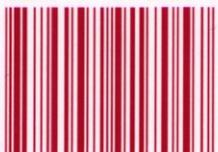


This volume contains studies, from the perspective of the countries of the European Union, on the means available to religious organisations to engage in dialogue with the States in which they exist. The studies explore the employment of covenants between religious groups and States as well as less formal facilities for dialogue and cooperation. The terms of the modern instruments of dialogue are treated, including in relation to the former communist member states, in their historical and political contexts.

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Religion and Law in Dialogue
Religion et droit en dialogue
R. PUZA & N. DOE



Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation between State and Religion in Europe

Religion et droit en dialogue: Collaboration conventionnelle et non-conventionnelle entre État et religion en Europe

Editors:

Richard Puza
Norman Doe



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To
KARIN PUZA

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PROCEEDINGS OF THE CONFERENCE

Tübingen
18-21 November 2004

ACTES DU COLLOQUE

Tübingen
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Edited by

RICHARD PUZA
NORMAN DOE



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PREFACE

This volume is the documentation of the 16th meeting of the European Consortium for Church and State Research. It was held at Tübingen and Rottenburg on 18-21 November 2004 and organised and prepared by Richard Puza, Tübingen. More than sixty people from the countries of the European Union, Consortium members, national reporters and guests, participated. The main questions which the national reporters addressed were: How does dialogue between religion, state and society operate in your country, and on what levels: agreements, lobbies, church departments? What today are the relevant operative concordats and agreements? What cooperation exists in states without conventions and agreements? Are there problem areas? What kind of covenantal relations between church and state exist in your countries: concordat, concordat agreements, convention, *accordo*, *intesa* or other forms, e. g. covenantal laws? Who are the parties to the concordats? What are the traditional subjects treated by agreements and what new subjects are being treated by them? What trends might be discerned? A press briefing was conducted under the title "Religion and Law in Dialogue. European alternative models to the German *Staatskirchenrecht*".

In this book detailed information is available about the newly-established systems of church-state relations, especially the development of concordats and contracts between religious groups and states in the old and new member states of the European Union. The reports on the former communist countries in particular single out those domains in which dialogue between church and state has taken place: the new concordats offer these countries guarantees of religious freedom and represent a factor in the renaissance of their national identity. Classical examples are Poland, Lithuania, Estonia, Slovakia and Hungary. The content of these concordat agreements can be found in the chart of B. Schanda. The new member states of the EU have developed models of cooperation different from those in western Europe. The topic of the meeting was analysed in detail going far beyond concordatarian agreements. The answers to the questions posed to the national reporters concerned dialogue on all levels, characterised by a renewal of the «favor concordati» in Eastern and Central Europe and in former Eastern Germany. For the first time in the history of the Consortium, the meeting was

accessible to the public in an open lecture, at the University of Tübingen, by A. Hollerbach, "The fundamental points of Concordat law in recent years", who began with a presentation of the Consortium.

As a result of this meeting a new dualist theory of religious agreements and concordats can be developed; namely: the separation of powers between State and Church, between the temporal and spiritual power, between politics and religion, and the guarantee of religious freedom. Concordat agreements must be possible, in principle, with all, at least all organised, religions. In reality the situation in Europe is conditioned by historical and political experiences. For a long time agreements between states and protestant denominations were a German speciality. Now this model has been adopted in Italy, Spain and also by some countries in Central Europe such as Poland and Hungary. M. Ventura and B. Schanda demonstrate this in their reports. The contractual systems in Germany, Italy, Spain and elsewhere do not stop at the borders of Christianity. In every one of these three countries one can find agreements with the Jewish community. Only in Spain is the Islamic Community a real contractual partner. Other forms of cooperation surface in covenantal law (*loi pactisée*). Here one can mention the transformation of the contract within the law of a state. In Italy it is necessary to introduce a law in order to change an agreement (*intesa*) into a law. One can talk about a covenantal law here. The Italian type of covenantal law differs from the Austrian version. According to R. Potz, in Austria only the Catholic Church as a juridical person of international law has the capacity to sign concordats or concordat agreements. Other religious communities may elaborate a law of their religion which can be recognized by the state.

In addition to a theory of religious agreements and concordats, a theory of dialogue must be developed. J. Duffar proposes some elements of this in his interpretation of Art. 52 of the draft of Convention of the European Constitution and he also shows the limits of such a dialogue: "Le dialogue vise à établir entre les interlocuteurs une communication, voire une entente égalitaire. Le dialogue ne peut exister sans renonciation des participants à une certaine concurrence, ni sans la prise de conscience progressive d'un intérêt commun". – «Ce dialogue existait déjà entre la Communauté et ces groupements». – «... des organisations philosophiques et non confessionnelles, [...] ne sont pas traitées à égalité. L'Union ne s'interdit pas, semble-t-il, de pouvoir exercer son jugement critique à l'égard du statut dont bénéficierait certaine organisation non confessionnelle en droit national» This is valuable also for states without formal concordats or concordat agreements. There is always some form

of cooperation or constructive co-operation. The analysis of the situation in these states shows how the dialogue is led there. So I think it will be possible to integrate these countries in a theory of dialogue.

I wish to thank all those who helped organise this conference: my Academic Assistant M.-E. Herghelegiu, the theology student Mss. A. Beck, my sons Walther and Ivo and also the other students who helped throughout this conference. I am also grateful to the members of the Executive Committee, especially S. Ferrari und I. Ibàn for their support and advice. For financial support I would like to thank to W. Redies, Vicar-General of the Diocese Rottenburg-Stuttgart, the Rector of the University of Tübingen, E. Schaich and the Mayor of Rottenburg am Neckar, K. Tappeser. We had as sponsors the German Conference of Bishops, the Archdiocese Freiburg, the Protestant Church in Germany (EKD), the Ministry of Culture in Baden-Württemberg through Dr. B. Lichtenthäler, and the Liga-Bank in Stuttgart/Tübingen. The Universitätsbund has contributed financially to publication of this volume. The conference took place in the Wilhelmsstift and I would like to thank its director M. Unsin. My wife Karin Puza I would like to thank for her loving care and for her constant support. She contributed in her own way to the success of the conference.

I thank Norman Doe for preparing the edition and Peeters in Leuven for publishing this book.

Tübingen, Cardiff, 20 August 2005
Richard Puza, Norman Doe

AXEL VON CAMPENHAUSEN

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CONVENTIONAL COOPERATION BETWEEN STATE AND
RELIGION: AUSTRIA AND GERMANY

I. Germany

1. *Background*

Conventional church-state law has a long tradition in Germany. Contracts with the Roman Catholic Church, usually called concordats, have existed for centuries. Church-state contracts with the Protestant churches have only existed since the end of the system of church government by the regional ruler (*landesherrliches Kirchenregiment*), when the Weimar Constitution in 1919 abolished the integration of Protestant churches and the state. Contracts between the state and the Protestant churches then not only became possible but also the norm. Since the Second World War many agreements have been concluded with small religious communities.

Surprisingly, it is precisely the separation of Church and State that has given church-state law a new impetus. Conventional church law forms an important source of church-state law. This importance is due to the fact that state and church, in mutual responsibility, regulate part of internal constitutional life within the framework of the constitution, and conventions balance the differences between church and state, or at least provide for ways of doing so. Nor can the church determine the state's task. In contrast to earlier times, the secular modern state cannot prescribe for churches what they should regard as their tasks. Conventions serve to compensate for unavoidable differences.

2. *General approach*

Since the overlapping areas of activity and interest on the part of state and church have remained largely constant, the contents of concordats and conventions enjoy continuity in terms of subject matter, despite the transition to the present-day pluralist and neutral state. In the agreements in

force in Germany one is first struck by the contractual repetition of constitutional guarantees: the protection of freedom of religion (including charitable activity by churches), the protection of church property, the autonomy of church organisation and employment. A second group of guarantees appearing in the agreements is protection by the state of the corporation status of churches and the determination of related rights, such as the right to collect tax. A further group of terms brings out the interest of the state in church organisation and the clergy. It concerns state participation in territorial or organisational changes, political scruples, theological faculties, and the educational standards of clergy. A regular group of provisions relate to property law, and these stem from the earlier connection of state and church and acts of secularisation (the last one being in 1803). Furthermore, the conventions provide for mutual delimitation in common affairs. The schools issue takes pride of place here (definition of school type, religious instruction, teacher training). More recent agreements provide for appropriate participation in broadcasting time, adult education, protection of historical monuments and exemption from fees. After the collapse of the German Democratic Republic (GDR), which discriminated against religions, conventions have assumed assurance of the equal (i.e. non-discriminatory) promotion of churches and their non-profit-making institutions, along with the recognition of the obligation of the state to provide support for church monuments. Such arrangements may appear a matter of course, but they are not considered unnecessary in view of the way the GDR deliberately discriminated against Christian institutions – being the biggest group in the voluntary sector – and tended to allow even valuable monuments to fall into dereliction. The inclusion of such provisions represents an expression of the will to return to a normal relationship, based on the rule of law, and practical cooperation between state and church institutions.

The conventions are negotiated between the state and the church, and – if they are conventions and not just administrative agreements – are concluded by act of parliament. They thus become generally binding.

A legal assessment of concordats and church contracts yields differing results. Concordats with the Roman Catholic Church are deemed to be a substitute for international law, because the Holy See is recognised as a subject of international law. It is, however, usual for concordats also to be called quasi-international law agreements. The argument here is that concordats deal not with the issues typical of international law but with those matters which arise from the relationship between state and church. Protestant church agreements are also concluded on the basis of the legal

equality of state and church. They do not have the character of international law but that of church-state contracts, and therefore come under public law.

Doubt has repeatedly been cast on the ‘binding effect’ of contractual agreements, with reference to the sovereignty of the legislator. It is beyond dispute that the state is not able to dissolve its conventional commitments by unilateral declaration. On the other hand, the sovereign cannot be bound by a contract. Hence the necessary distinction between ‘can’ and ‘may’. Of course, signing a contract does not mean that the state legislator renounces its freedom of decision-making and legislative competence for the relevant matter. It is able to pass laws which contradict the convention – this follows from its sovereignty. Such laws are also valid (as long as the German constitution does not provide otherwise). But non-conventional law does not cancel the convention itself. This remains valid, albeit infringed. In other words, the principle that a later law abrogates an earlier law also applies in conventional church law. The legislator is, however, guilty of breach of contract if the law does not agree with the convention. That is not compatible with a state based on the rule of law. Therefore the state will work towards a compromise. All agreements contain clauses wherein the contracting parties undertake to collaborate about changes should one party so desire.

This binding effect distinguishes the church convention from ordinary contracts and renders the convention an instrument of balance or compromise which enables the peaceful resolution of conflict. As such, church-state contracts in Germany after 1919 and 1945 have proved their own utility and have shaped the character of church-state law.

3. *The individual conventions*

The first instruments of German conventional church-state law in the 20th century were concordats with Bavaria (1924), Prussia (1929) and Baden (1932), followed by the relevant Protestant church contracts: Bavaria (1924), Prussia (1931), Baden (1932). The *Reichskonkordat* (1933) of Adolf Hitler was a matter of legal dispute. Its validity was confirmed by the Federal Constitutional Court (BVerfGE 6, 309). After the Second World War it was the Protestant church that first continued the series of agreements. This is linked to the fact that the Roman Catholic Church was busy with the recognition of the *Reichskonkordat* and was otherwise largely satisfied with the situation. The church convention of Lower Saxony led the field, the “Loccum convention” of 1955 (with its supplementary agreement of 1965). It also served as a model for

the church-state conventions in Schleswig-Holstein (1957), Hessen (1960), and Rhineland-Palatinate (1962). The state of North Rhine-Westphalia concluded church conventions in 1957 and 1958, and with specific reference to university policy in 1984. The Saarland agreement merely laid down the legal situation of the chair of theology at Saarbrücken University. At the federal level the convention was concluded in 1957 between the Federal Republic of Germany and the Evangelical Church in Germany to provide for Protestant military chaplains. After 1945 agreements were concluded with the Roman Catholic Church in Lower Saxony (1965), Hessen (1963, additional agreement 1974), Rhineland-Palatinate (1969: teacher training, 1973: teacher training, schools), North Rhine-Westphalia (1956: agreement on the establishment of the Essen diocese, 1984: theological faculties and teacher training), Bavaria (additions to the concordat of 1924) and the Saarland (1985: teacher training).

4. *Agreements in the five eastern länder*

After the fall of the GDR, the constitutions of four of the five eastern *länder* provided for the church convention as a legal instrument. In all *länder* agreements were concluded with the Protestant church: Saxony-Anhalt (1993), Mecklenburg-West Pomerania (1994), Saxony (1994), Thuringia (1994), and Brandenburg (1996). The agreements with the Roman Catholic Church, for the establishment of a Catholic hierarchy in the newly constituted *länder*, were unproblematic. Concluding concordats was somewhat more difficult, particularly as the Roman Catholic Church was careful to ensure that older agreements were not thereby called into question. Today all five eastern *länder* have concluded concordats with the Roman Catholic Church: Saxony (1996), Thuringia (1997), Mecklenburg-West Pomerania (1997), Saxony-Anhalt (1998), and Brandenburg (2003).

5. *Conventions with small religious communities*

Since the Second World War it has also become usual for the state to conclude conventions with small religious communities. For example, in Lower Saxony there are conventions with the Free Religious Community of Lower Saxony (1970), with the Evangelical Methodist Church in North West Germany (1978), and with the Association of Jewish Congregations of Lower Saxony, a corporation under public law (1983). After 1945 many agreements were concluded with Jewish religious communities, mostly only on questions of financial compensation. One example

is the convention between the Federal Republic of Germany and the Central Council of Jews (2003) on the promotion of the Jewish Community by the Federal Republic of Germany. A prominent example is that in Saxony-Anhalt (1994), a comprehensive convention parallel to the existing church conventions.

6. *Conventions which mirror the relationship between Church and State*

It is important to note that the agreements do not express any particular proximity between church and state, but are helpful and important precisely for that reason, since the state – incompetent in religious matters – wants to avoid infringement of the religious freedom of its citizens and the rights of religious communities in which citizens join together. The agreements all start from the premise – to quote the church convention of Mecklenburg-West Pomerania (1994) – that they are concluded “in the awareness of the difference of the spiritual mission of churches and the secular tasks of the state”. The contracting parties are “of the conviction that separation of state and church calls for distance and cooperation alike” (Preamble of the Mecklenburg-West Pomerania Church Convention).

II. Austria

The fundamental importance of church-state agreements in Austria is similar to that in Germany. Relations with the Roman Catholic Church are today based on a concordat of 1933. Its basic validity under international law and within the state is now beyond dispute, although it was initially the subject of fierce controversy. Individual provisions have since ceased to apply. Further agreements have also been concluded: in 1960 on the regulation of property law relations; in 1962 on school issues; and in 1960, 1964 and 1968 on organisational matters. Here the constitutional rights of the church are guaranteed internationally. These include appointments to all forms of church office, although the federal government is accorded the right to express “scruples of a general political nature” (“political clause”). Catholic theology faculties of universities are subject to church law regarding their internal arrangements and teaching; the appointment of professors and lecturers requires the approval of the relevant church authority, which can also demand their suspension. That also applies to teachers of religion in public schools. Here religious instruction is a compulsory subject and may only be taught by teachers with church permission.

For the Protestant church in Austria, which is very small compared to the Roman Catholic Church, the fundamental basis of relations was for a long time the Protestant patent of 1861. After state sovereignty and oversight over the Protestant church were abolished a new solution was necessary. Old traditions die hard, and the Austrians did not want to conclude a convention with the Protestant church. That is why in 1962 a so-called Protestant law was passed, a "law on the external legal situation of the Protestant Church". It was a negotiated law: the Protestant Church was in agreement with what was decided on the part of the state. The Protestant law is also interesting in that the reduction of state rights of oversight and approval go further here than in any other case, perhaps an expression of a bad conscience after centuries of discrimination. In any case, the Protestant law affords to the Protestant Church a guarantee of full enjoyment of church freedom in the sense of a deepened understanding of Art. 15 of the state constitution, equal status with the Roman Catholic Church, and a guarantee of specific freedoms, in some cases going beyond the bounds of the law, for example regarding clergy appointments.

The legal status of believers in Islam is also laid down in state laws, in this case dating back to the time of the monarchy. There have been no modern cases of agreements with smaller religious communities to date.

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COVENANTAL AND NON-COVENANTAL COOPERATION OF STATE AND RELIGIONS IN AUSTRIA

I. Introduction

In Austria covenantal cooperation is only possible formally with regard to the Roman Catholic Church. The treaties with the Holy See are recognised as bilateral international treaties *sui generis* and so are subject to a process of amendment in accordance with Art. 50 of the Austrian Federal Constitution. In Austrian constitutional law there is no other legal basis for treaties on ecclesiastical law.¹

This strong concordat tradition has to be seen in the context of the development of Austrian law on religion in the 19th and 20th centuries. The concordat served as an instrument for perpetuating at least some privileges for the dominant Roman Catholic Church in the 19th century at a time when the state church experienced change in a multi-denominational system. Due to the state's obligation to denominational neutrality, surviving inequalities were reduced gradually and special ecclesiastical laws for other churches and religious communities were enacted, namely the Protestant, Eastern-Orthodox and Oriental-Orthodox Churches, Judaism and Islam.²

¹ Treaties under public law are only foreseen under Art. 15a of the Federal Constitution: the Federation and the *Länder* may conclude agreements among themselves about matters within their respective spheres of competence. The conclusion of such agreements in the name of the Federation is, depending on the subject, incumbent on the Federal Government or the Federal Minister (sect 1). Agreements with the *Länder* can only be made about matters pertaining to their autonomous sphere of competence and must without delay be brought to the Federal Government's knowledge (sect 2).

² The respective laws in force are: Federal Law of 6 July 1961 on External Legal Circumstances of the Protestant Church in Austria (ProtestantenG), BGBl 1961/182; Federal Law of 23 June 1967 on External Legal Circumstances of the Greek Oriental Church in Austria (OrthodoxenG), BGBl 1967/229; Federal Law on External Legal Circumstances of the Oriental-Orthodox Churches, BGBl I 2003/20; Law of 21 March 1890 concerning the External Legal Circumstances of the Hebrew Religious Community (IsraelitenG), RGBl 1890/57 as amended by BGBl 1984/61; Law of 15 July 1912 concerning the Recognition

Covenantal cooperation between the State and the Roman Catholic Church must also be seen in the light of the close connection between the two Concordats of 1855 and 1933 and the political history of Austria in the last 150 years.

II. The Austrian concordats: historical perspectives

The importance of the Austrian concordats goes far beyond their "ecclesiastical" legal content. The two Austrian concordats from 1855³ und 1933⁴ were both deeply rooted in the general political development of Austria. The concordat of 1855 has to be seen as an attempt to promote the anti-revolutionary neo-absolutist system with the help of an "alliance between throne and altar". Catholicism after 1848, "as a system of limited freedoms with a supra-national pattern of identification", offered "the appropriate ideological basis for a post- and anti-revolutionary structuring of the Austrian Monarchy" (H. RUMPLER). In this concordat the Catholic Church enjoyed far-reaching privileges in the fields of matrimonial law and schooling. The political campaign of liberals against the concordat began with the re-establishment of parliamentarianism in 1860. With the *Dezemberverfassung* 1867, especially with the *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* (Constitutional Act on the Fundamental Rights of Citizens 1867 – StGG), and its concept of religious neutrality, some provisions of the concordat had become unconstitutional. After the refusal of the Holy See to enter into negotiations for its revision in 1870, Austria declared the concordat inoperative with reference to *clausula rebus sic stantibus*. It was argued that the partner of the agreement had changed with the declaration of papal infallibility. Four years later a "Law on the External Affairs of the Catholic Church" formally derogated the Concordat.⁵ This imposed restrictions on the

of the Adherents of Islam as a Religious Community (IslamG), RGBI 1912/159 as amended by BGBl 1988/164.

³ Announcement (Kaiserliches Patent) of 5 November, 1855, RGBI 1855/195.

⁴ Concordat between the Holy See and the Austrian Republic with its supplementary protocol, dated 5 June 1933, BGBl II 1934/2; cf. I. GAMPL, R. POTZ, and B. SCHINKELE, *Österreichisches Staatskirchenrecht. Gesetze – Materialien – Rechtsprechung*, vol. 1 (Wien, 1990) p. 160 ss. There also exist several additional and supplementary treaties concerning property rights (Treaty of 23 June 1960, BGBl 1960/50 as amended), school matters (Treaty of 9 July 1962, BGBl 1962/273 as amended by BGBl 1972/289) and diocesan establishments (Eisenstadt 1960, Innsbruck-Feldkirch 1964 and Feldkirch 1968).

⁵ Law of 7 May 1974 on Regulations Concerning External Legal Circumstances of the Catholic Church, RGBI 1874/50.

Catholic Church so that its legal position was more comparable with the positions under special laws of other churches and religious societies.

In the second half of the 19th century, the Austrian monarchy extended the idea of "Concordats" to other religious communities. After the occupation of Bosnia and Hercegovina in 1878, the administration of the Orthodox Church and of the Islamic Community in these two countries was regulated on the basis of a convention with the Ottoman Sultan,⁶ and the Ecumenical Patriarchate,⁷ respectively. The basis of each agreement was international law, which since then has often been appealed to on the Greek side to support a position under international law for the Ecumenical Patriarchate.

After the fall of the Habsburg monarchy, there was a significant constitutional change, but the system of state-church relations continued.⁸ The first renewal by means of a special law for a single church was not the consequence of changing constitutional conditions but of politics. Negotiations with the Holy See had already begun in 1929, but in 1933 the Christian-authoritarian government ended these. The government thought it possible to realise the notion of a "Christian State" with concepts found in the encyclical *Quadragesimo anno*, serving as an ideological basis. Evident expression of the unity of state and church would be – as during the neo-absolutist era of the concordat of 1855 – the successful conclusion of the concordat negotiations. The Concordat and the Additional Protocol were signed on 5 June 1933 and came into force together with the Christian-authoritarian constitution on 1 May 1934.⁹

The concordat between the Holy See and the Austrian Republic may be seen in the context of the establishment of a reactionary Christian-authoritarian system in 1934 directed against Nazism and Austro-Marxism. The concordat therefore was abolished by the NS-Regime and after 1945 questions about the further application of the concordat were raised. Discussion on the concordat-matrimonial law particularly involved conflict in the sphere of church politics, which assumed proportions similar to the so-called *Kulturkampf* era.¹⁰ This conflict may be understood

⁶ Text in C. STRUPP, *Ausgewählte diplomatische Schriftstücke zur Orientalischen Frage* (Gotha, 1916).

⁷ Text in I. SILBERNAGL, *Verfassung und gegenwärtiger Bestand sämtlicher Kirchen des Orients* (Regensburg, 1904²), 63 s.

⁸ In the Bundesverfassungsgesetz (B-VG: Federal Constitution of the Austrian Republic) of 1920 the StGG was retained due to a failure to agree on a new catalogue of fundamental rights.

⁹ Cf. fn 4.

¹⁰ Cf. R. POTZ and B. SCHINKELE, *Die kirchliche Trauung im staatlichen Recht Österreichs. Ein Beitrag zur Geschichte des Verhältnisses von Staat und Katholischer Kirche*

as a critical phase in the development of the state-church relationship in Austria. This crisis led eventually to the *Mariazeller Manifesto* from 1952 in which the Catholic Church made clear that political Catholicism should not be re-established.

In short, historically, the Christian-authoritarian era raised political discussion about the concordat and justifications for it. In recent years, however, it has been accepted widely that the employment of a concordat is compatible with the principle of religious neutrality and the non-identification of the State with a particular religious tradition.

III. The concordat and recent developments in law on religion

One of the crucial issues in Austrian law on religion is the implementation of the principle of parity,¹¹ as a special manifestation of the general principle of equality,¹² in the field of state-church relations with respect to special laws for single religious communities. In Art. 15 StGG the principle of parity is embodied in both of its forms: the formal and the substantive. According to this provision, "every recognised church or religious community orders and manages independently its internal affairs".

Following this doctrine, the Austrian Constitutional Court stated, in a decision of 1987,¹³ that to determine the meaning of the expression "its internal affairs" reference must be made to the tasks of the religious community concerned, in line with the principle of material parity as between religious communities as subjects of fundamental rights. That is why the self-understanding (*Selbstverständnis*) of the religious communities is relevant to the sphere of the state as far as it too determines the scope of the fundamental right in a significant way.¹⁴ By analogy with

in den langen Fünfzigerjahren', in: H. PAARHAMMER and A. RINNERHALER (eds), *Österreich und der Heilige Stuhl im 19. und 20. Jahrhundert* (Wien, 2001) 401-443.

¹¹ I. GAMPL, *Österreichisches Staatskirchenrecht* (Wien - New York 1971) 160s; H. PREE, 'Gibt es ein dogmatisches Prinzip des österreichischen Staatskirchenrechts?', in: *Im Dienst von Kirche und Staat - In memoriam Carl Holböck*, Freistadt 1985, 577 ss; R. POTZ, 'Suum cuique - The Parity of the Recognised Churches and Religious Communities in Austria', in *European Journal for Church and State Research* (1997) 188 ss.

¹² The general principle of equality is guaranteed in Art. 2 StGG and in Art. 7 of the Federal Constitution of the Austrian Republic (B-VG 1920).

¹³ GAMPL - POTZ - SCHINKELE (fn. 4), 35, E. 21.

¹⁴ POTZ (fn. 8); W. SCHLAICH, *Diskussionsbeitrag in: Essener Gespräche*, 20 (1986), 183s; A. ISAK, *Das Selbstverständnis der Kirchen und Religionsgesellschaften und seine Bedeutung für die Auslegung staatlichen Rechts* (Berlin, 1994).

freedom of religion for individuals, which protects manifestations of religion or belief,¹⁵ this self-understanding can include every activity which expresses the tasks of the religious community in question. This self-understanding has to be the starting point to establish a relationship with the "general laws of the state". The legal reservation encompassed in Art. 15 StGG - different from the other constitutional requirements of a specific enactment in the StGG 1867 (*formelle Gesetzesvorbehalte*) - has to be understood as substantive and implies weighing the legal merits. Consequently, a reasonable balance, according to the principle of proportionality, has to be found between the freedom protected and the law limiting it in a concrete case.¹⁶

Although there is separation between state and church on the *institutional level*,¹⁷ the principle of parity allows a co-operation with individual religious communities as long as this special regulation is in accordance with other "spheres of justice". The system of special laws for single recognised churches and religious communities introduces the possibility of distortion. Disparities seem to occur as a result of the historical realities outlined above. It is necessary, therefore, to examine in every single case if special regulation is in accordance with the principle of substantive parity.

At first glance, regarding the concordat, there exists a formal difference between the Catholic Church and the other communities. A consequence of the concordat as an international treaty is that - in the case of difficulties in its interpretation or the occurrence of problems not yet treated which affect state and church - an amicable solution is to be reached or a ruling is to be arrived at by mutual consent. This problem is diminished because nowadays the special laws for single churches and religious communities are enacted in agreement with the relevant religious community. The formulation of the legal text in all cases is the result of negotiation. Because of this *de-facto* concordatarianism, commentators speak of a "system of concordance" in Austrian law on religion.¹⁸

As well as this formal problem, the concordat - as the special law for the Catholic Church - contains some problematic particular rules. On the

¹⁵ Cf. e.g. Appl. 8741/76, 10. 3. 1981, D & R 24, 124; Appl. 10 678/83, 5. 7. 1984, D & R 29, 267; Appl. 10 358/83, 15. 12. 1983.

¹⁶ That means that the legislator's margin becomes narrower, while the organs of executive power have a greater margin of discretion in applying the constitutional law to a certain extent directly without mediation by the legislator.

¹⁷ Cf. H. KALB, R. POTZ and B. SCHINKELE, *Das Kreuz in Klassenzimmer und Gerichtssaal, Religionsrechtliche Studien*, vol.1 (Wien, 1997) especially 36 ss.

¹⁸ GAMPL (fn. 11), 53 ss.

one hand, there are regulations which – for critical commentaries – seem to be “privileges” and on the other hand there also are regulations which – particularly for representatives of the Catholic Church – seem to be “discriminations”.

One such “privilege” consists in the fact that all the institutions of the Catholic Church having legal personality in Canon Law also enjoy public law status in the sphere of state law. Institutions that are to be founded in the future obtain the status of public law institutions as soon as notice regarding the foundation is lodged with the competent Federal ministry.¹⁹ With the exception of the Protestant Church, the other recognised churches,²⁰ or religious communities, do not have any possibility of obtaining public-law status for institutions other than communities (*Kirchen- or Religionsgemeinden*). Therefore it has to be proved whether in this case the “most favoured religion clause” should be applied.²¹

Furthermore, the concordat contains rules dealing with theological faculties, religious orders, and the law of church property, specific Catholic categories. “Disparities”, some of minor importance, include the fact that Buddhist orders, for instance, are not able to acquire legal status as such. By way of contrast, whereas the foundation of Catholic provinces, dioceses and other important territorial alterations must be laid down in a treaty with the Federal government,²² the Protestant Church, under the “Federal Law of 6 July 1961 on the external legal circumstances of the Protestant Church in Austria” (*ProtestantenG*),²³ is completely free in this regard.²⁴

This more recent law represents the conclusion of a process which led to the equal treatment of the Protestant Church and the Catholic Church, and, compared with the concordat, it guarantees greater religious freedom. The Protestant Church is completely independent of the state in the appointment of all its functionaries. However, it is obliged both to name legal representatives for all those of its institutions which possess legal capacity and to inform the state of their names as well as the names of the members of the governing body of the Protestant Church.

¹⁹ Art. II Concordat.

²⁰ In this case, however, the “privilege” does not exist in relation to the Protestant Church, which has, according to §4 (1) *ProtestantenG* regarding the public-law status of juridical persons, the same position as the Catholic Church.

²¹ Cf. §1 sect 2 III *ProtestantenG*.

²² Art. III Concordat.

²³ GAMPL – POTZ – SCHINKELE (fn. 4), 331 ss.

²⁴ §3 (1) *ProtestantenG*.

The “Federal Law of 23 June 1967 on the external legal circumstances of the Greek Oriental Church in Austria” (*OrthodoxenG*),²⁵ recognises for the first time the Greek Orthodox Church in Austria as such, in addition to the existing Orthodox communities.²⁶ For the purposes of state law, membership now results directly from this law for all persons of Orthodox faith permanently resident in Federal territory even if there is no membership of a recognised *Kirchengemeinde*. Due to the inner structures of the Orthodox Church, for the avoidance of conflict, the state felt it necessary to include rights of supervision in the law. The recent “Federal Law on External Legal Circumstances of the Oriental-Orthodox Churches” of 2003 refers explicitly to the particular ecclesiological structures of these Churches (Coptic, Syriac and Armenian).

The Hebrew Community has also been affected by a significant change. The *IsraelitenG* 1890 was based on the concept of a uniform religious community, i.e. every Jew belonged to the religious community in the area in which he had his permanent abode. This rule, however, was modified in 1984.²⁷ The amendment gives Jews the opportunity to obtain recognition as an independent religious community by virtue of differences in orientation. The existing Hebrew Community will not necessarily remain the only religious community of Jewish belief.

Of special interest is the background to the “Law of 15 July 1912 concerning the recognition of adherents of Islam as a religious community” (*IslamG*).²⁸ The institutional recognition of Islam was not possible. Muslims were initially given only the status of adherents of a recognised religious community. Not without discussion about the validity of *IslamG* 1912, this law was applied when the institutional recognition of the Islamic Religious Community took place by way of a statutory instrument in 1988,²⁹ but at the last the solution proposed by the Islamic community was adopted.

The treaties with the Holy See represent an additional assurance of the special law on religion for the Catholic Church. Yet, from a state point of view, there should be legal provision to enable the establishment of

²⁵ GAMPL – POTZ – SCHINKELE (fn. 4), p. 292 ss.

²⁶ After World War I the system of autocephalous/autonomous churches of the Austro-Hungarian monarchy had to be changed according to the new political order, so that only three communities (*Kirchengemeinden*) – two Greek and one Serbian – remained within the borders of the Austrian republic.

²⁷ GAMPL – POTZ – SCHINKELE (fn. 4), p. 440 s.

²⁸ GAMPL – POTZ – SCHINKELE (fn. 4), p. 458 ss.

²⁹ GAMPL – POTZ – SCHINKELE (fn. 4), p. 464.

treaties with other religious communities. Thus the approach of granting privileges to the Catholic Church could be repudiated. As to justifications underlying the law on religion – pertaining to legal policy more or less constantly at issue – occasional objections to the concordat system have been brought forward. Though the arguments have often been reduced to the principle *pacta sunt servanda*, the reservations to the contractual ecclesiastical law in principle cannot be deemed justifiable. Concordats must not be considered “static” compromise solutions, but as dynamic and flexible agreements especially with regard to the “friendship clause” typically embodied in such treaties. From a state point of view religious communities are societal associations participating in public communication. Against this background concordats should be used as elastic instruments within the scope of the guarantees of religious freedom representing the fundamental norm of the law on religion.

IV. The state and religious communities in dialogue

Today we have to consider more and more contexts in which state and religious communities meet each other. One reason for this is the increasing significance of churches and other religious communities, alongside other non-governmental and non-commercial associations, in an expanding civil society. This fact is to be seen in a broader perspective. In the 1960s, a fundamental change became apparent: the public was no longer considered primarily a constitutional term but became a matter of political science as well as of social-empirical research. A structural change took place that served as a basis for the development of society to take on a progressive course. Consequently, the public constituted by civil society also became increasingly a subject of legal theory.

The modern pluralistic state ruled by law joins forces with diverse social groups in order to fulfil its functions in the various areas of its responsibility. Correspondingly, socially relevant groups, among them religious communities, are involved in numerous tasks which the modern welfare state performs. A system of contractual agreements between state and – in the Austrian context – religious communities represents a highly appropriate instrument for structuring the public space according to a democratic state governed by the rule of law.

ACHILLES C. EMILIANIDES

RELIGION AND THE STATE IN DIALOGUE: CYPRUS

I. Introduction

There are no concordats in Cyprus. Dialogue and cooperation between the state and the various religions takes place within the framework of the Constitution. This provides for a system of coordination between the Republic of Cyprus and the various religions and creeds. While it could be considered that such a system of coordination might present some similarities to the various concordat systems, there is an essential difference: any agreements between the church and the state are unilateral on behalf of the state and have the form of constitutional and other legal provisions. As such, these provisions could be amended by another unilateral decision of the state and are scrutinized by the courts in the same manner as any other law of the Republic. This paper describes the main characteristics of the coordination system, operative in Cyprus, and it will specify the main areas where the dialogue between the state and the various religions takes place.¹

The origins of the church and state system of Cyprus could be traced to the reforms established in 1856 by the *Hatt-i-Humayun*, an Imperial rescript of the Ottoman Empire.² The *Hatt-i-Humayun* granted spiritual advantages and exemptions, as well as a form of religious autonomy to the various Christian and non-Muslim religious communities living within the boundaries of the Ottoman Empire. It is indisputable that the *Hatt-i-Humayun* was also applied in Cyprus.³ When Great Britain

¹ For an overview of the church and state system in Cyprus see A. EMILIANIDES, ‘State and Church in Cyprus’ in G. ROBBERS, *State and Church in the European Union* (Nomos Verlagsgesellschaft: Baden – Baden, 2005) p. 237ff, C. PAPASTATHIS, ‘The Legal Status of Religions in the Republic of Cyprus’ in *The Status of Religion Confession of the States Applying for Membership in the European Union* (Strasbourg, 2000) p. 197-222.

² See G. YOUNG, *Corps de Droit Ottoman* (Oxford, 1905) v. II, p. 22ff, D. NICOLAIDES, *Ottoman Codes* (3rd Edition, Constantinople, 1890) v. III, p. 2858-2866 (in Greek).

³ *Parapano and Others v. Happaz* (1893) 3 Cyprus Law Reports 69, *Tano v. Tano* (1910) 9 Cyprus Law Reports 94. See also the observations of G. SERGIDES, *Internal and External Conflict of Laws in Regard to Family Relations in Cyprus*, *Studies in Cyprus Law*, Nicosia, 1988, p. 32ff.

acquired the rights of possession and administration of Cyprus by signing the 1878 Treaty of Alliance with the Ottoman Empire, it agreed to preserve the existing state of affairs.⁴ The same state of affairs remained in effect, even after the annexation of Cyprus by Great Britain in 1914,⁵ the recognition of this annexation by Turkey in 1923 and the proclamation of the island as a Crown Colony in 1925.⁶ Despite some attempts to limit the privileges of the Greek Orthodox Church during the period of the British rule,⁷ the right of the Church to elect its Archbishop and generally administer its internal affairs without any state intervention was eventually confirmed by law 20/1946 and the *Manoli* case, where it was held that the election of bishops is a matter of purely spiritual character and as such falls exclusively under the jurisdiction of the ecclesiastical courts of the Orthodox church.⁸

II. Legal status of religions

The Constitution did not create a new internal legal regime for the various religions in Cyprus. It maintains in effect the provisions of Ottoman law, especially *Hatt-ı-Humayun*, with regard to the implementation of the religious law of each religious community and religious group, regarding: 1) institutions of family law and 2) adjudication of the relevant disputes by the appropriate religious tribunals. This jurisdiction is, however, subject to the provisions of the Constitution. Any provisions of religious law, that are inconsistent with the Constitution, are not implemented.

The state is not confessional. As a result all the religions and creeds in Cyprus deal restrictively with their own affairs, without in any way interfering in the affairs of the state. When assuming their duties, state officials are not sworn in, but affirm their loyalty to, and respect for,

⁴ A. EMILIANIDES, 'Private International Law' Symposium on Cypriot Juridical Issues, Thessaloniki, 1974, p. 90 (in Greek).

⁵ Cyprus Annexation Order in Council of 5th Νοεμβρίου 1914 σε Statute Laws of Cyprus, vol. II, p. 184, c. ORR, *Cyprus under British Rule* (London: Robert Scott, 1918) p. 175.

⁶ Cyprus Gazette 1 May 1925, Notification No. 266.

⁷ Law 25/1937 provided for the audit control of the financial statements of the Church and the monasteries by the colonial government, while laws 33/1937 and 34/1937 stated that the elected Archbishop should be approved by the British Governor.

⁸ *Michael Georgiou Manoli v. Makarios Archbishop of Cyprus*, decision of the District Court of Nicosia, no. 343/1948. See the decision in GAVRIELIDES, *The Ethnarchic Rights and the Referendum for Union with Greece* (Second Edition, Nicosia, 1972) p. 72-76 (in Greek).

the Constitution and the laws made thereunder, the preservation of the independence and the territorial integrity of the Republic of Cyprus, pursuant to articles 42, §1, 59, §4, 69 and 100 of the Constitution. However, there is no prohibition with regard to the election or appointment of religious functionaries in political or public offices. This is due to the fact that during the British rule of Cyprus, the Orthodox Church constituted the nation – leading political organization of the Greeks under foreign sovereignty; thus, Makarios who was the first president of the Republic of Cyprus was also the Archbishop of the Greek Orthodox Church. Although it is true that the state respected the constitutional provisions concerning religions during the period of Makarios' presidency, it could be accurately argued that the fact that the president of the Republic was also the Archbishop of the Orthodox Church was undesirable for members of other religious communities, who might fear that the state would unavoidably favour the Orthodox Church. Ever since the death of Archbishop Makarios in 1977 the political system of Cyprus was completely secularized, since religious functionaries refrain from participating actively in elections and are not appointed in public offices.

According to article 110 §1 of the Constitution, the Autocephalous Greek Orthodox Church of Cyprus shall continue to have the exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter in force for the time being. The Parliament shall not act inconsistently with such right of the Orthodox Church. It is suggested that the Holy Canons whose force is safeguarded by the Constitution are not only those that relate to church doctrine, which are safeguarded for all known religions according to the principle of religious freedom enshrined in article 18 of the Constitution,⁹ but also those that refer to the administration of the Church's internal affairs and property. This includes both the strict observance of the doctrines (doctrinal unity) and the effect of those fundamental administrative institutions of canon law that give a Church its Orthodox character (canonical unity).

The exclusive right of regulating and administering their own internal affairs and property is also recognized according to article 110 §3 of the Constitution, with regard to the three 'religious groups' of the Republic.¹⁰ A "religious group", in the sense of article 2 §3 of the

⁹ Article 18 corresponds to article 9 of the European Convention on Human Rights, but it is more detailed and covers areas not covered by article 9.

¹⁰ See appendix E of the Treaty of Establishment between the United Kingdom, Greece, Turkey and the Republic of Cyprus

Constitution, is a group of persons, ordinarily resident in Cyprus, professing the same religion and either belonging to the same rite or being subject to the same jurisdiction thereof. The number of such group, on the date of the coming into operation of this Constitution, exceeded one thousand persons out of which at least five hundred became on such date citizens of the Republic.¹¹ It should be observed that such religious groups were formed only once; there is no possibility for a religion to be declared as a religious group in the future, nor is there a possibility to remove such constitutional status of any of the three religious groups. Such 'religious groups' are the Armenians¹², the Maronites¹³ and the Latins (Roman Catholics),¹⁴ who opted as a group to belong to the Greek Community¹⁵ and now reside in the non-occupied territory.

Article 110 §2 of the Constitution also provides that all matters relating to or in any way affecting the institution or foundation of *Vakf* or the *vakfs* or any *vakf* properties, including properties belonging to Mosques and any other Moslem religious institution, shall be governed solely by and under the Laws and Principles of *Vakfs* (*ahkamul evkaf*) and the laws and regulations enacted or made by the Turkish Communal Chamber, and no legislative, executive or other act whatsoever shall contravene or override or interfere with such Laws or Principles of *Vakfs* and with such laws and regulations of the Turkish Communal Chamber.¹⁶

¹¹ The different numbers with regard to members of the group residing in Cyprus and with regard to members of the group who became citizens of the Republic is due to the fact that a number of Roman Catholics and Armenians maintained the British citizenship for several years following the coming into force of the Constitution.

¹² See C. TORNARITIS, 'The Legal Position of the Armenian Religious Group' in *Constitutional and Legal Problems of the Republic of Cyprus*, second edition, Nicosia, 1972, p. 85-90, R. KESHISHIAN, 'The Armenian Community of Cyprus' (2002) 1 XL *Cyprus Today*.

¹³ See A. HAJIROUSSOS, 'The Maronite Community of Cyprus' (2002) 2 XL *Cyprus Today*, p. 46-53, R. BOWRON, 'The Maronites of Cyprus' (1937) 1 *Eastern Churches Quarterly*, p. 10-12, J.M. CIRILLI, 'Les Maronites de Chypre' (1899) XVII *La Terre Sainte*, p. 68-70, 102-104.

¹⁴ See N. COUREAS, 'The Latins of Cyprus: The Genesis and Development of Cyprus' Modern Latin Community' (2002) 3 - 4 XL *Cyprus Today*.

¹⁵ On the referendum was held on the 13th November 1960, 1077 Armenians, 1046 Maronites and 322 Roman Catholics opted to belong to the Greek Community, while 5 Armenians and a Roman Catholic opted to belong to the Turkish Community.

¹⁶ Such constitutional provisions were enacted according to the suggestions of the *Interim Report of the Committee of Turkish Affairs*, 1949. For the meaning of *Vakf* see O. EFFENDI, *The Laws of Evqaf*, Second Edition, Nicosia, 1922, K. DIDZAR, 'The Origin and Administration of the Cyprus Evkaf' Minutes of the First International Cyprological Conference, v. III, Nicosia, 1973, p. 63-78.

It should also be observed that article 23, §9 stipulates that no deprivation, restriction or limitation on the right to acquire, own, possess, enjoy or dispose of any movable or immovable property, belonging to any See, monastery, church or any other ecclesiastical corporation or any right over it or interest therein, shall be made, except with the written consent of the appropriate ecclesiastical authority being in control of such property. The same right is accorded to all Muslim religious institutions. According to 23, §10, no such deprivation, restriction or limitation may be imposed on the immovable or movable property of any *vakf*, except with the approval of the Turkish Communal Chamber and subject to the Laws and Principles of *Vakfs*. Such property includes the objects and subjects of the *vakfs* and the properties belonging to the Mosques or to any other Moslem religious institutions, or any right thereon or interest therein.

It has been suggested that the constitutional protection afforded to the Greek Orthodox Church is more extensive than the constitutional protection provided for the three religious groups of the Republic, as well as that the relation between the church and the state under the constitution of Cyprus is similar to the 'state law rule' system of Greece¹⁷. These views, however, are not convincing. Article 34 of the Courts Law, Chapter 8 of the 1959 Edition of the Laws of Cyprus referred to any matters which according to the principles of the Ottoman law in force in the colony of Cyprus, at the time of the enactment of the said law, were adjudicated by the ecclesiastical courts of the religious community of the parties. The law did not distinguish between the Greek Orthodox Church and the churches of the three religious groups, which had, prior to the declaration of independence, the right to administer their internal affairs. Such state of affairs was maintained by the constitutional provisions. It should also be observed that the fact that the Orthodox and the Islamic religion constitute one of the criteria of the bi-communal character of the Republic of Cyprus refers exclusively to the bi-communal structure of the Republic of Cyprus and does not prejudice the constitutional position of any religious organization.

It could, therefore, be accepted that there is no prevailing, official, or established religion in Cyprus.¹⁸ However, the five main religions of the

¹⁷ See C. TORNARITIS, 'The Relations between Church and State under the Law of Cyprus', *Review of Public and Private Law*, Nicosia, 1967, p. 9-16 (in Greek), and also by TORNARITIS, 'The Constitutional Position of the Greek Orthodox Church of Cyprus' Tribute to C. Vavoukos, v. III, Sakkoulas Editions, p. 425-435 (in Greek).

¹⁸ PAPANATHIS, *On the Administrative Organization of the Church of Cyprus*, Thessaloniki, 1981 (in Greek), p. 36ff. See also the *Report Submitted by Cyprus Pursuant to*

Republic, namely the Orthodox Christian, the Islamic, the Maronite, the Armenian and the Roman Catholic, enjoy a special constitutional status. The state has recognized broad discretionary powers in their favour and does not have the right to intervene in their internal affairs. Other religions and rites, such as the Jews, the Jehovah's Witnesses, the Orthodox Christians who follow the Old Calendar, enjoy religious freedom, but are not considered as 'religious groups' under the Constitutional sense. Such religions are equal before the law and no legislative, executive or administrative act should discriminate against them; however, such religions do not enjoy the special constitutional status of the five main religions of the island, which essentially refers to the provisions of the Constitution recognizing broad discretionary powers with regard to the main religions' internal affairs, with regard to family matters and with regard to matters of communal character. Whenever matters of common interest arise (religious education, family matters etc), the state and religious corporations debate on equal terms.¹⁹

III. Religious groups

The Constitution provides for two communal chambers, a Greek communal chamber and a Turkish communal chamber, which shall have legislative power in educational, cultural, religious and other matters of purely communal nature (articles 86 and 87). According to article 109 of the Constitution, each 'religious group' had the right to be represented by an elected member or members of such group in the communal chamber of the Community to which such group has opted to belong as provided by a relevant communal law. Such law was law 81/1960 Regarding the Composition of the Greek Communal Chamber, which provided that the religious groups of the Armenians and of the Roman Catholics would elect one member each in Nicosia, while the religious group of the Maronites would elect one member in Kyrenia. However, following the constitutional crisis of 1963,²⁰ the Greek communal chamber was self-dissolved and the Turkish communal chamber does not function, since the

Article 25, Paragraph 1, of the Framework Convention for the Protection of National Minorities, 1 March 1999, Part II, Article 5.

¹⁹ PAPAETHIS, *On the Administrative Organization*, n. 18 above, p. 34. See also G. PAPAETHIS, *L'Église Autocéphale de Chypre dans l'Europe Unie, Approche Nomenclative* (Katerini, 1998).

²⁰ See A. EMILIANIDES, *The Parliamentary Co-Existence of Greeks and Turks in Cyprus* (Nicosia: Epifaniou Editions, 2003) (in Greek).

Turkish Cypriot Community has relocated to the occupied area of the Republic. At the present time, all the competences of the Greek communal chamber belong to the central government which conducts the dialogue with the religious communities.

Ever since the Greek communal chamber was self-dissolved, the members of the three 'religious groups', in addition to the right of electing and being elected in parliamentary elections, elect under their capacity as members of their respective 'religious groups' one representative of each religious group that represents their group in the Parliament. According to Law 38/1976 Concerning Religious Groups (Representation), such representatives have the right to speak in Parliament with regard to all matters which concern the relevant 'religious group', but do not have the right to vote.²¹ It has been suggested that the presence of the representatives of the three religious groups in the House of Parliament is unconstitutional, since it violates the principle of equality according to article 28 of the Constitution.²² This view, however, is not correct. The presence of the representatives of the three religious groups in the House of Representatives was a direct result of the self-dissolution of the Greek communal chamber. The election of representatives of members of the religious groups in the Greek communal chamber does not violate the principle of equality, but intends to safeguard the rights of religious minorities in an adequate manner, with regard to matters of communal interest.

The state maintains a continuing dialogue with the representatives of the three 'religious groups', who may discuss any issue that they feel important for the welfare of their community. From 1998 to 2003, the state had appointed a Presidential Commissioner for Religious Groups, Overseas Cypriots and Repatriates who represented the state in this dialogue with the representatives of the three 'religious groups'.²³ The new government, however, has not appointed a new Presidential Commissioner and the Ministry of the Interior has undertaken the responsibility of

²¹ However, in practice the opinion of the representatives of the three religious groups is duly considered with regard to matters which concern their religious group.

²² L. PAPAETHIS, 'Constitutional Problems with Regard to the Representation of the Religious Groups of Armenians, Roman Catholics and Maronites in the House of Parliament' [1991] 4 *Cyprus Law Tribune*, p. 626-638 (in Greek).

²³ See Press and Information Office, *Ten Years of Government of President Glafkos Clerides: 1993 - 2003*, σελ. 255-261, J. McMAHON, 'Cyprus: Coping with a Quarter Century of Separation' [1999] September, Washington Report on Middle East Affairs, p. 74-75.

conducting the dialogue with the representatives of the religious groups, pending further developments on the issue.²⁴

It is extremely important that the government of Cyprus has submitted that it considers that the Framework Convention for the Protection of National Minorities should apply to all three 'religious groups' of the Republic, as well as to the Turkish Cypriots living in the non-occupied areas,²⁵ despite the fact that the Roman Catholics are obviously a religious and not a national minority, and the fact that the Armenians and Maronites could probably be considered as ethnic minorities, rather than national minorities. The Advisory Committee has suggested that the provisions of article 2 of the Constitution, according to which members of the religious groups belong to either the Greek or the Turkish community should be amended, since they violate article 3 of the Framework Convention, according to which each member of a minority group has the right to be considered, or not to be considered as such.²⁶ The Committee has also suggested that the Latin religious group should be named as Latins – Roman Catholics.²⁷

IV. Education and religions

Religious lessons given in primary and secondary schools follow the doctrine of the Eastern Orthodox Church. In secondary education, the courses are given by graduates of university schools of divinity, while in primary education they are given by the class teacher. Attendance is compulsory for Orthodox pupils; atheists or members of other religions, however, may be excused. The religious instruction of Maronite children who attend public schools is taught by Maronite priests who receive a monthly salary by the state. Children belonging to religious groups are assisted by the state to attend private schools of their choice, if they so desire. The state covers all fees and expenses of Turkish-Cypriot pupils whose families reside in the non-occupied area and who attend private school of elementary or secondary education. It also grants annual fees in order to

²⁴ Such development was undeniably a drawback in the dialogue between the state and religious groups, especially if one considers the observations of the Advisory Committee on the Framework Convention for the Protection of Human Rights, *Opinion on Cyprus*, adopted on 6 April 2001, para. 42, which suggested that the Presidential Commissioner should be responsible to conduct the dialogue with other religions as well.

²⁵ Report Submitted by Cyprus, 1 March 1999, Part II, Article 3.

²⁶ *Opinion on Cyprus*, 6 April 2001, para. 18.

²⁷ *Ibid.*, para. 20. It is suggested that there is no need for a constitutional amendment in order to rename the Latin religious group.

assist every Maronite, Armenian or Latin student who attends private education schools. The right of religious communities to operate their own schools is also safeguarded and such schools are financially assisted by the state. Armenians operate their own schools which are fully funded by the state. Maronites lost their educational establishments as a result of the Turkish invasion, but the state has recently undertaken the building of an elementary school for them. At the same time the Orthodox Church and the other Christian creeds operate Sunday schools. It could be well argued that there is a continuous effort to maintain the special characteristics of the various religions communities with regard to education.²⁸

In the University of Cyprus there is no School of Divinity. Those who wish to study theology resort primarily to Greece, as well as to other countries, where Orthodox Theological Academies enjoy the status of a University College. Under the supervision of the Holy Synod, the hieratic school *Apostolos Vanavas* is in operation in Nicosia, as a dependence of the Monastery of Kykkos. It should be noted that the Orthodox Church of Cyprus takes part in all important social and economic activities of the Republic. The Orthodox Church currently owns a private radio station, called "Logos". The Church owns a private television channel as well, which it has decided to rent to the Greek "Mega Channel". It should be further noted that the Cyprus Broadcasting Corporation Law makes a brave attempt to accommodate the various minority interests, by providing access to the media and ensuring that all religious groups may enjoy a certain amount of broadcast time.²⁹

V. Finance of religions

The Republic of Cyprus does not impose any special religious tax. Therefore, each creed administers its own property, without any state intervention. It is interesting to observe, however, that when the Orthodox church enacted a new Charter on January 1, 1980, which set up central and peripheral organs for the administration of its property, it invited to

²⁸ See HAJI ROUSSOS, 'Memorandum of the Cyprus Maronite Community to the House of Representatives', Nicosia, June 1997, S. BERAUD, 'The Latins: A Small Community of Cyprus'. See also Report Submitted by Cyprus, 1 March 1999, C. TORNARITIS, *Promotion and Protection of Human Rights of National, Ethnic and Other Minorities in the Republic of Cyprus* (Nicosia, 1974).

²⁹ See D. GOMIEN, 'Pluralism and Minority Access to Media' in Rosas, A. and J. HELGESEN, *The Strength of Diversity: Human Rights and Pluralist Democracy* (Dordrecht: Martinus Nijhoff Publishers, 1992) p. 49, at 57.

the discussions the then Minister of Finance, the Attorney General, the President of the Supreme Court, advocates and well-known Cypriot businessmen, in order to consider their views on the draft Charter.³⁰ All religious institutions enjoy exemption from the income tax (article 8 §13, Law 118 (1)/2002), while all constructional materials, fittings and furniture for churches and mosques and all vestments and other articles which are imported for religious purposes by any Ecclesiastical and Religious Authorities, are eligible for relief from import duty and excise duty. It should be observed, however, that the Ministry of Finance currently discusses with the representatives of the Orthodox Church, a proposal concerning the imposition of tax with regard to the Church's financial transactions.

Despite the fact that the Republic does not provide funding to religions *per se*, it gives significant financial assistance to religious communities with regard to the construction or repair of their churches, monasteries and cemeteries. As a result of an agreement between the Republic of Cyprus and the Orthodox Church, the Church has granted immovable property to the Republic, which in return contributes to the payment of the salaries of the parish clergy in rural areas. The government decided that this agreement should also include the clergy of the three 'religious groups' of the Republic, and as of 1.1. 1999 the state has begun to pay salaries to the priests of religious groups, despite the fact that only the Orthodox Church had granted any immovable property to the Republic.³¹ The state aid towards the Orthodox Church and the three religious groups reached in 2003 the amount of 2.319.000 Cyprus Pounds (approximately 3.500.000 euros).

VI. Family relations and religions

The Constitution used to maintain in effect the provisions of Ottoman law with regard to the implementation of the religious law of each religious community regarding institutions of family law and adjudication of the relevant disputes by the appropriate religious tribunals. Thus, according to article 111 of the Constitution, any family matters of the members of the Greek Orthodox Church were governed by the law of the Greek

³⁰ See Chrysostomos, Archbishop of Cyprus, 'Introductory Report on the New Charter of the Church of Cyprus' (1979) 40 *Apostolos Varnavas*, p. 375-377 (in Greek).

³¹ See Report Submitted by Cyprus, 1 March 1999, Part II, Article 5 D 11. See also the Minutes of the House of Parliament of February 2, 1965, p. 8-11.

Orthodox Church and were cognizable by a tribunal of such Church. All the aforementioned rights of the Orthodox Church were also granted to the ecclesiastical groups of the three 'religious groups' of the Republic.³² It should be noted that article 111, "was intended to preserve and not to extend, the competence of the ecclesiastical tribunals of the Greek Orthodox Church as exercised at the time of the coming into operation of the Constitution".³³

The need to adjust all matters relating to personal institutions, to contemporary legal principles, social perceptions and to the commitments of the Republic of Cyprus towards international conventions, led to the First Amendment of the Constitution (Law 95/1989), which amended article 111.³⁴ According to the provisions of Law 95/1989:

- a) All matters relating to divorce, judicial separation or restitution of conjugal rights or to family relations of the members of the Orthodox Church, came under the jurisdiction of a family court. In divorce cases the court is composed by three members. It is presided over by a clergyman, while two laypersons act as its other two judges. If the Church does not appoint a presiding judge, which has been the practice until today, a judge is appointed by the Supreme Court of the Republic. The family courts came into force with Law 23/1990.
- b) All matters relating to divorce, judicial separation or restitution of conjugal rights or to family relations of the members of the three religious groups, came under the jurisdiction of the family courts of the religious groups, which eventually came into force with Law 87/1994.
- c) The grounds for divorce are mentioned specifically in the Constitution. The grounds of irretrievable breakdown rendering the marital relationship intolerable for the plaintiff is added, while the grounds of divorce, mentioned in the Charter remain in force. The House of Representatives may establish with law any other grounds for divorce and eventually established new grounds for divorce with the promulgation of Law 46(I)/1999.
- d) The members of the Greek Community may choose to perform a civil marriage. This became possible after the promulgation of Law 21/1990, which established a dual regime relative to religious marriage.

³² See G. SERGHIDES, *Internal and External Conflict of Laws*, n. 3 above, C. TORNARITS, *The Ecclesiastical Courts, Especially in Cyprus* (Nicosia, 1976).

³³ *Tyllirou v. Tylliros* 3 Reports of the Supreme Constitutional Court 21.

³⁴ See *Nicolaou v. Nicolaou* [1991] 1 Supreme Court Decisions 1338 (in Greek). See also Minutes of the House of Parliament of 12 June 1989, p. 2423ff (in Greek) and L. SAVVIDES, 'Sex Discrimination in Family Law in Cyprus' (1983) 4 *Cyprus Law Review*, p. 708-714.

- e) Matters relating to betrothal, marriage and nullity of marriage continue to be governed by the law of the Greek Orthodox Church or the Church of such religious group as the case may be.

The Orthodox Church has not accepted the constitutional amendment and it still maintains its ecclesiastical courts.³⁵ At present, the Orthodox Church allows its members to petition the family courts for divorce, so long as they also petition the ecclesiastical courts.³⁶ It is undeniable that the ecclesiastical courts no longer have any jurisdiction to adjudicate disputes of family law according to the Constitution. However, in practice, anyone who wants to perform a second religious marriage is obliged to petition both the family and the ecclesiastical courts for divorce, since the state does not recognize the divorces issued by the ecclesiastical courts and the church does not recognize the divorces issued by the family courts.³⁷ This is a grave social problem, which has not been solved till now, despite many attempts of reconciliation between the church and the state.³⁸ It should be further observed that the Maronite and Roman Catholic religious groups also refuse to recognize any jurisdiction of the family courts, with regard to the adjudication of the disputes of family law of their members. The only religious group that has accepted the jurisdiction of the family courts is the Armenian religious group.

The Constitution did not provide for competence of Muslim religious institutions concerning family relations, because of the radical amendments of the Turkish Cypriot institutions, following the acceptance of the Kemalic reforms.³⁹ However, any matters with regard to family relations of the members of the Turkish Community were expressly within the competence of the Turkish communal chamber. Due to the occupation of northern Cyprus, Muslims who belonged to the Turkish Community and

³⁵ For the reaction of the Orthodox Church see e.g. Archbishop of Cyprus, Newsletter (1989) 50 *Apostolos Varnavas*, p. 324 (in Greek), POLYZOIDES, *A Commentary on the Charter of the Church of Cyprus* (Thessaloniki, 1997) (in Greek), p. 136-144, P. MPOUMIS, 'Dissolution of Marriages by State Courts' (1990) 51 *Apostolos Varnavas*, p. 48 (in Greek).

³⁶ Decision of the Holy Synod of 7 February 1996 and Decision of 2 May 1991 (unpublished).

³⁷ See also the observations of G. SERGHIDES, 'Observations on the Cyprus Marriage Act 2003' (2004) 58 *Armenopoulos*, at 677 (in Greek), I. NICOLAOU, 'Family Law: Legal and Procedural Problems' (1995) 49 – 50 *Cyprus Law Review*, p. 7259ff (in Greek).

³⁸ See more recently 'Divorces: Optimistic despite the Differences' *Simerini* 25/1/04 (in Greek) and 'Towards Reconciliation of Church and State with Regard to Divorces' *Phileleftheros* 17/1/04 (in Greek).

³⁹ See EMILIANIDES, 'Private International Law' n. 4 above, p. 91.

resided in the non-occupied area could not conclude a civil marriage in the Republic of Cyprus, since such competence belonged to the Turkish communal chamber. Eventually, in 2002 the Republic of Cyprus enacted law 46(I)/2002 which provided that Muslims belonging to the Turkish Community had the right to enact civil marriages.⁴⁰

⁴⁰ See also *Selim v. Cyprus*, Judgment of 16 July 2002.

JIRÍ TRETERA

CONCORDATARIAN AGREEMENTS AND PUBLIC
AGREEMENTS IN THE CZECH STATE ECCLESIASTICAL LAW

**I. The tradition of church-state settlements and state ecclesiastical
law in Czech lands**

The fall of the Communist Regime during November and December 1989 has been followed by the development of a democratic legal order in the Czech Republic. A model which combines concordatarian regulation with State laws has prevailed in the republic. The foundation of the system is the principle of the non-confessional State which does not identify itself with any religion or ideology, but observes parity in status of all Churches and religious societies (hereafter "churches"), and cooperates with Churches on matters of common interest. The Czech Republic is a non-confessional/secular state of a cooperative character.

Up until 1949, church-state relations were regulated by unilateral legislative acts of the State, partially utilising Austrian legislation enacted before 1918 as well as elements of legislation of the democratic First Republic of Czechoslovakia from the period before World War II. However, from 1928 to 1948 some church-state relations were also regulated by the settlement known as the *Modus Vivendi*.

The *Modus Vivendi*, concluded between the Czechoslovak Government and the Apostolic See in 1927/1928, concerned the appointment of diocesan bishops in the territory of Czechoslovakia. The Apostolic See committed itself to inquire, before the appointment of a diocesan bishop, whether the Government of the Republic had no objections to the candidate. The bishops promised to a representative of the State that they would not act against the unity and integrity of the State. The Apostolic See also committed itself to accommodate Church districts administered by bishops to State borders (realized in 1937), and that no religious house would be subject to a major religious superior outside the territory of the State.

The *Modus Vivendi* had not been formally cancelled after the putsch of February 1948, but it was not observed during the Communist era. Before the end of December 1989, during the first visit of delegates of the first post-Communist democratic government of Czechoslovakia to

the Vatican City, following the Velvet Revolution, both sides declared the *Modus Vivendi* void because of the fundamental change in circumstances (*clausula rebus sic stantibus*). On the basis of this declaration, the Czechoslovak Parliament passed a law which ended State interference with the appointment of church representatives and the creation of local church entities.¹ Since January 1990, Catholic diocesan bishops have been appointed by the Apostolic See without prior consultation with the State authorities. Moreover, the Apostolic See was not required to obtain consent from the State for the establishment of two new dioceses (1993, 1996) and an exarchate (1996).

II. Constitutional law provisions valid at the present time

The principle of the legal autonomy of religious bodies was confirmed by Czechoslovak constitutional law which promulgated the Charter of Fundamental Rights and Freedoms (Act No. 23/1991, Journal of Laws, 9 January 1991). The Charter has been a part of the constitutional system of the Czech Republic since 1 January 1993. The following provisions of the Charter are important for the development of state ecclesiastical law in the Czech Republic:

Article 2 paragraph 1: 'The State is founded on democratic values and must not be bound either by an exclusive ideology or by a particular religion'.

Article 15 paragraph 1: 'Freedom of thought, conscience and religious conviction is guaranteed. Everybody has the right to change his or her religion or faith, or to have no religious conviction'.

Article 15 paragraph 3: 'Nobody may be forced to perform military service against his or her conscience or religious conviction. Detailed provisions are set by law'.

Article 16: '(1) Everybody has the right to profess freely his or her religion or faith either alone or jointly with others, privately or in public, through religious service, instruction, religious acts, or religious ritual. (2) Churches and religious societies administer their own affairs, in particular appoint their organs and their priests, and establish religious orders and other church institutions, independently of organs of the State. (3) The conditions of religious instruction at state schools shall be set by law'.

¹ Act No. 16/1990, Journal of Laws, 23 January 1990.

Act No. 308/1991, in the Journal of Laws, on Freedom of Religion and the Status of Churches and Religious Societies, in force from 1 September 1991 to 6 January 2002, was based on these principles of the Charter. A later Act 3/2002, in the Journal of Laws, on Churches and Religious Societies, in force from 7 January 2002, is also based on the same principles, especially after a corrective decision issued by the Constitutional Court (the decision of the Constitutional Court published as No. 4/2003 in the Journal of Laws).

III. Internal Czech state-church agreements

Over time, the need arose to make provision for the enjoyment of some of the Charter rights in public institutions: prisons, the Army, public health establishments and Czech Radio.

1. Prisons

From 7 January 1994 Churches have provided pastoral service in prisons in pursuance of an agreement between the Prison Administration of the Czech Republic, the Czech Bishops' Conference,² and the Ecumenical Council of Churches in the Czech Republic³. A new agreement was concluded on 28 June 1999.

2. Military chaplains

On the basis of an informal agreement between the representatives of the Catholic Church and the Ministry of Defence, in 1996, two military chaplains began to serve in the armed forces of the Czech Republic in Bosnia. Following this, the Agreement on Cooperation Between the Ministry of Defence of the Czech Republic, the Czech Bishops' Conference and the Ecumenical Council of Churches in the Czech Republic was concluded on 3 June 1998. The agreement was implemented under the authority of the Minister of Defence on the establishment of a pastoral service, coming

² The Czech Bishops' Conference represents 8 Roman-Catholic dioceses (resp. 2 archdioceses and 6 dioceses) and 1 Greek-Catholic exarchate.

³ The Ecumenical Council of Churches in the Czech Republic represents 11 member Churches (Evangelic Church of Czech Brethren, Silesian Evangelic Church AC, Church of Brethren, Unity of Brethren – Moravian Church, Evangelic Church AC in CR, Baptists, Methodists, Czechoslovak Hussite Church, Old Catholic Church, Eastern Orthodox Church, Apostolic Church).

into force 22 June 1998. Military chaplains are officers. They are appointed on the collective proposal of all the Churches which are parties to the agreement. Subordination of military chaplains in the organizational structure of their Church is not involved. Conditions for the appointment of a military chaplain are prescribed in a special agreement between the Ecumenical Council of Churches in the Czech Republic and the Czech Bishops' Conference from 1998. Two thirds of military chaplains are Catholics, and one third are members of other churches.

3. *Public health*

At the moment, there are no general rules for pastoral service in public health establishments. Agreement on this matter has been concluded only in the case of post-traumatic care for members of the Police force (7 October 2002).

4. *Radio and television*

The Agreement on Cooperation between Czech Radio (the public radio station), the Czech Bishops' Conference, and the Ecumenical Council of Churches in the Czech Republic was concluded on 19 December 1995 and a new one in 29 June 1999. They are typical settlements of public law. Czech public television has established a special board for religious broadcasting with representatives of the Catholic and Protestant Churches. It operates without agreement with religious communities, but also without controversy.

IV. *Concordat negotiations*

Diplomatic relations between the Apostolic See and the Czech Republic, at the level of a nunciature and embassy, resumed following the restoration of diplomatic relations between the former Czechoslovakia and the Apostolic See in June 1990. The idea for an international agreement with the Apostolic See emerged after the third visit of Pope John Paul II to the Czech Republic in 1997. The social-democratic government appointed in 1998 decided to effect the idea.

On 2 November 1999, the ambassador of the Czech Republic to the Apostolic See stressed, on meeting a specialist committee at the Ministry of Culture, that the basis of the agreement – and of further possible agreements – is especially to confirm, deepen and guarantee existing rights at

the international level. The President of the Republic, Mr. Václav Havel, confirmed the wish to conclude the agreement during his visit to the Holy Father at Christmas 1999. From April 2000 the commission of representatives of the parties worked on the draft of the agreement – more than a framework agreement, although the possibility of additional agreements is not excluded. Preparation work was successfully completed in the presence of Mons. Erwin Josef Ender, the new nuncio in Prague, on 28 May 2002. The Agreement was signed by the Minister of Foreign Affairs and the nuncio on 25 July 2002. However, on 21 May 2003 the Chamber of Representatives of the Parliament did not approve the agreement with a majority of 110 votes out of 200 representatives (with 177 present).

It seems the reasons for this decision were not related to the content of the Agreement. Some time before a conflict had arisen, concerning the new law on churches (Act No. 3/2002 in the Journal of Laws), between the Chamber of Representatives on the one hand and the Senate and President on the other hand. In the end the act was passed by a majority of 111 votes of the representatives (in December 2001). However, in November 2002 the act was corrected by the Constitutional Court. It comes as no surprise that the Chamber of Representatives did not incline, in May 2003, to approve the Agreement.

The Chamber of Representatives can vote on the Agreement again in the future and approve it when the conditions for this are more favourable. The entry of the Civic Democratic Party, whose representatives strongly opposed the agreement in the past, into the European People Party might change the situation.

V. *Contents of the signed (but unratified) concordat of 2002*

The most important articles of the Agreement can be summarised as follows:

- The Czech Republic recognizes the legal personality of the Roman and Greek Catholic Church (article 3 paragraph 1). The Apostolic See guarantees that the borders of dioceses, Apostolic administrations, eparchias and exarchates will be conform with the borders of the State (article 3 paragraph 2).
- The confessionally neutral Czech Republic (article 5 paragraph 1) guarantees the Catholic Church (article 6) freely, independently and according to their own needs to: realize its Apostolic mission; administer their own affairs, and appoint and dismiss their priests and deacons and other persons providing pastoral service.

- No-one may be forced to perform military service against his or her conscience or religious conviction (article 7).⁴
- The Catholic form of marriage has consequences in civil law (article 9).⁵
- Legal persons under the statutes of the Catholic Church (canon law) have legal personality under Czech law if the conditions of the Czech law for this are fulfilled, especially in the areas of education, health-care, social care and charity concerned (article 10 paragraph 1).
- Catholic charities are administered under their own statutes and have the right to finance from the State budget as do all establishments of analogous character (article 13 paragraph 2).

In more detail, the right to establish church schools (article 10 paragraph 2, article 11 paragraph 1), the right to religious education and its control including *missio canonica* (article 11 paragraph 5-6) are regulated in the Agreement. University organs may approve statutes of the Catholic theological faculties only with the prior consent of the Church authority (article 11 paragraph 4).⁶ The right to nostrification of academic degrees in religious sciences from public and church theological faculties abroad is guaranteed (article 11 paragraph 3).

The right to pastoral service in prisons and in the Army is declared by reference to the settlement between the Catholic Church and the competent State authority (article 15 and 16).

As far as definitive solution of property issues are concerned, article 17 contains the commitment of the Czech Republic as soon as possible to reach a settlement of the matter. A possible new model of financing may lessen economical anxieties for the Catholic Church in the meantime. The Czech Bishops' Conference is empowered to negotiate on affairs affecting the whole Catholic Church in the Czech Republic, especially as to the provision of new or additional solutions; negotiations between the parties to the Agreement are not affected by this (article 18 paragraph 1). These affairs can be settled by agreements between the parties to the Agreement or between the competent State authorities and the Czech Bishops' Conference with the consent of the Apostolic See (article 18 paragraph 2).

⁴ It is assured by the provisions of Art. 15 paragraph 3, of the Charter of Fundamental Rights and Freedoms (see above). Detailed regulation is set by Act No. 18/1992, Journal of Laws, on alternative military service. Alternative military service takes 18 months (unlike 12 month in the event of basic military service) and will be cancelled in the near future because of the professionalization of the Czech Army (2004/2005).

⁵ The consequences of the religious form of marriage were recognized for civil law by the Act No. 234/1992, Journal of Laws.

⁶ This is guaranteed by Act No. 111/1998, Journal of Laws.

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NON-COVENANTAL COOPERATION OF STATE AND RELIGION IN DENMARK

I. State and church relations between 1536 and 1849

Before the great civil war, many people were engaged in the new evangelical movement, especially in the larger cities of Denmark and in the duchies of Slesvig and Holsten, during the reign of Duke Christian, later King Christian III of Denmark and Norway. The Duke had close personal contacts with Wittenberg, especially with Melancthon and Luther. Shortly after the Duke's victory in Copenhagen 1536, which ended the civil war, the Danish church reformation was resolved politically by the newly elected king, Christian III (1536-1559), and his council of the realm.

Christian III wanted to regulate the legal conditions under which the new church was to function. With help from learned Danish theologians and the German reformer, Johannes Bugenhagen, the legal basis of the new Danish Church was formulated in the Church Ordinance of 1539, which listed all the legal relations between the king and the church and believers in civil society. The draft ordinance was sent to Martin Luther. With his acceptance it was returned to the king who, with the council of the realm, brought it into force following the same procedure as that applicable to ordinary legislation. The Church Ordinance expressed the wishes of the king and the approval not only of the council, which represented the nobility, but also of Luther. For this last reason it may be said to represent a sort of treaty or concordat, but of course not formally. The Danish Church now had changed into a national state church with new superintendents replacing the former bishops, who were imprisoned, and all episcopal landed property was confiscated by the king.

The text of the Church Ordinance was understood to contain two different ordinances: God's ordinance and the king's ordinance. The first concerned the gospels, the sacraments and Christian teachings, while the regulations concerning preaching, ceremonies, schools, alms for poor people, superintendents, deans and books constituted the king's ordinance.

In this way the ordinance represented Luther's teaching on the "two governments", the spiritual and the secular.

Frederic II (1559-1588), the son of Christian III, published on 20 September 1569 the so called "25 Articles about Foreigners" in a Mandate to all superintendents and secular local authorities in the cities. They were obliged to question each foreign person on two religious matters: whether the person knew the right and true Evangelical-Lutheran religion and if he or she would follow this right Christian teaching? If not, the foreigner should not be allowed to settle in the Danish realm, and if he already lived under the Danish-Norwegian rule, he should leave the country at once. If the person claimed to follow the new church without doing so, he might be punished upon life and goods. This Mandate was primarily directed against members of the Roman Catholic Church because of the risk of a Counter-Reformation as well as the risk of a new civil war. Only one confession, the *Confessio Augustana* from 1530, was accepted in Denmark.

Fear of the "papists" continued to dominate policy against foreigners entering Denmark and Norway in the first half of the 17th century during the reign of Christian IV (1588-1648). An act from 19 June 1613 forbade papists to inherit, to settle and to accept any official position in the Danish realm. In 1615 people who were suspected of having visited Jesuit schools came within the scope of the act of 1613. In the Recess of 27 February 1643 monks, Jesuits and Roman Catholic clergy were forbidden to settle in Denmark under pain of capital punishment, for fear that they would spread their superstitious and erroneous teaching. Moreover, on 6 February 1651, King Frederic III (1648-1670) decided that no Jews might enter Denmark without a royal licence of safe conduct. The reason for this was that there were a lot of Jews which had settled illegally to engage in small trade. The king referred to old customs as the legal basis of this, but probably it was a new German-inspired policy, which the king brought to Denmark from the Duchies of Slesvig and Holsten. The Danish Code 1683, the comprehensive civil law code, also contained severe penal clauses for these groups.

The king was the head of the Danish Church in all legal and practical matters, and whilst he exercised a form of constitutional absolutism under the *Lex Regia* 1665, he was nevertheless obliged to belong to the Evangelical-Lutheran Church and to follow the Augsburg Confession 1530. The *monarchia mixta* which characterised royal government prior to the absolutist period involved a formal coronation promise from the king to follow the right Christian faith. With the *Lex Regia* it became a compulsory constitutional requirement for the monarch, and this survives today

with the modern constitution of 1953, which also requires membership of the Evangelical-Lutheran church. When a police authority was first instituted in Copenhagen in 1682, the Chief Constable acquired a responsibility for foreigners, especially those of religions other than the Evangelical-Lutheran confessions, and for children born of mixed religious marriages baptized by foreign priests. Freedom of religion for all religious communities or confessions was given by the Constitution of 1849.

In spite of the strict rules on foreigners of other confessions, the king in 1682 conferred privileges on all Christian believers and Jews to settle in the city of Fredericia in Jutland, which had the status of an asylum city. In 1685 believers from the Reformed Churches were given freedom to settle and to make a living in a trade anywhere in Denmark. New privileges were given to these different religions during the 18th century. Freedom of religion was given generally for all Jews in 1814, but wealthy Jews were allowed to settle much earlier in spite of the many rules about special permissions and passports.

Danske Lov 1683, the great civil law code which consisted of six books, regulated religion. In its second book we find rules about such subjects as the confessional texts, preaching and preachers. Many of its rules were taken directly from the Church Ordinance 1539, but quite a lot derived from later legislation or practice. In terms of systematisation, the second book of *Danske Lov* is comparable with the Church Ordinance.

II. Dialogue between the democratic state and the folk church

The conditions of the state church were changed by the new democratic constitution of 1849, and so was the state-church relationship, but not radically. The church was from now on called a Folk Church and was subject in legislative matters to the bicameral parliament, the *Rigsdag*, to day the unicameral *Folketinget*, and in administrative matters to the Minister of Ecclesiastical Affairs. The Folk Church consists of around 2,160 parishes with their local parish councils. There are 111 deaneries with special deanery committees, which have a supervisory role over churches and churchyards in the deanery and concerning the budgets of the local parishes. The regional supervisors are the bishops and the diocesan authorities.

Ecclesiastical legislation consists of different acts which concern: 1) economic matters; 2) churches and churchyards; 3) employees; 4) clerical functions; 5) parishes and membership; and 6) holy days. In fact this modern legislation concerns mainly the same subjects found in the Church

Ordinance 1539 and in the second book of the Danish Code 1683. Under economic matters we find rules about the church rate payable by members of the church, state subvention, and other incomes and expenditures, and also the specialised area of church music schools. The rules on employment deal with the appointment of the different groups of staff and officials, such as priests, deans and bishops. On this subject there is an act on judicial procedure applicable in doctrinal cases. Laws on clerical functions concern among other subjects notification of births and deaths for all, regardless of the nationality or belief of the registered person, which has been criticized by several religious communities outside the Folk Church. Laws on clerical functions also deal with the notification of births and deaths in respect of members of the few other recognised religious communities, as well as with baptism, confirmation, burial and cremation. Rules about parishes and membership of the Folk Church deal with such matters as church boards and committees and the release of a person from the parish to which they normally belong. Today there are few rules on holy days; indeed, only one act contains a single paragraph which provides that nothing may be done which might disturb divine service on the holy days of the Folk Church.

From the Church Ordinance 1539, through the Danish Code and the new democratic legislation following the constitutional change in 1849, dialogue between state and church has developed in the form of an ongoing legislative process.

III. Dialogue between the state and the religious communities

Article 66 of the Constitution declares that the Folk Church shall have its own synodical constitution to secure its autonomy in relation to the state. But the Folk Church has until now neither a constitution nor autonomy in relation to the state. A few rules in the constitution concern religious communities other than the Folk Church. Article 69 declares that religious communities other than the Folk Church shall be regulated by a special act dealing with the legal position of "dissenters". Such an act has never been provided, although the legal position of the different religious communities is not completely clear. Single rules in Danish legislation, such as the penal code and various statutory and administrative acts, deal with a wide range of topics concerning the legal positions of members of such religious communities.

Article 67 of the Constitution gives all citizens a right to associate in communities in order to worship God in the way which corresponds to

their conviction, unless the community is teaching or acting contrary to morality or public order. Art. 68 guarantees that nobody is obliged to pay church taxes to a religious community other than their own. Art. 70 provides that no one can be deprived of entitlement to the complete enjoyment of civil and political rights on grounds of his belief or origin. On the other side no one can refrain from the fulfilment of his civil duties on such grounds. Art. 71 declares that no Danish citizen can be committed to prison due to his religious conviction. This comprises every kind of compulsion, imprisonment and also hospitalization. The rule, though, only concerns Danish citizens and may be looked upon as discriminatory. But ECHR Art. 14 generally prohibits discrimination for political, religious or ethnical reasons. Probably this rule in practice has altered Art. 71.

Religious communities other than the Folk Church are seen legally as independent, autonomous, private institutions and are often organized as private associations with members paying a form of subscription. Such communities do not have special advantages or status from the State. But if they own landed property or real estate or run a charitable institution, a school, a hospital or the like, of course the religious community is subject, through its representatives, to Danish legislation on such matters, and they may also obtain advantages or subventions in this regard.

The religious bodies may in this way have different connections with different public authorities. The Ministry of Ecclesiastical Affairs has capacity to decide questions about authorization for the right to officiate at a religious wedding ceremony which enjoys civil legal force. A condition for having such an authorization is that the person in charge proves that he knows the Danish language and the relevant Danish legislation. And his religious community must prove that it has a clear organisational structure and a prescribed number of members. It also must have a cult, a doctrine and a rite which are legally acceptable. When a religious community in this way is acknowledged to perform weddings, it will automatically have the right to tax exemptions for single gifts between 500 and 5,000 Danish crowns per year. The Ministry of Taxation publishes yearly a list with the names of approved associations and religious communities.

If a religious body wishes to acquire land for a churchyard, church or mosque, a municipality may offer a plot of land for this purpose, or the religious community may choose to buy a piece of land as a private legal person. However, the religious body will have to work in close connection with public authorities in relation to the construction of places of worship, which must comply with local building restrictions, or the peaceful enjoyment of burial places.

Article 76 of the Constitution secures a right for all children to receive free education, the so called "freedom of education" clause. But it also secures "freedom of schools" for the parents, which means that they are not obliged to send their children to the public primary school. Parents have the right to choose a special private school for political, religious, cultural, pedagogical, national or personal reasons. Several religious communities have opened private schools, which receive state subsidies from the Ministry of Education, if they fulfil the legal conditions as to quality of instruction, independence and good administration. The school must be free of external or internal political interests and indoctrination.

Concerning Danish radio and television, individual organisations may receive grants to make programmes for radio or regional or local programmes for TV. For such grants religious bodies must approach the Minister of Cultural Affairs in the same manner as all other private bodies. There is no specific provision for access of religious communities to programme time.

There are no general rules for religious communities prescribing which state authority they have to contact in order to enter dialogue. They must discover such matters for themselves. As such dialogue is rather open and unstructured. But it exists.

IV. Conclusion

Historically, there has been an ongoing dialogue between state and church, including, albeit sometimes in a weak form, religious denominations other than the national church. State-church relations during the whole period covered in this study have been governed by laws and not by concordats. State and church do collaborate and agree on many common matters, and the state makes provision for religion as a result, but there remain areas of disagreement such as in relation to financial assistance from the state in the maintenance of places of worship and burial grounds, housing for Muslims, and charitable status.

The Ministry of Ecclesiastical Affairs is a government department dedicated to the affairs of the Folk Church, but not to religious affairs generally. Nevertheless, questions about religion are submitted by the Ministry to other bodies, councils, legal or theological experts or other advisers in religious matters, or to the special court for doctrinal cases. Issues about acknowledgement as a religious denomination for different purposes (eg to obtain tax exemption) are decided by such groups of advisers to the Ministry.

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LES PROCESSUS DES NÉGOCIATIONS ENTRE LES RELIGIONS ET LES POUVOIRS PUBLICS EN FRANCE

I. Présentation générale

1. Histoire

La France connaît, aujourd'hui, un régime de séparation des Églises et de l'État, mais elle possède néanmoins une réelle tradition concordataire. Sous l'Ancien Régime, la doctrine du gallicanisme et le concordat de Bologne, conclu en 1516 entre François I^{er} et Léon X, constituèrent le cadre fondamental du régime juridique de l'Église catholique jusqu'en 1790. Au XIX^e siècle, la France connut un régime de cultes reconnus, souvent qualifié de régime concordataire. Le texte fondateur était la loi du 2 avril 1802 (18 germinal an X) qui comportait elle-même deux éléments : d'une part un concordat, signé entre Napoléon Bonaparte et Pie VII le 15 juillet 1801 (26 messidor an IX) et d'autre part les « Articles organiques de la convention du 26 messidor an IX », loi unilatérale de l'État, composée de 77 articles relatifs au culte catholique et de 44 articles concernant les cultes protestants, Église réformée et Église de la confession d'Augsbourg. Le culte israélite fut réglementé par des décrets de 1808.

Si ce régime est qualifié de concordataire, notons cependant que les articles organiques étaient des mesures unilatérales de l'État, dont le Saint-Siège et l'Église de France contestèrent constamment la régularité, mais qui s'appliquèrent néanmoins. Ils réglaient des questions nombreuses et importantes de la vie religieuse, dans un esprit d'étatisation conforme aux conceptions politiques générales de Napoléon.

Les dispositions relatives aux Églises calvinistes, luthériennes, ou au culte juif furent, elles aussi décidées unilatéralement par le législateur français.

Tout au long du XIX^e siècle, diverses réformes intervinrent (notamment en 1844 et en 1852 pour le culte juif et les Églises protestantes); elles furent réalisées par des décrets à la préparation desquels les religions n'avaient guère été associées.

Le régime concordataire du XIX^e siècle en France ne donna pas lieu à des « négociations » particulièrement fréquentes et étroites entre les pouvoirs publics et les religions. Bon nombre d'historiens y voient davantage un instrument efficace du « contrôle » de la vie religieuse par l'autorité publique.

2. Actuellement, en France plusieurs régimes bien distincts coexistent

(1) La majeure partie du territoire français obéit au régime de séparation des Églises et de l'État dont le texte fondateur est la loi du 9 décembre 1905.¹ Son article 2 prévoit que la République ne « reconnaît aucun culte » ; les religions doivent s'organiser dans le cadre d'associations culturelles, de droit privé.² Cette non reconnaissance n'est pas ignorance. Au lendemain de la première guerre mondiale, un Bureau des Cultes fut créé au ministère de l'Intérieur dès 1918 et un Conseiller pour les Affaires religieuses fut nommé l'année suivante auprès du ministre des Affaires étrangères. Ces deux instances existent toujours et leurs services se sont considérablement développés.

(2) À côté de ce droit général, on trouve plusieurs régimes dérogatoires.

(i) Le « régime concordataire » survit en partie dans les trois départements de l'Est de la France (Haut-Rhin, Bas-Rhin, Moselle), dans le cadre d'un droit local où quatre cultes sont « reconnus ». Ce droit local est fait d'un certain nombre de « franchises locales » que l'État s'est engagé à respecter en 1918, lors du retour de ces territoires à la France.³ Si une modification du concordat était envisagée (ce qui n'est pas le cas) elle devrait faire l'objet d'une négociation internationale.⁴

¹ Jean-Marie MAYEUR, *La séparation des Églises et de l'État* (Paris, 3^e éd., 2005).

² Loi du 9 déc. 1905, art. 1 : « La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public. » – art. 2 : « La République ne reconnaît, ne salarie ni ne subventionne aucun culte... Pourront toutefois être inscrites auxdits budgets (publics) les dépenses relatives à des services d'aumôneries destinés à assurer le libre exercice des cultes dans des établissements publics... » – art. 4 : « Dans le délai d'un an à partir de la promulgation de la présente loi, les biens... (des anciens établissements publics) ... seront transférés par les représentants légaux de ces établissements aux associations qui, en se conformant aux règles d'organisation générale du culte dont elles se proposent d'assurer l'exercice, se seront légalement formées... ».

³ Dans un premier temps, un accord tacite se fit sur le maintien du *statu quo* ; puis la loi du 1^{er} juin 1924 déclara expressément conserver le régime des cultes existant en Alsace-Moselle. Le Conseil d'État, par un avis du 24 janvier 1925, rendu toutes sections réunies, a considéré que la loi de 1905 ne porte pas atteinte au pluralisme des régimes juridiques relatifs aux cultes, tels qu'ils existent en France.

⁴ Francis MESSNER, Pierre-Henri PRÉLOT, Jean-Marie WOEHLING, *Traité de droit français des religions* (Paris, Litec, 2003) p. 379.

Ce droit local et le maintien du système des cultes reconnus a diverses conséquences, dont les principales sont :

- Nomination des évêques par le chef de l'État (archevêque de Strasbourg et évêque de Metz).
- Agrément des curés par le gouvernement.
- Traitement des évêques et curés.
- Existence d'une « heure de religion » hebdomadaire dans les programmes des écoles publiques.

Un certain nombre d'instances administratives spécifiques négocient diverses questions de droit local avec les religions dans ces trois départements. Pourtant, discussions et négociations s'y déroulent de façon très semblable à ce qui existe dans le reste de la France. Il n'apparaît pas que le cadre concordataire, ou l'existence de cultes reconnus, constituent des facteurs déterminants, par eux-mêmes, des modalités spécifiques de dialogue entre religions et pouvoirs publics.

(ii) Les départements d'outre-mer et les territoires d'outre-mer (DOM-TOM) obéissent à une législation particulière, héritée pour chaque région, de l'histoire propre à ce territoire. La loi de 1905 est applicable dans certains, mais pas dans tous (ex : la Guyane reste régie par une ordonnance royale de 1828). En 1939, le ministre des Colonies Georges Mandel tenta de doter les terres « non placées sous le régime de séparation » d'un statut plus précis. Les « décrets Mandel »⁵ furent publiés.

Dans cette brève note, j'envisage seulement le régime général, applicable à la plus grande partie du territoire, tel qu'il découle de la loi de 1905. Afin de régler les relations entre religions et État, il existe en France des autorités compétentes pour négocier (II) ; celles-ci envisagent de multiples questions (III) ; et de nombreuses décisions peuvent ainsi intervenir (IV).

II. Les négociateurs et les modalités de négociations

1. Les négociateurs pour le compte des pouvoirs publics

Les représentants de l'autorité publique appelés à négocier avec les religions sont nombreux. Une liste précise ne peut pas être établie car, en l'absence de reconnaissance juridique formelle des cultes, le type de négociations peut varier, s'adapter aux nécessités d'un moment. Le régime

⁵ *Op. cit.*, p. 835-836.

français se caractérise par sa très grande souplesse. On peut, entre autres autorités, citer :

(1) Le Conseiller pour les Affaires religieuses auprès du ministre des Affaires étrangères. Il intervient notamment dans les discussions en vue de la désignation d'un nouvel évêque. De fait, depuis le «modus vivendi» de 1924, intervenu entre le gouvernement français et le Saint-Siège, il est prévu que le gouvernement peut «faire valoir ses objections au point de vue politique» sur un candidat à l'épiscopat dont l'autorité romaine envisage la nomination en France. Ce «droit de regard» s'exerce effectivement. Avant la nomination, le nonce propose un nom au gouvernement, qui s'adresse au Conseiller pour les Affaires religieuses. Ce dernier enquête et conseille le gouvernement sur la réponse à faire.⁶

Le Conseiller pour les Affaires religieuses intervient pour de nombreuses autres questions où les religions entretiennent des relations avec des autorités étrangères. Avant 1981, toute association étrangère devait solliciter une autorisation expresse pour se constituer. Le Conseiller pour les Affaires religieuses était consulté sur tout projet d'association ayant une connotation religieuse, musulmane par exemple. En 1981, l'une des premières mesures du gouvernement socialiste mis en place après l'élection de François Mitterrand à la Présidence de la République, fut d'abolir cette nécessité d'obtenir une autorisation préalable pour la création d'une association étrangère. Les négociations n'étaient plus nécessaires.

Le Conseiller pour les Affaires religieuses auprès du Ministre des Affaires étrangères suit également les activités d'un certain nombre de «nouveaux mouvements religieux», au rayonnement international.

(2) D'autre part, le Bureau des cultes du ministère de l'Intérieur constitue la principale instance, compétente⁷ pour traiter, seul ou avec d'autres, du plus grand nombre de questions relatives à la vie des religions en France, qui nécessitent des négociations avec les pouvoirs publics. Il est un bureau central, mais provoque lui-même la création de nombreux organes chargés de questions plus spécifiques. Les domaines d'intervention de ce bureau sont nombreux (cf. infra, III).

⁶ Jean GAUDEMET, «Une instance de liaison: le conseiller pour les affaires religieuses auprès du Ministre des relations extérieures», *Administration et Église. du concordat à la séparation de l'Église et de l'État* (Genève-Paris, 1987) p.47-56.

⁷ Je remercie Monsieur Vianney Sevaistre, Conseiller technique chargé des affaires cultuelles auprès du ministre de l'Intérieur, pour les utiles informations qu'il m'a communiquées.

(3) Dans la plupart des ministères, mais aussi dans les principales administrations publiques, et dans les services régionaux et départementaux, des bureaux, commissions, ... existent, se réunissent et participent à la gestion de la vie religieuse sous ses divers aspects. (ministère de la Santé, ministère de l'Éducation nationale, ministère de la Culture, administration pénitentiaire, armée,...).

2. Les négociateurs pour le compte des religions

L'État ne reconnaît aucun culte. Pourtant, il existe en France un certain nombre de religions dites «connues». Pouvoirs publics, opinion, sociologues ou juristes s'accordent sur l'identité de ces grandes religions connues, tout en prenant toujours soin de dire que la liste présentée n'est pas limitative et peut varier. Ces religions dites «connues», possèdent toutes une autorité considérée tant par la confession religieuse que par les pouvoirs publics comme instance représentative, apte à dialoguer, au nom de l'ensemble de la communauté religieuse, avec l'autorité publique. Là encore, l'identification de chacune de ces autorités résulte d'un certain consensus tacite, non d'une décision officielle de l'État ou de la religion concernée.

En 2004, on peut considérer que l'autorité publique, notamment le Bureau des cultes au ministère de l'Intérieur, dialogue essentiellement – mais la liste n'est pas exhaustive – avec les autorités suivantes :

- Pour l'Église catholique: la conférence des évêques de France, et son président.
- Pour le culte islamique: le conseil français du culte musulman, et son président.
- Pour les religions protestantes: d'une part la fédération protestante de France et son président; d'autre part la fédération évangélique de France et son président (depuis plusieurs années, les effectifs de cette seconde fédération augmentent).
- Pour les Églises orthodoxes: l'assemblée des évêques orthodoxes de France (qui réunit les sept principales Églises orthodoxes) et son président.
- Pour le culte israélite: le consistoire central israélite de France, et son président, ainsi que le Grand Rabbin de France.
- Pour le bouddhisme: l'Union des bouddhistes de France et son président.

3. Les modalités de négociations

Les discussions entre les pouvoirs publics et chacune de ces instances religieuses sont fréquentes et se déroulent sereinement. Si telle ou telle

religion connaît, à l'intérieur même de sa communauté religieuse, divers courants ou sensibilités, ces diversités (ou parfois divergences) internes n'affectent pas la sérénité des négociations avec les représentants de l'autorité étatique.

Au cours de ces négociations, marquées par un réel climat de confiance réciproque, il arrive parfois que les préoccupations des pouvoirs publics et celles des confessions religieuses se situent sur des plans différents, ce qui peut compliquer le dialogue, sans pourtant l'interrompre.

Les communications entre autorités religieuses et administratives peuvent se heurter à quelques difficultés qui sont généralement d'ordre pratique et ne résultent pas d'oppositions de fond. Il peut être difficile d'interpréter certains organigrammes et donc d'identifier la personne, ou la commission, compétente pour un débat spécifique. En outre, les exigences d'une organisation rationnelle qui sont celles de l'administration ne constituent pas la priorité des confessions religieuses.

(1) En ce qui concerne l'Église catholique, en février 2002, un accord était intervenu, entre le gouvernement (gouvernement socialiste alors dirigé par Lionel Jospin) et l'Église catholique⁸. Le cardinal Jean-Marie Lustiger archevêque de Paris, le président de la conférence des évêques et le premier ministre avaient décidé l'organisation de rencontres régulières. L'Église catholique devait constituer des groupes de travail qui, d'après le communiqué de l'Agence France Presse procéderaient à l'examen «des problèmes d'ordre administratif et juridique qui se posent dans les relations entre l'Église catholique et l'État en France». Ces rencontres régulières furent organisées et se poursuivent, même si certains estiment parfois que le travail des groupes n'a pas le dynamisme espéré.

(2) Donnons quelques précisions sur le Conseil français du culte musulman (CFCM). L'Islam est la seconde religion de France, avec 6 à 7 millions de personnes de «culture musulmane», dont plus de la moitié ont la citoyenneté française. Depuis les années 1980, les gouvernements successifs ont tenté de faire émerger, en France, une instance représentative des musulmans, apte à dialoguer avec les pouvoirs publics. Tentative de Pierre Joxe, créant le Conseil de Réflexion sur l'Islam de France (CORIF) en 1989. Tentative de Charles Pasqua aboutissant en 1995 à la rédaction de la «Charte du culte musulman». «Consultation des musulmans de

⁸ Voir Jean-Paul DURAND, «La création d'une instance de dialogue au plus haut niveau entre l'Église catholique et l'État français, 13 février 2002», *l'année canonique*, 46, 2004, p.245-258.

France», lancée par Jean-Pierre Chevènement en 1999... Aucune de ces entreprises ne fut une parfaite réussite. Toutefois progressivement les négociations progressèrent. Nicolas Sarkozy reprit en partie la ligne tracée par J. P. Chevènement et prépara les élections au CFCM. Celles-ci eurent lieu en avril 2003, dans le cadre des mosquées.⁹

Depuis l'été 2003, le CFCM se réunit et, en juin 2004, son conseil d'administration en était à sa 29^e réunion. Parallèlement, les conseils régionaux du culte musulman (CRCM) furent créés et ils se réunissent également.

Le CFCM est présidé par le Dr Boubakeur, Recteur de la grande mosquée de Paris. Cette présidence avait été décidée, conformément aux souhaits du gouvernement, avant même les élections. Elle fut mise en œuvre bien que la tendance que représente la grande mosquée de Paris ne soit pas celle qui ait obtenu le plus de sièges dans le conseil, lors des élections.

À l'intérieur du Conseil, un certain nombre de commissions ont été créées; plusieurs furent mises en place avant les élections, dans le cadre de la consultation préalable. Chaque commission est chargée de l'étude d'une question spécifique, pour laquelle elle dresse un état de la situation existante, des besoins des communautés musulmanes et formule des propositions.

L'avenir dira si l'Islam de France a véritablement trouvé son cadre d'organisation dans la création du CFCM dont le fonctionnement soulève parfois quelques difficultés.

III. Les principales questions, objets de discussions et, parfois, de réglementation

Si l'État s'interdit tout immixtion dans la vie interne des religions et, à plus forte raison, dans les questions dogmatiques, le régime de séparation entre les Églises et l'État n'interdit pas que de nombreuses questions soient débattues entre les représentants des religions et les pouvoirs publics.

Signalons, quelques-uns des sujets abordés, dans une énumération qui ne saurait être limitative:

1. *Les lieux de culte*: Diverses questions ont été récemment discutées: la question de l'utilisation des églises à des fins culturelles et non cultuelles. (Visite des lieux de culte qui sont classés comme monument

⁹ Voir Brigitte BASDEVANT-GAUDEMET et Franck FRÉGOSI, «L'Islam en France», in *Islam and European Union*, dir. Richard Potz et Wolfgang Wiershaider, publication du Consortium européen pour les relations religions États (Peeters, Leuven, 2004) p.143-181.

historique; organisation de concerts dans les églises; ...). La question du financement des réparations des bâtiments affectés au culte a été soulevée, notamment par les Églises protestantes et une note du ministre de l'Intérieur adressée aux préfets est intervenue, à la demande des protestants, pour préciser les modalités des aides sur fonds publics. La question du financement de la construction de mosquées se pose également; en droit français, aucun financement direct ne peut être accordé, sur fonds publics, pour des constructions de lieux de culte; mais des aides indirectes sont autorisées et les pouvoirs publics sont conscients de la nécessité de permettre aux musulmans de disposer de lieux de culte décents. Le mécanisme juridique des fondations semble compatible avec les dispositions de la loi de 1905.

2. *Application du droit du travail aux collaborateurs d'associations à caractère confessionnel, qu'ils soient salariés ou collaborateurs bénévoles*: Les situations sont diverses, mais soulèvent toutes des questions juridiques que pouvoirs publics et autorités religieuses tentent de résoudre dans un esprit de concertation (ex: statut, au regard du droit français des «animateurs pastoraux»; situation des religieuses, congréganistes, travaillant dans les hôpitaux; aumôniers des prisons, des hôpitaux, ou de l'armée,...).
3. *Structures associatives*: Les religions, ou les activités culturelles, sociales, ... peuvent s'organiser dans des cadres associatifs dont les régimes juridiques et, surtout, financiers et fiscaux peuvent présenter divers caractères. Le choix de recourir à tel ou tel type d'associations a donc des conséquences matérielles importantes. La loi de 1901 sur la liberté d'association constitue un cadre ouvert aux activités culturelles ou charitables des religions; ces associations peuvent solliciter des subventions sur fonds publics. Les associations culturelles, prévues par la loi de 1905, doivent avoir pour objet l'exercice d'un culte; elles ne peuvent pas obtenir de subventions, mais bénéficient d'un régime fiscal extrêmement favorable en ce qui concerne les dons qui leur sont faits par les fidèles.
4. *Organisation de l'Aïd El Kebir*: La fête de l'Aïd El Kebir implique l'abattage d'un nombre considérable de moutons. Pendant longtemps, le ministère de l'agriculture eut comme préoccupation essentielle la protection des animaux. Il importe également d'assurer le respect des règles d'hygiène. Actuellement, une commission interministérielle se met en place (principalement ministère de l'Intérieur, de l'Agriculture et de la Santé), qui travaille en liaison avec le groupe interne du CFCM

compétent sur ce point. En France, le code municipal impose que l'abattage des animaux ait lieu dans les abattoirs municipaux. Pour l'Aïd El Kebir, des dérogations sont accordées, mais après négociations et selon une réglementation stricte.

5. *Laïcité des services publics*: J'évoque seulement, – mais bien d'autres questions se posent également –, l'interdiction du port de signes distinctifs d'appartenance à une religion dans les écoles publiques. Sur ce point, le conseil d'administration du CFCM a, au cours de l'année 2003-2004, transmis au ministre un certain nombre de rapports, notes ou prises de position, lors de l'élaboration de la loi publiée en mars 2004 ou lors de l'élaboration des circulaires d'application de cette loi.¹⁰ Après la promulgation de la loi, tout en faisant part de ses critiques à l'égard de la loi et de la circulaire d'application, le Conseil a assuré le ministre de la volonté des conseils régionaux du culte musulman de dialoguer avec les recteurs d'académie, pour aboutir à un règlement serein des éventuels conflits. Les positions prises par le Conseil constituèrent l'un des motifs (parmi d'autres) qui ont conduit le ministre à modifier le texte de la circulaire d'application qui avait, dans un premier temps, été élaboré. À l'automne 2004, de fait, un certain nombre de négociations eurent lieu localement. Les conflits aigus ont été relativement rares.
6. *Aumôneries dans les établissements publics*. L'Église catholique se préoccupe de l'enseignement privé (qui, en France, est, dans 90% des cas, un enseignement catholique) et des aumôneries de l'enseignement public. La question des aumôneries intéresse aussi les musulmans. Une négociation a eu lieu à l'initiative du Bureau des cultes du ministère de l'Intérieur, associant les ministères de la Défense, de la Justice, des Affaires sociales (partie hospitalisation), de la Jeunesse, de l'Éducation nationale, tenant compte, là encore des positions présentées par le conseil d'administration du CFCM. De ces discussions, est résultée, en 2004, une «note», émanant du Bureau central des cultes, mais prise suite à une concertation entre cinq ministères, faisant le point des textes normatifs en vigueur et de leur application pour les aumôneries musulmanes dans les armées, les établissements de santé, les prisons, l'éducation nationale et les centres de vacances et loisirs.

¹⁰ Loi du 15 mars 2004, JO n°65, 17 mars 2004, p.5196 et Circulaire du 18 mai 2004, JO n°118, 22 mai 2004, p.9033.

On pourrait citer beaucoup d'autres thèmes, objets de discussions, et pour lesquels des solutions sont trouvées (pèlerinages, cimetières, cantines, audiovisuel, condition des ministres des cultes,...).

IV. Nature juridique des actes intervenant suite à ces concertations

Puisqu'en France l'État ne reconnaît aucun culte, aucun accord formel ne peut intervenir avec une confession religieuse; pas de «d'entente», pas de «contrat» ou «convention». D'autre part, le régime de 1905 ne laisse pas non plus place à une réglementation d'ensemble de toutes les questions relatives à l'organisation d'une religion, ni même à une réglementation des principales d'entre elles. Une loi générale, sur le statut des cultes, sur la liberté religieuse, n'a pas sa place dans le système français.

Pourtant, dialogues et négociations existent; ils sont de plus en plus nombreux et efficaces. Mais, les actes émanant des pouvoirs publics apparaissent, formellement, comme des actes unilatéraux de la puissance publique; l'existence des négociations ayant précédé la publication de ces actes n'est pas expressément mentionnée.

Les actes de l'autorité publique peuvent être de natures diverses:

- Un certain nombre de lois sont prises après consultation de comités dans lesquels siègent des représentants des religions (en matière d'éthique notamment).
- D'autres normes impératives interviennent sous forme de décret.
- De nombreuses circulaires ministérielles sont rédigées. Ainsi, dans les années 1990, deux circulaires ministérielles importantes furent prises après consultation du CORIF, afin d'inciter les maires à créer, dans les cimetières des «carrés confessionnels». Le ministre affirmait qu'il n'est pas contraire au principe de laïcité des cimetières de permettre aux fidèles d'une même confession d'être enterrés dans un même coin d'un cimetière communal. Il répondait alors à une demande forte de la part des musulmans, désireux que leurs tombes soient regroupées dans un même espace. Les menus des soldats musulmans furent réglés selon une procédure comparable.
- Simple note du Bureau des cultes, relative aux aumôneries musulmanes dans les services publics, ou à l'utilisation des lieux de culte.....

Dans cette brève étude, je n'ai cité que quelques-uns des multiples sujets sur lesquels un dialogue s'engage entre religions et État; je n'ai également mentionné que quelques exemples des résultats auxquels ses négociations peuvent aboutir.

Le régime d'absence de reconnaissance des cultes permet une étonnante souplesse et diversité dans les modalités de dialogues et de prises de décision. Le législateur est, par hypothèse, incompétent pour régler, dans son ensemble, l'organisation d'une religion. En conséquence, l'absence d'intervention générale laisse le champ libre à toutes sortes d'initiatives ponctuelles, adaptées à chaque situation et susceptibles de perpétuelles évolutions. La non reconnaissance des cultes n'est pas ignorance mais s'accompagne de nombreux mécanismes, parfois d'autant plus efficaces qu'ils sont informels.

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TREATIES BETWEEN RELIGIOUS COMMUNITIES AND
THE STATE IN GERMANY

I. General perspectives

Treaties between the State and religious communities are an integral and characteristic feature of German law on religion. There is a substantial corpus of treaties not only with the greater churches, but also with smaller religious communities and philosophical bodies.¹ There are treaties with an all-embracing character which deal with fundamental issues in a broad way. There are also many agreements of a limited, often merely administrative, character. In respect to treaties with the Holy See, the former are by tradition called concordats, whereas treaties with a merely partial character concluded with the Holy See would be called concordatary agreements. Treaties with Catholic dioceses or other entities of the Catholic Church are usually called (church) treaties. In respect to the Protestant Churches treaties of fundamental, broad character are usually called church treaties. Treaties of partial character are

¹ For the texts see Josef LISTL, *Die Konkordate und Kirchenverträge in der Bundesrepublik Deutschland*, 2 volumes (Berlin, 1987); <http://www.uni-trier.de/~ievr/brdreligionrecht/index.html>; for details: Alexander HOLLERBACH, *Die vertragrechtlichen Grundlagen des Staatskirchenrechts*, in LISTL/PIRSON (eds), *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, Vol. 1 (2nd edn., Berlin, 1994) p. 253; Alexander HOLLERBACH, *Verträge zwischen Staat und Kirche in der Bundesrepublik Deutschland* (Frankfurt a.M., 1965); Alexander HOLLERBACH, 'Grundlagen des Staatskirchenrechts', in: ISENSEE/KIRCHHOF (eds), *Handbuch des Staatsrechts*, Vol. VI (Heidelberg, 1989) p. 497; Alexander HOLLERBACH, Art. 'Konkordat', in *Staatslexikon*, Vol. III (1987) col. 620-625; Alexander HOLLERBACH, Art. 'Staatskirchenverträge', in *Staatslexikon*, Vol. V (1989) col. 186-188, Dietrich PIRSON, Art. 'Evangelische Kirchenverträge', in *Staatslexikon*, Vol. II (1986) col. 494-499, Dietrich PIRSON, Art. 'Vertragskirchenrecht', in *Evangelisches Staatslexikon*, Vol. II (1987) col. 3814-3827, Axel von CAMPENHAUSEN, *Staatskirchenrecht* (3rd edn., München, 1996) p. 55; Gerhard ROBBERS, 'Staat und Kirche in der Bundesrepublik Deutschland', in: ROBBERS (ed), *Staat und Kirche in der Europäischen Union* (Baden-Baden, 1995) p. 63; Heiner MARRÉ, 'Das staatliche Religionsrecht in Deutschland', in: PUZA/KUSTERMANN (eds), *Staatliches Religionsrecht im europäischen Vergleich* (Freiburg/Schweiz, 1993) p. 10.

usually referred to as agreements. There is no legally prescribed terminology, however.

Today, treaties between the state and religious communities are a widely-accepted legal instrument to give a structure to the relations between state and religious communities. Although deeply-rooted in history, it seems to be a very modern way of framing the relevant legal relations. In other fields, also, the State has taken to covenantal forms of legal relations in Germany. The State has changed its character from giving orders to concluding agreements. This is visible in administrative law, concluding different types of public law treaties with individuals and groups. Laws in general are not adopted without prior dialogue and even negotiations with relevant groups in civil society, "pactitioned" laws, "gentlemen's agreements" between the state or administrative authorities and parts of civil society are a visible phenomenon, and even German constitutional provisions have been framed in international treaties in the reunification process. Thus, legally binding agreements with religious communities are nothing exceptional, but form part of a wide range of negotiated law.

II. Historical developments

In Germany most matters concerning the relations between the State and religious communities form part of the competencies of the Federal *Länder*. It is therefore predominantly the *Länder* that have concluded treaties with religious communities and associations of *Weltanschauung*. As far as competencies of the Federal Republic are concerned there are also treaties concluded by the Federal Republic in which the Federation is the obliged partner. This is the case with the recent agreement of the Federal Republic of Germany and the Central Council of the Jews of 27 January 2003 concerning financial aid to the Jewish cult communities in Germany resulting from historical reasons. This is also the case for the treaty between the Federal Republic of Germany and the Evangelical Church in Germany about military chaplaincy and, with some special legal questions, for the *Reichskonkordat*, the concordat concluded by Germany and the Holy See in 1933.

Treaties between the secular power and the church in Germany date back centuries. Concerning today's relevant treaties we can distinguish three phases of particular treaty activity. A first phase can be seen in the Republic of Weimar. Some of these treaties are still in force today and carry characteristic features. Concordats with the *Länder* Bavaria

(29.03.1924), Prussia (14.06.1929) and Baden (12.10.1932) provide a basis for treaty law on the most relevant questions for law on religion in most of the territory of the German Reich for the Catholic Church. Treaties of these *Länder* with the Protestant Churches followed (Bavaria 12.11.1924, Prussia 11.05.1931, Baden 14.11.1932). These treaties mirrored the new system of state-church relations established in the Weimarer Constitution. There were many consequences – especially in relation to the Protestant Churches – of the separation of church and state based in the new constitution of 1919. Equally they mirrored the idea of "parity", equality between the churches.

Special attention should be paid to the concordat concluded between Germany and the Holy See, the *Reichskonkordat*, signed on 20 July 1933. The negotiations between German authorities and the Holy See had started long before, but it was the fate of this concordat that it was the first international treaty concluded by and with Nazi Germany. Apart from the international standing visible in the concordat, the treaty was favourable to the Nazis in respect to the obligation of the Catholic Church to show political restraint, but it also secured somewhat the position of the church against the regime. An equivalent treaty with the Protestant Church was expected, but the upcoming *Kirchenkampf* put an end to those developments.

The second phase came after 1949. This time the treaties with the Protestant Churches took the lead. A breakthrough came on 19 March 1955 with the treaty of Niedersachsen with the Protestant Land Churches (*Loccumer Vertrag*). Protestant treaties with Schleswig-Holstein (23.04.1957), Hesse (18.02.1960) and Rhineland-Palatine (31.03.1962), Nordrhein-Westphalia (09.09.1957 and 06.03.1958) followed. The Federal Republic concluded the treaty on military chaplaincy with the Protestant Church in Germany on 22 February 1957.

The specific characteristic of the post-war treaties can be seen in the provision of the treaty of Loccum in which the parties declare their consent as to the public task of the churches and their independence. It is certainly the experience of Nazi terror and the resistance of at least important parts of the churches against this regime that provide a key reason for the public standing of religion and religious communities in Germany. Treaties with the Holy See and German dioceses followed.

A third phase is marked by the German Reunification. The new *Länder* have concluded a wide range of treaties with the relevant churches and church bodies as well as with other religious communities. They also mirror subtle developments in German law on religion, the position of

religious communities in society as well as persisting scepticism towards religion rooted in former times.

In the sphere of the German Democratic Republic, Article 39 Sec. 2 Sent. 2 of the Constitution of 1968/1974, provided for the possibility of agreements with churches and religious communities, but there have been no agreements of any importance except some technical agreements in specialised fields.²

III. Contents of the treaties

In general the treaties and agreements between the State and religious communities in Germany relate to all questions relevant in their relationship. Very often, they repeat fundamental provisions of constitutional law concerning freedom of religion, self-determination, and public law status. Treaties repeat and further specify the right to church tax and religious instruction in public schools. They also secure and specify the right to run private religious schools. They concern the right to military chaplaincy and access to public institutions in order to provide spiritual assistance. They relate to questions about the attribution of church offices. Often there are provisions on the financing of churches by way of public funding providing a new basis and specification for state obligations that are sometimes centuries-old. Several specific agreements also provide for further details on the level of administrative agreements.

IV. Legal status of treaties

The debate about the exact legal status of state agreements with religious communities has not come to an end in Germany. There are quite different positions concerning the theoretical status of these legal sources. There is a consensus about the fact that such agreements in fact are sources of law.

In respect to the concordats and concordarian agreements with the Holy See it is generally held that those are in fact treaties of public international law or at least quasi-treaties of public international law. Often, however, in addition to that they are qualified as being *sui generis* treaties of public international law. It is out of the question, however, that these treaties represent valid and binding public international law, whatever their exact dogmatic qualification may be.

² Cf. A. HOLLERBACH, 'Das Verhältnis von Kirche und Staat in der Deutschen Demokratischen Republik', in: *Handbuch des katholischen Kirchenrechts*, S. 1078.

Even more debatable seems to be the nature of treaties between the State and the Protestant Churches or other religious or non-religious entities without public international status. Because of the equal treatment of all religions and communities of *Weltanschauung*, those treaties that have a fundamental character are also subject to parliamentary approval by law. It is probably fair to say that these treaties, again, are *sui generis*.

Because of the sovereign power of the state it can pass law contrary to the treaty concluded. Such law would in terms of state law remain valid law. However, the state would have broken the treaty. If the state does not comply with any specific provision in the treaty the church can take the state to the administrative courts for them to decide the matter.

KONSTANTINOS G. PAPAGEORGIU ET CHARALAMBOS PAPASTATHIS

FORMES DE COLLABORATION CONVENTIONNELLE OU
NON CONVENTIONNELLE ENTRE L'ÉTAT ET
LES COMMUNAUTES RELIGIEUSES EN GRÈCE

I. Introduction

La loi et la convention ratifiée par la loi constituent aujourd'hui les formes exclusives réglant les rapports entre l'État grec et les Cultes exercés sur son territoire. De plus, des matières concernant certaines minorités religieuses qui se trouvent sur le territoire grec (minorité musulmane, catholique romaine, israélite) sont réglées par des traités internationaux, lesquels font partie du droit interne et, à condition d'être ratifiés par une loi, l'emportent sur toute disposition contraire (Constitution art. 28 §1).

Le statut des rapports entre l'État grec et les Cultes, doit se conformer à l'article 13 de la Constitution concernant la liberté religieuse (dans toutes ses manifestations), à la Convention Européenne des Droits de l'Homme (Rome, 4-11-1950) et au Protocole additionnel (Paris, 20-3-1952) qui ont été ratifiés par le décret-loi 53/1974.

L'État grec n'a jamais signé de concordat avec le Saint-Siège (il a seulement établi des relations diplomatiques, comme nous le verrons en détail par la suite) ou de convention ecclésiastique, comme celles conclues par les *Länder* allemands avec les Églises protestantes locales. En Grèce, toute religion connue peut former des associations civiles qui, en ce qui concerne leur situation juridique, sont des personnes morales de droit privé.

La Constitution de la Grèce – selon le système de la prépondérance de l'État conformément à la loi – impose la réglementation du statut des Cultes par la voie législative et ne permet pas sa réglementation conventionnelle. Ceci est valable même dans les cas où un accord a été déjà conclu dans un esprit de collaboration. Enfin, on doit souligner que ce cadre de rapports législatifs entre l'État grec et les Cultes, est dû à la reconnaissance constitutionnelle de la doctrine de l'Église orthodoxe orientale comme religion «officielle». En Grèce la plus grande partie du peuple, estimée à 95% de la population totale, est de confession orthodoxe. Même si l'on manque de données statistiques, on

peut faire un calcul approximatif des membres des autres communautés religieuses: anciens calendaristes 700.000, musulmans 120.000, protestants 80.000, témoins de Jéhovah 70.000, catholiques 21.000, juifs 4.000 etc.

II. La réglementation des rapports entre les deux partis

Les rapports entre l'État grec et les Cultes sont régis par les dispositions des articles 3, 13, 18 §8, 72 §1 et 105 de la Constitution de 1975 (révisée en 1986 et 2001). On peut tirer de ces dispositions deux conclusions fondamentales:

- (a) Toutes les religions «connues»,¹ c'est-à-dire, celles qui n'ont pas de dogmes secrets ni de culte clandestin, jouissent de la liberté religieuse (Constitution art. 13).
- (b) L'assemblée plénière du Parlement (et non pas les sections d'été), vote la loi qui règle les matières visées aux articles 3 et 13, à savoir, les matières qui concernent les Cultes du pays (Constitution art. 72 §1, 3 et 13).

De cette façon l'État a la possibilité d'intervenir directement et considérablement dans la réglementation des matières concernant l'ensemble de communautés religieuses.² En ce qui concerne ces dernières, les dispositions susnommées, d'une part garantissent leur auto-administration en tant que manifestation de la liberté religieuse et limitent l'intervention étatique, de l'autre.

Enfin, les sources législatives secondaires telles que les décrets,³ les arrêtés ministériels ou les circulaires administratives, peuvent régler des questions spécifiques concernant les Cultes, à condition de ne pas violer, directement ou indirectement, la Constitution et les lois.

¹ Traduction du grec par Stella Michailidou. Pour plus de détails sur la notion de religion «connue», voir Ch. PAPASTATHIS, «Le régime constitutionnel des cultes en Grèce», *Le statut constitutionnel des cultes dans les pays de l'Union Européenne*, [Consortium Européen: Rapports Religions-État] (Paris-Milano, 1995) p. 155; dans IDEM (éd.), *Liberté religieuse et religion dominante*, [Société des juristes de la Grèce du Nord, 38] (Athènes-Thessalonique, 2000) (en grec) p. 21-50.

² Pour ce système de relations, voir Ch. PAPASTATHIS, «The Hellenic Republic and the Prevailing Religion», *Brigham Young University Law Review* (1996) pp. 815-852; IDEM, «État et Église en Grèce», dans: G. ROBBERS (éd.), *État et Église dans l'Union Européenne* (Baden-Baden [1996] pp. 79-99.

³ À condition qu'il y ait une autorisation législative pour sa promulgation.

III. Les statuts spéciaux des cultes

1. Le statut de l'Église orthodoxe orientale

En ce qui concerne l'Église orthodoxe orientale, le *terminus technicus* «Chartes statutaires» indique les lois fondamentales qui règlent ses rapports avec l'État et son organisation intérieure. L'Église orthodoxe de Grèce ne présente pas d'uniformité au point de vue administratif, étant donné que le territoire grec se divise en cinq circonscriptions ecclésiastiques: 1. l'Église autocéphale de Grèce; 2. les Métropoles des Territoires nouveaux; 3. le Mont Athos; 4. l'Église de Crète et 5. l'Église du Dodécanèse. Ces régions, malgré leur unité dogmatique, présentent, quant aux institutions administratives ecclésiastiques, une organisation particulière.

(1) L'Église autocéphale de Grèce

L'Église autocéphale de Grèce comprend les métropoles de la Grèce du Sud, c'est-à-dire les métropoles de la Grèce centrale, du Péloponnèse, des Cyclades, des îles Ioniennes et de la Thessalie. L'article 72 §1 de la Constitution, prévoit que les questions ecclésiastiques doivent être réglées par une loi. L'assemblée plénière du Parlement, en appliquant cette disposition, a voté la Charte statutaire de l'Église de Grèce en vigueur, à savoir, la loi 590/1977. La disposition de l'article 9 §1, alinéa c de la loi susnommée, prévoit que le Saint-Synode Permanent est compétent pour avis sur tous les projets de loi ecclésiastiques. L'avis, qui doit avoir été donné avant le vote du projet de loi, n'engage pas l'État.

Le système «de la prépondérance de l'État conformément à la loi» a connu deux exceptions. Selon la première, les questions relatives au patrimoine des monastères ont été réglées par des conventions conclues entre l'État et l'Église, qui furent ensuite ratifiées par le Parlement (i). Selon la deuxième exception, l'État a accordé à l'Église une large autorisation législative afin de régler ses affaires intérieures. Dans ce but, l'organe synodal de l'Église a la possibilité d'arrêter des Dispositions réglementaires (ii).

(i) Les conventions portant sur le patrimoine des monastères

La question du patrimoine des monastères a été, dès la fondation de l'État grec moderne, l'un des problèmes les plus épineux qui a provoqué beaucoup de difficultés dans les rapports entre l'Église et l'État. Cela est arrivé d'une part à cause de la controverse concernant l'étendue et la légitimité des titres d'acquisition des biens du patrimoine des monastères, d'autre part à cause des efforts étatiques visant à l'expropriation ou à la cession

partielle du patrimoine, dans le but de promouvoir une politique sociale concernant le rétablissement d'agriculteurs sans terres ou de réfugiés. Pour mieux comprendre l'intensité du conflit, on doit prendre en considération que, en dehors de son importance financière, la propriété foncière des monastères effectivement énorme, au moins dans le passé, a toujours constitué un puissant argument de négociation utilisé par l'Église pendant les périodes de crise avec l'État, argument auquel elle n'était pas, évidemment, disposée à renoncer.

Pour toutes ces raisons l'État grec moderne a essayé deux fois d'exproprier de grandes parties de la propriété foncière des Monastères. Dans ce but il a conclu des conventions bipartites, ratifiées ensuite par le Parlement.

La première expropriation de la propriété monastique a eu lieu en 1952. Plus précisément, l'État et l'Église, après de longues négociations et beaucoup d'objections émises par la hiérarchie ecclésiastique, ont conclu la Convention du 18 septembre 1952, ratifiée par le Décret Royal du 26-9/8-10-1952. La Convention visait à l'expropriation de biens fonciers ruraux, forestiers et d'élevages. L'État a acquis leur propriété afin de la transférer aux agriculteurs dépourvus de terre. Dans ce cadre législatif, le décret-loi 2185/1952 a prescrit la conclusion d'accords entre, d'une part, les Ministres de l'Agriculture et des Finances et l'Église orthodoxe de Grèce de l'autre, ayant pour objet le rachat de biens immeubles ecclésiastiques par l'État (voir art. 38 §1).⁴ Cependant même aujourd'hui on ne connaît pas avec certitude, faute de données exactes suffisantes, dans quelle mesure les engagements contractuels ont été exécutés.

Une deuxième tentative d'expropriation a été réalisée en vertu de la loi 1700/1987. Ces dispositions ont introduit une présomption de propriété en faveur de l'État concernant les immeubles ruraux et forestiers que les Monastères occupaient, mais sans avoir des titres de propriété. L'État, en échange, a cédé aux monastères les terres qui les entourent et a augmenté le chiffre du budget de l'État destiné à l'Église.

La loi 1700/1987 a provoqué la forte réaction de la hiérarchie ecclésiastique qui est arrivée jusqu'au refus d'application de cette loi et à l'emploi de menaces entraînant des conséquences politiques. Enfin, la

⁴ Voir K. CHOROMIDIS, *L'expropriation forcée* (en grec) (Thessalonique, 1975) pp. 92-97. Ch. K. PAPASTATHIS, «L'inaliénabilité en faveur des Anciens Patriarcats orthodoxes du Proche-Orient. Contribution à l'étude de l'article 18 § 8 de la Constitution», *Charis-teion à Sérapheim Tikas, Archevêque d'Athènes et de Grèce* (Athènes, 1984) pp. 515 sq. (en grec).

hiérarchie a cédé et, le 11 mai 1988, a signé la Convention sur la cession des biens fonciers monastiques à l'État. Cette Convention a été ratifiée par la loi 1811/1988.

Néanmoins, en juillet 1987, quelques monastères ont eu recours à la Cour Européenne des Droits de l'Homme, qui, le 9 décembre 1994, a décidé (arrêt 10/1993/405/483-484, «Monastères contre Grèce») que la loi 1700/1987 violait la disposition de l'article 1 §1 du Protocole additionnel à la Convention de Rome (Paris 1952) protégeant le droit de propriété et sa jouissance imperturbable. L'État grec, afin d'exécuter ce jugement, a voté la disposition de l'article 55 de la loi 2413/1996 qui prescrit que la loi 1700/1987 ne concerne pas les monastères qui n'ont pas signé la Convention du 11 mai 1988.

(ii) *Les Dispositions Réglementaires*

La Charte statutaire de 1969 a introduit une innovation institutionnelle qui avait des conséquences décisives pour l'auto-administration ecclésiastique. Plus précisément, c'était la première fois qu'une Charte statutaire accordait des autorisations législatives au Sainte Synode de la Hiérarchie de l'Église autocéphale de Grèce, concernant l'arrêt de Dispositions Réglementaires ayant pour objet l'organisation et la fonction des organes ecclésiastiques. La Charte statutaire en vigueur comprend des dispositions d'autorisation analogues qui visent à l'organisation et à l'administration de l'Église de Grèce, dans sa totalité, aussi bien que des personnes morales ecclésiastiques.

(2) Les Métropoles des Territoires nouveaux

Par le terme «Territoires nouveaux» on entend les 36 circonscriptions épiscopales de l'Épire, (sauf Arta), de la Macédoine (Elassona, qui se trouve en Thessalie, incluse), de la Thrace Occidentale et de quelques îles de la Mer Egée (Lesbos, Chios, Samos et les îles qui se trouvent autour d'elles).

Le statut ecclésiastique des Territoires nouveaux est régi aujourd'hui par l'Acte patriarcal et synodal du 4 septembre 1928⁵ conformément à l'article 1 §3 de la loi 590/1977 (Charte statutaire de l'Église de Grèce). Les dispositions de ces deux textes cèdent, provisoirement (et pas

⁵ Voir la traduction française faite par P. Grég. PAPATHOMAS, *L'Église de Grèce dans l'Europe unie* (Katerini-Thessalonique, 1998) 565-574 (réimpr. *Année Canonique* 45 [2003] 325-328).

définitivement), l'administration ecclésiastique des Métropoles des Territoires nouveaux au Saint-Synode de l'Église de Grèce, composé des Métropolitains des sièges épiscopaux sis dans les Territoires nouveaux et dans celui de l'Église autocéphale de Grèce, qui forment ensemble l'Église de Grèce.

(3) Le statut du Mont Athos

Le Mont Athos est régi par un statut d'auto-administration privilégié qui s'appuie sur l'article 105 de la Constitution. Plus précisément, ce statut est réglé par les dispositions de la Charte statutaire du Mont Athos de 1924 et du décret-loi du 10/16-9-1926. Ce dernier a ratifié la Charte statutaire du Mont Athos. Il est à souligner que l'article 13 de l'ajout spécial au Traité de Sèvres concernant la protection des minorités en Grèce, ratifié par le Traité de Lausanne (24.7.1923) et le Parlement grec, sauvegarde les droits des communautés monacales non grecques du Mont Athos.⁶

(4) Le statut de l'Église de Crète

Le statut ecclésiastique de Crète⁷ est fondé sur la Convention conclue à Chanée, le 4 août 1900, entre le Patriarcat œcuménique et la Province autonome de Crète, comme sujets ayant une personnalité juridique internationale. Cette convention qui a réglé, d'une part la dépendance ecclésiastique de la Crète du Patriarcat œcuménique, d'autre part les relations de cette Église avec la Province autonome, constitue le cas le plus remarquable de l'histoire ecclésiastique moderne, parce que les accords conclus entre l'État et l'Église ont pris la forme d'une Convention et pas celle d'une loi.

Les six articles du texte final de la Convention, qui a été ratifiée le 14 octobre de la même année, ont reconnu à l'Église de Crète le statut de l'autonomie ecclésiastique. De plus, la Convention a permis à l'Église de régler toutes ses autres matières en collaboration avec la Province

⁶ Voir N. ANTONOPOULOS, «La condition internationale du Mont Athos», dans *Le Millénaire du Mont Athos 963-1963: Études et Mélanges I* (Chevetogne, 1963) 395-397; Ch. PAPASTATHIS, «The legal Status of the Monks of non-Greek Origin in Mount Athos», dans: *Huit Siècles du Monastère de Chilandar*, Académie Serbe des Sciences et des Arts (Belgrad, 2000) pp. 179-185.

⁷ Pour plus de détails voir, K. PAPAGEORGIU, *L'Église Orthodoxe de Crète: Institutions et organisation administrative selon sa Charte statutaire (Loi 4149/1961)*, (en grec), La Chanée (Crète) 2001.

crétoise, à condition de ne pas violer la tradition dogmatique et canonique de l'Église orthodoxe orientale. Cette réglementation a été réalisée par les dispositions de la loi 276/1900, c'est-à-dire par la première Charte statutaire de l'Église de Crète.

La deuxième Charte statutaire (loi 4149/1961), qui est encore en vigueur, est le fruit d'une collaboration analogue entre l'Église de Crète et l'État grec. Le projet de loi avait fait, dès 1947, l'objet de négociation et d'élaboration commune par le Saint-Synode de Crète, le Ministère de l'Éducation Nationale et des Cultes de Grèce et le Patriarcat œcuménique.

(5) Les provinces ecclésiastiques du Dodécanèse

Le terme «Église du Dodécanèse» désigne habituellement les six provinces ecclésiastiques du Dodécanèse. Ces dernières ne constituent pas, au niveau de l'organisation, une «Église» particulière, parce qu'elles dépendent directement – au point de vue canonique –, du Patriarcat œcuménique. Cette dépendance constitue une caractéristique décisive du statut ecclésiastique du Dodécanèse. Il est à noter que cette région ne possède pas une Charte statutaire, mais qu'on y a introduit de façon circonstancielle quelques dispositions du droit ecclésiastique de l'Église autocéphale de Grèce.

2. Le statut des minorités religieuses

Le statut des minorités religieuses qui se trouvent en territoire grec est garanti par les dispositions constitutionnelles susmentionnées, ainsi que par les traités internationaux suivants:

- Le Protocole signé à Londres, le 22.1/3.2.1830, entre la Grande Bretagne, la France et la Russie, concernant spécialement la protection des Catholiques (le Protocole a été ratifié le 28.2.1832).
- Le Traité d'Athènes (9/14-11-1913). L'article 11 du Traité oblige la Grèce) à respecter les minorités religieuses qui se trouvent sur son territoire et particulièrement leurs coutumes et leurs rapports familiaux.
- Le traité spécial annexé au Traité de Sèvres sur la protection des minorités en Grèce (28.7/10.8.1920), comme il fut ratifié par le Traité de Lausanne, et les articles 37-45 du Traité de Lausanne sur les minorités. Le Traité de Lausanne fut signé le 24 juillet 1923 par la Grande Bretagne, la France, l'Italie, le Japon, la Grèce, la Roumanie, le Royaume des Serbes, des Croates et des Slovènes et la Turquie. Ce Traité a été par la suite ratifié en Grèce par le décret-loi du 25/25 août 1923.

- La Convention de Rome (4.11.1950) concernant «la protection des Droits de l'Homme et des Libertés fondamentales» et le Protocole additionnel de Paris (20.3.1952), ratifiés par le décret-loi 53/1974.

(1) Les Anciens Calendaristes

«Les Anciens Calendaristes» ou «Vrais Chrétiens Orthodoxes» n'ont pas accepté l'adaptation, réalisée en 1924, des fêtes religieuses au calendrier grégorien. Ils ont ainsi conservé l'ancien calendrier julien et ils ont fondé une communauté religieuse à part. Aujourd'hui on compte plusieurs de ces communautés, à cause du morcellement graduel de la communauté initiale unique.

La déclaration officielle du Ministre de l'Education Nationale et des Cultes, faite lors du vote de la Constitution en vigueur, fut enregistrée aux procès-verbaux des séances du Parlement. Selon cette déclaration, les Anciens Calendaristes pourraient accomplir sans aucune entrave leurs devoirs religieux. La jurisprudence récente⁸ accepte, en s'appuyant sur cette déclaration, que l'organisation administrative et le fonctionnement des communautés des Anciens Calendaristes soient régis exclusivement par les saints canons et les saintes traditions, ainsi que, de manière complémentaire, par les statuts de leurs associations et fondations. Celles-ci sont des personnes morales de droit privé, qui ont été instituées afin d'assurer à leurs membres l'exercice du culte.

(2) Les Israélites

L'article 11 du Traité d'Athènes (1913), ratifié par la loi 4213 du 4 novembre 1913, prévoit, parmi d'autres matières, la protection des Israélites grecs. Mais leur statut spécial est surtout réglé par les lois 2456/1920 et 367/1947, par le Décret Royal du 29/29 mars 1949, qui prévoyait l'institution de la Fondation d'assistance et de rétablissement des Israélites de Grèce, etc.

Les Israélites de Grèce appartiennent aux Communautés Israélites locales qui sont des personnes morales de droit public. Chaque communauté s'administre selon son statut et dispose d'un rabbin, nommé par décret présidentiel, qui accomplit les fonctions religieuses. L'ensemble des Communautés est administré par une Assemblée et un Conseil. L'organe central est le Conseil Israélite Central qui est élu tous les trois ans et siège à Athènes.

⁸ Arrêt 1444 /1991 de la séance plénière du Conseil d'État, revue *Nomiko Vima* 40 (1991) 626-628.

(3) Les Musulmans⁹

Les articles 37-45 du Traité de Lausanne (1923) sur les minorités portent sur la liberté religieuse des Musulmans de Grèce. Cependant, l'Acte de contenu législatif (24.12.1990) «sur les Ministres du culte musulman», ratifié par la loi 1920/1991, est appliqué actuellement, étant donné que le Traité de Lausanne ne règle pas le statut des Muftis, à savoir, des chefs religieux des Musulmans. Ces dispositions reconnaissent les muftis comme hauts fonctionnaires et Ministres du culte, nommés par décret présidentiel sur la proposition du Ministre de l'Éducation Nationale et des Cultes et après avis d'un comité composé du Préfet, comme président, des Ministres du culte musulman ou d'habitants de la circonscription respective, tous de citoyenneté grecque. En outre, les Muftis sont considérés comme organes judiciaires de l'État grec. Ils sont compétents concurremment avec les tribunaux civils, pour se prononcer sur certaines affaires relevant du droit de la famille et du droit des successions concernant les citoyens grecs Musulmans de leur circonscription. Pour cette raison, ils jouissent de l'indépendance personnelle et fonctionnelle. Aujourd'hui en Grèce, et plus précisément en Thrace Occidentale, on compte 3 Muftis: l'un siège à Komotini, l'autre à Xanthi et le troisième à Didymoticho.

La loi 2345/1920 prévoit que les Comités d'administration des biens (des établissements pieux) musulmans (*evkaf*) sont des personnes morales de droit public.

(4) Les Catholiques¹⁰

On a déjà noté que l'État grec n'a pas conclu un concordat avec le Saint-Siège, mais qu'il a seulement établi, en 1979 et après cinq ans de négociations, des relations diplomatiques. On doit remarquer qu'auparavant, à savoir en 1920, en 1946 et en 1956,¹¹ on avait fait de vains efforts dans

⁹ Voir S. MINAÏDIS, *La liberté religieuse des Musulmans dans l'ordre juridique grec* (Athènes-Komotini, 1990) (en grec); cf. K. TSITSELIKIS, «Le statut juridique de l'Islam en Grèce», *L'Année Canonique* 45 (2003) pp. 219-242.

¹⁰ D. SALACHAS, «Administration et organisation de l'Église catholique. Relations entre l'Église et l'État selon l'Église catholique, et plus spécialement en Grèce», (en grec), dans l'ouvrage collectif sous la direction de Th. KONTIDIS, *Le Catholicisme* (Athènes, ed. Ellinika Grammata, 2000) 265-319.

¹¹ I. ASIMAKIS, «25 ans de relations diplomatiques entre la Grèce et le Saint-Siège», (en grec), *Sychrono Vima* 35 (2004) 193-224. Voir aussi les journaux *L'Osservatore romano*, 15 juillet 1979; *Notizie Ortodosse*, 1 août 1979 (de la Communauté Orthodoxe Grecque de Rome); *ELEUTHEROTYPIA*, 16 juillet 1979; Institut Karamanlis, *Archives*:

cette direction. Toujours en 1979, la Grèce a conclu le traité d'adhésion à la Communauté Economique Européenne. Les deux accords reflètent la volonté du pays de sortir de l'isolement et de se tourner, peu de temps après la chute de la dictature, vers l'Europe.

Enfin, la loi 1764/1988 a institué l'ambassade de Grèce auprès de la Cité du Vatican, tandis que le 3^{ème} Protocole des Puissances Protectrices (Londres 1830), prévoit la protection des Catholiques qui se trouvent sur le territoire grec.

L'Église Catholique en Grèce est composée des Archevêchés: a) de Naxos-Tinos-Myconos-Andros et Métropole de l'Egée; b) de Corfou-Zante- Céphalonie et Métropole des îles Ioniennes; c) d'Athènes; d) de Rhodes; des évêchés a) de Syros; b) de Thira; c) de Crète; d) de Chios; du Vicariat Apostolique de Thessalonique; de l'Exarchat Catholique grec et de l'Exarchat des Arméniens Catholiques.

Le Saint-Synode de la Hiérarchie Catholique de Grèce, qui est une personne morale ecclésiastique selon le droit canonique de l'Église Catholique, fut institué par le Saint-Siège le 10 juin 1965 et fonctionne selon les dispositions du droit canonique de l'Église Catholique et son propre statut agréé par le Saint-Siège.

Après la condamnation de la Grèce par la Cour Européenne des Droits de l'Homme (arrêt 143/1996/762/963) pour violation des articles 6 §1 et 14 de la Convention de Rome, l'État grec a promulgué la loi 2731/15-7-1991. L'article 33 de cette loi reconnaît la personnalité juridique des établissements catholiques fondés avant l'introduction du Code Civil (23-2-1946). Cette solution n'a pourtant pas satisfait la demande de la hiérarchie de l'Église Catholique de Grèce pour la reconnaissance de la personnalité juridique des établissements catholiques, conformément au droit canonique de l'Église Catholique.¹²

(5) Les communautés Protestantes (Evangéliques)

Le statut des Protestants grecs n'est pas spécifiquement réglé de manière globale par une convention nationale ou par des documents spéciaux. Les Églises Protestantes grecques afin d'accomplir leurs objectifs, religieux ou autres, instituent des associations ou des établissements qui sont des personnes morales de droit privé.

Evènements et personnages. K. KARAMANLIS: 50 ans d'histoire politique (en grec) (Athènes, 1996) t. XI, 195.

¹² D. SALACHAS, op. cit, p. 308 ss.

(6) Les Arméniens

Aujourd'hui en Grèce on compte environ 35. 000 fidèles de l'Église Arménienne. Cette dernière est administrée par un Conseil composé surtout de laïcs. L'État grec reconnaît le système d'auto-administration de l'Église Arménienne, prévu par sa Charte statutaire, qui est connue comme «Constitution Nationale des Arméniens». Les divisions administratives de l'Église Arménienne sont des personnes morales de droit privé, qui revêtent la forme d'établissements ou d'associations; elles jouissent de la protection constitutionnelle concernant toutes les religions connues, prévue par l'article 13 de la Constitution.

(7) Les Témoins de Jéhovah

Le statut des Témoins de Jéhovah n'est pas réglé par une législation spéciale, soit internationale soit interne. Néanmoins, pendant les délibérations de la deuxième Sous-Commission pour la Constitution de 1975, l'opinion suivante avait été formulée expressément: les Témoins de Jéhovah devraient constituer une religion protégée. De plus, les Témoins de Jéhovah, malgré les persécutions qu'ils avaient subi au paravant à cause du refus de servir dans l'armée pour des raisons de conscience religieuse¹³, après une série d'arrêts du Conseil d'État, sont aujourd'hui considérés comme une religion connue et, par conséquent, sont protégés par les dispositions constitutionnelles sur ce point. Leurs adeptes peuvent constituer des associations dotées d'une personnalité morale de droit privé.

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¹³ La loi 2510/1997 accorde aux citoyens qui refusent de faire leur service militaire par objection de conscience, le droit de faire un service militaire social; voir la traduction anglaise du texte, Ch. PAPASTATHIS, «Church and State in Greece 1997», *Revue européenne des relations Églises-État*, vol. 5 (1998), pp. 40-46.

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BALÁZS SCHANDA

RELIGION AND LAW IN DIALOGUE: COVENANTAL AND
NON-COVENANTAL COOPERATION OF STATE AND RELIGIONS
IN HUNGARY

I. Historical background to concordatarian settlements in Hungary

Throughout her history Hungary has been closely linked to the Holy See, but such links never resulted in the establishment of a concordat to regulate their bilateral relations or the situation of the Roman Catholic Church. (Though the Austrian Concordat of 1855 was intended to be applied also in Hungary, it was never enacted in Hungary). When the Austro-Hungarian monarchy fell, diplomatic relations had already begun before the peace treaty was signed.¹ In the inter-war years an *intesa semplice* of 1927 was introduced to regulate procedure for the appointment of diocesan bishops and the military bishop, as the patronage of the king over the Catholic Church became obsolete; the Kingdom of Hungary had a governor as head of state in the inter-war period. The agreement was formalized as a written note. No concordat was considered for Hungary.

In the post-war era even diplomatic missions were closed down and the apostolic nuncio Angelo Rotta was expelled by the occupying force in April 1945. After the 1956 revolution, however, the communist regime tried to consolidate its power and seemed to be ready to grant certain concessions following a period of systematic persecution. As the new *Ostpolitik* emerged, on the part of the Holy See, negotiations began in May 1963 between the Hungarian Government and the delegation of the Holy See led by Agostino Casaroli, later cardinal secretary of state. As a result of these negotiations, on 15 September 1964, a document (*atto*) was signed containing a compromise reached by the parties with respect to a small number of issues (procedures for the nomination of bishops, the oath of allegiance to the Constitution required from priests and bishops, and the operation of the Papal Hungarian Institute in Rome), and a

¹ J. GERGELY, 'Relazioni diplomatiche tra l'Ungheria e la Santa Sede (1920-1990)', in I. ZOMBORI (ed) *Le relazioni diplomatiche tra l'Ungheria e la Santa Sede 1920-2000* (Budapest, 2001) 15, 19.

much longer protocol, stating the respective positions of the parties on issues where no agreement was reached.² The document was not published. It is to be noted that the document cannot qualify as a concordat or a *modus vivendi*, and not even as an accord, but only as a partial agreement, eventually as an *intesa practica*. Representatives of the regime and the Holy See met from that date twice a year, once in Budapest, once in the Vatican, but diplomatic relations could not be re-established.

II. Agreements with the Holy See

1. The 1990 Agreement

A few months before the first free elections, on 9 February 1990 – a few days after Parliament had passed the new law on freedom of religion but before its promulgation – the Holy See and Hungary re-established diplomatic relations at the highest level. The accord signed in Budapest states that issues related to the church are to be settled by its (new) *Codex Iuris Canonici* and the new law of the state on religious freedom.³ This means on the one hand that in Hungary the regulation of religion is primarily not based on agreements but on the law,⁴ and, on the other hand, that the secular law enjoys the positive acknowledgement of the Catholic Church. The 1964 “partial agreement” was repealed. The accord states that the parties in the future will reach mutual agreements on issues of common concern.⁵ Merely setting up diplomatic relations had not required an agreement signed at prime ministerial level – but the need to put aside the 1964 document did make a formal agreement necessary. Interestingly, the accord was signed by the Cardinal Secretary of State, Augustino Casaroli, who in 1964 as the plenipotentiary of the Holy See had signed the earlier document. In a symbolic way, the “father of the *Ostpolitik*” acquired the role of eliminating the earlier compromise and opening a new era. The 1990 Agreement is the first one concluded by the Holy See with a “new

² A. CASAROLI, *Il martirio della pazienza. La Santa Sede e i paesi comunisti (1963-89)* (Torino, 2000) 95.

³ In Hungary published in the official gazette Magyar Közlöny 1990/35; not published in the AAS.

⁴ P. ERDŐ, ‘Aktuelle staatskirchenrechtliche Fragen in Ungarn’, in *Österreichisches Archiv für Kirchenrecht* 40 (1991), 390.

⁵ P. ERDŐ, ‘Accord bilatéraux entre le Saint-Siège et la Hongrie’, in *Revue d'éthique et de théologie morale «Le Supplément»*, 199 (décembre 1996, Quand le Saint-Siège signe des concordats), 121, 127.

democracy” emerging after the collapse of a communist regime. Later agreements with other countries went into much more detail and were usually signed by ministers of foreign affairs on the one hand, and the nuncio on the other.

2. Further agreements between the Holy See and Hungary

The Agreement of 9 February 1990 proved to be a foundation for further relations. Since then two additional agreements have been concluded. On the 10 January 1994, an agreement was signed on the military ordinariate⁶ as this was a precondition for the Government to set up the army chaplaincy.⁷ On the 20 June 1997, a third accord was signed solemnly in the Vatican on financial issues concerning the Catholic Church.⁸

2.1. The agreement on the military ordinariate

The Military Ordinariate operates according to the apostolic constitution *Spirituali Militum Curae*. The *ordinarius* is appointed by the Holy See, after notification to the Hungarian Government, taking military requirements into consideration. The Government has the right to raise political objections within 15 days, but these do not bind the Holy See. The *ordinarius* can be a diocesan bishop at the same time. The military *ordinarius* and the chaplains have a position with two different natures. As officers of the army and as priests of the ordinariate, their liabilities are rigorously distinct, so the Army Chaplaincy does not constitute an institutional entanglement of church and state, but does respect the institutional separation of Church and State as provided for in the Constitution.⁹ The military ordinariate has the right to hire auxiliary army chaplains who do not become officers but usually serve in the parish where the military base is to be found.

⁶ AAS 86 (1994) 574-579, 19/1994 international agreement from the minister of defense; E. BAURA, ‘L’Accordo tra la Santa Sede e la Repubblica di Ungheria sull’assistenza religiosa alle Forze Armate e di Polizia di Frontiera’, in *Ius Ecclesiae* 7 (1995) 374-381.

⁷ Government Decree 61/1994. (IV. 20.) Korm.

⁸ Ratified by the decree of the Parliament: 109/1997. (XII. 8.) OGY, promulgated: Act LXX/1999.; AAS 90 (1998) 330-341; P. ERDŐ, ‘Accordo Accordo tra la Santa Sede e la Repubblica d’Ungheria’, in *Anuario de Derecho Eclesiástico del Estado XIV* (1998) 721-728; see also *Ius Ecclesiae* 10 (1998) 652-659.

⁹ Constitutional Court Decision 970/B/1994. AB.

2.2. The agreement on financial issues

Although the legislation concerning church activities was generally favourable, or had a beneficial intent, the vagueness of and frequent changes in administrative practice led to legal uncertainty which endangered the solid functioning of church institutions. This uncertainty stimulated the negotiations that finally led to the conclusion of the accord. The accord on financial issues was a result of negotiations carried out in 1996 and 1997. The purpose of the accord was rather to guarantee positions already declared by laws and Constitutional Court practice than to achieve new benefits. The fundamental provisions were as follows:

- Educational institutions maintained by the Church are entitled to receive the same public support as institutions maintained by the state or municipalities. (The principle of the equal funding of public activities complies well with can. 797 of the CIC urging in the name of *iustitia distributiva* a truly free choice of schools for parents.)
- In institutions of higher education maintained by the Church (both for theology and for secular subjects) the minimum numbers of funded student places are fixed in the accord.
- The accord withdrew half of the real estate claims of the Catholic Church based on the 1991 law on the functional restitution of church properties. A definitive list of 818 buildings was attached to the accord, which are to be transferred until 2011. The value of the buildings not claimed back was turned into a fund that is to be valued in accordance with the devaluation of the national currency. From 2000 the state pays 5% of the fund every year as a "dividend". This settlement was modelled on payments executed by, amongst others, Austria and Germany on titles going back to earlier secularizations. The Holy See declared in the agreement that with transferring the listed buildings and executing the payments from the fund, the claims based on the 1991 Act are regarded as fulfilled. The accord also shows that the Holy See made use of the supreme authority of the Pope under can. 1256 CIC, deciding over properties or property claims of various juridical persons like parishes, dioceses, religious orders, etc. The financial compensation received by the Church is managed and distributed by the Bishops' Conference and not by the former owners themselves.
- Following the agreement with the Holy See, 1% of the income tax was given free at the disposal of the taxpayers to fund Churches (in the Hungarian system – unlike the Italian – the taxpayer decides on the

percentage of his own income tax and not on the percentage of the total state revenue from the income tax).

- The Church may also receive subsidies for the preservation, renovation or enrichment of valuable items of religious or cultural inheritance, monuments, and artistic works, as well as for the operation of archives, libraries and museums.
- Some taxation benefits are also protected by the accord.¹⁰

The Holy See pursued very modest aims in relation to financial issues: the freedom of the Church, stability in operation, and pastoral values, were to the fore rather than the *restitutio in integrum* of property claims; the Holy See was looking ahead rather than back.

On some issues the accord delegates certain rights to the Bishops' Conference. For example the accord foresees that the Bishops' Conference and the competent state authorities agree upon the financing of institutions of theological higher education founded after the accord was concluded. On other issues the parties have to review praxis after a certain period. For example after the first four years of the new funding system (1% in 2001 the parties evaluated their experiences and agreed upon satisfactory amendments to the law. The agreement was laid down in a protocol, but subsequent changes in the legislation occurred later resulting in the abandonment of these. The present system is not disadvantageous, but happened to be enacted unilaterally. This shows that legislation changes faster than negotiations were able to occur – the trend is rather to legislate and negotiate than to base legislation on previous negotiations.

To ensure the fulfillment of the accord, a joint commission was set up, presided over by the apostolic nuncio and the state secretary for foreign affairs (who is the deputy minister for foreign affairs).¹¹ Members of the joint commission were Hungarian bishops, not in their capacity as members of the bishops' conference, but as members of the delegation of the Holy See. By the end of 2000 domestic legislation (mostly taxation laws) were adjusted to the accord. As more recent legislation made a further review necessary, this is under way in the form of another joint commission, in which the government side is led by the Secretary of State for

¹⁰ For the funding of the Church see: B. SCHANDA, 'Church and State in Hungary in 1999. The Funding of the Churches in Hungary', in *European Journal for Church and State Research* 7 (2000), 259.

¹¹ On difficulties arising after the accord: P. ERDŐ, 'Das neue ungarische Staatskirchenrecht und die Vereinbarung zwischen dem Heiligen Stuhl und der Republik Ungarn', in *Folia Theologica* 10 (1999) 121-153.

Church Relations.¹² The budget subsidy to church schools represents the most sensitive topic of negotiations.

2.3. Evaluation of the concordat agreements between the Holy See and Hungary

It is to be noted that the agreements between Hungary and the Holy See are of a highly technical nature, lacking general statements characteristic of other concordat agreements. Hungary has no general agreement with the Holy See – neither a concordat nor a basic agreement providing a comprehensive set of rules. Among the new Central-Eastern-European member states of the European Union, which joined the Union in 2004, this feature of Hungarian ecclesiastical law is almost unique. One reason may be on the one hand the lack historically of a tradition of concordats, and on the other hand the pragmatic legal tradition that prefers case-by-case settlements instead of large constructions.

The existing concordat agreements by their nature bind the state (not just the Government), as international agreements. As the Constitution provides for the coherence of domestic law with international law, the Constitutional Court has the power to invalidate internal laws in conflict with international agreements promulgated by higher-ranking laws or by laws on the same level (eg: a Government Decree or an Act of Parliament is inoperative if it violates an international agreement promulgated by an Act of Parliament). If the Constitution was in conflict with an international agreement, the Court had to signal this to those responsible for the conflict. As Parliament modified the Law on Social Care late in 2003, in such a way as to make the right of churches setting up (publicly funded) social institutions subject to an agreement with the municipality of the institution, the Court abolished this provision, on the basis that it was contrary to the 1997 agreement with the Holy See as this agreement guaranteed that it was for the individual to opt for a church-maintained institution. This way the Catholic Church had the right to set up institutions for social care without the consent of any other authority.¹³ The case shows that the agreements with the Holy See truly qualify as international agreements and function as such.

III. Agreements between the government and other churches

Other churches have entered into contractual relations with the government but these lack an international character. Contracts have been signed on army chaplaincies as well as on financial issues. As the 1997 agreement with the Holy See opened the possibility of turning property claims into an annuity, the same possibility was opened up by law¹⁴ to other religious communities having property claims. Five of the twelve communities concerned made use of this possibility that required entering into a financial agreement with the Government. The agreement with the Reformed Church signed in 1998 contained in a comprehensive way various relevant aspects of the co-operation between the state and the church. The agreements signed with the Lutheran Church, the Alliance of Jewish Communities, the Baptist Church and the Buda Serb Orthodox Diocese are confined more strictly to financial issues. In December 2000 the Government signed a second agreement with the Alliance of Jewish Communities. This supplements the agreement concluded in 1998 on the settlement of financial issues, following closely the content of the 1998 agreement with the Reformed Church, containing a wide range of church-state issues, with special reference to Jewish issues (like the commemoration of the Holocaust). No agreement grants any special rights to the adherents of a faith community, as the accommodation of religious claims is always effected by law. The agreements are stipulated as having been entered between the Government and the representatives of the church concerned, as registered with the court.

These agreements were promulgated by Government resolutions in the Official Gazette.¹⁵ Their nature is disputed. They are certainly not merely of a political nature; they could eventually qualify as administrative law agreements. They may be characterised as having a *sui generis* nature, a peculiar mixture of civil law elements, administrative agreements and declarative statements. Financial claims could be invoked in the ordinary courts in a similar manner to private law contracts. Their content is technical, on the one hand, but expresses the public appreciation of church activities on the other.

¹⁴ Act CXXIV/1997. §3.

¹⁵ Government Resolution 1056/1999. (V. 26.) Korm. (Calvinist Church); Government Resolution 1057/1999. (V. 26.) Korm. (Lutheran Church); Government Resolution 1058/1999. (V. 28.) Korm. (Alliance of Jewish Communities); Government Resolution 1043/2001. (IV. 20.) Korm. (Serb Orthodox Diocese); Government Resolution 1044/2001. (IV. 20.) Korm. (Baptist Church); Government Resolution 1045/2001. (IV. 20.) Korm. (Alliance of Jewish Communities).

¹² Government Resolution 1119/2003. (XII. 10.) Korm.

¹³ Decision 15/2004. (V. 14.) AB.

IV. Further contractual settlements

Certain issues may need contractual settlements for technical reasons. Churches, as legal entities, as well as internal organs of churches that enjoy legal personality (a parish, a religious order, a church institution) may enter into contracts with the Government, a local autonomous government or the social security on a civil law basis, or in certain cases they can conclude an administrative law agreement. These agreements may provide for a contribution of a municipality to the renovation of a church (as a one-off issue), the funding of a church-maintained hospital by the social security, or the operation of a church-maintained school etc. State universities may enter into cooperation agreements with theological faculties (run by churches in Hungary) on mutual access to libraries, acknowledgment of credits or even joint courses.

The Government itself signed agreements on a budget subsidy for church activities introduced in 2002 on a supplement to the revenues of rural church employees with the Catholic Church, the Reformed Church and the Lutheran Church.¹⁶ At the same time, the Government concluded an agreement with the Alliance of Jewish Communities on a subsidy for the maintenance of rural Jewish cemeteries (as a large majority of Jews in the country became victims of the Holocaust, there are about 1,000 abandoned Jewish cemeteries; in 2002 this subsidy will be 35 million HUF (about 140,000 Euro))¹⁷. Churches have to distribute the subsidy to clergy or other church employees who live and work in settlements of less than 5,000 inhabitants. The rationale behind the subsidy was to express public appreciation to churches working under disadvantaged conditions: rural areas of Hungary suffer from agricultural depression, and urbanisation drains villages of economic and creative human resources. In a sense it is not the religious impact of the recipient that is appreciated but the public one: churches have a prominent role in such fields as community building, culture and preventive mental health care. Prior to World War II most rural congregations had small estates that secured alimentation for clergy. In a sense this subsidy is a functional redemption instead of restitution. Minor churches wishing to conclude similar agreements did so in early 2002 (Baptist Church, Unitarian Church, Romanian Orthodox Church, Serb Orthodox Church, Greek Orthodox Church, Evangelical Pentecostal Community).

¹⁶ Government Resolution 1138/2001. (XII. 26.) Korm.

¹⁷ Government Resolution 1140/2001. (XII. 26.) Korm.

Churches can claim that administrative practice should treat them equally. That is, if they fulfill criteria, contractual relations have to be established; their establishment is not dependent upon the discretion of the administration (e. g. if a church runs a hospital, the social security must sign a contract to provide funding for its activities).

V. Non-conventional cooperation

In a number of cases public institutions and churches coordinate activities. For example the national public media offers airtime for religious programmes.¹⁸ Media institutions and religious communities concerned have signed agreements on the distribution of airtime as well as church involvement in programme preparation. Another opportunity for practical, non-contractual cooperation is religious education offered by religious communities at public schools. The law provides churches with the right to offer optional, extra-curriculum religion classes, which, however, take place at the schools.¹⁹ It is the school and the local church entity that have to fix the time of religion classes so that they are held between 8 AM and 3 PM, but should not clash with other compulsory or popular optional activity. In a similar way hospitals and other social institutions have to provide space for religious services;²⁰ it is for the parties to arrange on the local level how they provide for time and space to enable the exercise of religion at these institutions. Some universities made agreements with churches as to the provision of pastoral activities on university premises. In these cases there is no legal right to enter into a contractual relationship, but it is possible to claim adequate rights under the law. If formal agreements are signed, this is so merely to specify the exercise of a right that exists independently of formal agreement.

VI. The secretariat of church relations

The Law on Religious Freedom expressly prohibits the establishment of any agency empowered to control church activities²¹ – this is a clear reference to the communist experience when a government office was

¹⁸ Act I/1996. §23 (4) c).

¹⁹ Act IV/1990. §17 (2).

²⁰ Act IV/1990. §6.

²¹ Act IV/1990. §16 (1).

charged to administer church issues. What the Government could institutionalise under the new law was a “liaison office” for churches. Due to strict institutional separation, this office is not an authority, as it has neither competence in the administration of religious communities, nor a role in the registration procedure thereof, as this is done by the courts. The secretariat for church affairs administers the budget subsidies for churches (tax assignment, religious education, cultural heritage etc.), administers the restitution procedure of church properties confiscated during the communist regime, and maintains contacts between the government and churches. From 1990 to 1995 the secretariat was part of a department of the Ministry of Education. From 1995 to 1998 it was part of the Prime Minister’s Office, then it was moved to the Ministry of Cultural Heritage. In 2002 it was placed back in the Prime Minister’s Office, to be transferred back to the Ministry of Cultural Heritage in 2004. Since 1995 the Secretariat has been headed by a “secretary of state” and is regarded as the primary contact agency on the Government side for religious communities.

Certainly church-related administrative matters may arise in the most diverse fields of administration. As churches pursue significant activity in education where particular problems may emerge, the Ministry of Education established a Secretariat for Church Education.

VII. Church statements on public issues

Religious communities cooperate in lobbying, but the lobbying activities of churches are not particularly well-developed. The Catholic, the Reformed and the Lutheran Churches, joined occasionally by the Alliance of Jewish Communities, often pursue joint negotiations with the government, file joint petitions to the Constitutional Court; that is, they have developed a certain degree of practical coordination.

Churches occasionally issue public statements. Statements of the Catholic Bishops Conference often attract attention. Whereas some statements may be widely welcomed on the political scene (e. g. when the Bishops’ Conference argued for a “yes” vote on the referendum to join the European Union in 2004), others may be politically divisive (e. g. Prime Minister Gyurcsány accused the episcopate of illegitimate political involvement with regard to his audience with Pope John Paul II in December 2004, as the bishops argued for a “yes” vote on the referendum to grant access to Hungarian citizenship to ethnic Hungarians abroad). Church statements vary in form and scope.

1. Pastoral letter on social welfare

The pastoral letter *Towards a more just and brotherly world* was a novelty in all respects. Its publication in 1996 was preceded by long and thorough preparation, involving numerous devoted lay Catholic personalities. The contents, tone and magnitude of the letter sounded new. Since the change in regime, no such comprehensive analysis in Hungary on the burning issues of society had been produced with such a serious comparable affect. This was outstandingly positive: the dialogue was greeted with positive feedback from each segment of the public sphere, and even from members of the intelligentsia known for their distance from the church.

2. Pastoral letter on the family

The success of the pastoral letter on the social situation as well as the need to emphasize and protect the family as a value encouraged the Hungarian Episcopate to publish its pastoral letter *For happier families* in 1999. It addresses believers and all people of good will and outlines the reality of the family in Hungary. By writing this pastoral letter, the Episcopate provided a general survey on marriage and the family, through presentation of the Catholic understanding of the human being, family and marriage.

3. Pastoral letter on bioethics

The Bishops’ Conference issued a comprehensive pastoral letter on bioethics in 2003. Whereas the above mentioned statements – especially that on social welfare – were widely discussed, this document, providing Catholic moral aspects for the debate on reproductive ethics, euthanasia and genetics, reached rather a limited audience.

4. Statements on induced abortion

In Hungary, the liberalization of abortion policy took place at a very early stage. Under the communist dictatorship there was no public debate at all. Thus the fact that the Hungarian Episcopate issued a letter of protest, on 12 September 1956, was regarded as outstanding. After the fall of communism, the issue of abortion became highly debatable. It is to be noted, that in Hungary – similar to other Eastern-European countries – the number of abortions is very high, both in absolute figures, and in the percentage of births (the proportion of abortions to live births is about 60%).

After the decrees passed in the socialist era were abolished by the Constitutional Court,²² Parliament created an act on the “protection of the life of the foetus” in 1992, which in turn was criticized by the Hungarian Episcopate in a pastoral letter. After the act was partially struck down by the Constitutional Court,²³ the issue was again on the parliamentary agenda. Before the debate on the bill, the Hungarian Episcopate issued a straightforward statement in which it “found important to summarize the Catholic teaching on the protection of the life of the foetus, not to judge the individuals but to rekindle the sense of responsibility in society.” There is a strict warning contained in the teaching: “All persons asking for an abortion, or cooperating in the execution thereof in any way, including medical staff as well, commit a serious sin.” The statement labels abortion “the institutionalized form of exterminating life”. The statement calls not only upon the faithful, but also the whole of society to protect life. The responsibility of the legislators is especially highlighted: “Therefore we want all legislators to bear in mind that abortion is a sin that cannot be justified by any human laws. Furthermore, Catholic legislators are not allowed to participate either in a campaign promoting such a legal act or in the voting on it”.

On 17 February 2000, the Hungarian Episcopate also forwarded its concern about and remarks on the bill (LXXIX/1992) to the administrative state secretary of the Ministry of Health. The most important points included in the letter are: the foetus’ right to life cannot be set against the right of self-determination of the mother, only against the mother’s right to life; the bill should precisely define what it means by a severe crisis; and finally, “instead of the termination of pregnancy, women should be supported in the prevention of pregnancy”.

5. Pastoral letters on elections

Before the first free elections (general elections: March, 1990; municipal elections: October, 1990), the Hungarian Episcopate issued a statement, which was to be read out at each mass on a fixed Sunday. These letters reminded the faithful “about the heavy responsibility obliging us in the shaping of the future of our church and our nation, ... We may trust only those candidates who indeed serve the common good, are able to represent moral values, justice, freedom and the dignity of the human

person.” Also prior to elections in 1994, 1998 and 2002 pastoral letters were issued calling on Catholics to take part in the elections and to vote for politicians that serve the common good. Prior to the election of the Hungarian members to the European Parliament in 2004, a similar statement was published. Parties are never expressly mentioned by these documents, though sympathies in general can be understood.

6. Further issues

In relation to NATO accession, the *Justitia et Pax* Commission of the Bishops’ Conference felt obliged to encourage Hungarian citizens to consider the question and then vote on it. The declaration of the conference, released in October 1997, favours Euro-Atlantic integration and regards joining the political-military organization, which signifies solidarity for Europe’s peace and security, as a reasonable alternative.

In the summer of 1997, the episcopate published its opinion on the draft of the act on public health, where the Catholic viewpoint was clearly represented: “the bill’s present regulation on euthanasia, medical experiments carried out on humans and assisted human reproduction cannot be accepted by the Catholic Church, as the regulation fundamentally opposes some points of the Catholic moral teaching and natural law”. The problems with the bill from a Catholic point of view are: the concept of human dignity is not adequately defined; the bill may make way for euthanasia and does not prohibit it explicitly; nor does it prohibit experiments carried out on embryos. The same issues are raised in a letter of April 1999, addressed by the bishops’ secretariat to Catholic representatives, in relation to the amendment to the act on public health.

In 1999, in a commentary letter addressed to the Ministry of Social and Family Affairs on the occasion of drafting the National Conception on Family Policy, the episcopate suggested that the government support large families living together to create more stable families and to ease some burdens. The bishops were happy to recognize that the government acknowledged the profound importance of the family proposing also that grandparents (and great-grandparents) belong to the family. A major advantage would be the increase in allowances due for child-rearing, but the financial situation of the poorest families still remains unsolved.

On 5 March 2001, the Bishops’ Conference published a short press-release as a protest against “those sections of the Labour Code which assign an almost uncontrolled authority to the employers to make their employees work on Sunday”. The press-release urges the legislators to

²² Decision 64/1991. (XII. 17.) AB.

²³ Decision 48/1998. (XI. 23.) AB.

consider Christian religious interests and to recognize “the strengthening of the affectionate relationship of Hungarian families” in their observance of Sunday.

As mentioned above, the Bishops’ Conference suggested voting in favour of joining the European Union and for granting access citizenship to ethnic Hungarians abroad in 2004.

As other mainstream denominations have a less centralized structure, the statements they publish gain less public attention.

VIII. Conclusion

Religious freedom is protected by the Constitution.²⁴ The state has to remain neutral in matters of religion and ideology, to safeguard the freedom of everyone, equally.²⁵ Neutrality means on the one hand that the state must not identify itself with any religion or ideology, and that on the other hand, it should avoid institutional entanglement with any institution based on a particular religion or ideology; that is, state and church shall be separated.²⁶ Separation, however, does not rule out cooperation and respect for the independence of the parties. On the contrary: ensuring the free exercise of religion under certain circumstances requires the coordination between public entities and faith-based communities. This may happen by contractual relations of diverse nature, as well as by non-covenantal cooperation.

²⁴ Constitution Article 60.

²⁵ Decision 4/1993. (II. 12.).

²⁶ Constitution Article 60 (3).

PAUL COLTON

Bishop of Cork

RELIGION AND LAW IN DIALOGUE: COVENANTAL AND NON-COVENANTAL COOPERATION OF STATE AND RELIGIONS IN IRELAND

I. Introduction

In a landmark study of the relationship between the Irish State and the Roman Catholic Church in Ireland, a key characteristic identified by J.H. Whyte is the hold of the Catholic Church on the loyalty of the people between 1923 and 1979.¹ In the 1990s, writing for this Consortium,² Professor James Casey acknowledged that:

“Ireland is an overwhelmingly Roman Catholic country ... [A]nd a very high proportion of these people continue to observe the tenets and practices of that church. The remainder of the population is divided between various Protestant churches, and there are also small Jewish, Muslim and Orthodox communities”.³

The presuppositions are homogeneity and diligent adherence. It would be naïve and inaccurate to suggest that Ireland has lost this character entirely. However, there have been significant changes,⁴ particularly in the late 1990s – social, economic, political and religious – impinging on our subject: religion and law in dialogue.

1. *Recent Changes*

In terms of religious observance the Roman Catholic Church is still the majority church. Nonetheless the presupposition of homogeneity has been

¹ J.H. WHYTE, *Church and State in Modern Ireland 1923 – 1979* (Gill and Macmillan: Dublin, 1980) p.15.

² G. ROBBERS (ed), *State and Church in the European Union* (Nomos Verlagsgesellschaft: Baden-Baden, 1996).

³ J. CASEY, “State and Church in Ireland” in ROBBERS, G. *op cit.*, pp.147 to 168 at p. 147.

⁴ This has been acknowledged in later publications both by Professor Whyte (in J.H. WHYTE, “Recent Developments in Church-State Relations” (1985) *Seirbhís Phoiblí* Vol. 6 No. 3, pp. 4-10) and by Professor Casey (in J. CASEY, *Constitutional Law in Ireland* (Sweet and Maxwell: Dublin, 2000) p. 687).

greatly eroded. Equally, among that majority the pattern of adherence and affiliation has altered.

2. Statistical data and social patterns

In April 2004 the religion report of the Irish Census of 2002 was issued.⁵ A number of propositions are tenable on foot of the statistics:

- Religion, albeit in many hitherto unfamiliar guises in Ireland, is still important.
- Christianity, expressed in many ways, is still hugely significant. All of the main Christian denominations increased in size since the previous Census in 1991: the Roman Catholic Church, the Church of Ireland, the Methodist Church and the Presbyterian Church (by 7%, 30%, 99% and 56% respectively).
- The expression of Christianity is more diverse: for example, Orthodox, Evangelical, Pentecostal, Lutheran (with increases since 1991 of 2815%, 362%, 1006% and 203% respectively).
- Greater numbers of Muslims, Hindus, Buddhists and adherents of other stated religions (with increases – also since 1991 – of 394%, 225%, 295% and 306% respectively).
- People espousing no religion have grown in number to the point where they are the second largest grouping.

In recent years Ireland⁶ has benefited from dynamic economic performance. There has been a population increase arising from net migration, which in turn has resulted in a rich ethnic, racial and religious diversity. A key element has been a questioning of every hierarchy and authority, not least because of unfolding scandals in many sectors and institutions: financial, ecclesiastical, commercial, social services, judicial, political and the police.⁷ Two of the consequences are a marked decline in the Church's influence in public affairs and religion is no longer the dominant force it once was.

⁵ Volume 12 Census 2002 published on 8th April, 2004. It may be found at www.cso.ie/census/results.htm or at www.eirestat.cso.ie/census/ReportFolders/reportfolders.aspx

⁶ Throughout this paper I shall use the constitutional name of the State – Ireland – which refers to the twenty-six counties of what is also referred to as the Republic of Ireland. My reflections shall concern that context alone.

⁷ Known in Ireland as *An Garda Síochána*.

3. A personal perspective

In addressing the subject of “Religion and Law in Dialogue”, it is not my role to reiterate other definitive, all-embracing studies,⁸ which treat of the subject of Church and State in Ireland, although overlap for the defined purposes of this conference is, to some extent, inevitable.⁹

I write as a practitioner (an Irish Anglican Bishop who in his work actively takes part in that dialogue, and also a law graduate and currently a student of Canon Law at Cardiff University), who by virtue of his vocation is caught up in the very dialogue which is the subject of our attention.

I hope, therefore, that I bring, not anecdote but empiricism; a contemporary rather than historical view: an articulation about religion and law in dialogue from that juncture where *praxis* meets reflection, seasoned with a current academic pursuit and interest, which has its nascence in my every day work in Church and society; and which inescapably compels me to reflect again at the interface with *praxis*. Although the paper focuses in the main on the Christian Church, the situation of the other principal faiths in Ireland is analogous.

II. The anatomy of relationship

Turning to the first objective of this gathering – looking at the development of the concordats between religious groups and states – it would be facile to ignore those States, such as Ireland, where no such concordat exists: the nature of the relationship is worthy of analysis not simply to verify that there is no concordat, but usefully to depict the framework that does exist. What is the relationship?

1. No Concordat

“No concordat between the Irish State and the Catholic Church has ever been negotiated, nor, so far as is known, has one ever been suggested.”¹⁰ Likewise, there is no concordat or agreement between the other churches

⁸ J.H. WHYTE, *op cit*; J. CASEY, *op cit*; and G.W. HOGAN, “Law and Religion: Church-State Relations in Ireland from Independence to the Present Day” in 1987 XXV *American Journal of Comparative Law*, pp. 47 – 96; to name but a few.

⁹ First, to establish the development of the concordats and of the concordatian contracts between religious groups and states in the EU. Second, to analyse the states without formal concordats and how the dialogue is led there. Third, how the Consortium can contribute to the dialogue with the EU.

¹⁰ J.H. WHYTE, *op cit.*, p. 15.

and the State.¹¹ In affirming that there is no concordat between the State *qua* State and any Irish church *qua* Church, is not to say, however, that there is neither formality nor law pertinent to their rapport. The churches exist in a juridical framework which takes cognisance of religion and channels each to the other in a variety of ways.

In order to establish what this relationship is and to describe the mechanism of dialogue it is necessary first to examine the Constitution of Ireland (*Bunreacht na hÉireann*); the legal status of churches in Ireland; relevant statute law; formal agreements with religious bodies and entities within the churches (as opposed to churches *per se*); informal agreements and understandings; and a complex interplay between Church and State, or more accurately between religion and law, arising from the concept of "ethos" both sociologically and legally. This will enable us to define this model; to describe the mechanism of dialogue and to outline the engagement with the institutions of the European Union.

2. Churches in a constitutional framework¹²

Article 44 of the *Constitution of Ireland* (itself prefaced with an invocation of the "Most Holy Trinity",¹³ and ending "...to the Glory of God..."¹⁴) included a significant addition in the Constitution of 1937:¹⁵ Article 44.1:

"The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion."¹⁶

The Constitutional Review Group, by majority decision, called in 1996 for the deletion of Article 44.1 and its replacement by the phrase "The State guarantees to respect religion."¹⁷ This has not been put to the people

¹¹ In reaching this conclusion I consulted Church leaders, the secretariats of the main Christian churches, ecumenical bodies, lawyers, academics and legal officers of the State. If there is such a formal concordat no one knows about it!

¹² For a full treatment and analysis of Article 44 of *Bunreacht na hÉireann* (The Irish Constitution) see: G.W. HOGAN and G.F. WHYTE, J.M. Kelly: *The Irish Constitution* (4th edition, LexisNexis: Dublin, 2004) pp. 2029 to 2075; and also J. CASEY, *Constitutional Law in Ireland* (Sweet and Maxwell: Dublin, 2000) pp. 685 to 708.

¹³ Opening sentence of the Preamble to *Bunreacht na hÉireann*.

¹⁴ Endnote of *Bunreacht na hÉireann*.

¹⁵ There had been an earlier Constitution in 1922 which did not include this.

¹⁶ *Bunreacht na hÉireann* Article 44.1.

¹⁷ *Report of the Constitutional Review Group* (1996, PN 2632) at p. 378.

and, while not specifically Christian in tenor, would not undermine the fundamental point that Ireland is a country where religion is important.

The constitutional position is well summarised in *Corway v Independent Newspapers (Ireland) Ltd*¹⁸ by Barrington J:

"The effect of these various guarantees is that the State acknowledges that the homage of public worship is due to Almighty God. It promises to hold his name in reverence and to respect and honour religion. At the same time it guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be they Roman Catholics, Protestants, Jews, Muslims, agnostics or atheists. But Article 44.1 goes further and places the duty on the State to respect and honour religion as such. At the same time the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality."

Article 44 acknowledges that "... public worship is due to Almighty God..."¹⁹ and the State is required to "...respect and honour religion."²⁰ While this has been interpreted as underpinning Christianity,²¹ the courts have also made clear that the benefits are not confined to Christians.²² In *Quinn's Supermarket v A.G.*²³ Walsh J emphasised: "Our Constitution reflects a firm conviction that we are a religious people."

This is borne out by Article 44 as a whole. Freedom to profess and practise one's religion is guaranteed, subject to public order and morality.²⁴ The State is precluded from endowing any religion,²⁵ from discriminating not only on the ground of religious profession, belief or status,²⁶ but also where there is legislation providing State aid for schools under the management of different religious denominations it shall not discriminate between those schools.²⁷ The autonomy of religious denominations is guaranteed in relation to the management of its own affairs:²⁸ "...the primary aim of the constitutional guarantee is to give vitality,

¹⁸ *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484 also at www.bailii.org/ie/cases/IESC/1999/5.html

¹⁹ *Bunreacht na hÉireann* Article 44.1.

²⁰ *Id.*

²¹ *Norris v Attorney General* [1984] IR 36.

²² *Quinn's Supermarket v Attorney General* [1972] IR 1; *McGee v Attorney General* [1974] IR 284 and in *Norris v Attorney General* [1984] IR 36.

²³ *Quinn's Supermarket v Attorney General* [1972] IR 1.

²⁴ *Bunreacht na hÉireann* Article 44.2.1.

²⁵ *Id.* Article 44.2.2.

²⁶ *Id.* Article 44.2.3.

²⁷ *Id.* Article 44.2.4.

²⁸ *Id.* Article 44.2.5.

independence and freedom to religion.”²⁹ Restrictions are placed in principle, subject to certain exceptions, on State acquisition of the property of religious denominations and educational institutions.³⁰

Article 44 originally recognised the special place of the “Holy Catholic Apostolic and Roman Church” together with the existence of certain other churches and the Jewish Congregation in Ireland. This special position, deemed to confer no juridical privilege,³¹ was removed by referendum in 1972³² and the universal nature of the constitutional guarantees has subsequently been reiterated.³³

3. *The status of the churches in Ireland*

What is the legal status of the churches within this constitutional setting? In the case of the Church of Ireland, the matter is settled by legislation³⁴ and interpreted accordingly by subsequent cases. It is “...a consensual compact ... imposed by secular legislation... [and] ... a fundamental consequence of this doctrine is that internal church rules are inferior to secular law in cases of inconsistency.”³⁵

The position is well summarised by the *Irish Church Act, 1869* which places “...the Church, as regards the civil law of the land, in the same position as any other body of men associated together for purposes recognized and allowed by the law.”³⁶ In *State (Colquhoun) v d’Arcy*,³⁷ in the High Court, citing Barry, J in *O’Keefe v Cullen*³⁸, Sullivan P., described the status of a church not established by law as having: “...the status of a voluntary association the members of which subscribe or assent to certain rules and regulations and bind themselves to each other to conform to certain laws and principles, the obligation to such conformity and

²⁹ Henchy, J in *McGrath and Ó Ruairc v Trustees of the College of Maynooth* [1979] I.L.R.M. 166 at 187.

³⁰ *Id* Article 44.2.6.

³¹ see *Quinn’s Supermarket v Attorney General* [1972] IR 1; *McGee v Attorney General* [1974] IR 284 and *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321, [1998] 2 ILRM 81.

³² *Fifth Amendment of the Constitution Act, 1972*.

³³ *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484.

³⁴ *The Irish Church Act, 1869* S.20.

³⁵ N. DOE, *Canon Law in the Anglican Communion* (OUP: Oxford, 1998) pp.17 and 19.

³⁶ Brooke, W.G. *The Irish Church Act, 1869 and The Glebe Loan Act, (Ireland) 1870*, annotated (Hodges Foster and Co: Dublin, 1871) p.44.

³⁷ *The State (Colquhoun) v. D’Arcy* [1936] I.R. 641.

³⁸ *O’Keefe v. Cullen* I.R. 7 C.L. 319 at p.339.

observance resting wholly in the mutual contract of the members enforceable only as a matter of contract by the ordinary tribunal of the land....”³⁹

In the same case (quoting Lord Davey in *General Assembly of the Free Church of Scotland v. Lord Overtoun*⁴⁰) Hanna J⁴¹ described that church (in an analogous position to the churches in Ireland) as: “...a voluntary and unincorporated association of Christians united on the basis of agreement in certain religious tenets and principles of worship, discipline and Church government....It is, indeed almost a truism that an unestablished religious association is free from State control as regards doctrine, government and discipline.”⁴²

Although in 1925 the Supreme Court had already held that Roman Catholic Canon law is to be categorised as foreign law,⁴³ it was referred to as a voluntary association by Campbell J in *Buckley v Cahal Daly*:⁴⁴ “There is no direct power in the Courts to decide whether A or B holds a particular station according to the rules of a voluntary association.”⁴⁵

This then is the status of all churches in Ireland (and by analogy other faith communities), none of which is established: voluntary and unincorporated associations.

4. *Relationships arising from statute*

That specific relationships arise from Statute is borne out by the examples from the domains of marriage, specific sundry legislation, education and from the particular concept of “ethos” as envisaged in some legislative provisions.

4.1 Marriage⁴⁶

The historic position of the churches in Ireland in relation to marriage is a model of partnership: an intrinsic reliance by the State on the churches in fulfilment of civic functions. Matrimonial law was administered by the

³⁹ *The State (Colquhoun) v. D’Arcy* [1936] I.R. 641 at 650.

⁴⁰ *General Assembly of the Free Church of Scotland v. Lord Overtoun* [1904] A.C. 515.

⁴¹ He also cited *Long v. The Bishop of Capetown* 1 Moo. P. C. (N.S.) 411.

⁴² *Id* at 515 and 648.

⁴³ *O’Callaghan v O’Sullivan* [1925] 1 IR 90.

⁴⁴ *Buckley v. Cahal Daly* [1990] NIJB 8.

⁴⁵ *Id*.

⁴⁶ See A.J. SHATTER, *Family Law* (4th edn, Butterworths: Dublin, 2001).

ecclesiastical courts until the disestablishment of the Church of Ireland⁴⁷ when the jurisdiction passed to successive courts.⁴⁸ The *Marriages (Ireland) Act, 1844* prescribed the statutory formalities for the solemnisation of marriage in the State, with the exception of Roman Catholic marriages which were governed, in the main, by the common law. Under this legislation and successive marriages acts⁴⁹ the churches (other than the Roman Catholic Church) had enjoined on them, arguably on behalf of the State, its responsibilities in the area of marriage including ascertaining freedom to marry, the solemnisation and the registration of the marriage. In the case of the Church of Ireland Banns of Marriage are published by clergy at the liturgy. Ordinary Licences are issued by registrars and surrogate licensors nominated by the Bishop (but appointed by the State on receipt of the Bishop's surety) and Special Licences are issued under the Bishop's own signature. This scenario will radically change under the *Civil Registration Act, 2004*.⁵⁰ As will be seen, the passing of that legislation is instructive of the means of dialogue between Church and State.

4.2 Specific Legislation

The *Irish Church Act, 1869*, whereby the Church of Ireland as the established church was disestablished, empowering it also to meet in Synod and to frame a constitution,⁵¹ gives that administration and constitution a statutory context.

From 1 January 1871 the ecclesiastical courts were to be abolished. However, the "...ecclesiastical law of Ireland, and the present articles, doctrines, rites, rules, discipline, and ordinances of the said Church, shall be deemed to be binding on the members for the time being thereof in the same manner as if such members had mutually contracted and agreed to abide and observe the same, and shall be capable of being enforced in the temporal courts in relation to any property..."⁵²

⁴⁷ *The Irish Church Act, 1869*.

⁴⁸ In 1870 to the Court of Matrimonial Causes and Matters (under the *Matrimonial Causes and Marriage Law [Ireland] Amendment Act, 1870*); in 1877 to the Supreme Court of Judicature in Ireland (under the *Judicature [Ireland] Act, 1877*); to the High Court (under the *Courts of Justice Act, 1924*); a position confirmed by the *Courts (Establishment and Constitution) Act, 1961*.

⁴⁹ Marriage Law (Ireland) Amendment Act, 1863, Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870, 'Marriage Law (Ireland) Amendment Act, 1873 and the Marriages Act, 1972.

⁵⁰ The Act is due to be commenced in early 2006.

⁵¹ *Irish Church Act, 1869* s.19.

⁵² *Irish Church Act, 1869* s.20.

The ecclesiastical law, while abolished *as law*, did not, in fact, cease to exist in the life of the Church, in the sense that it is enjoined on those who choose to be members of the Church of Ireland. It "...continues to govern the Church (subject to modification and alteration by the legislative body of the Church)."⁵³ Although ecclesiastical law then, ceased to exist as the law of the land, section 20⁵⁴ "...continues the whole of the present Ecclesiastical law, and the present teaching and discipline of the Church, even after the 1st January, 1871, subject to such alterations, if any, as the Church itself may introduce..."⁵⁵

This statutory basis of the Church of Ireland's life may have consequences in public law. However, the argument that its statutory basis on the *Irish Church Act, 1869* gives the Church of Ireland a foundation in public law rendering its internal decisions and disciplinary procedures justiciable, has not yet been tested.⁵⁶

To the extent that the *Irish Church Act* also made some interim provisions in compensation for the *Regium Donum*⁵⁷ and a capital grant for Maynooth College, the legislation also created a statutory relationship with the Presbyterian and Roman Catholic Churches but without current legal implications.

4.3 Education⁵⁸

Education is an area manifestly so fertile with Church-State synergy, both historically and administratively, that it dents any theory of total separatism between the two. The contemporary scenario arising from the *Education Act, 1998*, creates an inextricable interdependence in this sector.

Although the Act is drafted in universal and inclusive terms, the fact that education in Ireland is mostly organised along denominational lines, deposits a significant gloss on the legislation. Where, for example the

⁵³ G. ATKINS, *The Irish Church Act, 1869: Carefully Annotated* (Ponsonby: Dublin, 1869) p. 28.

⁵⁴ *Irish Church Act, 1869* s.20.

⁵⁵ C.H. TODD, *Irish Church Act (1869) with Observations* (Hodges, Foster and Co: Dublin, 1869) p. 42.

⁵⁶ See unpublished paper by Colton, P. (for the LLM Canon Law at Cardiff University) *The Ecclesiastical Tribunals and Courts of the Church of Ireland: What are they and do they need to be reformed?* 2004.

⁵⁷ A State grant payable to Presbyterian Clergy initiated in October, 1672 to stimulate the introduction of Presbyterianism into Ireland.

⁵⁸ For a full study in this field see D. GLENDENNING, *Education and the Law* (Butterworths: Dublin, 1999) particularly Chapter 2 which provides an historical outline encompassing the Church-State dynamic.

Act refers to the Patron⁵⁹ this will, in most instances, *de facto* mean a Bishop or religious authority. Likewise, references to “characteristic spirit”⁶⁰ are usually to be construed in the light of the ethos of particular churches. The purpose of the legislation is to “...ensure that education is conducted in a spirit of partnership...” between the various partners and the State.⁶¹ It is predicated not only upon such partnership, but also on cooperation, consultation (e.g. the Minister shall consult with Patrons⁶²), recognition,⁶³ and agreement (in certain circumstances the Minister shall have the agreement of Patrons⁶⁴ and in others the Patron requires the consent of the Minister⁶⁵).

4.4 Ethos

A tangential dynamic flows from legislation which relies, in part, on the concept of “characteristic spirit” (known also as “ethos”). This arises not only in the education sector, but also in employment and equality legislation.⁶⁶ Moreover, its expression in law is an acknowledgement by the State of the role of religion and that of the churches.

Defining ethos is problematic. In *Re Article 26 and the Employment Equality Bill 1996*⁶⁷ the view was expressed in the Supreme Court that: “the respect for religion which the Constitution requires the State to show implies that each religious denomination should be respected when it says what its ethos is. However the final decision on this question as well as the final decision on what is reasonable or reasonably necessary to protect the ethos will rest with the Court and the Court in making its overall decision will be conscious of the need to reconcile the various constitutional rights involved.”

4.4.1 Ethos: Education Act, 1998

It is in the context of education that the ethos or characteristic spirit has most practical relevance; and also where there is greatest scope for

⁵⁹ As defined in *The Education Act, 1998* s.8.

⁶⁰ As referred to in *The Education Act, 1998* s.15 (2)(b).

⁶¹ *The Education Act, 1998* The Long Title of the Act.

⁶² *Id* s. 7 (4)(b).

⁶³ *Id* s.8.

⁶⁴ e.g. in prescribing all matters pertaining to the appointment of a school Board *Id* s.14 (8).

⁶⁵ e.g. in order to dissolve a school Board *Id* s. 16 (1).

⁶⁶ *Employment Equality Act, 1998* and *Equal Status Act, 2000*.

⁶⁷ *Re Article 26 and the Employment Equality Bill 1996* [1997] IR 321 at p359.

litigious dispute. The concept is ill-defined. The relevant section of the Act s. 15 (2)(b) places on a school Board of Management the responsibility of upholding and being accountable to the Patron “...for so upholding the characteristic spirit of the school as determined by the cultural, educational, moral, religious, social, linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school...”

This is an all-embracing and elusive definition which is an intangible foundation for all other policies (enrolment, disciplinary, pastoral) fostered by the school.

4.4.2 Ethos: Employment Equality Act, 1998⁶⁸

The *Employment Equality Act, 1998* prohibits discrimination on nine grounds: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the traveller community. As a Bill, this legislation was referred by the President to the Supreme Court to test its constitutionality: section 37 (which permits discrimination by a religious, educational or medical institution established for a religious purpose, where it is reasonable to do so in order to maintain the religious ethos of the institution or is reasonably necessary in order to avoid the undermining of that ethos) was not found to be unconstitutional.⁶⁹ The institution concerned would need, therefore, to have a clear sense of its ethos.

4.4.3 Ethos: Equal Status Act, 2000⁷⁰

A similar onus arises in relation to the *Equal Status Act, 2000* enacted to promote equality and prohibit types of discrimination, harassment and related behaviour in connection with the provision of services, property and other opportunities to which the public generally or a section of the public has access. The enumerated grounds of discrimination are the same as those in the *Employment Equality Act*. In this legislation, derogations are given *inter alia* on the gender and religious belief grounds to educational establishments which train ministers of religion, and on the religious belief grounds to schools in relation to the admission of students of a different belief where those schools provide education in an environment which promotes certain religious grounds, and where such refusal is necessary to maintain the ethos of the school.

⁶⁸ As amended by the *Equality Act, 2004*.

⁶⁹ *Re Article 26 and the Employment Equality Bill 1996* [1997] IR 321.

⁷⁰ As amended by the *Equality Act, 2004*.

In practical terms, therefore, if, on religious grounds, a student is refused admission to a school or on the same grounds, in a staff recruitment process where one of two equally qualified teachers is preferred to another, such a decision may only be made in order to protect the ethos of the school in question. In practical terms this is almost never sustainable (nor desirable).

Not only in disputed cases where appeals ensue, but also in the administrative course of things, particularly in the education sector, the question of ethos as described in these three situations invariably propels religious schools or institutions into dialogue with the State about the nature and purpose of the ethos of schools and institutions; often in circumstances which are adversarial or pastorally sensitive.

5. *Specific agreements with entities within churches*

A number of examples illustrate that the State from time to time concludes formal agreements with a variety of bodies, groups or even individuals within churches:

Legislation was passed by the State in 2002 setting up a process through which children who were abused in residential care would have access to fair and reasonable compensation without undergoing the rigours of formal court actions.⁷¹ The working out of the purpose of the legislation has, in practice, proved both difficult and contentious. As far as this study is concerned, however, it is noteworthy that in June 2002, under pressure to establish a compensation mechanism (as the victims of abuse appeared reluctant to cooperate with the Laffoy Commission which had been set up to listen to the victims and to investigate allegations⁷²) the Government concluded a deal with certain Irish religious orders whereby the State accepted a contribution from them of €128 million in exchange for an indemnity from further liability to pay compensation to the abused. Although the Commission was set up in 1999, the first public hearing did not take place until 26 July 2002: a month after the Government's deal with the religious orders. Queries about the constitutionality (under Article 44) were raised in the media at the time, but not tested in the courts.

⁷¹ The *Residential Institutions Redress Act, 2002*.

⁷² The Laffoy Commission, the Chair of which was resigned by Ms Justice Mary Laffoy in 2003 as, in her view, the Commission had never been properly enabled by the Government to fulfil satisfactorily the functions conferred on it by the *Oireachtas* (Parliament).

Under the *Planning and Development Act, 2000* many church buildings were listed as protected structures. This gave rise to concerns and there were unforeseen consequences: new and inordinate insurances premiums; and perceived restrictions on internal alterations to meet liturgical needs. Discussion within several churches resulted in representations to the Government which resulted in an agreement in November 2003: *Architectural Heritage Protection for Places of Public Worship: Guidelines for Planning Authorities*.

A third and current example: the Church of Ireland Archbishop of Dublin and Bishop of Cork are in discussion with the Department of Education and Science about the patronage of comprehensive schools in their respective dioceses, and most recently an agreement recognising the bishops' historic roles in relation to the schools, which would stand alongside the provisions of *The Education Act, 1998* has been suggested.

6. *Unwritten agreements or understandings*

Until the passing of the *Education Act, 1998* there was no formal legislation underpinning the Church's role in education: influence was exercised through custom, practice and local agreements. Many developments (such as the introduction of Comprehensive Schools under protestant management) had no formal agreements, and were based only on simple understandings of how the schools would function. A further example is the scheme whereby children of minority religious denominations receive a means-tested subvention to facilitate their enrolment at one of the schools under the management of their religious denomination. This so-called "Block Grant" was negotiated by Church of Ireland bishops in the 1960's and rests, not on legal agreement, but on an exchange of letters in which the issues were teased out.

7. *Pursuit of a model*

It does little justice to the empirical realities between Church and State in Ireland simply to observe that *de facto* and *de iure* there is no concordat. It is necessary to articulate a model that reflects the reality. Taking cognizance of the interconnections – constitutional, statutory, formal and informal – it may be appropriate to adopt an "active partnership/tacit concordat" model.⁷³ Undoubtedly some will feel this reflects the reality;

⁷³ This model had its nascence in conversation with Professor Norman Doe as we dialogued about the reality it was necessary to articulate in States of the Common Law tradition.

others may feel it is wishfully aspirational in an age when religion has had its day. It is tempting, nonetheless, to hypothesise it, for the purposes of discussion: the active partnership/tacit concordat model. The model is corroborated by the way church and state conduct dialogue.

III. The mechanism of dialogue

It will be observed in response to our second aim at this meeting (how dialogue occurs) that this is to be deduced from the anatomy of the relationship.

Casey suggests that "...[i]n Ireland the question of Church and State has been essentially a matter of politics rather than law."⁷⁴ This analysis, as a broad brush stroke is correct. However, it is insufficiently nuanced in the light of the relationships with a statutory impetus (particularly in the field of education).⁷⁵ To this exception, need to be added the partnership in respect of matrimonial law, as well as the particular agreements and other characteristics of the "active partnership/tacit concordat" model already described.

Moments of significant conflict are as notable for their paucity as for the furore they generated.⁷⁶ "On the whole, church-men and statesmen had similar preoccupations. They both recognised the changes going on; they both had to make judgements about which developments should be welcomed, which acquiesced in, and which resisted. In general, they came to similar conclusions on these matters."⁷⁷

1. Informality/Communitarity

An aspect of Irish society which has a bearing sociologically on this study is the demographic and geographic size of Ireland together with its communal and familial characteristics. People know one another. Community life is strong. Politicians and church leaders (local and national) have

⁷⁴ J. CASEY, *Constitutional Law in Ireland* (Sweet and Maxwell: Dublin, 2000) pp. 686 and 687.

⁷⁵ Professor Casey himself makes this qualification in his earlier work: J. CASEY, "State and Church in Ireland" in ROBBERS, *op cit.*, pp. 147 to 168 at p. 151 – "Irish law – save in regard to education – has accepted the principle of separating church and state.

⁷⁶ These have been few in number: concerning the Health Act, 1947; the Mother and Child Scheme, 1951 and a unique episode (mentioned by J.H. WHYTE, *op cit* at p. 388) in 1976 when one Bishop argued publicly with the then *Taoiseach* (Prime Minister) over the extent to which an Irish state should take account of the views of religious minorities.

⁷⁷ J.H. WHYTE *op cit.*, p. 388

regular contact in the civic round. It is a factor which has a bearing on the relationship between all the social partners and voluntary bodies on the one hand and the State on the other.⁷⁸ In my experience such immediate contact nurtures partnership.

2. Dialogue between whom?

In the main, dialogue nationally occurs usually between government department, minister or statutory body on the one hand, and on the other at the level of the episcopate, church leaders, executive staff (e.g. education officers) or representative assemblies (the standing/executive committees of synods, assemblies or conferences). Frequently, for their part, being highly representative and modelled on consensus, are often, because of their infrequency of meeting, too cumbersome either to make timely and rapid response or to enter into an immediate and energetic discourse.

3. The nature of the dialogue

In the main, dialogue is about administrative detail and practical matters rather than policy. A time-consuming preoccupation of the churches is securing state funding for its institutions in the education, health, heritage and youth work sectors.

3.1 Consultation

The first and most notable occasion when consultation by Government with churches formally occurred was when Eamon de Valera, as *Taoiseach*, consulted concerning the wording of the proposed Article 44 of the Constitution, 1937.⁷⁹ Two contemporary examples:

Pre-1922 Legislation: The Office of the Attorney General has had occasion to consult with the Church of Ireland concerning aspects of pre-1922 (pre-independence) legislation in order to establish its contemporary relevance for the church. The course adopted is illustrative: correspondence

⁷⁸ This dynamic is well-described in K. HANNON, *The Naked Politician* (Gill and Macmillan: Dublin, 2004).

⁷⁹ A full account of the consultation with the Church of Ireland Archbishop – J.A.F. Gregg – may be found in G. SEAVER, *John Allen Fitzgerald Gregg: Archbishop* (Allen Figgis: Dublin, 1963) at pp. 127 to 129.

addressed to the Archbishop of Dublin who convened a meeting and invited a solicitor and the Bishop of Cork to take part. A methodology was agreed and the work is on-going.

Births, Deaths and Marriages: The dispersed nature of marriage law in Ireland has already been pointed out. In preparation for the modernisation of the registration process two government departments issued a consultation document in May, 2001.⁸⁰ The churches⁸¹ entered actively into this process. The State for its part took on board the Church of Ireland's observation that to leave until a later date the matter of the legal formalities for the solemnisation of marriage would leave the churches with an overly intricate and confusing system. At a late stage amendments were drafted (making up a significant portion of the new Act⁸²) to provide for this. Consultation continues on the matter of commencement of the Act and the preparedness of the churches.

3.2 Direct personal contact

This process also draws attention to the importance of direct personal contact in the dialogue. The legislation advanced through the *Oireachtas*⁸³ at a pace which caught the consulting partners from State and Church off guard: and which precluded planned discussion about the final drafting of the amendments and almost precipitated a crisis which would have impinged on the churches' historic liturgies and practice. This dilemma was only overcome by direct personal contact: senator to committee member; bishop to Archbishop; bishop to government minister; minister to official; official to bishop (over a period of two weeks); bishop to other bishops; and in parallel, Archbishop to *Taoiseach*.⁸⁴

3.3 Representation

Arising from that same process, it appears that the four Church leaders (as they are known)⁸⁵ wrote to the *Taoiseach* on the 5 April, 2004

⁸⁰ See www.groireland.ie/groproject.htm

⁸¹ Including this author.

⁸² *Civil Registration Act, 2004*.

⁸³ Parliament.

⁸⁴ Prime Minister.

⁸⁵ Roman Catholic and Church of Ireland Archbishops of Armagh, together with the Moderator of the Presbyterian Church and the President of the Methodist Church.

complaining about the precipitous way in which the consultation had unfolded.⁸⁶ Direct representation like this, whether by an individual Bishop, conference of Bishops or a representative committee of a Church has been described as quite normal and, moreover, in the midst of one notable Church – State conflict⁸⁷ it was suggested that "...the practice of receiving and considering such private representation is most helpful to the Minister, facilitates the working of the parliamentary machine, and is definitely in the public interest."⁸⁸ From a contemporary perspective this appears from personal experience to hold true. Two examples:

Vetting of childcare workers: Arising from the policy on children and youth ministry it adopted in 1996 – Safeguarding Trust – the Church of Ireland, in common with other religious groups, has had concerns about the unavailability of vetting procedures for both paid and voluntary youth workers in the State. Formal representation was made by the Standing Committee of the church to the appropriate minister.

Planning: A further example, already noted, is the ecumenical representation by the main church leaders to the Government following the implementation of the *Planning and Development Act, 2000*.

3.4 Statutory consultation

As already described, the *Education Act, 1998* requires a government minister (and therefore, his/her department) to consult with school patrons (usually bishops) and the other partners in education (this may include, at times, the churches' boards of education and education officers). It should be noted, however, that this obligation to consult is with the bishop as patron, not as bishop or church representative.

3.5 Social comment

Speeches, statements, pastoral letters and sermons often reported in the media do not always go unnoticed. Church opinions, resolutions, pronouncements of relevance are still actively reported, although not as uncritically as before. It would appear that at a minimum these are noted. Frequently a public remark or reaction in reply suggests that this is so.

⁸⁶ *Irish Times* 16th August, 2004.

⁸⁷ That concerning the proposed Mother and Child Welfare Scheme, 1951.

⁸⁸ A Civil Servant quoted by J.H. WHYTE, *op cit.*, at pp. 247 and 248.

3.6 Lobbying and partner associations

It is difficult to assess the nature of "dialogue" at the edge of formality; in the realm of political lobbying and through membership of a variety of organisations much is done by individual church members, and by church bodies in partnership with one another. An excellent example is the highly-regarded and well-heeded work in the fields of social, justice, economic and religious areas of CORI (Conference of Religious of Ireland).⁸⁹ It was suggested that the Roman Catholic Bishops wrote to the *Taoiseach* in June 2004 expressing disappointment at the absence of a reference to Christianity in the draft EU constitutional treaty.⁹⁰

In general, it would appear that the more formal consultation relates to administrative and practical matters. Policy issues tend to be addressed in a more public way through social comment and engagement in the broader democratic framework.

On Friday, 12 November 2004, at a ceremony in the Irish Pontifical College in Rome to mark the establishment of diplomatic relations between Ireland and the Holy See 75 years ago, the Catholic Archbishop of Dublin called for "new forms of structural dialogue" between church and state in Ireland. "Times have changed" he said "...since the early days of the State, when the interests of the Catholic Church in Ireland were so 'entwined' as to be almost indistinguishable."⁹¹ In response the Minister for Foreign Affairs announced "...the Government's intention to institute arrangements for 'an open, transparent and regular dialogue with churches and with philosophical and non-confessional organisations'."⁹²

IV. Dialogue with the institutions of the EU

How the churches contribute to the dialogue with the EU institutions – our third objective here – within Ireland, is characterised by similar dynamics with some additions:

1. National Forum on Europe

In October 2001 a National Forum on Europe was established to debate the future of the European Union and Ireland's future in it.⁹³ The main

⁸⁹ See www.cori.ie

⁹⁰ *Irish Times*, 11 August 2004.

⁹¹ *Irish Times* Saturday, 13 November 2004.

⁹² *Irish Times* Monday, 15 November 2004.

⁹³ see www.forumoneurope.ie

Christian denominations, together with representatives of the main faiths and social partners have had a special observer status which has afforded access to the process.⁹⁴

2. Channelled engagement through ecumenical cooperation

All of the main churches encounter European issues and have vicarious contact with the European Union Institutions through their membership of the Conference of European Churches⁹⁵ and the active engagement of that Europe-wide ecumenical body in European issues. It works closely with COMECE (The Commission of the Bishops' Conferences of the European Union).

3. Church links and structures

Several churches have their own structures to deal with European matters. The Roman Catholic Church works through COMECE on which the Irish Bishops' Conference has a member. Coincidentally an Irish priest works within the secretariat of that body.⁹⁶ The objectives of COMECE are: to monitor and analyse the political process of the European Union; to inform and raise awareness within the Church of the development of EU policy and legislation; and to promote reflection, based on the Church's social teaching, on the challenges facing a united Europe. The Church of Ireland has a Working-Group on European Affairs, and the Presbyterian Church in Ireland accesses the EU through its support for the Church of Scotland's work in Brussels.

V. Conclusion

In summary, therefore, it is suggested that although there is no concordat between Church and State in Ireland, the relationship is sufficiently developed and implemented to call it an active partnership/tacit partnership model: underpinned by the Constitution; an understanding of the status of the churches; a number of statutory provisions; specific agreements with church entities in certain instances; some informal

⁹⁴ The list of observers is available at www.forumoneurope.ie/observer.asp

⁹⁵ see www.cec-kek.org This author was a member of the CEC Central Committee in the 1990s.

⁹⁶ Father Noel Treanor.

agreements; and evidenced in the embodiment of "ethos" as a concept in legislation.

In a familial and communal society, the dialogue is facilitated by consultation, direct personal contact, representation, statutory consultation in the field of education, by social comment, lobbying and in conjunction with partner associations in society. To these, in the European context are added the National Forum on Europe, ecumenical cooperation and the commitment of ecumenical bodies.

This is just one complex Church-State model. Throughout the European household there are many more, which are equally subtle, rooted in their respective settings. Dialogue between religion and States is crucial to the well-being of the European household. The time has come for the Churches to elevate their contribution above mere concern about whether or not God was to be mentioned in the Preamble to the *Constitution*.

For their part the State and the EU Institutions have to find ways to nurture the dialogue, to take cognizance of it as a social and political dynamic, frequently fuelled by non-theological factors. This commitment will be measured by how churches and EU alike will work out the covenants in Article 52 of the draft European Constitution adopted by the European Council on 18th June, 2004 (and awaiting ratification by the member States).

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RELIGION AND LAW IN DIALOGUE: COVENANTAL AND
NON-COVENANTAL COOPERATION OF STATE AND
RELIGIONS IN ITALY

Both covenantal and non-covenantal cooperation have played a crucial role in the development of the *diritto ecclesiastico*. Italian legal doctrine has usually addressed the issue from two different perspectives: the selection of the best legal form (bilateral or unilateral, covenantal or non-covenantal) to regulate the field, on the one hand, and the principle of cooperation between public and religious authorities, on the other.

In the first section this paper will highlight the historical development of both the principle of cooperation and the strategic legislative choice between the covenantal and the non-covenantal approaches. In the second and in the third sections it will address respectively the issues of covenantal and non-covenantal cooperation. In the last part some critical reflections will be offered.

I. Historical background

There are three main historical (and ideological) periods marking the relations between the (Italian) State and religious denominations: the post-unity liberal period, the fascist period and the republican and democratic period. To understand how the *diritto ecclesiastico* has dealt with, and continues to deal with, covenantal and non-covenantal cooperation it is necessary to underline the differences between these three periods.²

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² This summary of the historical background is based mainly on the following literature: A.C. JEMOLO, *Chiesa e Stato in Italia negli ultimi cento anni* (Torino, 1963); F. MARGIOTTA BROGLIO, *Italia e Santa Sede dalla grande guerra alla Conciliazione. Aspetti politici e giuridici* (Bari, 1966); I. GARZIA, *Il negoziato diplomatico per i Patti lateranensi* (Milano, 1974); G. LEZIROLI, *Relazioni tra Chiesa cattolica e potere politico* (Torino, 1996).

1. *The liberal age and the choice of the unilateral State regulation of religion*

The post-unity liberal phase (from unity in 1860 to the fascist putsch in 1922) is characterised by three main principles.

(1) The full sovereignty of the State implies that every social field, including all kinds of interaction between religion and the public sphere, is entirely ruled by the State itself; at the same time the State fully safeguards (or should fully safeguard) the internal freedom of religious denominations according to liberal doctrine on the positive social and economic effects of the freedom of social actors.

(2) In conformity with such a principle, covenants with religious denominations and, notably, the Concordat, are regarded as the heritage of the past (the *Ancien Regime*) implying inequality between the different denominations (the Holy See having to be acknowledged as a sovereign entity on the same level as the State), the mutilation of state sovereignty and independence, and the limitation of social freedoms. On the contrary, the best means to fulfil the new political requirements is by way of **unilateral act** adopted by Parliament. (This is precisely the case with the *Legge delle Guarentigie* of 1871 providing for a new framework of "guarantees" acknowledged by the State to the Catholic Church after the end of the Papal States and for the other acts enforcing the new liberal deal).

(3) Because of both the burden of the past and the ideals of the present, the priority is separation: at this stage the cooperation is simply anachronistic.³

2. *The fascist period and concordatarianism: the bilateral approach to the Catholic Church and the unilateral approach to the other denominations*

The fascist period (1922-1943) marks a dramatic *revirement* in ecclesiastical policy affecting significantly the system of legal sources. Because

³ Of course it is worth mentioning the diplomatic negotiation with the Vatican authorities in order to solve the *questione romana*, but in my opinion this cannot be considered as a proper form of cooperation in the sense in which the term is used in contemporary European legal doctrine in church and state research. The liberal state was strongly determined to fight the Catholic Church in order to build up an Italian wall of separation. On the other hand, the Catholic opposition first to the unity of the Italian State and secondly to the Italian postunitarian institutions was another powerful factor preventing any sincere and open cooperation.

conciliation with the Holy See and the support of the Italian Catholic Church were major strategic goals for Mussolini, both for domestic and international reasons, two radically different approaches (also affecting the kind of legal source to be used) were set up in order to accommodate the interests of the Catholic Church and to marginalize the other religious groups.

(1) With regard to the government's attitude towards the Catholic Church, the Italian government accepts the conditions of Vatican diplomacy in order to solve the *questione romana*. Thus, the principle of Italy as a Catholic country is strongly implemented, the Holy See is acknowledged as a sovereign entity, and the agreement is stipulated under the only possible subsequent option, that of an international treaty.

The Lateran Pacts of 1929 contained three sections: the Treaty of Conciliation (27 articles) which established the Vatican City as an independent state, restoring the civil sovereignty of the Pope as a monarch and providing for several guarantees protecting the Holy See; the Financial Convention annexed to the treaty (3 articles) which compensated the Holy See for loss of the papal states; and the Concordat (45 articles), which dealt with the Roman Catholic Church's relations with the Italian State. The bilateral settling of the *questione romana* and the concordatarian approach are meant to start a phase of strong cooperation between the fascist dictatorship and the Catholic Church: although to some extent there was (especially in the first years) a close cooperation, some conflicts arose in the mid thirties and the relations between the government and the Church became much more difficult and controversial.

(2) The choice of a concordatarian approach to the regulation of the relationship between the State and the Catholic Church does not imply the adoption of a systematic bilateral approach to the whole spectrum of the relationships between the State and the different religious denominations. Similar to that which occurred in the liberal age, the legal status of the non-Catholic denominations was regulated by unilateral State law and this choice was enforced through the adoption of an act (no. 1159 of 1929, *legge sui culti ammessi*, act on the admitted cults) providing for a general legal framework that applies to all religious denominations (the legal status of the denomination as well as some religious activities – e.g. religious marriages – can be recognised by the civil authorities, but the life of the group is submitted to a strict police control). Of course no cooperation with these groups was envisaged.

3. *The post-fascist, democratic and republican period and the constitutional option for the principle of agreed relationships between the State and the religious denominations*

The democratic and republican age (1947-) opened with pre-constitutional debate and political compromise between Catholics, liberals, socialists and communists fundamental to the Constitution of 1947 (which came into force in 1948). Given the strategic role of the matter in the past, that of covenantal and non-covenantal cooperation was one of the most discussed issues during the pre-constitutional debate. Was it better to abolish the fascist concordat and return to the liberal pattern (non-covenantal approach, the State regulating the field by unilateral acts) or to reform slightly the fascist covenantal system without radically renouncing the Concordat?

The final deal between the Christian democrats and the communists (the socialists and the liberals were supporting the introduction of a separatist non-concordatarian system) resulted in the selection of the latter and therefore creating a system of covenantal cooperation based on a mixture of the two former liberal and fascist patterns:

(1) Art. 7 of the Constitution acknowledges the special international status of the Holy See and the principle that relationships between the State and the Catholic Church are regulated through covenants (namely through the Lateran Pacts and their bilateral modifications);

(2) Art. 8 of the Constitution states that all religious denominations are "equally free" and that all religious denominations other than Catholicism have the opportunity to enter agreements (*intese*) with the State providing for a special legal status which accommodates their specific needs.

The covenantal principle is potentially extended to all religious groups but the Catholic Church is still specifically recognised with a special covenantal status since the Concordat is explicitly protected by the Constitution as an international agreement.

Since 1948, both the interpretation and application of the covenantal principle in the Constitution have been highly controversial. As I will highlight in the following paragraphs, the issue of covenantal cooperation has been one of the most crucial in the whole development of the *diritto ecclesiastico* as a matter of legal doctrine, of political and legislative options (the amendment of the Concordat in 1984, the *intese* signed after 1984) and of decisions by the Constitutional Court. On the one hand, the Constitution, despite the fact it does not mention explicitly the principle

of cooperation between the State and religious groups, contains some principles and provides some tools which have stimulated the development of an informal cooperation at the national as well as at the local level (see below section 4). On the other hand, the introduction in official Catholic teaching⁴ of the formula *sana cooperatio* has been crucial for the conceptual development of the idea of cooperation which is significantly acknowledged for the first time not in a unilateral piece of legislation, but in the new Concordat of 1984 (art. 1).

II. Covenantal cooperation: the application of articles 7 and 8 of the Constitution

As far as the interpretation and application of the constitutional covenantal approach to cooperation are concerned, it is necessary to understand the different ways in which the approach is enacted in respect to the Catholic Church (art. 7 of the Constitution) and in respect to the other denominations (art. 8 of the Constitution).

1. *Art. 7 and different kinds of agreements between the State and the Catholic Church*

Covenantal cooperation with the Catholic Church has been implemented in three different ways.

(1) Through the Lateran Pacts of 1929 executed by act no. 810 of 1929 and explicitly recognised and protected by art. 7 section 2 of the Constitution.⁵ The act ratifying the Pacts is at the highest level within the legal hierarchy and it is subject to fundamental Constitutional principles only (decision of the Constitutional Court no. 30 of 1971 admitting the power of the Court itself to scrutinize the norms of the Pacts in cases of inconsistency with the supreme principles only). Therefore, these norms can be

⁴ II Vatican Council, constitution *Gaudium et spes*, 76 c: "The Church and the political community in their own fields are autonomous and independent from each other. Yet both, under different titles, are devoted to the personal and social vocation of the same men. The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all".

⁵ Art. 7 section 2 Const.: "Their relationship (ie the relationship between the State and the Catholic Church) is regulated by the Lateran Pacts. Amendments to these pacts which are accepted by both parties do not require the procedure for constitutional amendments". Section 1 is also crucial as it acknowledges the sovereignty of the Catholic Church: "State and Catholic Church are, each within their own spheres, independent and sovereign".

modified only by a new agreement or by an amendment to the Constitution involving a special procedure.⁶

(2) Through the *Accordo* (agreement) of 1984 (executed by act no. 121 of 1985) which modifies and replaces the Concordat of 1929. The *Accordo* is considered a substantially new Concordat: dealing with the same subject-matter and structured with the terms of a new agreement. However, in order to be protected by art. 7 (which, according to the most influential scholars, extends the protection enjoyed by the Lateran Pacts to their "modifications" and not to new pacts), it has been formalised as a modification of the former Concordat. In the event that the *Accordo* had to be interpreted as a new Concordat not covered by the art. 7, it would, nevertheless, be protected as an international agreement since, according to the Constitution, the state has the duty of implementing international law and international agreements.⁷

(3) Through the general principle of covenantal cooperation included in art. 13 section 2 of the *Accordo* which states that in case of "need for collaboration" ("*esigenza di collaborazione*") the two parties will settle through new *accordi* (agreements enjoying the same international nature as the *Accordo* of 1984 itself) or through *intese* (internal agreements not allowed the same international nature of the *Accordo*) to be stipulated between the State and the Conference of Bishops.⁸

(4) As mentioned above, through the agreements (*intese concordatarie*) concerning specific subjects (e.g. Catholic teaching at public schools, chaplains in the Army, hospitals and prisons, protection of the cultural heritage) stipulated between the State and the Conference of Bishops as

⁶ Art. 138 Const.: "(1) Law amending the constitution and other constitutional acts are adopted by each of the two chambers twice within no less than three months and need the approval of a majority of the members of each chamber at the second vote. (2) Such laws are afterwards submitted to popular referendum when, within three months of their publication, a request is made by one fifth of the members of either chamber, by 500,000 electors, or by five regional councils. The law submitted to referendum is not promulgated if it does not receive the majority of valid votes. (3) No referendum may be held if the law has been approved by each chamber in the second vote with a majority of two thirds of its members.

⁷ Art. 10 Const.: "The legal system of Italy conforms to the generally recognized principles of international law"; art. 80 Const.: "Chambers ratify by law international treaties which are of a political nature".

⁸ Art. 13 section 2 *Accordo* of 1984 (act n. 121 of 1985): "Additional matters as to which the need for collaboration between the Catholic Church and the State might arise, shall be governed by further agreements (*accordi*) between the two Parties or by understandings (*intese*) between the competent authorities of the State and of the Italian Bishops Conference".

the representative of the Holy See according to the *Accordo* of 1984 (art. 13 section 2). The majority of authors excludes any special protection under art. 7 of these sources (as far as the agreements are not stipulated with an external and international subject, the Holy See itself, but with an internal one). Since the federalist process has been enhanced, several agreements have been stipulated at the regional level between the representatives of the Regional Council (or of its Executive Board) and the representatives of the Regional Conference of Bishops (the regional agreements may cover every matter included in the regional competencies such as health care, education, charity, tourism, land and building property, local taxes and exemptions).⁹

2. Art. 8 and the issue of *intese* between the State and non-Catholic religious denominations

The application of art. 8 as a whole and especially implementation of the policy of the *intese* (art. 8 section 3 Const.) have proved very controversial. The most volatile issues are:

- (1) The discrimination of groups the status of which is regulated through an *intesa* and the groups that are regulated through the general unilateral act of 1929

Six religious denominations are regulated "by law based on agreements (*intese*) with their representatives" (art. 8, section 3 Const.). This means that after reaching an agreement, it must then be approved by Parliament in order to become enforceable by law.¹⁰ Nearly thirty other groups are recognized on the basis of unilateral law (the above mentioned act

⁹ See A. RUGGERI, *Intese "concordatarie" e intese "paraconcordatarie" nel sistema delle fonti*, in *Il diritto ecclesiastico*, 1-2 (1988) pp. 55-100.

¹⁰ Since the Constitution came into force in 1948, the following agreements have been signed: with the Waldensian Church (21 February 1984), the Union of Italian Adventist Churches of the Seventh Day (29 December 1986), the Assemblies of God in Italy (29 December 1986), the Union of the Jewish Communities in Italy (27 February 1987), the Union of Evangelical Christian and Baptist Churches in Italy (29 March 1993) and the Evangelical Lutheran Church in Italy (20 April 1993). Two more agreements have been signed with the Christian Congregation of Jehovah's Witnesses (20 March 2000) and the Italian Buddhist Union (20 March 2000) but they have not been approved by Parliament as yet, due to opposition from the centre-right majority, a result of the elections of 2001. Negotiations have been entered officially with the Italian Soka Gakkai, the Italian Hinduist Union, the Apostolic Church in Italy, the Church of Jesus Christ of the Latter Day Saints and the Exarcate for Southern Europe.

no. 1159 of 1929 on religious minorities still awaits amendment) and some are not recognized at all.

The equality principle of art 8 section 1 of the Constitution does not prevent the State from treating the various denominations differently (since the section refers simply to “equal freedom” and not to equality of treatment).¹¹ The subsequent differentiation in the legal status of the religious denominations is strongly related to the issue of covenantal cooperation since some denominations, due to having stipulated an *intesa*, enjoy a special status while the others are acknowledged and regulated according to the above-mentioned general law of 1929 on the “admitted cults”. This means that the substantive legal condition of a religious denomination is closely related to the formal way its status is regulated: access to bilateral sources is synonymous with better treatment. This is the way not all the acknowledged denominations but certain groups only receive public funding (on the basis that beneficial treatment is provided by an agreement with the State) from the “*otto per mille*” (amount from income taxes that the taxpayers can devote to support the Catholic Church and the other groups having signed an agreement with the State).¹² At the same time, the fact that the *intese* do not have the same legal nature as the Concordat with the Holy See (the *intese* are merely domestic acts – like the agreements with the trade unions – not international treaties as is the case with the Concordat) seriously undermines equal freedom before the law on one side of the Catholic Church and on the other of the denominations having stipulated an *intesa*.¹³

¹¹ It is also worth mentioning that according to art. 3 of the Constitution all citizens are equal and can not be discriminated against on the basis of religion and that art. 20 Const. specifies that the same principle must be applied to the religious associations.

¹² In other cases, the Constitutional Court has condemned as discriminatory the difference in treatment, especially in public regional funding of religious buildings (see the decision no. 193 of 19 April 1993 concerning Regione Abruzzo and the almost identical decision no. 346 of 8 July 2002 concerning Regione Lombardia); in this case the ground for defining an unconvincing rationale is that differences in treatment concerning places of worship strongly affect the equal freedom principle itself.

¹³ The case of Cardinal Giordano illustrates the relevance of the distinction between the legal nature of the Concordat (and more generally of the Lateran Pacts) and the legal nature of the *intese*. Italian prosecutors first began investigating the Cardinal of Naples in January 1997, when his brother was indicted for running a loan-sharking ring that offered loans at rates of up to 300 percent. Investigators found that most of the cash to finance the scheme had come from the cardinal. The case generated church-state tensions when police insisted on examining confidential documents of the Naples archdiocese, in addition to the financial records that Giordano provided and when the prosecutors revealed that they had tapped Giordano’s phone. The Vatican also protested that Italian investigators had not informed them that Giordano was a target of investigation, a notice they should have given

The issue is particularly crucial as Italian society is becoming much more multicultural and multireligious. With these new religious actors asking the State for the same privileges provided for the denominations that have stipulated an *intesa* (access to the “*otto per mille*” being the far most controversial consequence of the different treatment). There is a risk that the system of the *intese* might collapse and experts urge the enactment of a general religious freedom act (replacing the act of 1929) providing a high standard of protection for all religious denominations regardless of the stipulation of an *intesa*¹⁴.

- (2) Governmental discretion in the selection of religious partners, and in the negotiation, content, stipulation and presentation of the *intesa* to Parliament for final approval and for the transformation into law

The decision whether a religious denomination can stipulate an *intesa* or not (as well as the decision whether an *intesa* already stipulated is approved by Parliament or not) is a political decision to be made entirely by the State (namely by the government as to the negotiations, the stipulation and the proposal to Parliament and by Parliament as to final approval): no right is vested in a group to stipulate an *intesa*. This is why Jehovah’s Witnesses and Buddhists are still awaiting the approval by Parliament of the agreements signed in March 2000.¹⁵

In any event, in the meantime, due to the intervention of the administrative courts and the sensitiveness of some governments, the margin of discretion for the government has been somewhat reduced.¹⁶

under the terms of the Concordat. The case went to trial and the judge eventually found Giordano innocent of all charges on 22 December 2000. The Cardinal never set foot in court, exercising his right as a cleric under Italian law to be absent. Beyond the controversial interpretation of the Concordat, it is clear that should a religious authority belonging to another confession be involved in such a case, the case would have been handled very differently, not only for political reasons but also because of the special protection provided to Catholic authorities by the Lateran Pacts and their modifications.

¹⁴ Since the early nineties, several projects of law on religious freedom replacing the act of 1929 have been presented but none has been approved yet. The last project has been presented by the Berlusconi administration the 18 March 2002 (no. C. 2531). Significantly the principle of cooperation is not mentioned at all.

¹⁵ The impact of this case on religious freedom has been underlined in D. JOUVENAL, ‘Church and State in Italy in 2000’, in *European Journal for Church and State Research*, 8 (2001) p. 207. For the author the political opposition to the recognition of the two *intese* by Parliament has “de facto prevented the adoption of the relevant laws, as well as the implementation of the constitutional rights of a number of Italian citizens”.

¹⁶ The decision to start negotiations in view of an Agreement has usually been a discretionary decision of the Chairman, but following a decision of the Consiglio di Stato

(3) The criteria for the selection of the subjects admitted in the negotiations

From the outset, it is important to stress that the legal definition of the identity of a religious denomination, prior to the recognition of its legal personality and possibly to the stipulation of the *intesa*, provokes considerable debate in Italian law. The Constitution refers to religious denominations (*confessioni religiose*, especially in art. 8) but does not provide any definition. Following some cases concerning the Buddhists, the Jehovah's Witnesses and the Church of Scientology, the Constitutional Court has stated (decision of 19 April 1993 no. 195 concerning the Jehovah's Witnesses) that in order to be recognized as a religious denomination the group has to document a previous public recognition (even an implicit one or even simply at the local level) or an evidence (proving its religious nature) based on the statute and/or on the common perception in public opinion that the group is effectively a religious group. The Cassation Court has tried to specify the criteria in a decision (8 October 1997 no. 1329) concerning the Church of Scientology, but it remains finally a matter of interpretation (and of political influence on the institutional body in charge of the interpretation).

For example, humanist associations are not acknowledged as a religious group. In 1997 the government rejected the request of the Union of Agnostic Atheists and Rationalists to start negotiations to stipulate an *intesa* on the grounds that the Union is not a religious confession. While humanist associations are entitled to other exemptions provided for more general categories of associations (charity, education, humanitarian actions) they will not be allowed to enjoy the same privileges as the religious groups having stipulated an *intesa*.

The issue of the stability and credibility of the representatives of the religious denomination is also crucial, especially for groups like the Muslim communities whose institutional structure does not include a single hierarchical structure of leadership that represents all the believers belonging to the group.

(4) The contents of the *intesa*

Experience has shown that it is particularly difficult to accommodate specific needs in the *intese*. One cannot exempt the Jehovah's Witnesses

(29 October 1997 no. 3048) at present a formal collective resolution of the Cabinet is required. A more detailed regulation of the procedure in view of the stipulation of an *intesa* is also contained in the 2002 draft of the law on religious freedom (arts. 28-37).

from observance of the general rules protecting the right to health and life in order to let them follow their particular belief (in the case of blood transfusions). However, this leads to the complication that all the contents of the various *intese* are more or less always the same (someone has commented that in this way the *intese* are merely photocopies of each other).

III. Non-covenantal cooperation

Non-covenantal cooperation as such is not recognized (such as in art. I-52 section 3 of the 2004 EU Constitution for Europe) in the Italian constitution. Also, on an empirical basis, it is hard to assess to what extent this kind of cooperation is actually practised.

Nevertheless it is possible to list some legal provisions which not only permit the cooperation, but also encourage it.

1. The first indirect tool is the set of constitutional principles, as interpreted by the Constitutional Court, recognizing the general democratic role played by social groups (*formazioni sociali*)¹⁷ and the specific value of religion.

2. The second direct tool is represented by the "reciprocal collaboration for the promotion of man and the common good of the Country" prescribed by the *Accordo* between the State and the Catholic Church of 1984 (art. 1) according to the useful formula (cited above) of the second Vatican Council (significantly, the article repeats art 7 Const. merely adding this provision at the end¹⁸). Also, art. 12 of the *Accordo* prescribes "collaboration" between the State and the Catholic Church for protection of the cultural and artistic heritage.

3. The third tool consists of the provisions in the *intese* prescribing "collaboration" between the State and the religious group for the protection of the cultural and artistic heritage (*Intesa* with the Waldensian Church, art. 17 section 1: for this purpose a bilateral board might be instituted. Provisions like this are included in all the *intese*), and "consultation" with the group during the application of the *intesa* (*Intesa* with the Assemblies of God, art. 27). It is important to underline that no general principle of "collaboration" like that for the Catholic Church in the

¹⁷ Art. 2 Const.: "The republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality".

¹⁸ Art. 1 *Accordo* 1984: "The Italian Republic and the Holy See reaffirm that the State and the Catholic Church are, each in its own order, independent and sovereign and commit themselves to the full respect of this principle in their mutual relations and to reciprocal collaboration for the promotion of man and the common good of the Country".

Accordo of 1984 has been inserted neither into any *intesa* nor into the 2002 draft law on religious freedom.

4. The last tool deals with all public initiatives (by any public body, national or local), prescribing general consultation with civil society or specific cooperation with the religious groups (e.g. procedures for pre-legislative consultation). While it seems generic and lacking a well-defined legal structure, the development of stronger cooperation between religious and public agents is likely to develop due to the general process of contractualization in the public sphere and the increasing involvement of civil society in issues of governance.

IV. Conclusion and critical reflections

The picture I have drawn is of course extremely synthetic and provisional, as it is constantly subject to the complex reshaping of law and religion in Europe and in Italy. Amongst the most influential factors contributing to the rapidly-changing Italian *diritto ecclesiastico* is the federal process reserving more competencies to the local (especially the regional) powers, the effects of European integration, the rebound of globalisation, the social and legal impact of Islam and new religious movements, the new strategies of the Catholic Church and the attempt to root Catholicism as the civil religion of the country.

More specifically, with regard to cooperation between the State and the religious actors, there are four major challenges.

1. *The risk of the State discriminating between the different religious denominations*: this implied in the implementation of both kinds of cooperation (covenantal and non-covenantal); and from the selection of the partners to the procedures governing dialogue and negotiation, the principle of equality is seriously challenged by the new public active religious policies.

2. *The impact of the European economic, social and legal integration*: as far as art. I-52 section 1 of the EU Constitution for Europe will be interpreted as a barrier against a continental harmonization in the field of the State-religion relationships (and as a mean of sacralisation of the national priority) it will inevitably prove to be ineffective:¹⁹ Italy has already

¹⁹ That is what I argue in M. VENTURA, 'Protectionnisme et libre-échange: la nouvelle gestion juridique de la religion en Europe', *Conscience et liberté*, 64 (2003) pp. 122-132.

experienced – although under a different legal mechanism (the jurisdiction of the European Court for Human Rights) – that even the (apparently) most untouchable concordatary rules can be affected by the European legal integration;²⁰ at the same time, art. I-52 section 3 and, even more so, the praxis of informal dialogue carried on by the Commission and the theoretical background of the governance, will challenge the whole structure of cooperation in domestic public action and law.

3. *The crisis of bilateral relationships as the best way to obtain legal advantages*: several Italian scholars have already noticed that new general legal provisions (such as the act on private associations engaged in the third sector) are likely to overlap the *intese* and avoid the traditional strategy of covenantal cooperation as the only path available in order to be recognized and obtain an advantageous legal status (should it be approved, the new general act on religious freedom would be likely to have the same meaning).²¹

4. *The balance between central-national and local (forms of) cooperation*: both public authorities and religious authorities are definitely challenged by the deep change in sovereignty, the allocation of powers, and the balance between the public and private spheres (both horizontal and vertical subsidiarity). While regionalisation is increasingly reshaping the traditional constitutional order (according to the process of “devolution”),²² the process of European integration is seriously putting into

²⁰ I refer to the case of the European Court of Human Rights, *Pellegrini v. Italy* (20 July 2001 no. 30882/96) concerning the right to a fair trial and the right to defence in case of civil recognition of a decision given by an ecclesiastical court. Because of the priority of the protection of the fundamental right to defence, the “sacred” Italian principle of the specificity of the legal bilateral and international regulation of the matter has not been “spared” by the European Court.

²¹ See C. CARDIA, *Concordato, intese, stato federale*, in *Confessioni religiose e federalismo*, a cura di G. Feliciani (Bologna, 2000).

²² The system is currently undergoing reform: new art. 117 of the Constitution lists the matters subject to concurrent legislation of both the state and the regions and provides that the regions “have exclusive legislative power with respect to any matters not expressly reserved to state law”; at the same time “the principles of subsidiarity, differentiation and adequacy” have been introduced in new art. 118. The constitutional reform is still in process. According to the project promoted by the government in 2004, except in case of danger for the national interests, regions will be the only competent authority to govern public education, “*ordine pubblico*” and health care. Limitations at this level could concern buildings for religious worship (several cases having been judged by the administrative regional tribunals), public funding of confessional schools, or the organisation of religious education in public schools. See F. FINOCCHIO, ‘Il sistema delle fonti del diritto ecclesiastico italiano dopo il D. Lgs. 31 marzo 1998, n. 112’, in *Il Diritto ecclesiastico*, 1 (1999); G. PASTORI, ‘Regioni e confessioni religiose nel nuovo ordinamento costituzionale’, in *Quaderni di diritto e politica ecclesiastica*, 1 (2003) pp. 3-12; P. CONSORTI, ‘Nuovi

question the ancient (outdated?) Italian mind set of churches-state negotiations and cooperation.²³

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²³ As to the changing patterns in sovereignty see in general M. WIND, *Sovereignty and European Integration: Towards a Post-Hobbesian Order* (London: Palgrave, 2001) and more specifically as to law and religion S. VAN BIJSTERVELD, *The Empty Throne: Democracy and the Rule of Law in Transition* (Utrecht: Lemma Publishers, 2002).

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ALEXIS PAULY ET PATRICK KINSCH

LE MODÈLE CONCORDATAIRE LUXEMBOURGEOIS: UN SYSTÈME HYBRIDE

En employant le mot de modèle,¹ nous ne pensons pas à un produit luxembourgeois destiné à l'exportation. Il s'agit de planter le décor du cadre complexe d'un petit pays.

I. La succession de plusieurs États sur un même territoire

L'intérêt de cette étude se trouve dans le fait que plusieurs États se sont succédés sur un même territoire. En 1801-1802 le Luxembourg forme le département français des forêts. Le concordat de 1801 entre Bonaparte et Pie VII s'applique, il en va de même des articles organiques émis unilatéralement par Napoléon en 1802.² Précisons la distinction entre un concordat (convention internationale soumise au droit international public) et les articles organiques (lois de police relevant principalement du droit interne). Portalis aurait été le rédacteur de ses articles.³

De 1815 à 1830 le Luxembourg devient, selon les dispositions du traité de Vienne, un État théoriquement indépendant, mais rattaché à la couronne des Pays-Bas. En 1839,⁴ le Luxembourg retrouve la paix, après la révolution belge⁵. Il perd cependant la moitié de son territoire.

Au moment où le Luxembourg se dote de sa première constitution, au sens moderne du terme, l'existence du concordat n'est guère contestée. Les constituants de 1848 souhaitent⁶ la conclusion d'un nouveau concordat. Le résultat des travaux des constituants de 1848 rend perplexe.

¹ Voir A. PAULY, *Les Cultes au Luxembourg* (Luxembourg, Forum, 1989).

² Voir P. PESCATORE, *La séparation des pouvoirs et l'office du juge de Montesquieu à Portalis* (Luxembourg) p. 81-83.

³ Voir J.M.E. Portalis, *Discours, travaux et rapports inédits sur le Concordat de 1801* (Paris, Joubert, 1845).

⁴ Voir G. TRAUSSCH, *Du particularisme à la nation* (Luxembourg, Editions Saint-Paul, 1988).

⁵ R. AUBERT, «L'Église et l'État en Belgique au XIXe siècle», in *Res Publica X* (1968) 9-19.

⁶ Voir, L. RICHARD, *La constitution de 1848* (Luxembourg, Bück, 1894).

L'article 23 devenu article 22 en 1868 et toujours en vigueur se lit ainsi: «L'intervention de l'État dans la nomination et l'installation des chefs des cultes, le mode de nomination et de révocation des autres ministres des cultes, la faculté pour les uns et les autres de correspondre avec leurs supérieurs et de publier leurs actes, ainsi que les rapports de l'Église avec l'État, font l'objet de conventions à soumettre à la Chambre des Députés pour les dispositions qui nécessitent son intervention.»

On fera remarquer l'utilisation du pluriel au début de l'article et du singulier à la fin du même texte. Au lecteur de juger: finesse subtile ou obscurantisme prononcé. Le modèle complété. L'évêché créé unilatéralement par le Saint-Siège en 1870 est reconnu par l'État luxembourgeois en 1873. Une loi spéciale prendra acte de ce fait. Le premier grand-duc de Luxembourg, prince allemand de confession protestante, fait ériger une Église protestante avec ses biens et ses statuts à la fin du dix-neuvième siècle. On devine les réactions dans un pays catholique ultramontain. La création est considérée plutôt comme un aménagement de la Cour grand-ducale «Hofkirche» que comme une réforme des rapports culturels.⁷

Dès le début du vingtième siècle des tensions apparaissent dans le protestantisme entre les employés et les ouvriers du bassin minier et la «Hofkirche» de Luxembourg. Ce n'est qu'en 1982 qu'une convention⁸ est établie entre le gouvernement et l'Église Protestante Réformée du Luxembourg.⁹ Les sensibilités personnelles et sociales prédominent sur les questions disciplinaires et dogmatiques.

II. Les conventions de 1997-1998

Le 10 juillet 1998 le législateur approuve quatre conventions avec l'Archevêché,¹⁰ la communauté israélite,¹¹ l'Église Protestante du Luxembourg et l'Église hellénique du Luxembourg.¹² En fait, ces conventions reconnaissent par un instrument juridique des pratiques existantes. (Échange de lettres, subventions par le budget de l'État.) D'après nous il serait injuste de parler de l'abolition du système concordataire, d'ailleurs concordat et convention ont la même origine linguistique.

⁷ Voir arrêté grand-ducal du 16 avril 1894, ainsi que la loi du 10 juillet 1895.

⁸ Mém. A1982 p.1993.

⁹ La convention très longue reproduit une large part de la discipline de cette église.

¹⁰ Mém. A 1998, p. 1318-1323.

¹¹ Mém. A 1998, p.1327-1333.

¹² Mém. A 1998 p. 1333-1335.

Pour les catholiques, les droits et devoirs des laïcs salariés sont mieux garantis. Ils ont, comme les ecclésiastiques, le droit de recourir aux juridictions du travail. L'État reconnaît d'autres structures que les paroisses en laissant à l'ordinaire le libre droit de nomination. Certains articles organiques sont abolis.¹³ L'enseignement religieux dans l'enseignement primaire¹⁴ est approuvé. Les enfants doivent suivre soit un cours d'éducation morale ou sociale, soit un cours d'éducation chrétienne et morale.¹⁵ Les subventions salariales des enseignants de cours de religion et chargés de cours sont fixés.¹⁶

La convention avec le Consistoire israélite est lapidaire sur le fond, elle risque de poser des questions au juge.¹⁷ L'État est autorisé à prendre en charge les traitements des ministres du culte de l'Église Anglicane du Luxembourg et à lui conférer la personnalité juridique.¹⁸

La situation de l'Orthodoxie est plus délicate. L'Église Orthodoxe hellénique est d'abord reconnue.¹⁹ Par un avenant à la Convention avec l'Église Orthodoxe hellénique de 1997 on reconnaît aux orthodoxes roumains et serbes qu'ils sont en communion avec Le Patriarcat de Constantinople.²⁰ Les deux Églises obtiennent la personnalité de droit public, mais concèdent d'être représentées par le Patriarcat Œcuménique de Constantinople avec qui ils sont en communion.²¹

On remarquera l'absence de convention avec les musulmans. On invoque la difficulté de trouver un interlocuteur, on ne cache pas des questions géopolitiques. On peut résumer à quatre les conditions pour reconnaître et surtout par ce fait subventionner une dénomination religieuse. Elle doit être présente au niveau mondial. Elle doit aussi être reconnue dans un autre pays de l'Union Européenne. Elle doit en outre ne pas violer l'ordre public luxembourgeois. Enfin il lui faut un ancrage historique au pays et un nombre suffisant d'adeptes. On regrettera la facture très différente des conventions qui peut amener à des contradictions fâcheuses.

Le concordat de 1801 n'a donc pas été dénoncé selon le droit des gens. La terminologie du codex de 1983 est très générale en parlant de

¹³ *Prima facie*, on ne voit pas une logique claire dans la démarche du législateur.

¹⁴ Mém. A 1998 p.1338.

¹⁵ Mém. A1998 p.1338-1341.

¹⁶ Mém. A 1998 p.213.

¹⁷ Article 15 «Les dispositions contraires à la présente convention sont abrogées.»

¹⁸ Mém. 2004 p.1608.

¹⁹ Mém. 1998 pp. 205-207.

²⁰ Mém. 2004 p.1610.

²¹ On fera observer qu'elles sont en communion et non sous la juridiction du Patriarcat Œcuménique de Constantinople.

conventions et non de concordats.²² I. Riedel-Spangenberg fait une comparaison intéressante avec les «Kirchenverträge»,²³ instruments juridiques internes entre les autorités publiques et les églises en Allemagne.

On ne peut que constater que le Luxembourg hérite de nombreuses traditions et s'inspire de modèles divers. C'est une richesse de ce petit pays, mais c'est aussi un risque. On peut confronter la liberté contre l'ordre public.

²² Le canon 3 du CIC parle de *conventiones*, terme plus général

²³ LKStKRlip.618.

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RELIGION AND LAW IN DIALOGUE: POLAND

I. Introduction

In Poland there is no state or national church. Despite the fact that over 90 % of Poles were baptised as Catholics, the Catholic Church does not have legal status as the predominant religion and from the legal point of view is generally regarded and treated in the same way as the 14 other major churches and religious communities.¹ However, relations between the State and the Catholic Church are laid down both in a statute and in a concordat with the Holy See as a special instrument of cooperation and dialogue. This paper will first examine statutes relating to 15 churches and religious communities and the subsequent part will offer some remarks on the concordat.

II. A brief history of dialogue between the state and churches and other religious communities

In 1572 Sigismund Augustus, the last king of the Jagellonian dynasty, died. In the following period (1573-1795) kings of Poland were elected: after the death of a king, every noble person was allowed to come to Warsaw and elect a new king. Since there was no crown-prince or heir to the throne, the Archbishop of Gniezno, as the Primate, was an *inter-rex*, exercising power until the next king was elected. Till the end of the first Republic (1795) the catholic bishops (and for some periods even non-catholic bishops) had *ex officio* seats in the upper House (Senate) and so they could influence the politics of the State in different areas. The first Polish constitution of 3 May 1791 stated the Catholic faith was the predominant one. According to Art. 1: "The dominant national religion is and will be the holy religious faith with all its rights. A change

¹ For statistical reasons the Catholic church and its bishops have in fact more influence on social and political life than representatives of other denominations.

from the ruling religion to any other confession will be punished as Apostasy. Yet, because our same belief orders us to love other brothers we shall offer all people of any confession religious peace and government protection, and we guarantee the freedom of all rites and religions in Polish territories according to the laws".² For over a century, between 1795 and 1918, Poland was divided between Austria, Prussia and Russia. During this difficult time, churches – primarily the Catholic Church – maintained the national identity of the divided nation: Poles shared the same religion, the same language, and the same traditions. The Archbishop of Gniezno, the Primate and commonly regarded as an *interrex*, was the voice of the nation and the guardian of national identity. The Primate Cardinal Mieczysław Ledóchowski was even imprisoned for his activities (1874-1876); the same happened 80 years later to the Primate Cardinal Stefan Wyszyński, who spent three years in a Polish communist prison. Anti-Polish remarks of Pope Gregory XVI, who was very much in favour of Czarist rule in Polish territory, did not affect the position of Church in divided Poland.

In the 20th century the dialogue between the State and churches underwent major changes. The most significant results of the dialogue were achieved due to the extraordinary personalities of primates and some other important hierarchs. During the second Republic – between 1918 and 1939 – the Catholic Church was a major player in the construction of the newly independent state, although the Archbishop of Cracow, Prince Adam Stefan Sapieha, was after 1926 in obvious opposition to the government and Józef Piłsudski. The so-called "March Constitution" of March 1921 stated in Art. 114: "the Roman Catholic Faith, being the religion of the overwhelming part of the Nation, takes a primary position among denominations having equal rights. The Roman Catholic Church rules according to its own rights. The relation of the State with the Church will be determined by a convention with the Holy See, which will be ratified by the *Sejm*".³ A few years later, in 1925, a concordat was signed and ratified, although the minutes of the session of the *Sejm* show the high temperature of the debate.⁴ The wording of Art. 114 of the constitution, "primary among denominations having equal rights", was the subject of

² For the English text of the "May Constitution" see: Rett R. LUDWIKOWSKI, William F. FOX, *The Beginning of the Constitutional Era: a Bicentennial Comparative Analysis of the First Modern Constitutions* (Catholic Univ. of America Press, Washington, 1993).

³ Z. J. HIRSZ, *II Rzeczpospolita* (Białystok, 1994) (translation by the author).

⁴ The content of the concordat will be discussed below in the section devoted to the current concordat of 1993.

constant discussion: some authors believed that the formula itself was against the principle of equality; others underlined that this wording was merely an expression of the "platonian respect of the State towards the Catholic religion". In practice, Catholic clergy were privileged in terms of presence and position. According to Art. 115: "Churches or religious minorities and other legally recognized bodies are ruled according to their own laws which are not repealed by the State if they do not contain provisions against the [state] law. The relation of the State with those churches and denominations will be laid down in a statute jointly in a consultation with their legal representatives". The following churches and religious communities had relations with the Polish State on the basis of a statute or regulation of the President enacted on the dates indicated:⁵

- The Jewish Religious Community: 1919 in the ex-Russian area and 1921-1928 in the entire territory of Poland
- The Orthodox Church: 1928
- The Muslim Religious Community: 1936 (and still in force)
- The Karaim Religious Community: 1936 (and still in force)
- The Lutheran Church: 1936
- The Eastern Church of Old Rites: 1938 (and still in force)

In the case of ten smaller religious communities, the legal instruments issued under the laws of Prussia, Russia and Austria remained in force. These relate among others to the Reformed Church, the Herrnhut movement or the Mariavites Church in areas held previously by Russia.⁶ Relations with the Catholic Church were laid down in the concordat of 1925 (see below, part IV).

During World War II the Archbishop of Gniezno, Cardinal August Hlond, was exiled in Rome and despite his best efforts could not return to Poland. The Germans murdered 3 bishops and many other bishops were arrested. The duties of *interrex* were exercised by the Archbishop of Cracow, Prince Cardinal Sapieha, who during World War II saved innumerable persons. After the downfall of Hitler a new era began: that of Stalin. One of the first decisions of the new (communist) government was to declare annulment of the concordat of 1925. The new Primate, Archbishop of Gniezno, Stefan Wyszyński (1901-1981), who guided the Catholic Church in Poland between 1948 and 1981, was in favour of a limited dialogue with the communist government, although his famous

⁵ H. MISZTAŁ (ed), *Prawo wyznaniowe* (Lublin, 2000) pp. 90-92.

⁶ *Ibid.*, p. 92.

Non possumus (1953) marked the frontier which the Church could not cross while negotiating with communists. Primate Wyszyński paid a high price: he was imprisoned from 1953 to 1956. Archbishop of Cracow, Cardinal Karol Wojtyła (born 1920), a generation younger than Wyszyński, followed more or less the same line. His election to the Holy See as Pope John Paul II completely changed the situation for the communists, since the Catholic Church in Poland received in this way a new support, much stronger than ever before. In the 1980s, during the period of Martial Law, the Catholic Church made every effort to help the people. However, the Church could not have prevented all forms of violence. Some priests disappeared without trace, and some were murdered by so-called "unknown delinquents". The death of Jerzy Popiełuszko, a priest murdered by the communist intelligence service in 1984, was the only case in which officers of that service were found guilty and convicted.

During the historic "Round Table" (1989) negotiations, representatives of the Catholic Church attended all meetings; both sides regarded priests as neutral observers. After 1989 the Church tried to influence political life, but after elections in 1993 and the constitutional referendum in 1997, when citizens voted obviously without paying any attention to the bishops' wishes, the Bishops' Conference refrained from issuing any clear statements relating to politics. However, the Catholic Church and its senior representatives are still important players in Poland, especially in some regions, notably great personalities such as Cardinal Franciszek Macharski, Archbishop of Cracow, Cardinal Henryk Gulbinowicz, Archbishop of Wrocław, or Józef Życiński, Archbishop of Lublin. The 1990s may be summed up as the decade of a new concordat and of 11 new statutes relating to churches and religious communities.

III. Constitutional and statutory provisions of the dialogue

1. *The constitutional framework*

The most important principles of Polish ecclesiastical law are set in the Constitution of 1997 which provides in Art. 25 for equality of churches and religious communities. The provisions of Article are as follows:⁷

(1) Churches and other religious organizations shall have equal rights.

(2) Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life.

(3) The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.

(4) The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.

(5) The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.

Paragraphs 4 and 5 are central for this discussion. The concordat with the Holy See was signed in 1993 and ratified in 1997. (Comments on its content, procedure, and the circumstances under which the concordat was signed and ratified are discussed below). Pursuant to Art. 25(5) of the constitution, there are 15 statutes on relations between the State and religious denominations. (One relates to the Catholic Church, passed in 1989 and partially amended in compliance with concordat.) However, as these statutes were passed before the current constitution, they were not "adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers" as foreseen in Art. 25(5). They are merely unilateral acts on the part of the State – based on negotiations and dialogue with churches and religious communities – but there was no formal agreement between those parties.

The following is a chronological list of the 15 statutes; the official Polish title appears in brackets; the list also includes the abbreviation for the religious body:

- Eastern Church of Old Rites (*Wschodni Kościół Staroobrzędowy*): Presidential regulation [the only one], 22 March 1928; Orit.
- Muslim Religious Community (*Muzułmański Związek Religijny*): 21 April 1936; Musl.
- Karaim Religious Community (*Karaimski Związek Religijny*): 21 April 1936; Kar.
- Catholic Church (*Kościół Katolicki*): 17 May 1989; Cath.

⁷ Translation: Chancellery of the *Sejm* (Warsaw, 1999).

- Polish Autocephalous Orthodox Church (*Polski Autokefaliczny Kościół Prawosławny*): 4 July 1991; Orth.
- Evangelical Church of the Augsburg Confession in Poland (*Kościół Ewangelicko-Augsburski w RP*): 13 May 1994; Luth.
- Evangelical Reformed Church in Poland (*Kościół Ewangelicko-Reformowany w RP*): 13 May 1994; Ref.
- Polish Catholic Church in Poland (Old Catholic) (*Kościół Polskokatolicki w RP*): 30 June 1995; Pol-Cath.
- United Methodist Church (*Kościół Ewangelicko-Methodystyczny*): 30 June 1995; Meth.
- Baptist Union of Poland (*Kościół Chrześcijan Baptystów*): 30 June 1995; Bapt.
- Seventh-day Adventist Church (*Kościół Adwentystów Dnia Siódmego*): 30 June 1995; Adv.
- Old Catholic Church of Mariavites (*Starokatolicki Kościół Mariawitów*): 20 February 1997; OMar.
- Catholic Church of Mariavites (*Kościół Katolicki Mariawitów*): 20 February 1997; Mar.
- Jewish Religious Communities (*Gminy Wyznaniowe Żydowskie*): 20 February 1997; Jew.
- Pentecostal Church (*Kościół Zielonoświątkowy*): 20 February 1997; Pent.

The wording and internal order of these statutes are in most cases very similar, and in some cases identical, especially those passed on the same day, like the Adventists and Baptists or the Mariavites and Old Catholic Mariavites. However, although basically similar, the statutes include some elements of specific importance to a given church or religious denomination. For example, the statute on the Old Catholic Mariavites prescribes as representatives of the entity only masculine forms (bishop, incumbent), while the wording of the statute for the Mariavites provides both the masculine and feminine forms (*arcybiskup* – *arcykapłanka*, *kapłan* – *kapłanka*). This difference is difficult to represent in the English language, but in the Polish text is very clear. Some statutes underline the independence of a church or religious community, as with the Mariavites, but in the case of the Methodist Church, Art. 2 of the statute states that the church is a member of the General and Central Conference of the United Methodist Church and a member of the World Methodist Council.

An important part of Polish ecclesiastical law is the statute of 1989 on guarantees of freedom of conscience and religion applicable as a *lex generalis* to all churches and religious communities, whether or not their

status is regulated in a separate statute. The statute of 1989 in a way repeats the principles laid down in the constitution. It has been amended a few times since 1989, but it still seems to be quite hesitant in terms of dialogue. However, churches and religious communities were involved in preparation of Article 25 of the constitution, and during the discussions they expressed their opinions.

2. The content of the statutes: a comparative overview

The statutes passed in 1990s have more or less the same content. The statutes and the one presidential regulation issued during the second Republic (relating to the Eastern Church of Old Rites, Muslims, Karaims) have a slightly different structure, but some rights were added in 1990s to bring the older provisions more in line with new ones. The statutes generally include the following rights (the number before abbreviation is the relevant statutory Article; a hyphen indicates lack of a corresponding provision):⁸

(1) *Autonomy/independence of a church or religious community*: 1 ORit., 1-2 Musl., 1-2 Kar., Cath., 2 Orth., 1 (2) Luth., 2 (1) Ref., 2-3 Pol-Cath., 3 Adv., 3 Bapt., 3 Meth., 2 (1) OMar., 2 (1) Mar., 3 Jew., 2 Pent..

(2) *Legal personality of ecclesiastical entities and their representatives, entitled to act on behalf of this entity, listed in the statute*: 9-10 ORit., 4, 18, 35 Musl., 3, 28 Kar., Cath., 6 Orth., 7-9 Luth., 3-7 Ref., 4 Pol-Cath., 4 Adv., 5 Bapt., 6 Meth., 3 OMar., 3 Mar., 5 Jew., 4 Pent..

(3) *Free nomination of office-holders*: in the case of ORit, Musl and Kar. nominees are supposed to swear an oath towards the Republic; – Luth., 7 Ref., 6 Pol-Cath., 6 Adv., 7 Bapt., 8 Meth., 5 OMar., 5 Mar., 7 Jew. Churches: Orthodox and Pentecostal are obliged to inform the state administration about personal changes concerning positions in a church. The Catholic Church is obliged to inform only about the nomination of a bishop.

(4) *Days free of work for adherents of the denomination*: – ORit., 34 Musl., 27 Kar., Cath., 14 Orth. (7 days), 14 Luth. (3 days), 14 Ref. (2 days), Pol-Cath., 11 Adv. (every Saturday), 11 Bapt. (2 days), 12 Meth.

⁸ For a profound analysis, see: J. KRUKOWSKI and K. WARCHALOWSKI, *Polskie prawo wyznaniowe* (Warszawa, 2000).

(2 days), 9 OMar. (1 day), 9 Mar. (2 days), 11 Jew. (every Saturday plus 13 days), 12 Pent. (3 days).

(5) *Teaching religion in schools*: 17 ORit., 32 Musl., 16 Kar., 19 Cath., 15 Orth., 15 Luth., 9 Ref., 10 Pol-Cath., 12 Adv., 12 Bapt., 13 Meth., 10 OMar., 10 Mar., 12 Jew., 13. Pent..

(6) *The right of children to attend services while on holidays*: 30 Cath., 26 Orth., 21 Luth., 12 Ref., 16 Pol-Cath., 18 Adv., 18 Bapt., 19 Meth., 16 OMar., 10 Mar., – Jew., 19 Pent..

(7) *Chaplaincy in hospitals, prisons, etc.*: – ORit., – Musl., – Kar., 31-32 Cath., 26-28 Orth., 22-23 Luth., 12 Ref., 17 Pol-Cath., 18 Adv., 19-20 Bapt., 19-20 Meth., 16 OMar., 15 Mar., 16 Jew., 19 Pent..

(8) *The right of soldiers to attend services*: – ORit., – Musl., – Kar., 21 Orth., 29 Luth., 12 Ref., 15 Pol-Cath., 17 Adv., 17 Bapt., 18 Meth., 15 OMar., 14 Mar., 14 Jew., 18 Pent..

(9) *Military chaplaincy*: – ORit., 22 Musl., 19 Kar., special structures of military chaplaincy: 25-29 Cath., 23 Orth., 30-31 Luth., the others: regular priests supposed to take care of soldiers: Ref., 15 Pol-Cath., 17 Adv., 17 Bapt., 18 Meth., OMar., 14 Mar., Jew., 18 Pent..

(10) *Relief for clergy from military service*: – ORit., – Musl., – Kar., Cath., 25 Orth., 32 Luth., 13 Ref., 14 Pol-Cath., 16 Adv., 16 Bapt., 17 Meth., 14 OMar., 13 Mar., 15 Jew., 17 Pent..

(11) *Charity*: ORit., Musl., Kar., 38-40 Cath., 32 Orth., 24 Luth., 10 Ref., Pol-Cath., 19 Adv., 21 Bapt., 22 Meth., 18 OMar., 17 Mar., 18 Jew., 21 Pent..

(12) *Broadcasting religious programmes on public TV and radio*: – ORit., – Musl., – Kar., 48 Cath., 36 Orth., 20 Luth., 11 Ref., 23 Pol-Cath., 25 Adv., 29 Bapt., 26 Meth., 22 OMar., – Mar., 20 Jew., 25 Pent..

(13) *Ownership of mass-media*: 20 concordat, 25 Adv., 29 Bapt., 25 Pent..

(14) *The right to acquire, administer and alienate assets*: 9 ORit. (added in 90's), 35 Musl. (added in 90's), 28 Kar. (added in 90's), 52 Cath., 39 Orth., 33 Luth., 16 Ref., 26 Pol-Cath., 27 Adv., 32 Bapt., 28 Meth., 25 OMar., 23 Mar., 22 Jew., 28 Pent., fund raising organized in a public way: – ORit., – Musl., – Kar., 57 Cath., 42 Orth., 36 Luth., 21 Ref., 29 Pol-Cath., 30 Adv., 35 Bapt., 31 Meth., 28 OMar., 26 Mar., 27 Jew., 31 Pent..

(15) *Foundations*: – ORit., – Musl., – Kar., 58-59 Cath., 45 Orth., Luth., Ref., 30 Pol-Cath., 31 Adv., 36 Bapt., 32 Meth., 29 OMar., 27 Mar., Jew., 32 Pent..

(16) *Supplementary social insurance run by the churches and religious communities*: – ORit., – Musl., – Kar., Cath., 45 Orth., Luth., 22 Ref., 32 Pol-Cath., 33 Adv., 38 Bapt., 34 Meth., – OMar., 31 Mar., Jew., 34 Pent..

(17) *The right to found and run seminaries*: – ORit., 33 Musl., – Kar., 23 Cath., 19 Orth., 19 Luth., – Ref., 12 Pol-Cath., 14 Adv., 14 Bapt., 14-15 Meth., 12 OMar., 12 Mar., – Jew., 15 Pent..

Statutes passed before World War II (ie on Muslims and Karaims) and the concordat of 1925 obliged the clergy of those denominations to celebrate on festive days a religious service for the benefit of the Republic and its President.

As mentioned above, all these statutes had been adopted before the present constitution came in force: none of them fulfils the conditions of Art. 25 (5), being exclusively a unilateral act of the state. The content of the statutes was discussed with representatives of the churches and religious communities, but their final shape is not the result of an agreement. Therefore, the statutes ought to be the subject of change. It is not the case, however, that churches or religious communities expect or demand new rights or privileges. There are also procedural issues. Currently, there is no formal procedure for the enactment in *Sejm* of a statute based on an agreement with a religious denomination. One peculiarity is that the *Sejm* would not be competent to interfere with or change the statutory wording; the procedure of ratification for an international treaty does not seem applicable in such a case.

It should be noted that the three newest statutes, passed on 20 February 1997, when the text of the constitution of the Republic was operative, include in their Article 1(3) provision that the statute may be changed only after obtaining the opinion of the highest council or representative of a church.

IV. Concordats with the Holy See

1. *The concordat of 1925*

After World War I, relations with the Catholic Church were considered of great importance for a new state. Work on the project had already started in 1921, but it took a few years before the concordat was signed.

The first Polish concordat was concluded between the Holy Father, Pius XI, and the President of the Republic, Stanisław Wojciechowski.⁹ It consists of 27 articles, some of which are particularly interesting¹⁰. Art. XII provides for an oath to be taken by bishops to ensure loyalty to the Republic, and Art. XXV states that all statutes, regulations and other acts contrary to the concordat are null and void. The Concordat referred to three Catholic rites existing in Poland: Latin, Greek-Ruthenus and Armenian.

After 1944, a new communist government implemented a policy to eliminate churches and religion in general from the public life. In June 1945 the communist government issued a secret instruction for the state administration to proceed as if there was no concordat with the Holy See. Shortly after this the government proclaimed that during World War II the Holy See repeatedly broke the concordat and therefore the State would no longer be bound by it. This was announced in one of the Polish daily newspapers (1945). However, this message was never delivered in an official way to the Holy See. The explanation is very simple: at this time there was no diplomatic contact between the communist government and the Holy See, since the latter regarded the exiled government in London as the proper one, according to the constitution of 1935. It should be underlined that the unilateral decision of the government was not even published in the Polish Official Journal (*Dziennik Ustaw*, abbr. Dz. U.) in which the concordat was published in 1925. This led some conservative lawyers to assume that the concordat was still binding: one of the courts in Poznań stated one year later, in 1946, that the concordat was still in force.¹¹ The Holy See expressed also its opinion quite informally, on radio. It is easy to notice that although the Vienna Convention on Treaties was signed some 24 years later, the behaviour of the communist government did not meet international standards.

The communists continued to follow an anti-religious policy: officially, the March Constitution of 1921 was still in force, but the government abused it often and in many spheres of life. In September 1946 the Bishops' Conference, in a formal memorial, asked the government to respect the constitution and the rights of believers and of the church. At the same time, the church kept reminding believers how important it was to cooperate and work together in order to rebuild the country, so badly damaged

⁹ Interestingly, during the time of the second Republic (1918-1939) the President of the Republic used in the Official Journal the plural form "we, Stanisław Wojciechowski".

¹⁰ Text of a concordat in Dz. U. (Official Journal) 1925, No. 72.

¹¹ H. MISZTAŁ (ed), *Prawo wyznaniowe* (Lublin, 2000) p. 138.

during World War II. In 1947 the communist *Sejm* adopted a new constitutional law (traditionally called *Mała konstytucja* – the small constitution) the wording and content of which were very clear in terms of State-church relations. During the time of the communist regime (1944-1989) discussion about a new concordat was not possible. Even in the 1970s and at the beginning of the 1980s, although the Archbishop of Cracow Cardinal Karol Wojtyła was elected Pope, the communists were still quite reluctant to cooperate with the church. This situation lasted till the end of 1980s. In May 1989, just three weeks before the historical elections of 4 June 1989 (when *Solidarność* won 99 out of 100 seats in the Senate), the *Sejm* passed a statute on freedom of conscience and religion. Diplomatic relations with the Holy See were resumed in July 1989.

2. The concordat of 1993

As was the case after 1918, the question of a concordat seemed to be important and urgent. The new concordat, signed in 1993 and ratified in 1998, was the subject of long political disputes and debates and deserves a separate section in this paper.¹² The first draft of a new concordat, accepted both by the government and the Bishops' Conference, was sent to the Vatican in May 1988, but there was no response. In September 1991 the Minister for Foreign Affairs presented a new draft, different from the previous one, but it was rejected by the Polish Parliament, the *Sejm*. Shortly after this, the Holy See delivered its own new draft, which was discussed by a commission of 12 persons, representing Poland and the Holy See. The text was adopted by the government on 1 June 1993 and signed on 28 July 1993. It took four years until the concordat was ratified, due to the fact that there were quite a number of provisions that were described as "dubious" or "unsatisfactory".

From the legal point of view, the moment the concordat was signed was highly controversial: a few weeks before, the government of Ms Hanna Suchocka, the first Polish female Prime Minister, failed to win a vote of confidence in the Council of Ministers. Despite this, the Minister for Foreign Affairs, Mr Krzysztof Skubiszewski, signed the concordat. This was one of the most important issues in a political debate which lasted over four years: was a government lacking the confidence of Parliament empowered to conclude such an important international treaty?

¹² For a detailed history of the ratification of the concordat: A. FRANKIEWICZ, *Prawne zagadnienia okoliczności podpisania i treści konkordatu z 1993 r.*, w: *Przegląd Prawa i Administracji*, XLII (Wrocław, 1999) p. 109.

The Alliance of the Democratic Left (SLD – *Sojusz Lewicy Demokratycznej*) won the subsequent elections in September 1993. The same persons who were active in political life as members of the communist party until 1989, were forming a new social-democratic government. The final result of those four years (1993-1997) was that by the end of the life of the *Sejm* (1997), and after three governments formed by the SLD, the concordat was still not ratified. A major obstacle was the provision that religious marriage would have effect in civil law. A fear of deputies was primarily connected with the concordatarian obligation of a priest to submit within 5 days the certificate of marriage to the local Office of Civil Registration (USC – *Urząd Stanu Cywilnego*). The USC is obliged to issue a (declaratory) certificate that the marriage is valid in state law. The deputies, especially the SLD-deputies, claimed that this provision infringed the rights of other churches and gives the Catholic Church a predominant position. The second reason was – and the deputies were quite convinced about this – that priests would neglect their duties. A general mess, bigamy, “underground marriages”, “shadow-marriages” and few others were the most frequently used terms to describe what was supposed to happen if the concordat came into force.

A group of deputies wanted to block the concordat and asked the Constitutional Court whether a concordat conformed to the constitution of the Republic. A key question was whether the Constitutional Court was empowered to determine the conformity of a concordat to a constitution that did not exist. By this time, a draft constitution had been discussed by a joint committee of the National Assembly (*Sejm* and *Senat* together). The Court stated in its judgment, 28 November 1994, that it was allowed to establish the conformity of international treaties to the Constitution, but the Court underlined that this meant a constitution being in force, and not a future constitution the provisions of which are as yet unknown.

Already, on 11 August 1993, a bishop of the Lutheran Church, J. Szarek, by this time the President of the Polish Ecumenical Council (see below), expressed his opinion that rights and privileges of the Catholic Church should be extended to other churches and religious communities.¹³ This happened in June 1997, when a “statute to amend the statute on freedom of conscience and religion” was passed. By this statute, in relation to eleven religious denominations (Catholic, Orthodox, Lutheran, Reformed, Methodist, Baptist, Adventist, Polish-Catholic,

¹³ A. FRANKIEWICZ, op. cit., p. 130.

Jewish Communities, Old Catholic Mariavite and Pentecostal), an ecclesiastical marriage may have effects in civil law.

The concordat was finally ratified by a new, right-oriented *Sejm* and published in its Official Journal.¹⁴ The provisions of the concordat did not change substantially the legal position of the Church. Under the concordat: the Holy See must inform the State about a person to become a bishop; and the Church has the right to exercise its own jurisdiction, but judgments of ecclesiastical courts do not have any impact on Polish state or civil law. This means that in the case of an ecclesiastical marriage with civil consequences, a married couple has to obtain divorce from the state court and may seek the annulment of the ecclesiastical marriage. In 1997, a new legal institution was introduced to the Polish family code of 1964: separation. Separation is almost the same as divorce, but neither of the ex-spouses may enter a new marriage.

V. Dialogue between the State and churches and religious communities

1. Dialogue in practice

The government and the Catholic Church have created two special commissions responsible for dialogue: the Ecclesiastical Concordatarian Commission, chaired by Bishop Tadeusz Pieronek, and the Government Concordatarian Commission, appointed by the Prime Minister. Those two commissions replaced the former “common commission of the Government and the Episcopate”. The main fields of their activity are questions about the insurance for clergy, some problems connected with finance, and chaplaincies. The ecclesiastical commission consists of five members: three bishops and two excellent specialists of church-state law: Prof. Dr. Remigiusz Sobański and Dr. Witold Adamczewski.

State contact with other churches and religious communities takes place on two levels: working meetings and official meetings. The official responsible for contact with churches and religious communities nationally is the Minister for Internal Affairs and Administration and locally the *voivod* (a representative of the government).¹⁵ In every office of the *voivod* there is a small department dealing with religious denominations.

¹⁴ Dz. U. 1998 No. 51 item 318.

¹⁵ Since 1999 Poland has been divided into 16 “voivodships”. Neither of them have autonomy, since Poland is a unitary State (Art. 3 of the constitution).

During the period 1944-1989, those entities were responsible for "monitoring" churches and religious denominations: what kind of "monitoring" it was is easy to guess. Currently, those units are basically responsible for the restitution of real estates and cooperation with ecclesiastical bodies and the Ministry.

The official contacts of churches and religious communities also take place on a higher level. The press office of the President of the Republic publishes periodically throughout the year information about the main activities of Mr. Aleksander Kwaśniewski.¹⁶ One part of the publication is permanently devoted to his presidential meetings with the representatives of churches and religious communities. All meetings are listed, and some parts of the President's speeches are published. In one 18-month period, between January 2003 and June 2004, Mr. Kwaśniewski went twice to Rome to participate in the Holy Mass and in celebrations on the occasion of the birthday of the Holy Father. He was received twice by His Holiness in the Vatican (18 May 2003 and 18 May 2004). On 16 March 2004 the President met in his palace the Primate Cardinal Józef Glemp. Mr. Kwaśniewski also receives various distinguished representatives of churches and religious communities visiting Poland and he pays particular attention to relations with the Orthodox Church; for example, he has received Anastasios, Archbishop of Tirana, Durres and Albania (20 May 2003), Chrystodoulos, Archbishop of Athens (21 August 2003), Herman Archbishop of Washington and the whole of the USA and Canada (5 September 2003); and he met the Orthodox military bishop and some military chaplains (24 May 2004). Some distinguished guests (e.g. Archbishop Desmond Tutu) came to visit the President in his palace (11 March 2004). In 2003, Mr. Aleksander Kwaśniewski took part in the annual meeting of the Polish Ecumenical Council (PRE, see below). The President attends religious services, without active participation, and he frequently expresses his reverence towards Pope John Paul II.

2. Dialogue and the special matter of the restitution of ecclesiastical property

After regaining full sovereignty in 1989, several important social processes accompanied the democratisation of the state. One was the process of restitution of ecclesiastical real estates. This would not have been possible without dialogue which took place in the form of the so-called "Assets

¹⁶ Informator Kancelarii Prezydenta RP.

Regulation Commissions." However, one should underline that churches and religious communities in Poland have never been extensive real-estates owners. The Catholic Church, the greatest owner amongst religious bodies, owned before World War II altogether about 150,000 *ha*, which was less than the real estates of Count Jan Zamoyski, who owned some 190,000. The agricultural real estates of nobles and rich farmers were confiscated under a Decree of 1944, but ecclesiastical properties were excluded from the decree. Nationalisation of forests exceeding 25 *ha* was carried out under the decree of 1944, but the forests owned by churches were not excluded. Ecclesiastical real estates were finally confiscated under a statute of 1950 on "hand over" of the so-called "dead hand" properties. According to this law, churches were left agricultural estates not exceeding 50 *ha* to satisfy the personal needs of a rector, or 100 *ha* in Northern and Western parts. This means that only those parts over 50 or 100 *ha* should have been confiscated, and not the entire property. Moreover, monasteries were to be allowed to retain up to 5 *ha*, and 50 *ha* for bishops and seminaries; but the communist authorities did not honour this. Generally, about 120,000 *ha* were confiscated, and 35,000 *ha* were retained. Those responsible for nationalisation were very eager, as happened many times, to confiscate even such properties which, according to the statutes or decrees, should have been left to the churches. All those legal and illegal acquisitions were legalised by a law of 12 March 1958 by which law the confiscation of ecclesiastical real estates in Poland was complete.

The process of restitution commenced twelve years later, in 1970, but many more detailed provisions following in statutes of the 1990s. Under a statute of 1971, churches and religious communities obtained the first opportunity to assure their property rights. This happened through a declaratory decision of the *voivod* which confirmed the status quo. The restitution of ecclesiastical assets is regulated in many statutes, relating to different churches and religious communities. General provisions may be found in statute on freedom of conscience and religion 1989. There are several types of restitution procedure:

- declaration of the *voivod* to confirm the status quo (introduced in the 1970s)
- process before the Assets Regulation Commissions
- detailed regulations for smaller churches and religious communities which name particular real estates

A decision of the *voivod* may be subject to appeal to an administrative court for failure to act if within two years after commencement of the

procedure no decision has been issued by the *voivod*. There are five separate Assets Regulation Commissions:

- The Catholic Church-Assets Regulation Commission (art. 61 of the statute on relations with Catholic Church); a detailed procedure, 8 February 1990, M.P. (Monitor Polski) 1990 No. 5, item 39.
- The Inter-ecclesiastical Regulation Commission for the Reformed Church, Methodist Church, Christian Baptists Church, and Pentecostal Church (art. 38a of the statute to guarantee freedom of conscience and religion): a detailed procedure; 9 February 2000.
- The Regulation Commission for the Lutheran Church (art. 40 of a statute of 13 May 1994); detailed procedure, 12 October 1994.
- The Regulation Commission for Orthodox (4 July 1991); detailed procedure, 14 May 1999.
- The Regulation Commission for Jewish Religious Communities (art. 30 and 31 of the statute of 20 February 1997); detailed procedure, 10 October 1997.

All Commissions work in teams consisting of four persons: two members representing the government (Treasury Ministry) and two representing the church or religious community. These rules apply in the case of the Assets Regulations Commission for the Catholic Church too, although there are many teams, working simultaneously. The Inter-ecclesiastical Commission has eighteen members, representing diverse churches and religious communities. The Commission works in teams, consisting of two representatives of the government and two representatives of the interested church/religious community. The procedure consists of mixed elements both of a civil and administrative form. If the members of the Commission (or team within the Commission) consider that they will not be able to reach an agreement they may present the case to a court and an ordinary procedure, which includes a right of appeal, is launched. However, this happens very rarely: among 1,950 applications submitted by the Catholic Church, only 9 cases were brought to the court.

The primary aim of assets regulation is the return of the same real estate. In the case of cemeteries this is the only possible solution. When return of the same property is not possible, another property from state resources, and of equal value, is offered. If this is not possible either, compensation should be paid from the budget of the *voivod*. However, this does not happen due to absence of such provision in the budget of the *voivod*. Interestingly, churches and religious communities turn out to be relatively patient (so far!). The work of a Commission (or a team) must

not infringe the rights of any third persons, especially of other churches and religious communities or individual farmers. If a former ecclesiastical real estate, subject to the regulation procedure, is currently owned by private persons (both legal or natural), the *voivod* is the relevant party. The judgment of the Commission is an order for enforcement. All the expenses of the Commissions are covered by the State budget.

The restitution of property is basically regulated in the statutes on relations between the State and churches and religious communities. By this the restitution is limited to those churches and communities only. One of the reasons was a fear that people may found religious communities only in order to obtain free real estate from the State. However, a few cases of "Epifania" and other religious communities, registered under the law of the second Republic, were settled. There is a dispute between the Greek-Catholic Church and the Orthodox Church, concerning "a few" Greek-Catholic temples given by the communist authorities to the Orthodox Church. The formula "a few temples" is used deliberately, as the exact number of temples in dispute is unclear. In a case like this, when two churches claim ownership, the property still belongs to the State. Some churches are so small that the relevant statute includes detailed provisions about the properties (the exact address and position in the real-estates register). Statutes passed before World War II (Eastern Church of Old-Rites, Muslims, Karaims) do not contain any provisions on restitution.

Unfortunately, neither the Polish Ministry of the Interior and Administration nor the Treasury Ministry are willing to share statistical data. In the period covered by the statute, 3,033 applications were submitted to the Commission by the Catholic Church.¹⁷ Till the end of 1998, the Commission completed 1,995 trials; 1,605 applications were settled, half of them (811) were settled by agreement. In 381 cases, a quarter of all settled cases, the claim of the Church was rejected. The ecclesiastical institutions received some 46,000 *ha* of agricultural and forest lands. The Lutheran Church applied for 1,209 properties; 690 applications have been already settled, some 40 % of them were discontinued. The rest – usually the most complicated cases – await settlement. The Jewish communities applied for some 5,000 properties. So far there has been no single compensation in cash. Process before the Commissions can last for years.

¹⁷ The figures according to: M. WINIARCZYK-KOSSAKOWSKA, *Państwowe prawo wyznaniowe w praktyce administracyjnej* (Warszawa, 1999) p. 72-73.

3. *Dialogue and the Polish Ecumenical Council*

As stated earlier, there are in Poland currently fifteen churches and religious communities whose legal situation and relation with the State is regulated in separate statutes. There are approximately 145 other religious communities, registered in accordance with the statute on guarantees of freedom of conscience and religion 1989. According to this statute, a group of 100 Polish citizens may found a church or a religious community, and later 15 persons, which in fact was abused in different ways, especially in relation to taxation and army service. In most cases, they are very small communities consisting only of one parish or similar entity, as a result of withdrawal from a larger denomination. There is no doubt that the Catholic Church is the most important player among all churches and communities in Poland: 35 million out of almost 39 million Poles were baptised as Roman Catholics. Even if one takes into account that, according to various statistics, only 40% of them attend church on Sunday on a regular basis (approximately 17% in big cities, and some 62% in villages), this still represents 14 million *dominicans*. This number, in comparison with 500,000 persons baptised as Orthodox, shows the overwhelming majority of Roman Catholics in Poland. The third denomination – in terms of number of adherents/believers – is the Greek Catholic Church (123,000) followed by Jehovah Witnesses (122,000) and the Lutheran Church (83,000, with approximately 80 % as *dominicans*).

This (not only statistically) overwhelming power of the Catholic Church is supposed to be balanced by the Polish Ecumenical Council (*Polska Rada Ekumeniczna*- PRE). PRE is recognised and registered as an inter-church organization,¹⁸ and consists of following members: the Lutheran Church, Orthodox Church, Polish Catholic Church, Evangelical Reformed Church, United Methodist Church, Old Catholic Church of Mariavites and Baptist Union of Poland. Church members of the PRE are members of the CEC-KEK (see below). The Catholic Church is not a Member of the PRE, but cooperates with it. PRE works in fifteen regional teams, chaired by hierarchs from its member churches. One of the crucial achievements of PRE was to issue a declaration on mutual recognition of baptism that was signed by all its member churches and the Catholic Church. Beside the Polish Ecumenical Council there are four smaller inter-ecclesiastical organisations (e.g. Polish Buddhist Union and the Biblical Society in Poland), but they are of limited importance.

¹⁸ Registered by the Minister of the Interior and Administration.

4. *The dialogue with European institutions*

The bishops showed interest in European integration since their memorable visit to Brussels, when they met EU-commissioners and discussed a variety of issues with representatives of EU institutions. Dr. Michael Weninger, responsible on behalf of the President for dialogue with churches and religious communities, formerly an Austrian diplomat in Warsaw and skilled in the Polish language, enables contact. The Catholic Church participates actively in works of the COMECE – the Bishops' Conference of the European Community. Mgr Henryk Muszyński, Archbishop of Gniezno, used to be Polish observer at COMECE, and since 1 May 2004 he has been a full member of the Commission. Seven major non-catholic churches became members of CEC-KEK (Conference of European Churches). Their position was not altered by Polish accession to the EU, as churches from the non-member states of the EU have equal rights.

While discussing the final wording of the Treaty establishing the constitution for Europe, the Polish government was in favour of "Christian roots" in the preamble. Unfortunately, the Prime Minister Mr Marek Belka did not convince other heads of states and governments. However, his efforts were appreciated both by the Catholic Church in Poland and by the Holy See.

VI. Conclusions

The most important instruments of dialogue between State and Church are the concordat with Holy See 1993 and fifteen statutes on relations between the state and prescribed religious denominations. A concordat is a comprehensive treaty, and it should be underlined that "concordat" is its proper name (not *modus vivendi*, *intesa* or any other contemporary word). The statutes are very similar to each other, were passed between 1928 and 1997, and are unilateral acts on the part of the state. They do not correspond with the Spanish idea of an agreement or the German idea of *Staatskirchenvertrag*. According to the approach proposed (in debate at the Consortium meeting) by Prof. Dr. Rik Torfs, church-state relations in Poland are based on level 1 (concordat as international agreement) and level 3 (statutes as the result of negotiations with a religious denomination, but not formally based on an agreement).

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COVENANTAL AND NON-COVENANTAL COOPERATION
OF STATE AND RELIGIONS IN PORTUGAL

The *Constitution of the Portuguese Republic* of 1976 does not refer to any form of covenantal or non-covenantal dialogue between the state and religions.¹ It is however clear that the existence of agreements between the state and religions has a sound constitutional basis. It provides the foundation, from the side of religions, upon which they are separated from the state, and free in their organization and the exercise of their functions and worship (article 41, N° 4 of the Constitution) and, from the side of the state, for one of the “fundamental tasks” of the state, namely, “to guarantee fundamental rights and liberties” (article 9, b) of the Constitution). Since the collective rights of religious liberty can not be exercised in many cases without the cooperation of the state, some sort of dialogue and of agreement is needed, even if it is obtained in an administrative fashion, by demand or through meetings with individuals. But then it is of great advantage for both state and religions to have general agreements. In Portugal there is a long tradition of agreements with the Catholic Church, which culminated in the concordats of 1940 and 2004. There is also a legal basis for agreements with religions which are settled in the country in the *Religious Liberty Act* of 2001, which was itself the result of a very extensive consultation with the registered religions.

I. Historical survey of the agreements with the Catholic Church

As soon as Portugal became independent in 1143, the first King of Portugal, Afonso Henriques, seeking to have his kingdom recognized, entered a feudal relationship with the Pope as a vassal paying tribute in 1143. The Pope accepted the vassalage in 1144, but only recognized him

¹ The same can be said of Germany, which has the most extended system of contractual law on religion.

as a king in 1179. After this contract with the Pope, there were agreements called *concordias* between the King and the Portuguese bishops in 1210, 1223, 1238, 1243, 1361, 1391, 1427, 1455, 1458, 1516, 1642 and some others of uncertain date. Some of them were confirmed by bulls of the Pope, as with the bulls *Si illustris Rex Portugaliae* of 1238, and *Hiis quae pro personarum* of 1516. Some were included in the official Portuguese digests of laws, the *Ordenações Afonsinas* (1447). There were also concordats with the Pope, concluding diplomatic negotiations: in 1289, with 52 articles covering all the main subjects of common interest, which was negotiated by the bishops in the name of the church and accepted by the Pope; in 1737 and 1745, both about the institution of a patriarch in Lisbon; in 1778, and 1848, about the problems resulting from the irregular nominations and depositions of bishops (the so called "schism of 1832-48") during the civil war between absolutists and constitutional monarchists; in 1886 and again in 1928 and 1929, these three about the *padroado*, the special rights and duties of Portugal related to the dioceses in India, Macau and Timor, some of them outside Portuguese sovereignty. The concordats of 1928 and 1929 were each called an *acordo* (agreement), but were negotiated and ratified like treaties or concordats.

Finally, there were the two concordats of 1940, one called "concordat" and the other, annexed to the first, called "missionary agreement", and finally the concordat of 18 May 2004. Both are generic concordats, which aimed, as said in the preamble of the 1940 concordat, "to rule by agreement and in a stable manner, the legal situation of the Catholic Church in Portugal, for the peace and the greater good of the Church and the State". Between these dates, the Holy See and Portugal changed the 1940 Concordat in one point, by introducing the possibility of civil divorce of catholic marriages, through the Additional Protocol to the Concordat, of 15 February 1975,² and reached agreements, that were not officially published in Portugal, in 1950, about the *padroado*, reducing it to dioceses in territory under Portuguese sovereignty, in 1952, about the reduction of "holy days", so that the remaining ones are state holidays, after 1974, reducing the right to *padroado* to Macau and disposing about the military bishop assisting the armed forces.³

² Published in April 4, 1975.

³ See António LEITE, "Acordos entre a Santa Sé e Portugal anteriores à Concordata de 1940", António LEITE *et al.*, *A Concordata de 1940 Portugal – Santa Sé* (Lisboa, Didaskalia, 1993) 11- 27.

II. The concordat of 18 May 2004

The *Religious Liberty Act (Lei da Liberdade Religiosa)* of 22 June 2001, in Article 58, provides that the Concordat between the Holy See and the Portuguese Republic dated 7 May 1940, the Additional Protocol to the same of 15 February 1975, as well as the legislation applicable to the Catholic Church, remain untouched, and as not being subject to the provisions of the Act which relate to churches or religious communities registered or settled in the country. The lack of constitutionality and unjustifiable inequalities of the concordat of 1940, and the legislation which developed it, were to become politically unsustainable. Hence the socialist government, which had in the first place submitted the Act to Parliament in April 1999,⁴ asked the Holy See to initiate negotiations for the revision of the concordat. The Holy See and the Portuguese Bishops' Conference, in a communiqué of 9 February 2000, responded positively. Parliament backed the Government in a resolution of 19 April 2000.⁵ The Portuguese negotiating committee was constituted on 6 June 2001.⁶ In a way such negotiations were facilitated by the fact that the Catholic Church had participated very actively in the preparation of the Act, responding to each public hearing of the religious communities with propositions or comments on the text of each article, under the presupposition that the regime applicable to the religious communities settled in the country should be acceptable to the Catholic Church.⁷

The concordat was negotiated by two committees, one of the Portuguese Republic, presided over by the Portuguese Ambassador to the Holy See (Ribeiro de Menezes), with two lawyers (representing the Minister of Justice – Gil Galvão – and the Minister of Foreign Affairs – João Geraldes, substituted, after a change in government, by Cerradas Tavares), and one of the Holy See, presided over by the *Nuntius* in Lisbon (Eduardo Rovida), with the former President of the Portuguese Bishops'

⁴ The Act resulted from a Project of Law (Projecto de Lei Nº 27/VIII, *Diário da Assembleia da República*, II série-A, 3-12-1999, p. 108-(2)) by socialist MPs, among them the former socialist minister of justice, Vera Jardim, who had in the antecedent legislative period presented the same text to Parliament as a Law Proposal of the Government (Proposta de Lei Nº 269/VII, *Diário da Assembleia da República*, II série-A, 24.4.1999, p.1614).

⁵ Resolução da Assembleia da República nº 39/2000 of 19 April 2000.

⁶ Resolução do Conselho de Ministros nº 67/2001 of June 6, 2001.

⁷ The President of the Committee for the Reform of the Religious Liberty Act advocated in a Memorandum of 7 July 1998 a revision of the 1940 Concordat and the Report of the Law Proposal of the Religious Liberty Act says that "the Concordat is anachronistic".

Conference (João Alves), who presided after retirement of the *Nuntius*, and a law professor of the Catholic University (Sousa Franco), who had subscribed as minister of finance the proposal of the Religious Liberty Act. The text was first suggested by the Portuguese side, which had asked for the revision, and was discussed in common sessions. The Government, the Bishops' Conference and the Holy See were regularly informed and the Bishops' Conference gave advice when asked. The final text was examined by the Secretary of State of the Holy See and by the President of the Portuguese Republic and was signed in Rome on 18 May 2004 by the Secretary of State Cardinal Angelo Solano and the Prime Minister Durão Barroso. The Portuguese Parliament approved the treaty for ratification on 30 September 2004. As a treaty, the concordat of 18 May 2004 came into force on 18 December 2004 after exchange of ratifications and publication in the Portuguese official journal (*Diário da República*).⁸

What is different in the new concordat? The 2004 Concordat was agreed in a setting historically very different to that in 1940. Its scope is different. And it will probably have a different impact. These are reflected by the preambles. The 1940 Concordat begins: "In the name of the Most Holy Trinity"; and it provides that the solemn convention should recognize and guarantee the liberty of the Church and protect the legitimate interests of the Portuguese Nation, including those relative to the Catholic Missions and the *Padroado* of the Orient. The part which deals with the latter constituted the Missionary Agreement (*Acordo Missionário*), which was separately signed in the same act and form. The missions were subsidised as needed by the Government, which paid honoraria to the bishops, apostolic vicars and perfects as well as their pensions and those of the other missionary personal. In continental Portugal neither the Church nor the clergy were subsidised. The missions had to teach the Portuguese language in their schools. Since Portugal has no more territories overseas, it seems that the Missionary Agreement became void.⁹ The 2004

⁸ The Concordat between the Portuguese Republic and the Holy See of 18 May 2004 was published in the *Diário da República* 16 November 2004 as an annex to the Resolução da Assembleia da República n° 74/2004, of 20 September 2004, was ratified by Decreto do Presidente da República n° 80/2004 of November 16 and the instruments of ratification were exchanged on 18 December 2004, as announced in the Aviso n° 23/2005 published in the *Diário da República* of 26 January 2005. According to Article 33 of the Concordat, it comes into force with the exchange of the instruments of ratification.

⁹ The site <http://agencia.ecclesia.pt> of the Catholic Church in a "Sinopse das concordatas de 1940 e 2004 entra a Santa Sé e a República Portuguesa" says that "the Acordo Missionário ceases to exist, for obvious reasons" (note to article 31).

Concordat does not have an additional concordat as a second part, but in Article 33 it "substitutes" and therefore abrogates expressly the 1940 Concordat. It says nothing similar about the Agreement, in spite of the fact that even after the independence of the former colonies the Missionary Agreement has been considered in force to justify the maintenance of pensions and of taxation benefits. Article 31 provides only that "the existing legal situations constituted under the Concordat of 7 May 1940 and under the Missionary Agreement remain untouched". This article is bound to give rise to many difficulties as to the situations covered. It is clear that the State continues to pay the pensions of the missionaries that are receiving them under the Agreement. But some kind of systematic argument is needed to prescribe – as it should be prescribed – that the existing taxation benefits are not maintained.

To recognize and guarantee the liberty of the Catholic Church was certainly an intended impact of the 1940 Concordat, since at the time the wounds of the "war" the republican regime waged between 1910 and 1918 against the Catholic Church (the main republican political party, the Democratic Party, aimed at the eradication of the Church within three generations) were still deeply felt. The State was in 1940 prepared to give more than that: state schools should be guided by Christian doctrine and morals in its traditional catholic interpretation (Concordat, Art. 21), the indissolubility of catholic marriages was enforced by the State (Art. 24), and the next revision of the constitution (in 1950) was to declare that Catholicism is the religion of the Portuguese nation.¹⁰ In turn the Church accepted political objections from the State to the nomination of bishops (Art. 10 of the 1940 Concordat and Art. 7 of the Missionary Agreement).¹¹ Therefore the 1940 Concordat was an agreement of religious and political cooperation, which changed the real constitution from a system of separation of church and state to a jurisdictional system, notwithstanding the formal separation declared in the constitution.

¹⁰ Shortly after the Concordat, the Administrative Code of 1940 (article 449) made it practically impossible until 1974 for other religions to acquire legal personality.

¹¹ The political objections were secret, but it is known that they were made against the nomination of a native bishop to Nova Lisboa, Angola and of D. António Ribeiro, who would be later accepted as bishop of Lisbon, as bishop of Beira, Mozambique, where he would have succeeded to a politically incommodious bishop (D. Sebastião Soares de Resende), against whose nominations to Lourenço Marques and to a diocese in Portugal political objections were made. Not the letter, but the spirit of the Concordat explains the exile of the bishop of Porto in 1959, who stood up for democracy, and its acceptance by the Holy See and by the Portuguese Church. See Manuel BRAGA DA CRUZ, *O Estado Novo e a Igreja* (Lisboa, Bizâncio, 1999) 114-156, 164-165.

In the preamble of the 2004 Concordat there is no invocation of the Trinity. It begins with the assertion: "the Catholic Church and the State are autonomous and independent in each [one's] own order". The liberty of the Church needs neither treatment nor mention. Instead religious liberty is mentioned as "the context" within which State and Church cooperate; and it sets limits to such cooperation. The historical relations with the Catholic Church are invoked and the 1940 Concordat is praised as having reinforced such ties and as having consolidated the activity of the Catholic Church for the benefit of the faithful and the whole community. There is no qualification to such praise, but it is recognized that an actualization is needed because of subsequent profound national and international developments, especially because of the new democratic Constitution of Portugal, open to the norms of the European Community and of contemporary international law, and because of the evolution of the relations between the Church and the political community.

The unconstitutional aspects of the 1940 Concordat¹² have been systematically removed. According to Article 9 of the new concordat the Church has only to communicate to the State the bishops that she freely nominates or removes; it does not have to wait thirty days for eventual "objections of general political character", as foreseen under Article 10 of the 1940 Concordat.

Instead of the former requirement (old Article 9) for bishops, pastors, rectors of seminaries, and superiors of congregations to be Portuguese, now the Holy See only declares that no part of the Portuguese territory will be dependent on a bishop resident in foreign territory (Article 9, n° 5).

Ecclesiastic officeholders no longer have the same protection from the State as do public authorities (Article 11); the State merely "ensures, according to Portuguese law, the necessary measures to protect places of worship and ecclesiastical officeholders and to avoid the illegitimate use of catholic practices or means" (Article 7). What does "illegitimate" mean? Since the State cannot constitutionally enforce the canonical legitimacy of religious practices, it should mean: "against the legal rights of the Catholic Church".

Military chaplains are graduate officers of the armed forces subordinate to a Military Ordinariate (Article 18 of the 1940 Concordat). There

¹² The arguments for them can be found in Jorge de MIRANDA, "A Concordata e a ordem constitucional portuguesa", in António LEITE *et al.* (note 2), 67-84. They have been taken up in the Memorandum mentioned in note 7 and in the Report of the Law Proposal of the Religious Liberty Act.

is nothing similar in the 2004 Concordat: the Military Ordinariate will provide religious assistance to those who ask for it and its forms and organization are left for a future agreement (Article 17). The existing legal position of the military bishop and military chaplains in office as graduate officers remains untouched (Article 31).

Ecclesiastic officeholders are no longer exempt from taxation with regard to income, as they were under Article 8 of the 1940 Concordat, in spite of the fact that a similar exemption for public officials had been abolished. Article 26 of the 2004 Concordat reproduces closely the wording of Articles 31 and 32 of the Religious Liberty Act 2001. However, the facility to assign 0, 5% of income tax to the Church, which was introduced in the Act, to compensate for the abolition of the exemption of VAT (effected by restitution of the VAT already paid), remains as a possible option for the Bishops' Conference or as the matter to be treated by subsequent agreement (Article 27).

Article 15 of the 2004 Concordat reproduces Article I of the 1975 Additional Protocol to the Concordat, which recognized the possibility for Catholics to obtain civil divorce, bearing in mind of course the religious prohibition against doing so.

Action concerning nullity of a catholic marriage is no longer reserved to ecclesiastical jurisdiction as was the case under the 1940 Concordat (Article 25). Decisions about nullity or the dissolution (or "dispensation") of a ratified but non-consummated marriage, once confirmed at the appellate level, become effective in civil law after review and confirmation under Portuguese law. The Portuguese court does not order automatically their execution, as before, but "has to verify: a) if they are authentic; b) if they come from the competent court; c) if the principles of contradiction and of equality have been respected; and d) if the resulting consequences do not offend the principles of the international public order of the Portuguese State" (Article 16). These provisions pose some difficulties, as the words used in them are appropriate to nullity cases but not to dissolution cases, in which "the dispensation is granted by the Roman Pontiff alone" (canon 1698, §2), without a prior appealed decision and without possibility of appeal.

The teaching of Catholic religion and morals is no longer provided in State schools below college level except by means of a dispensation (Article 21, which in this particular point was declared unconstitutional by the Constitutional Court¹³), but rather is given "without any form of discrimination" only to those who ask for it (Article 19).

¹³ Decision n° 423/87 (*Acórdãos do Tribunal Constitucional*, 10, 77).

With respect to provisions which are entirely new, Article 1 of the Concordat asserts that the State and the Catholic Church are committed to cooperation for the promotion of the dignity of the human person, justice and the peace. A similar principle of cooperation is found in the Religious Liberty Act with regard to all religious communities settled in Portugal (Article 5, n° 1). Article 4 provides that “the cooperation referred to in n° 1 of article 1 can cover activities carried out within such international organizations to which the Holy See and Portugal are parties or, with due respect for international law, other joint actions, bilateral or multilateral, especially in countries where Portuguese is the official language”. Article 29 institutes, as a development of the principle of cooperation, a Parity Committee which functions in cases of doubt in the interpretation of the Concordat, looks for a mutually agreed solution and recommends measures for the better execution of it. Article 28 provides that the content of the Concordat can be “developed” through agreements between “the competent authorities of the Catholic Church and of the Portuguese Republic”.

The Concordat provides that the Portuguese Catholic University was “erected by the Holy See on 13 October 1967 and recognized by the Portuguese State on 15 July 1971”, and that it develops its activity according to Portuguese law, without discrimination, “respecting its institutional specificity” (Article 21, n° 3). In fact the Catholic University was established through the constitution of the Philosophy Faculty – which had been erected by the Jesuits in 1947 as a private school – as the first Faculty of that University, through the Decree *Lusitanorum nobilissima gens*, 13 October 1967, of the Sacred Congregation of Seminaries and Universities. The Catholic University as such, with three faculties, Philosophy, Theology,¹⁴ and Human Sciences, was only erected¹⁵ by the Decree *Humanam eruditionem*, 1 October 1971, issued by the Sacred Congregation for Catholic Education, after it had been legally created as a “legal person of public utility”, according to civil law, by the Decree-Law n° 307/71 of 15 July 1971.

What is the “institutional specificity” of the Portuguese Catholic University? It is “*concordatária*”: that is, in accordance with the 1940 Concordat. This implies, as was said in the preamble of the Decree-Law

¹⁴ Erected simultaneously by the Decree *Ampla cum sedes* of 1 October 1971 of the Sacred Congregation for Catholic Education.

¹⁵ Namely: “*penitus nunc canonice ad normam can. 1376 C.I.C. erigitur*”; i.e. it “is now completely erected canonically according to canon 1376 C.I.C.”.

n° 307/71, that according to Art. 20, n° 3 of the 1940 Concordat in the establishments of ecclesiastical education (i.e. the Faculty of Theology, the Faculty of Philosophy and a future School of Canon Law), the internal regime and the teaching of theology and philosophy are not controlled by the State. It also implies that according to n°1 of same article the establishments analogous to those of the State are, like other “private schools” of the Church, subject to State control and to the general law; today there is in Portugal a “*diritto commune*” for private universities. However the Church obtained from the State in 1990 a Decree (Decreto-Lei n° 128/90 of April 17) which states that the Portuguese Catholic University “was canonically erected according to article XX of the Concordat”. This was misleading, since the University was erected canonically under Canon 1376 after being created by the State according to administrative law and respecting article XX. Moreover, the ecclesiastical faculties, establishments, disciplines, degrees, etc., and the non-ecclesiastical ones, are free from State control and not regulated by the law common to private universities. Since then the “institutional specificity” of the later faculties, etc. is a matter of conflicting opinions which remain after 2004. In my opinion the only relevant institutional specificity relates to the ecclesiastical establishments. The non-ecclesiastical ones are subject to Portuguese law “according to the preceding numbers” (n°3 of Article 21 of the 2004 Concordat), i.e. “without any form of discrimination” (n°1) and “as established by the Portuguese law for similar schools” (n°2).

The 2004 Concordat sets out in Article 30 a provisional list of holy days, besides Sundays, which confirms those agreed in 1952 outside the Concordat. The list is provisional as a new agreement under Article 28 is promised in Article 3, n° 2.

Article 8 recognizes the Portuguese Bishops’ Conference as a legal person in accordance with the statutes approved by the Holy See. As did Article 1 of the 1940 Concordat, Article 1, n°2 recognizes the Holy See as a legal person.

III. Agreements between non-catholic religious corporate bodies and the State

The *Religious Liberty Act* of 2001 considered as a consequence of the principle of equality that non-catholic churches and other religious communities should have the opportunity to enter agreements with the State as close as possible to concordats from the perspective of their legal force. Since such agreements cannot be treaties, they should have the force of

law. However, the Act neither favours nor recommends such agreements, unless they are needed, because they tend to multiply inequalities. The very existence of the *Religious Liberty Act* should make superfluous the usual dispositions of such agreements, since they are already included in the Act. Therefore the State can refuse to negotiate such an agreement whenever the practical aims of a proposed agreement can be reached without a law (article 47, c)).

Churches or religious communities settled in the country, or federations in which these are integrated, may propose the conclusion of agreements with the State on matters of common interest (Article 45). The agreement proposal is submitted through an application requesting the opening of negotiations and is addressed to the Government minister for justice. Having heard the Religious Freedom Commission on the agreement proposal, the minister may (Article 46):

- (1) Justifiably refuse to negotiate the agreement;
- (2) Appoint a negotiating committee, composed of representatives of the Ministries concerned and an equal number of Portuguese citizens nominated by the church or religious community, to draft an agreement or a report on the reasons for its impracticability.

The grounds for refusal to negotiate the agreement are (Article 47):

- a) The internal rules or the religious practice of the church or religious community do not assure compliance with Portuguese law;
- b) Five years have not passed since the refusal of a previous proposal;
- c) The approval of a new law in order to meet the practical objectives of the proposal is not necessary;
- d) The basic content of the proposal does not merit approval.

Once approved by the Council of Ministers, the agreement shall come into force only after its ratification by law by the Assembly of the Republic. Up to the moment of deliberation of the Assembly of the Republic, which ratifies the agreement, this can be amended by agreement of both parties, having any amendment immediately communicated to the Assembly of the Republic (Articles 448-50).

Religious corporate bodies can conclude other agreements with the State, the autonomous districts and counties for the achievement of their purposes, which do not involve the approval of a law (Article 51).

Since the implementation of the Act is still in its infancy, no religious communities settled in the country could be recognized up to now, so that no agreements in the form of a law could be proposed.

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COVENANTAL AND NON-COVENANTAL COOPERATION OF STATE AND RELIGIONS IN SLOVAKIA

I. Historical and sociological introduction

Churches and religious societies have played their irreplaceable role in every society, at every stage of its development. The need to be conscious of the significance of Churches and religious societies and their position and function in our modern society in relation to ongoing socio-political changes has become a very compelling issue. A Church is not merely a part of the social structure, but also represents the most significant factor in the formation of the spiritual and moral conscience of the entire society. The basic precondition for a new establishment of Churches and religious societies must be a corresponding legislative adjustment in terms of their standing.

1. *Social conditions – statistical data*

The population census (of 1991) indicated that in the Slovak Republic, after 40 years of communist rule, 72.8% of people (ie 3.8 million inhabitants) claimed to belong to some Church or religious organisation. In the Slovak Republic there are 15 registered Churches, of which the Roman-Catholic Church is the largest, accounting for 60.33% of the population. Those of medium size include the Evangelical Lutheran Church A.C. (6.18%), the Byzantine-Catholic Church (3.41%), the Reformed Christian Church (Calvinist) (1.56%), and the Orthodox Church (0.56%).¹ Other registered churches have much smaller membership.

Religious and confessional life differs depending on historic, cultural and social conditions in given regions. The Churches are organised in higher confessional structures, i.e. the Conference of Bishops of Slovakia and the Ecumenical Council of Churches in the SR. The registered

¹ P. MULIK, 'Gesellschaftliche Rahmenbedingungen', in: *Recht und Religion in Mittel- und Osteuropa*, Band 1 – Slowakei (Wien, 2000) p. 13 – 17.

Churches are organisations *sui generis* and they have their own legal identity, and within each there may be further components (provinces, bishoprics, parishes, orders, institutes of religious and apostolic life and secular institutes, districts, Church dioceses, senior and metropolitan authorities).

2. Historical background and current developments

The ethnogenesis of the Slovak nation is very closely connected with the acceptance of Latin Christianity. The evangelical and diplomatic mission of the saints brothers Constantine-Cyril and Methodius (863) from Constantinople brought the ancient Slovaks to the level of the most culturally advanced nations of Europe at that time. They had their own script and literature in the nation language. The oldest Slovak town is Nitra. In the 9th century it was already the seat of the Princes Pribina and Svätopluk (Sventepolc), and from 880 also a bishopric. For one thousand years (906-1918) Slovakia was an integral part of the multiethnic Hungarian regime. Slovakia was not acknowledged as a separate political entity and within its territory Hungarian or Austrian laws governed relations between the State and the Churches. After the establishment of the Czecho-Slovak Republic in 1918, through adoption these laws continued to be valid in the territory of Slovakia. The constitution of CSR did not accept the separation of Church and State; the "congrua" Law (Law No. 124/1928) guaranteed the Churches the financial support of the State for the benefit of clergymen.²

After the Second World War, the relationship between Church and State in Slovakia was very different to that in the Czech lands throughout the period of the First Czechoslovak Republic. Slovak political Catholicism played a positive role in the national emancipation of the Slovaks. The results of the war, and the geopolitical changes which came with them, diametrically changed the view, role and the significance of the Catholic Church in social and political life. From the passing of the Red Army, the relationship between the Church and the renewed Czechoslovak State was characterised by the greatest tension. In Slovakia, during the "Slovak National Uprising", there were already many

² J. KRÁLIK, 'Financial and Legal Development of Securing the Churches in the Territory of the Slovak Republic', in: *Modely ekonomického zabezpečenia cirkví a náboženských spoločností* (Ways of Financing Churches and Religious Societies) (Bratislava, 1997) s. 85-89.

cases of open confrontation between supporters of the Uprising and representatives of the Church. Although the supporters of the uprising were composed of different groups with different aims, they were united in their hostile attitude towards the Catholic Church. It was blamed for supporting the regime of the Slovak Republic (1939-1945) and fascism. Confiscation of Church schools by the Slovak National Council, on 6 September 1944, especially affected Slovak Catholics. When the Slovak bishops protested against this decision, the response was the arrest of Bishop J. Vojtaššák and later of Bishop M. Buzalka. The compromising of Slovak Catholicism was also one of the secondary, but hidden aims, of the manipulated political trial and execution of Jozef Tiso – catholic priest and President of the Slovak Republic.³

Slovak Catholics did not succeed in creating their own political party, which would attract the supporters of the banned Slovak People Party, so they were forced to conclude an agreement with the leadership of the Democratic Party before the first post-war parliamentary elections in May 1946. However, the absolute victory of this party in the elections in Slovakia did not bring benefits, because of the lack of a solution to the constitutional position of Slovakia in the Czechoslovak Republic and because of the opportunism of its leadership.

The attitude of the State toward the Churches changed radically after February 1948, when power was seized by the communists. Church schools were abolished, Church property was confiscated, and religious orders were forbidden. The activities of the churches, especially of the Roman Catholic Church, were restricted and the Greek-Catholic Church was practically liquidated.⁴

3. Developments in religious law and church-state law following the fall of Communism

State law on religion since 1989 ended State control over the Churches, but it continued the system of financing the Churches from the State budget (salaries of priests, running Church schools, etc.). Legal provision was made for the restitution of church property, and church marriages were recognised as having equal status to civil marriages with regard to

³ P. MULIK, 'The Church in the Politics of the States of Central and South-eastern Europe in the period of installation of the communist regimes and formation of the Soviet block', in: *Forms of Totalitarianism and Dictatorship*, p. 100-120.

⁴ P. MULIK, 'L'État et l'Église en République slovaque', in: *Conscience et Liberté: Le rôle des Églises dans les sociétés nouvelles* (Bern, 1997) p. 76.

legal validity. The law also allowed the Churches to run schools. Churches and other religious societies are registered by the Ministry for Culture on the basis of an application.

The Constitution of the Slovak Republic, which respects the Convention of Human Rights and Freedoms, proclaims the State to be secular, non-denominational, a lay state, ideologically and religiously neutral, unconnected with any particular ideology or religion. Nevertheless, in the spirit of the tradition going back to Cyril and Methodius, Christianity and Christian civilisation are represented in the preamble of the Constitution as part and parcel of national identity. The relation between the Church and the State at the present time may be described as that of partnership. The State provides significant support to registered Churches and religious societies in the performance of those of their activities which are for general welfare, and it guarantees their legal standing and opportunities to be active in public life. The task of the State is also to promote these relations and adjust them legislatively so that they may fully correspond with the standards of denominationally neutral democratic states of Western Europe.

II. The legal sources

1. *The constitutional law*

The Constitution of the Slovak Republic is the fundamental legal document which determines the relations between the State and the Churches. The Slovak Republic is a State independent of any religion, but at the same time accepts its Christian roots and the national and civilian principles. The Constitution guarantees freedom of religion and the freedom of the Churches and religious societies, and in doing so it provides a fundamental legal framework within which details are regulated by the laws and generally binding legal injunctions of the SR.

2. *The most important sources of law*

Provisions about the position of churches and their activities are found in a variety of legal sources. Based on the Constitution, Law No 308/1991 Zb⁵ concerns freedom of religion and the status of Churches and religious societies. Later laws, decisions of the Government and the proclamations of competent ministries, regulate the

⁵ Zbierka zákonov – Collection of Laws.

activities of Church schools, material security for the clergy, the process of registration of the Churches, and the work of priests in correctional-educational institutes. On the basis of this law there was also effected the restitution of Church property that had been stolen by the State in 1948.⁶

3. *International law*

The Slovak Republic which came into being in 1993 subscribes to all the important international agreements about human rights, including those on religion. It took four years to prepare a complex modification of the relations between the SR and the Catholic Church in the form of a bilateral International Fundamental Agreement. The international agreements about human rights, including religious rights, have in some circumstances preference over the laws of the SR.⁷

Relations between the Slovak Republic and the Holy See, representing the Catholic Church, are regulated by the *Modus Vivendi* of 1977. An amendment of State-Church relations was concluded last year. In the case of the Catholic Church, this agreement has the character of an international agreement – a concordat. The Fundamental Agreement between Slovakia and the Holy See (Concordat) was concluded on 18 December 2000, when the Slovak Parliament, after four years' negotiation, effected a Ratification of this international law document. Before this Act, 24 November 2000, the President of the Slovak Republic and the Secretary of State of the Holy See signed the concordat in Rome.

The applicability of this international act has been disputed. Nevertheless, until 1998 the appointment of bishops had been carried out under it, and even the autonomous Slovak Church Province was established by the Holy See on the basis of the *Modus Vivendi* (1977). Its validity has been contested by some experts who claim that it was violated by the Czecho-Slovak communist Government in 1949 when the so-called State approval for bishops and clergy in pastoral work came into force.

Other laws regulate the fundamental relations between the State and the non-Catholic Churches. These allow the formation of partial contracts between the State and the different Churches to define the entire field of

⁶ P. MULIK, 'State and Churches in the Slovak Republic', in: *European Journal for Church and State Research* (1998) Volume 5, p. 183.

⁷ M. ŠMID, 'Das Völkerrecht', in: *Recht und Staat in Mittel- und Osteuropa*, Slowakei (Wien, 2000) s. 39-40.

these relations and to permit various registered Churches to conclude special agreements on particular issues. The Slovak Parliament amended law No. 308/1991 Zb by law No 394/2000 Zb which made it possible for the non-registered Churches also to enter into agreements with the State.

4. *The current State system of law on religion*

The current state of legal arrangements on the relations between the State and the Churches in the Slovak Republic is, due to historical factors, comparable with that of the Czech Republic. The State guarantees freedom of religion by the Constitution of the Slovak Republic, by the constitutional Law No. 23/1991 Zb, with its List of Basic Rights and Freedoms, and by the Law No. 308/1991 Zb about freedom of religious faith and the status of the Churches and other religious societies. This law regulates the principal questions of the relationship between the State and the Churches as well as some conditions as to registration of the Churches in conjunction with the Law No. 192/1992 Zb.⁸

5. *The importance of the judicature of the religious law*

As yet, in the praxis of the courts in the Slovak Republic, there are no judgements which would influence in any way the development of State law on religion. Yet at present there are lawsuits regarding the return of church real estate property confiscated in the past.

III. **The main features of the church-state legal system**

1. *The legal protection of religious freedoms*

In the SR, the law guarantees freedom of religious faith. This law is applicable either on the level of the law courts in general, the Constitutional Court, or even the European Court of Human Rights. Here we have an absolute right which cannot be restricted by any law. However, public manifestations of the faith are not an absolute right.

2. *The legal protection of freedom of conscience*

The Constitution and SR laws protect both the right to have faith and the right not to have faith. Regulations in this regard must be adjusted by

⁸ M. NEMEC, 'Staatliche religionsrechtliche Gesetzgebung', *Ibid.*, s. 41.

Churches and religious societies in accordance with State legislation. Conscientious objection is lawfully determined only in two cases – military service and the silence of persons performing a spiritual activity.

3. *Complaints at the European Commission for Human Rights*

Since the establishment of the office which represents the Slovak Republic in proceedings at the European Commission and Court for Human Rights in Strasbourg, there have been 508 grievances registered against the Slovak Republic. But until November 1998 only 20 cases were sent from Strasbourg to Bratislava for official explanation. As confirmed by the secretariat of the office, none of the 20 cases was related to religion.⁹

Some fundamental changes in State-Church relations were effected by Law No. 308/1991 Zb. This act provides for liberty of conscience and religious belief, guarantees observance of these basic human rights and freedoms, and it alters certain conditions for the registration of Churches; at the same time, therefore, it is an expression of commitment to international obligations. Further registration conditions are regulated by the Act of the Slovak National Council (SNC) No. 192/1992 Zb. on the Registration of Churches and Religious Societies. Questions of financial relations between the State and the Churches are still governed by the SNC Decree No. 218/1949 Zb. on Economic Provision by the State for Churches and Religious Societies, in terms of Law No. 16/1990 Zb, by which State control over Churches was abrogated, and Law No. 522/1992 Zb. In addition to these Acts, further normative legal acts exist in the domain of State-Church relationships pertaining to various problem areas. Among the more important ones, mention should be made of the Act of the SNC of 27 October 1993 on the Mitigation of Some Wrongs On Properties Done to Churches and Religious Societies (The Restitution Act) which came into force on 1 January 1994 and the legal provision by the Presidency of the SNC No. 21/1990 Zb. on the Settlement of Relations between the Greek Catholic and the Orthodox Church.

The Slovak Government, on the basis of international standards on religious liberty (e.g. Universal Declaration of Human Rights; Europe Agreement on Defence of Basic Human Rights and Liberties; International Convention of Civil and Political Rights; Declaration of Elimination of Any Forms of Intolerance and Discrimination, and other respective agreements, as well as basic principles expressed in the Helsinki Process) has

⁹ P. MULIK, 'Religionsrechtliche EMRK-Beschwerden', *Ibid.*, s. 50.

been respecting the extraordinarily important role of the Churches and other religious societies in the communication of values and in the formation of society.¹⁰

The State considers that besides their religious activities the Churches and religious societies also undertake activities in other fields – culture, social and health care – though they should support the national consciousness, too, and so accept an important role in the life of the Slovak Republic.

We have defined our aim to support a full enforcement of liberty of conscience and confession. We are confident that respect for liberty of confession of the individual represents a basis for human relations and that support of the principle of tolerance is an important element of a democratic State guaranteed by ensuring the autonomy of Churches and other religious societies with regard to their internal affairs and the fulfilment of their mission.

4. *The authorities of the State Cult Administration*

The central authority of State administration for Church matters and for those of religious societies is the Ministry of Culture of the Slovak Republic. This Ministry established the Institute for State-Church Relationships as a specialised research and analysis centre.

5. *The legal status of religious societies*

The legal positions of churches in the Slovak Republic are treated in several legal instruments, but the relationship towards all churches is uniform – the same legal conditions are in force for all churches as far as registration and activity are concerned. The churches are registered either on the basis of reception or on the basis of application (after 31 December 1989) and by registration they achieve public status. The legal subjectivity of religious institutions according to SR law is accepted on the basis of the internal regulations of the church in question.

In terms of Act No. 308/1991 Zb, the Ministry of Culture of the Slovak Republic, as the central authority of public administration in church affairs, has registered the following churches and religious societies:

1. The Roman Catholic Church
2. The Byzantine Catholic Church

¹⁰ M. NEMEC, 'Allgemeine Normen zur Rechtsstellung', *Ibid.*, s. 51.

3. The Evangelical Church (A. C.) in Slovakia (Lutherans)
4. The Reformed Christian Church in Slovakia (Calvinists)
5. The Orthodox Church in Slovakia
6. The Religious Association of Jehovah's Witnesses
7. Church of the Brethren
8. The Central Union of Jewish Religious Communities in the Slovak Republic
9. The Baptist Church in the Slovak Republic
10. Church of the Seventh-Day Adventists
11. The Apostolic Church in Slovakia
12. Christian Congregations in Slovakia
13. The Evangelical Methodist Church
14. The Ancient Catholic Church
15. The Czechoslovak Hussite Church
16. The Newapostolic Church

According to the regulations in force, Churches and religious societies are legal entities and may mutually associate, form communities, orders, associations and similar unions. In these terms, the Ministry of Culture lists more than 50 Catholic male and female religious orders and congregations in the Slovak Republic with legal dependency on the Roman Catholic and the Greek Catholic Church.

The Bishops' Conference of Slovakia is a co-ordinating board of all dioceses of the Roman Catholic and Byzantine Catholic Churches. A permanent institution is that of an assembly of bishops of the Slovak Province who attend in common certain pastoral matters of the Ecclesiastical Province. Amongst other church legal subjects, mention may be made of the Ecumenical Council of Churches in the Slovak Republic, associated by Churches professing the same theological principles. The Ecumenical Council of Churches was registered by the Ministry of Culture on 14 May 1993 and comprises the following members: Church of the Brethren, The Czechoslovak Hussite Church in Slovakia, The Lutheran Church in Slovakia, The Evangelical Methodist Church, The Orthodox Church in Slovakia, and The Reformed Christian Church in Slovakia. The observers at the Ecumenical Council of Churches in Slovakia are: The Apostolic Church in Slovakia, the Baptist Brethrens Unity in the Slovak Republic, and the Church of the Seventh-Day Adventists. The Slovak Catholic Charity is an independent legal entity. Its primary objects are social and charitable activities. These activities are also pursued by certain protestant Churches through the

intermediary of their specialised institutions (Evangelical Deaconry, Bethany, ADRA etc).¹¹

Churches and religious societies also develop contacts with partner Church associations abroad. The Catholic Church enjoys quite an exceptional position in this respect, because it is strictly centralised and its world centre – The Holy See in Rome – possesses an exclusive authority in essential matters pertaining to Catholics in all countries world-wide.

Non-Catholic Churches are members of various International Church organisations, such as the World Council of Churches, the Conference of European Churches, and many others. Churches and religious societies abroad provide those in Slovakia with material and other aid, intended and utilised mainly for social and charitable purposes. Finally, mention should also be made of several Church publishing houses editing various books, periodicals and audio- and video-cassettes on religious topics. The Churches and religious societies also have access to the mass media, as borne out by the regular religious programmes broadcast on radio and television channels.

The Ministry of Culture of the Slovak Republic registers over a score of civil groupings with a religious character which, however, are neither Churches nor religious societies in the proper legal sense.

6. *The right of the religious societies to self-determination*

The State recognises only those Churches and religious societies which have been registered through the Law No. 308/1991 Zb. The registered Churches and religious societies have in their relationship with the State (except with regard to their financial connection with the State budget) an autonomous and independent position. The registration conditions for the non-registered religious societies are regulated by the Act of the Slovak National Council (SNC) No. 192/1992 Zb on the Registration of Churches and Religious Societies. The body must have 10,000 adult members for registration as a new religious community. All religious communities under this limit do not have their own legal personality as a religious association. In 2000 the Association of Non-Registered Churches tried to persuade the Slovak Government to change the law to enable greater freedom for new religious societies.

¹¹ P. MULIK, *Die Religion in der Slowakischen Republik* (Bratislava, 1996).

In June 2000 a new body was registered by the Ministry of the Interior: the Slovak Monitoring Agency for Freedom of Religion. Its representative is Peter Mulik. This Agency, a voluntary independent civil association, monitors on its own initiative respect for religious freedom, the right to associate as a religious community, and compliance with the guarantees of Slovak and international law.

7. *Legal statutes regarding new religious movements – cults*

There are no special measures regarding new religious societies and movements. In the legal system of the Slovak Republic the basic human rights and freedoms are in the same way secured for the members of the registered and not-registered Churches and religious societies. For the State administration it is impossible to define which religious associations are so-called “cults”. Such determinations could be discriminatory for some groups of citizens.

IV. *Specific subject areas*

1. *Churches and education*

The Ministry of Education of the Slovak Republic has over 130 Church schools of various types on its lists (elementary schools, grammar schools, secondary vocational schools, special schools) and several theological faculties preparing people for ordination. More detailed data on Church schools may be obtained from the Ministry of Education of the Slovak Republic.

2. *Labour law within the churches*

It is without doubt that in Slovakia the Church employs a relatively high number of personnel. But the question of their legal status is somewhat neglected in the current law. In any event, the labour code covers nearly all labour groups amongst citizens, with the exception of Church workers. From this it would be possible to conclude that, on the one hand, it may be desirable to enact specific provisions for Church employees, but on the other hand this may not be desirable because they function under ecclesiastical jurisdiction and their legal standing is *a priori* derived (i.e. in the case of the Catholic Church) from canon law.¹² I would like to

¹² H. BARANCOVÁ, ‘Individuelles Arbeitsrecht’, in: *Recht und Staat in Mittel- und Osteuropa*, Slowakei (Wien, 2000) p. 87.

bring attention to this problem, especially at present, when new ideas for the labour legal code are being constructed.

3. *Financing of churches*

In the time of the first Czechoslovak Republic a clergy stipend congruency law was adopted which regulated the financing of the Churches in a similar way. Act No. 218/1949 Zb, on economic support to Churches, brought about a change granting clergy of registered Churches a claim for wages and covering any deficit. At present in the Slovak Republic, which proclaims in its Constitution adherence to the Cirilo-Methodian traditions inseparable from the Christian faith and its intention to collaborate with Churches on the basis of partnership, nothing exists to stimulate the faithful to accept the Church tax on natural persons.

There are also other reasons for the preservation of the system of State contributions to the Churches. Due to the weakened position of Churches resulting from the communist regime (caused by persecution and the systematic restriction of their activities) at least some moral if not material compensation, in the form of conservation of financing the registered Churches from the State budget, is desirable. The Act No. 282/1993 (on restitution of church property) provided for the conservation of the existing system of economic support to the Churches until 1998; this took into account the fact that restored property will not actually be in the hands of the Churches as yet and will not yield any financial benefit in the near future. Analysis of the contemporary situation proves that the restored property cannot represent an exclusive financial source for the Churches in future. Hence it is not possible to expect the Churches to develop their activities in the way they plan, and society requires, without adequate financial support.¹³

The contemporary method of financing the Churches directly from the State budget via the Ministry of Culture must be adjusted by new law. This was emphasised in the course of the legislative preparation of the Resolution of the Government of the SR No. 187 of July 1997 regulating the personal needs of clergy of Church denominations.

As far as financial provision for Churches is concerned, it should be mentioned that the State finances salaries of the clergy, financial deficits

¹³ M. HOLEČKO, 'The Contemporary Form of Financing the Churches and Religious Societies in the Slovak Republic' in: *Modely ekonomického zabezpečenia cirkví a náboženských spoločností* (Ways of Financing Churches and Religious Societies) (Bratislava, 1997) p. 91-94.

in the management of Church centres and contributes to the restoration and maintenance of religious buildings through direct grants within the approved budget. Besides these direct grants, the State also provides certain advantages to Churches and religious societies in the domain of tax obligations and customs duties.

No less interesting is the situation in this field in other Central-East European countries, reported upon by representatives of State authorities responsible for Church affairs. The relevant legislation in the Czech Republic is essentially identical with that in Slovakia. A significant difference relates to Church property restitution. This was solved by the Slovak Republic in 1993 most consistently from among all the countries of the former Soviet Bloc. In Poland, Hungary and Croatia a strict separation of Church and State was declared at the time of the communist regimes. This state of affairs has been preserved since 1989. Although, in these countries, the State closely cooperates with Churches, principally the Catholic Church; it contributes to Churches only to a limited extent to cover the expenses of their social, charitable, educational, health and therapeutic activities. The State does not contribute towards matters of cult and salaries of clergy. These financing principles have been confirmed in agreements with the Holy See in these countries before the Slovak Republic.

Nowadays secularised society often asks: is it right for the State to assist the financing of Churches? In the course of their development, Church and State have always struggled to limit their competencies. This has brought about permanent conflict. The last two hundred years, when the Church was either in a strong defensive or even oppressed position, have shown that society needs a harmonious coexistence of Church and State because the individual, both as citizen and believer, is an object of their common tasks. Churches play an irreplaceable role in this process: to create and to maintain the system of moral values in the whole of society. For this role the Churches deserve appreciation not only from individual believing citizens but also directly from the State itself.

The financial relationship between the State and Churches is regulated by Law No. 218/1949 Zb about the economic security of the Churches and the religious societies by the State as amended subsequently.

The State cooperates with the registered Churches and religious societies along the lines of the principles of partnership and cooperation. The State gives important economic support to the Churches, guarantees their legal status and the opportunity to be active in public life. All the registered Churches and religious societies have the same standing before the

law. Their affairs are managed independently of the State authorities. The central authority of the State for the affairs of Churches and religious societies, the Ministry of Culture of the Slovak Republic, is not their supervisor and does not interfere in their internal matters.

The Government of the Slovak Republic accepted in 1992 the principle of transition for the period 1994-1998, during which the State shared the financing of specifically defined needs of the Churches. In 1998, the State regulated the income of clergy which was fixed at double that of the minimum living standard.

The current preparation of a new draft law, about the financing of Churches in Slovakia, contemplates five groups of registered Churches. In the first group is the Roman Catholic Church. It will receive salaries from State budget for one clergyman for every 1,500 believers. The other groups of Churches have smaller numbers of believers per single salaried clergyman (1,000, 600, 400, 250).¹⁴

4. *Religious assistance in public institutions*

The clergy can operate in correctional-educational institutions on the basis of the law and the ministry of priests in the military is developing (for now) on the basis of an informal agreement between the Ministry of Defence and those Churches which have expressed interest in this work – that is, thus far, only the Catholic Church and the Lutheran Church. The legislation regulates uniformly the status of all recognised Churches.

In the social sphere, the Churches take part in work with those in detention and remand centres, with drug addicts, alcohol-dependent persons, in hospitals and nursing wards, the establishment of children's homes, hostels for the homeless, and refuges for single mothers etc..

5. *Ethics, charity and education*

The key normative instrument regulating relations between the State and the Churches and religious societies is Law No. 308/91 Zb. This gives the Churches and religious societies the opportunity to bring into being and operate their own appropriate agencies for social welfare and medical service. Churches and charities play their role also in connection with the problems of emigrants and refugees.

¹⁴ Actual draft of Law about the Financing of Registered Churches.

The law allows religious education of children in public and private schools. Religion is taught in alternation with ethical education and is personally taken care of by the Church.

6. *Lobbying by religious societies*

Despite restrictions on them, many Churches, notably the Roman Catholic and Greek Catholic Churches, have acquired an exceptional moral authority in society at large. Dialogue between the Catholic Church and the State does not exist in terms of the proper meaning of that word. There are only *ad hoc* discussions about diverse questions. Even the preparation of the interstate agreement between the SR and the Vatican has not given rise to active cooperation. There is little congruity between the expectations of the State and the Church. The State sometimes has expectations of the Church which it cannot really fulfil.

Church leaders often have a distorted vision of the State. Whilst many legal norms were prepared in an atmosphere of a partnership, there is no specific legal framework within which the Churches enjoy a right to examine legislative proposals which touch their own activities. One very problematic area in the relations between the State and the Churches was the restitution of ecclesiastical property.

Slovak Catholics value democracy. There is no residuum of monarchism. They accept pluralistic society, but do not like the media to undermine morality. In consequence, State television (STV) restricts the depiction of violence and eroticism in programmes. Political plurality is also generally accepted. Consciousness of law is still not very high, but most of the faithful see a State governed by the rule of law as their ideal.

7. *Pastoral care in public institutions*

The State has created conditions for the registered Churches and religious societies to establish and run their own social services. They may also function in State institutions. In 1994 the State approved and acknowledged: "The Concept of the Creation and Introduction of the Spiritual and Religious Service in the Army of the SR". The relevant state authority in the Ministry of Defence is the Office of the Military Clergy. The expected number of priests serving in the Army of the SR should not exceed forty.¹⁵

¹⁵ J. JURAN, 'Militärseelsorge', in: *Recht und Staat in Mittel- und Osteuropa*, Slowakei (Wien, 2000) p. 101-103.

The Catholic Church is preparing the creation and operation of student pastoral centres in all cities with universities. Up to now, such centres have been established in Bratislava and Zvolen. The Lutheran Church AC in Slovakia has appointed one cleric for such purposes.

8. *The legal status of clergy and religious*

The status of clergy and religious is not specifically regulated by law in any area. For social, health and special benefits, clergy are in the same position as public servants.

9. *Religious societies and state and church matrimonial law*

Both Church and State marriages have legal consequences according in the SR, even if the marriage of a citizen of the SR has taken place abroad. The participation of clergy of recognised Churches at wedding ceremonies has a public character. However, the decisions of Church Courts in matrimonial matters are of no effect in the legal order of the SR.¹⁶

10. *Penal code and the protection of the religious life*

The penal code of the SR defines criminal offences, such as interference with religious freedom, defamation, genocide and acts which suppress the rights of citizens. The code also protects religion indirectly by means of offences which threaten morality, spread false news, bigamy, or restrict personal freedoms, freedom of association, and freedom of assembly.¹⁷

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¹⁶ M. NEMEC, 'Staatliches und Innerreligiöses Eherecht', *Ibid.*, p. 109-111.

¹⁷ M. ŠMID, 'Strafrechtliche Bestimmungen', *Ibid.*, p. 113-114.

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ACCORDO

tra la Repubblica Slovacca e la Santa Sede sull'educazione e istruzione cattolica

La Repubblica Slovacca e la Santa Sede (in seguito solo "le Alte Parti"), facendo riferimento da parte della Repubblica Slovacca alla sua Costituzione e al suo ordinamento giuridico e da parte della Santa Sede ai documenti del Concilio Vaticano II, in particolare alla dichiarazione *Gravissimum educationis* e alle norme del Diritto Canonico, e da parte di entrambe le Alte Parti all'Articolo 13, paragrafo 9, dell'Accordo Base tra la Repubblica Slovacca e la Santa Sede, firmato il 24 novembre 2000 in Vaticano,

riferendosi ai principi internazionalmente riconosciuti sulla libertà religiosa, alla missione autorevole della Chiesa Cattolica, tanto di rito latino quanto di rito bizantino, cioè della Chiesa romano-cattolica e della Chiesa greco-cattolica secondo la dicitura dell'ordinamento giuridico della Repubblica Slovacca (in seguito denominata solo "la Chiesa Cattolica") nella storia della Slovacchia, nonché al loro ruolo attuale nell'ambito dell'educazione e dell'istruzione cattolica,

richiamandosi all'eredità spirituale cirillo-metodiana,

riconoscendo l'apporto dei cittadini della Repubblica Slovacca alla Chiesa Cattolica,

manifestando la volontà di contribuire al bene spirituale e materiale della persona umana ed al bene comune,

hanno concordato quanto segue:

Articolo I

1. Vengono definite scuola cattolica e istituzione scolastica cattolica (in seguito denominate solo "la scuola cattolica") la scuola confessionale e l'istituzione scolastica confessionale istituite o riconosciute dal vescovo diocesano locale, dal suo vicario generale o dal superiore di un istituto religioso (in seguito denominati solo "la competente autorità della Chiesa Cattolica") in conformità con l'ordinamento giuridico della Repubblica Slovacca.
2. L'Autorità ecclesiastica che istituisce la scuola cattolica ha il diritto di nominare e revocare il preside della scuola stessa in conformità con le condizioni stabilite dall'ordinamento giuridico della Repubblica Slovacca. Similmente stabilisce criteri per l'assunzione dei docenti e degli insegnanti in rapporto al progetto educativo della

scuola cattolica, nel rispetto della legislazione della Repubblica Slovacca.

3. L'Autorità ecclesiastica che istituisce la scuola cattolica approva i criteri per l'ammissione degli alunni allo studio nelle scuole cattoliche medie superiori.
4. Il preside approva l'ordinamento interno della scuola cattolica in conformità con le condizioni stabilite dall'ordine giuridico della Repubblica Slovacca e in conformità con i principi dell'educazione e dell'istruzione cattolica.
5. L'insegnamento delle discipline formative di base e delle discipline di specializzazione nelle scuole cattoliche corrisponde nei suoi contenuti all'insegnamento delle discipline formative di base e delle discipline di specializzazione nelle scuole statali del relativo grado, genere e tipo.
6. L'insegnamento nelle scuole cattoliche si imparte secondo i piani di istruzione, le linee di insegnamento, i programmi scolastici educativi approvati dall'Autorità ecclesiastica che istituisce la scuola, previo accordo con il Ministero dell'Istruzione della Repubblica Slovacca.
7. La Repubblica Slovacca non farà richiesta che le scuole cattoliche svolgano programmi educativi e di istruzione non corrispondenti all'educazione ed all'istruzione cattolica.
8. Alle scuole cattoliche viene concessa la copertura finanziaria nella stessa misura in cui viene concessa a tutte le altre scuole, in conformità con l'ordinamento giuridico della Repubblica Slovacca.
9. Il Centro Cattolico Pedagogico e Catechetico, istituito dalla Conferenza Episcopale Slovacca e sostenuto dalla Repubblica Slovacca, assicurerà, previo accordo con il Ministero dell'Istruzione della Repubblica Slovacca, la gestione specialistica e metodologica delle scuole cattoliche nonché l'istruzione specialistica e la formazione del personale docente e non docente delle scuole cattoliche.
10. La Repubblica Slovacca e la Chiesa Cattolica collaboreranno nel processo di preparazione e di redazione dei programmi educativi e formativi e nel campo dell'istruzione e dell'educazione nelle scuole cattoliche.

Articolo II

1. Alla materia "educazione religiosa" insegnata nelle scuole non cattoliche, corrisponde in quelle cattoliche, rispettivamente, la materia "religione romano-cattolica" o "religione greco-cattolica" (in seguito

denominata solo la materia "religione cattolica") impartita da persona designata dalla Chiesa Cattolica.

2. Al momento dell'iscrizione dell'alunno alla scuola il preside darà ai genitori o ai loro rappresentanti legali la possibilità di avvalersi dell'insegnamento della religione cattolica in modo che la loro decisione non causi alcuna forma di discriminazione dell'alunno stesso nelle attività scolastiche.
3. La Repubblica Slovacca renderà possibile, in accordo con la volontà dei genitori o dei loro rappresentanti legali, l'insegnamento della religione cattolica anche nelle istituzioni prescolari.
4. La religione cattolica viene insegnata come una delle materie opzionali obbligatorie nelle scuole primarie e nelle scuole secondarie in conformità con le condizioni stabilite nell'ordinamento giuridico della Repubblica Slovacca.
5. La religione cattolica viene insegnata secondo i programmi d'insegnamento e le linee d'istruzione approvate dalla Conferenza Episcopale Slovacca, previo parere del Ministero dell'Istruzione della Repubblica Slovacca.
6. Per la redazione, il finanziamento della stampa, la distribuzione dei testi e dei manuali metodologici per l'insegnamento della religione cattolica che abbiano ottenuto l'approvazione della competente autorità della Chiesa Cattolica, valgono le norme circa la redazione, il finanziamento della stampa e la distribuzione dei testi e dei manuali metodologici delle altre materie di base.
7. L'ispezione statale scolastica concernente l'insegnamento della religione cattolica viene compiuta da persone incaricate dall'Ispettore Capo, previo accordo con la competente autorità della Chiesa Cattolica.
8. Le ispezioni metodologiche concernenti l'insegnamento della materia della religione cattolica vengono compiute da persone incaricate dalla competente autorità della Chiesa Cattolica. I presidi renderanno possibile alle medesime il compimento di tali azioni.
9. Previo accordo con i presidi, la competente autorità della Chiesa Cattolica può organizzare nei locali scolastici altre attività complementari connesse con l'insegnamento della religione cattolica.

Articolo III

1. L'insegnamento della religione cattolica viene impartito da insegnanti in possesso dell'abilitazione professionale e pedagogica secondo le

norme giuridiche della Repubblica Slovacca, e del mandato canonico, cioè della *missio canonica*, ricevuta dalla competente autorità della Chiesa Cattolica. La revoca del mandato canonico implica la perdita del diritto ad insegnare la religione cattolica.

2. L'ulteriore formazione professionale e metodologica degli insegnanti di religione cattolica, le direttive circa l'insegnamento della religione cattolica e la prestazione del servizio metodologico e didattico vengono assicurate dal Centro Cattolico Pedagogico e Catechetico e dagli Uffici Catechistici Diocesani in quanto persone giuridiche autonome della Chiesa Cattolica.

Articolo IV

1. L'Università Cattolica di Ružomberok è una istituzione universitaria pubblica istituita secondo l'ordinamento giuridico della Repubblica Slovacca e secondo le norme del Diritto Canonico. La sua condizione è uguale alle altre omologhe istituzioni pubbliche nella Repubblica Slovacca.
2. Le Alte Parti appoggeranno la collaborazione fra l'Università Cattolica e gli altri istituti universitari in campo formativo e scientifico specialmente nei seguenti campi:
 - a) scambio di docenti universitari, di scienziati, di ricercatori, di esperti, di tirocinanti e di studenti;
 - b) organizzazione di colloqui, di seminari e di conferenze scientifiche;
 - c) partecipazione comune a progetti specializzati;
 - d) scambio di documentazione scientifica e di informazioni, di periodici scientifici e di pubblicazioni e di altre fonti e sussidi di studio.
3. Le Alte Parti promuovono gli studi universitari, le ricerche scientifiche e la formazione nelle facoltà ecclesiastiche cattoliche, negli istituti teologici e nei seminari maggiori, regolati secondo le norme del Diritto Canonico.
4. I docenti delle materie teologiche cattoliche negli istituti universitari devono avere un mandato speciale, cioè la *missio canonica* della competente autorità della Chiesa Cattolica.
5. La Repubblica Slovacca assicura i mezzi finanziari per le facoltà ecclesiastiche cattoliche e per i seminari maggiori.
6. La Repubblica Slovacca riconosce, in conformità con l'ordinamento giuridico della Repubblica Slovacca, i diplomi di studio ed i titoli

accademici in teologia cattolica e nelle altre discipline ecclesiastiche rilasciati dalle università e facoltà ecclesiastiche.

Articolo V

1. I centri pastorali universitari realizzano attività pastorali, spirituali e formative per i membri delle comunità accademiche negli istituti universitari.
2. Il centro pastorale universitario è un'istituzione della Chiesa Cattolica. Può agire in ambito accademico in base all'accordo tra la competente autorità della Chiesa Cattolica ed il relativo istituto universitario.
3. L'assistenza spirituale nel centro pastorale universitario viene svolta dal rettore del centro pastorale universitario e dai suoi collaboratori in base al mandato della competente autorità della Chiesa Cattolica.
4. La Repubblica Slovacca non ostacolerà l'istituzione e le attività dei centri pastorali universitari.

Articolo VI

1. Le Alte Parti risolveranno eventuali divergenze nell'interpretazione o nella realizzazione di quest'Accordo per via diplomatica.
2. L'Accordo sarà sottoposto a ratifica ed entrerà in vigore il giorno dello scambio degli strumenti di ratifica.
3. Questo Accordo potrà essere modificato e completato con il reciproco consenso delle Alte Parti. Le modifiche e le aggiunte devono essere apportate in forma scritta.

Fatto a Bratislava, maggio 2004, in doppio originale, ciascuno in lingua slovacca e italiana, ambedue i testi hanno la stessa validità.

Per la Repubblica Slovacca

Per la Santa Sede

LOVRO ŠTURM*

RELIGION AND LAW IN DIALOGUE: SLOVENIA

Although religious freedom in the Republic of Slovenia is protected under the Constitution of 1991, the doctrines defining the contours of the church-state relationship are still developing. The legislature and courts have taken various approaches in defining this relationship – at times they apply principles of strict church-state separation, and at other times, they provide more room for church-state cooperation in achieving common social goals. Since its emergence from the oppressive Communist era, Slovenian law has tended to rely on concepts of strict neutrality in defining the church-state relationship. However, as Slovenia continues to redefine its position in the area of religious freedom, it should adopt the more modern approach of elevating religious freedom over mere toleration by allowing the State to maintain a cooperative relationship with religious communities that recognizes the beneficial social function that religions fulfill.

1. The Roman Catholic Church has traditionally occupied a special position in Slovenia. Based on its long-standing influence in the region and the number of its adherents, Catholicism may legitimately be termed the national religion of Slovenia.¹ As such, the development of the Church's

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¹ This Table compares Slovenian religious demographics according to the 1991 and 2002 censuses:

Religion	1991	2002
Catholics	71.36%	57.80%
Orthodox Christians	2.38%	2.30%
Muslims	1.51%	2.40%
Protestants (including Evangelicals)	0.97%	0.90%
Other Religions	0.04%	0.30%
Believers Without Specific Religion	0.20%	3.50%
Response Denied	4.21%	15.70%
No Response Known	14.97%	7.10%
Atheists	4.35%	10.10%
Total	100.00%	100.00%

relationship vis-à-vis the State reflects, in many respects, the trends of church-state relations generally in Slovenia.

2. Under the Habsburg Empire, of which Slovenia was a part, the Catholic Church was the state church for centuries.² By the end of the eighteenth century, the State had become secularized,³ but the Church retained a special influence over secular politics which continued until World War II⁴ when, with the emergence of the Socialist Federative Republic of Yugoslavia (SFRY), a Communist regime, the Church was heavily persecuted by the State.⁵ Ironically, despite the SFRY's declared principle of

URAD VLADE REPUBLIKE SLOVENIJE ZA VERSKE SKUPNOSTI [REPUBLIC OF SLOVENIA, GOVERNMENT OFFICE FOR RELIGIOUS COMMUNITIES], DRŽAVA IN VERSKE SKUPNOSTI V RS [THE STATE AND RELIGIOUS COMMUNITIES IN THE REPUBLIC OF SLOVENIA] §4.1, translation available at <http://www.sigov.si/uvs/ang/StateAndReligiousCommunities.htm>. [hereinafter THE STATE AND RELIGIOUS COMMUNITIES] (English translation only reports the results of the 1991 census); see also BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002: SLOVENIA (2002), available at <http://www.state.gov/g/drl/rls/irf/2002/13981.htm> [hereinafter INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002].

The Count of the Population in the Year 2001 Act ensures that each person counted freely declares his or her religion and whether he or she will answer questions regarding religious affiliation. See Zakon o popisu prebivalstva, gospodinjstev in stanovanj v Republiki Sloveniji leta 2001 [The Act Regulating the 2001 Census of Population, Households and Housings in the Republic of Slovenia], Official Gazette of the Republic of Slovenia [hereinafter Official Gazette RS] Nos. 66/2000, 26/2001, 22/2002. Collecting data by the State on the religious belief of its inhabitants is not contrary to the principle of the separation of religious communities and the State. Constitutional Court of the Republic of Slovenia [hereinafter Slovn. Const. Ct.], Decision No. U-I-92/01 (Feb. 28, 2002), 11 Odločbe in sklepi Ustavnega sodišča [Decisions and Rulings of the Constitutional Court of Slovenia] [hereinafter Odl.US] 25, Official Gazette RS, No. 22/2002, available at www.us-rs.si.

² See JAMES GOW & CATHIE CARMICHAEL, SLOVENIA AND THE SLOVENES: A SMALL STATE AND THE NEW EUROPE 63–67 (2001); see also JEAN BÉRENGER, A HISTORY OF THE HABSBURG EMPIRE 1273–1700 (C.A. Simpson trans., 1994); KARIN J. MACHARDY, WAR, RELIGION AND COURT PATRONAGE IN HABSBURG AUSTRIA: THE SOCIAL AND CULTURAL DIMENSIONS OF POLITICAL INTERACTION, 1521–1622, at 108–11 (2003) (noting that the Habsburg court remained predominantly Catholic after the Protestant reformation).

³ The secularization of the Habsburg Empire and the emergence of religious pluralism is often referred to as “Josephinism” in reference to Emperor Joseph II. See H. FRANZ, *Joseph II*, in CATHOLIC ENCYCLOPEDIA (Tom Burgoyne trans.), available at <http://www.newadvent.org/cathen/08508b.htm>.

⁴ GOW & CARMICHAEL, *supra* note 2, at 21. For example, educational and charitable activities have remained almost completely in the hands of the Catholic Church.

⁵ STELLA ALEXANDER, CHURCH AND STATE IN YUGOSLAVIA SINCE 1945, at 90–94, 131–36 (1979) (describing the imprisonment of clergy and other post-war persecution occurring in Slovenia); Tamara Griesser-Pečar, *Pomen “osvoboditve” za slovensko katoliško cerkev [The Meaning of “Liberation” for the Slovenian Catholic Church]*, in SLOVENIJA V LETU 1945 [SLOVENIA IN THE YEAR 1945], at 111–37 (Zbornik Referatov

the separation of church and state, the Catholic Church in Slovenia was actually under strict state control during the period between 1945 and 1990.⁶ The legal status and actual position of religious communities in the SFRY were not solely determined by generally known and published legal rules. They were primarily determined – especially in the case of the Catholic Church – by strictly confidential legal rules which, together with other confidential regulations, formed a parallel secret legal system.⁷ These secret internal rules were established with the view that the Catholic Church was a “permanent internal enemy,” which has “opened an ideological confrontation with the then sociopolitical conceptions.”⁸ These rules sought to limit the social influence of the Church. For example, between World War II and 1991, religious communities were forbidden to engage in “activities of a general or social significance,”⁹ including

ed., 1996) [hereinafter Griesser-Pečar, “Liberation”]; Tamara Griesser-Pečar, *Die Verfolgung der Frauenorden in Slowenien nach 1945 [The Persecution of Feminine Religious Orders in Slovenia Since 1945]*, OSTERREICHISCHE OSTHEFTE, Vol. 42, Pt. 1, at 77 (2000) [hereinafter Griesser-Pečar, *Feminine Religious Orders*]; See also generally RELIGUA, CERKEV IN ŠOLA V DOKUMENTIH OBČINSKIH KOMITEJEV ZKS [RELIGION, CHURCH, AND SCHOOLS IN THE DOCUMENTS OF LOCAL COMMITTEES OF THE SLOVENIAN COMMUNIST PARTY] (Milko Mikola ed., 2003) (two volumes) [hereinafter DOCUMENTS OF LOCAL COMMITTEES].

⁶ See Andrej GRASELLI, *Sporazum s Svetim sedežem [Agreement with the Holy See]*, 55 PRAVNIK No. 1-3, at 94–106 (2000); LOVRO ŠTURM, OMEJITEV OBLASTI [LIMITS OF POWER] 263–66 (1999); NAVOLDILA ZA DELO VARNOSTNIH ORGANOV V SR SLOVENIJI [GUIDELINES FOR SECURITY ORGANS IN THE SOCIALIST REPUBLIC OF SLOVENIA] Viri No. 21 (France Martin Dolinar ed., 2003) [hereinafter GUIDELINES FOR SECURITY ORGANS].

⁷ See Lovro ŠTURM, *The Legal Status of Religious Communities in the Republic of Slovenia at the Time of Its Inclusion in the Free Democratic Society of Modern Europe, in STATE AND CHURCH: SELECTED HISTORICAL AND LEGAL ISSUES 385–398* (A. ŠELI, ed., 2002) [hereinafter Šturm, *The Legal Status of Religious Communities*]. For example, National Security Service documents from 1967, 1970, 1982, and 1985 deal extensively with the Catholic Church. See generally SOCIALIST REPUBLIC OF SLOVENIA, THE POLICE MANUAL ON PROTECTION OF THE CONSTITUTION (1985); GUIDELINES FOR SECURITY ORGANS, *supra* note 6, at 131–34, 155, 165–170; Lovro ŠTURM, *Pravnosistemske komponente okolja, v katerem je delovala politična policija po letu 1974*, in GUIDELINES FOR SECURITY ORGANS, *supra* note 6, at 5–14.

⁸ Slovn. Const. Ct., Decision No. U-I-121/97 (May 23, 1997), 6 Odl.US 69, 390, Official Gazette RS, No. 34/97 (author's translation); Ervin DOLENC, *Culture, Politics, and Slovene Identity*, in JILL BENDERLY and EVAN KRAFT (eds), INDEPENDENT SLOVENIA: ORIGINS, MOVEMENTS, PROSPECTS 84 (1994) (“The Catholic Church in Slovenia was considered the greatest potential enemy of the State until the very end of Communist rule; consequently it was carefully watched.”). See generally GUIDELINES FOR SECURITY ORGANS, *supra* note 6.

⁹ Zakon o pravnem položaju verskih skupnosti v Socialistični republiki Sloveniji [The Legal Status of Religious Communities in the Socialist Republic of Slovenia Act] art. 5, para. 4, Official Gazette RS, Nos. 15/1976, 42/1986, 5/1990, 22/1991 (1976) [hereinafter

educational activities.¹⁰ In 1945, the government prohibited the operation of any kind of private schools, and many private schools that operated before this time were nationalized.¹¹ Religious communities could establish only religious schools to educate priests, and diplomas from these religious schools were not publicly recognized. As a result, the atheism prescribed by Marxism was the privileged belief in Slovenia for almost half a century and was encouraged throughout the educational system.¹² Relations between the Church and State did not improve until the Holy See and Yugoslavia reestablished diplomatic relations in 1966.¹³ But even after 1970, although free profession of religion was constitutionally guaranteed, the Catholic Church and other religions were not allowed to appear in public life.¹⁴

3. On 25 June 1991, the Slovenian parliament proclaimed its independence from the SFRY.¹⁵ After only ten days of resistance from the Yugoslav army, a peace agreement was reached, thus paving the way for national sovereignty and international recognition. Since that time, the people of Slovenia have adopted a new constitution, formed a government, and established numerous laws respecting religious freedom and the

Legal Status Act]. Important amendments to the Legal Status Act in 1991 changed and updated the Act from its Communist conception. First, the 1991 amendments deleted the word "Socialist" from the title, which had previously read "The Legal Status of Religious Communities in the Socialist Republic of Slovenia." Second, the 1991 amendments deleted the fourth paragraph of the fifth article, cited *supra*, so that the current Legal Status Act no longer contains that restriction. Finally, the 1991 amendments did away with article ten, a provision that tolerated religious educational institutions only for clergy. URŠA PREPELUH, PRAVNI POLOŽAJ VERSKIH SKUPNOSTI V SLOVENIJI [THE LEGAL POSITION OF RELIGIOUS COMMUNITIES IN SLOVENIA] 5 (1997). These changes, introduced in 1991 by the first democratically elected parliament in Slovenia, constituted a crucial turning point for religious communities.

¹⁰ GRIESSER-PEČAR, "Liberation", *supra* note 5, at 112; PREPELUH, *supra* note 9, at 5.

¹¹ See DOLENC, *supra* note 8, at 84; ALEXANDER, *supra* note 5, at 122.

¹² ALEXANDER, *supra* note 5, at 230–31. See also generally DOCUMENTS OF LOCAL COMMITTEES, *supra* note 5. [is there a page number for this cite]

¹³ FOREIGN AREA STUDIES, AMERICAN UNIVERSITY, YUGOSLAVIA: A COUNTRY STUDY 102 (Richard F. Nyrop ed., 1982).

¹⁴ Subsequent constitutions under the SFRY permitted only private, nonpublic exercise of religion. CONSTITUTION OF THE SOCIALIST FEDERATIVE REPUBLIC OF YUGOSLAVIA, art. 174 (Feb. 1974) [hereinafter YUGO. CONST.]; CONSTITUTION OF THE YUGOSLAV REPUBLIC OF SLOVENIA, art. 229 [hereinafter Y.R.S. CONST.]. Moreover, the statutory law in the Yugoslav Republic of Slovenia protected only "individual" exercise of religion. See generally Legal Status Act, Official Gazette RS, Nos. 15/1976, 42/1986, 5/1990, 22/1991 (1976); see also ALEXANDER, *supra* note 5, at 232.

¹⁵ Janko PRUNK, *The Origins of an Independent Slovenia*, in MAKING A NEW NATION: THE FORMATION OF SLOVENIA, 29 (Danica Fink-Hafner & John R. Robbins eds., 1997).

church-state relationship. Many of these laws reflect a genuine appreciation for the social contribution made by religious communities. From a policy standpoint, the 1991 Constitution and several of the new laws promulgated under it embrace a positive view of church-state relations. Yet, at the same time, the influence of Slovenia's Communist past and its strict or negative view of state neutrality towards religion have been reflected in law and in recent constitutional interpretation.

In principle, the Slovenian legal system only addresses churches or religious communities generally; it does not have any statutes regulating individual churches or religious communities. However, after negotiations, the Government of Slovenia signed mutual agreements on the legal position with the Bishops' Conference of the Catholic Church in Slovenia in 1999 and the Bishops' Conference of the Evangelical Church in Slovenia in 2000.

The first international agreement between the Government of Slovenia and the Holy See was signed in 2001. The Agreement was under constitutional review until November 19, 2003 when the Constitutional Court declared it in accordance with the constitution.¹⁶ There are also current negotiations with the Serbian Orthodox Church, the Adventist Church, and the Islamic Religious Community in Slovenia.

How is the relationship between state and church to be defined in European democracies under this contemporary understanding of freedom of religion? Neutrality of the state towards religion means that the state, after disengaging from various religious functions and positions, is no longer involved in the religious needs of its subjects. "Once religion is guaranteed as a fundamental right," in the legal sense, "it is properly placed beyond the reach of the state...."¹⁷ The only exceptions are cases when the state must limit the implementation of the right to freedom of

¹⁶ See Slovn. Const. Ct., Decision No. Rm-1/02-21 (Nov. 19, 2003) (qualifying the agreement as constitutional insofar as the court's recent interpretations of the principle of church-state separation is obligatory for all state organs not only in exercising the agreement but also for the future in all further possible agreements).

¹⁷ Christian STARCK, *Religion and the State*, in CONSTITUTIONALISM, UNIVERSALISM, AND DEMOCRACY – A COMPARATIVE ANALYSIS: THE GERMAN CONTRIBUTIONS TO THE FIFTH WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW 247 (Christian Starck ed., 1999), at 247; see also Sophie C. van BIJSTERVELD, *Freedom of Religion: Legal Perspectives*, in 4 LAW AND RELIGION 303, 305 (Richard O'Dair & Andrew Lewis, eds., 2001) [hereinafter van BIJSTERVELD, *Freedom of Religion*], at 300–01 (noting that the acknowledgement of freedom of religion as a fundamental right creates a "corresponding... duty of non-interference by public authority"). Although van Bijsterveld provides a more realistic notion of freedom of religion than tradition fundamental rights, the concept that the State is prevented from interfering with the individual remains pivotal to her analysis. *Id.* at 306–09.

religion due to reasons of public order (*ordre public*).¹⁸ A country that is neutral with respect to religion and worldviews shall neither support nor hinder religions or other worldviews. The state should neither teach nor refute any individual philosophy, ideology, or morality (such as rationalism, materialism, liberalism, Marxism, etc.). And it should not give priority to secular morality. Secularism should not become the official ideology, morality, or even state religion. In the area of religious freedom, individuals must remain truly free.¹⁹

The contemporary free, democratic state order introduces, as a fundamental human right, freedom of the individual, including religious freedom.²⁰ Therefore, there are two reasons why the state no longer identifies with a given religion or some other specific conviction. First, freedom of the individual as a fundamental human right implies that the state no longer answers questions concerning the correct conviction or worldview, as it is one of the fundamental decisions that a free individual must retain. Second, since people are equal in this right, the decision is not entrusted to the chosen few, but to everyone. The state may only intervene in the religiously motivated decisions of individuals in order to ensure the coexistence between individuals and in order to preserve the foundations of social order.²¹ If individuals are equal with regard to religious or other convictions, the state may impose objectively justified limits (or perhaps

¹⁸ STARCK, *supra* note 17, at 247; ŠTURM, *The Legal Status of Religious Communities*, *supra* note 7, at 392; *see also* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 1st Sess., art. 29(2), U.N. Doc. A/890 (1948) (explaining that in exercising rights and freedoms, everyone is "subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."); *cf.*, Gerhard ROBBERS, *Religious Freedom in Germany*, 2001 B.Y.U. L. REV. 643, at 647–48 (discussing the limited ability of the State to intrude into religious freedom).

¹⁹ Metoda OREHAR, *Svoboda religije proti ločitvi države in religije [Freedom of Religion Versus Church-State Separation]*, in CERKEV IN DRŽAVA [CHURCH AND STATE] 27 (Lovro ŠTURM ed., 2000).

²⁰ *See, e.g., Religious Freedom in New and Future EU Member-States: Law and Practice*, introduction, available at <http://www.forum18.org/PDF/EUaccession.pdf> ("The right to freedom of religion is generally seen as one of the most fundamental rights. It is even said that this right is a good indicator for all the others."); van BIJSTERVELD, *Freedom of Religion*, *supra* note 17, at 300–01.

²¹ *See* European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 11, para. 2, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/Convention/webConvenENG.pdf> (official website of the European Court of Human Rights) ("No restrictions shall be placed on the exercise of these rights other than [those] necessary in a democratic society in the interests of national security or public safety... or for the protection of the rights and freedoms of others.").

restrictions) to religious freedom. However, the limits must be such that an objective observer, viewing the limitation in favour of the freedom of conviction, would not consider the individual rejected or ignored. The more direct the link between a certain type of conduct and a (religious) conviction, the less the state should interfere. Hence, the key duty of the state is to abide by the principle of neutrality and to refrain from interfering in the freedom of the individual.²²

Conclusion

Separation and neutrality do not preclude the state from having an equally positive relationship, or form of cooperation, in common endeavours with churches and religious communities as it already does with other organizations of the civil society.²³ Two hundred years ago the demand that the state had to ensure the greatest possible freedom for the individual meant that it had to withdraw from all areas of social life. Today, the service function of the state, consisting of nonmaterial and even material goods being offered to its inhabitants, is an important role. The modern social state is actively participating in various social fields and is directly or indirectly promoting those spheres.²⁴ Because religious communities perform a variety of secular and social tasks, the state, in supporting and promoting various activities in society, must not ignore or exclude religion.²⁵

The tension between the demands of state neutrality in religious affairs and the need to recognize the positive social contributions of religious communities is particularly acute in Slovenia, where the law surrounding the freedom of religion is still developing. Although the 1991 Constitution

²² ŠTURM, *The Legal Status of Religious Communities*, *supra* note 7, at 393.

²³ Sophie C. VAN BIJSTERVELD, *Church and State in Western Europe and the United States: Principles and Perspectives*, 2000 B.Y.U. L. REV. 989, 990 (discussing the importance of the relationships between church and state) [hereinafter van Bijsterveld, *Church and State*], at 993 ("[S]tate neutrality towards religion does not mean that church and religion should be ignored but that they should have a place in the framework of law."). That the principle of neutrality does not prevent the State from maintaining a positive relationship with religious communities is emphasized by the fact that the Constitutional Court of the Republic of Slovenia recognized the role that religious communities play as generally useful and beneficial institutions. *See* Slovn. Const. Ct., Decision No. U-I-107/96, 5 Odl.US 174 (Dec. 5, 1996), Official Gazette RS, No. 1/97, item 28.

²⁴ *See* VAN BIJSTERVELD, *Church and State*, *supra* note 23, at 992 (noting that religion and state both participate in the social realm).

²⁵ *See id.* ("[C]hurch and state meet in the implementation of" various social endeavours).

assures modern religious freedom, the constitutional interpretations and legislation affecting religious communities are not always in line with modern trends in church-state separation, as this survey of the current state of Slovenian law has shown. The church-state relationship in Slovenia is influenced, on one hand, by the strict – even radical – neutrality of the former Communist state and, on the other hand, by the nation's recent embrace of modern religious freedom under the 1991 Constitution. As evident from Slovenian constitutional, legislative, and judicial approaches to religious freedoms, Slovenian law has yet to settle on either approach as it continues to oscillate between the two extremes. The 1991 Constitution was initially interpreted to favour religion, but more recently it has been interpreted under principles of strict neutrality. Likewise, the Legal Status Act, the Education Act, and the Media Act represent an ultra-strict regime of church-state separation. Unfortunately, these shifts are likely to continue but the Republic of Slovenia should recognize the beneficial role of religious communities and effectively utilize them in the true spirit of church-state cooperation.

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RELIGION AND LAW IN DIALOGUE: THE COVENANTAL AND NON-COVENANTAL COOPERATION OF STATE AND RELIGIONS IN SPANISH LAW

I. The principle of cooperation between public authorities and religious groups

In the Spanish legal system, it is possible to identify four principles that regulate Church-State relations: 1) religious freedom; 2) non-discrimination for religious reasons; 3) non-establishment of churches or neutrality; and 4) cooperation of public authorities with religious denominations. These principles are laid down in articles 14 and 16 of the 1978 Spanish Constitution.¹

Of these four principles, the first three – religious freedom, non-discrimination and non-establishment of churches or neutrality – have a concrete legal significance. The Constitutional Court has a consolidated case law in which the scope of these principles is clearly stated. Thus, since its very first decisions, the centrality of the principles of religious freedom and non-discrimination has been emphasized and a precise legal significance has been conferred on them: “There are two basic principles in our political system that determine the State’s attitude toward religious phenomena and the series of relations between the State and the churches and confessions: the first one is religious freedom, understood as a subjective right of a fundamental nature that is embodied in the recognition of a realm of freedom and a sphere of *agere licere* of the individual;

¹ -Article 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 condition or personal or social circumstance”.

-Article 16: “1 Freedom of ideology, religion and worship of the 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 cooperation with the Catholic Church and other confessions”.

the second is equality, declared by articles 9 and 14, from which it is concluded that it is not possible to establish any kind of discrimination or differing legal treatment of citizens on the basis of their ideologies or beliefs and that all citizens should be able equally to benefit from religious freedom. In other words, the principle of religious freedom recognizes the right of citizens to act in this realm with full immunity from the coercion of the State and any social group, in such a manner that the State forbids itself any participation, together with citizens, as a subject of acts or attitudes of a religious nature, and the principle of equality, which is a consequence of freedom in this realm, means that the religious attitudes of the subjects of law do not justify differences in legal treatment" (Constitutional Court Decision 24/1982, dated May 13th).

As regards the principle of non-establishment of churches or neutrality, its scope is clearly laid down in the Constitutional Court Decision 340/1993, dated November 16th: "it must be borne in mind that the terms used by the initial wording of art. 16.3 of the Spanish Constitution not only express the non-confessional nature of the State in view of the pluralism of beliefs existing in Spanish society but the guarantee of religious freedom for all, acknowledged in sections 1 and 2 of this constitutional precept. On determining that «there shall be no State religion», it would seem that the drafters of the Constitution have furthermore wanted to express that religious confessions may not, under any circumstance, transcend the purposes inherent in them and be compared to the State by occupying an equal legal position; because as stated in Constitutional Court Decision 24/1982, 1st Legal Basis, art. 16.3 of the Spanish Constitution «forbids any type of confusion between religious functions and public functions»".

This jurisprudence should be complemented by the idea of *positive neutrality* or *laïcité positive*, expressly included in Constitutional Court case law by Decision 46/2001, dated February 15th: "As a special expression of this positive attitude regarding the collective exercise of religious freedom, in its plural manifestations or conducts, art. 16.3 of the Constitution, after making a declaration of neutrality (...) considers the perceptible religious component in Spanish society and orders the public powers to maintain "appropriate cooperation with the Catholic Church and other confessions", thus introducing an idea of **positive separation or laïcité** that forbids any type of confusion between religious functions and state (public) functions".

Unlike these three principles, the last one – the principle of cooperation between public authorities and religious denominations – has no concrete legal content. This does not mean that it is not legally effective, as

it requires public authorities to cooperate with the religious confessions and it is the basis for the notion of *positive neutrality* introduced by the Constitutional Court. Saying that it lacks specific content is intended to show that it shares the same characteristics as the clauses of the *social State*, which are clauses of final programming: it provides an objective, a precise mandate – dialogue with the religious confessions – but it does not specify either the way this cooperation should be achieved or its specific scope².

It can be concluded from the wording of this principle in article 16.3 of the Constitution that the system of Church-State relations designed by the Spanish Constitution calls for dialogue and cooperation between public authorities and religious entities. In fact, the Constitution frames the principle of cooperation as a duty imposed on public authorities resulting from the positive view of citizens' religious beliefs; article 16 says that "the public authorities shall take the religious beliefs of Spanish society into account and shall in consequence maintain appropriate cooperation with the Catholic Church and the other confessions".

The Spanish Constitution does not indicate the way in which collaboration with religious confessions should or could be achieved and therefore, in principle, any legal tool that helps to channel and make this cooperation effective may be used to fulfill this aim. Notwithstanding this assertion, the Religious Freedom Act 7/1980 dated 5 July 1980, has specified some forms of cooperation with religious denominations in its articles 7 and 8.

Article 7 reads as follows: "1. The State, taking account of the religious beliefs existing in Spanish society, shall establish, if appropriate, cooperation Agreements or Covenants with the Churches, Faiths and religious Communities enrolled in the Register that, thanks to their reach and number of believers, have obviously taken root in Spain. Such Agreements shall, in any case, be subject to approval by an Act of Parliament. 2. Subject to the principle of equality, such Agreements or Covenants may confer upon Churches, Faiths and religious Communities the tax benefits applied by ordinary legislations to non-profit Entities and other Charitable Organizations".

On the other hand, article 8 provides that "an Advisory Committee on Freedom of Religion is hereby created in the Ministry of Justice whose

² Cooperation between public authorities and religious confessions is a particular manifestation of the general provisions contained in article 9.2 of the Spanish Constitution: "It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life".

membership, which shall be stable, shall be divided equally between the representatives of the central Government and of the corresponding Churches, Faiths and religious Communities or their Federations including, in any case, those that have obviously taken root in Spain, with the participation as well of persons of renowned competence whose counsel is considered to be of interest in matters related to this Act. Such Committee may have, in turn, a standing commission whose membership shall be likewise equally apportioned. The functions of such Committee shall consist of reviewing, reporting on and setting forth proposals with respect to issues relating to the enforcement of this Act and such intervention shall be mandatory in the preparations of and recommendations for the Cooperation Agreements or Conventions referred in the preceding article".

Two conclusions can be drawn from these precepts: in the first place, the agreements with religious confessions are an instrument for carrying out the cooperation stated in article 16.3 of the Constitution; secondly, provisions are made for administrative bodies composed of representatives of the Administration and the religious confessions, the purpose of which is dialogue and cooperation between both parties in the application of legislation concerning the religious factor.

Based on these conclusions, the explanation of the legal framework within which the dialogue between public authorities and religious confessions is developed in Spanish Law will be divided into two blocks: the first will pay special attention to the agreements signed by the public powers with religious confessions, as they are the primary tool for cooperation between both parties (II); the second will refer to the administrative bodies with responsibilities in religious matters, and especially those whose specific mission is dialogue and cooperation with the religious denominations (III).

II. Agreements between public authorities and religious denominations

One of the ways of securing the cooperation between public authorities and religious organizations as provided in article 16.3 of the Constitution is through signature of collaboration agreements between both parties. Nevertheless, in Spanish Law the agreements between the State and the religious confessions are not exclusively an outcome of the principle of cooperation laid down in the Constitution. There is a historical component present in this issue that cannot be overlooked.

In Spain, there is a consolidated concordatarian tradition with the Holy See, the main manifestations of which are the two major Concordats of

16 March 1851 and 27 August 1953.³ Both belong to the modern era of concordat-based relations which began with the Napoleonic Concordat of 1801 and are characterized by two essential factors: absence of parliamentary representation of the clerical class and affirmation of the *contractual theory* for purposes of determining the legal nature of the concordats.⁴ These two concordats defined the relations between the Roman Catholic Church and the Spanish State and addressed issues such as the legal and acting capacity of the Church, the religious heritage, the economic regime of the Church, religious education, and the secular relevance of canonical marriage.

General Franco's death in 1975 marked the beginning of a period of transition from dictatorship to a pluralist democracy, and one of the main issues that the new political authorities had to confront was Church-State relations. These relations had deteriorated in the last few years of the Franco era, primarily due to the changes made in Church doctrine after the Second Vatican Council. After the Council, the 1953 Concordat was seen as an anachronistic instrument that did not adapt to the new legal context in which the State and the Roman Catholic Church conducted their relations or to the demands of Spanish society. The concordat was overcome by the ecclesiastical reality, the reality of the State and the social reality, and therefore it was considered as absolutely necessary to reform it or replace it with a new concordat with the Holy See.⁵

In this context, one fact that reveals the importance accorded to Church-State relations during the process of transition to democracy was the speed and urgency with which they were channeled. For legal purposes, the key date at the beginning of the period of political change in Spain after the demise of the Franco regime is usually considered to be 4 January 1977, when Act 1/1977 on Political Reform was passed. Given the unquestionable importance and symbolic nature of this Act,

³ The Concordat of 11 January 1753 is also usually included in the list of the *main* concordats signed between Spain and the Holy See; however, here it is considered as secondary for reasons to be expounded in the main text. The texts of these three concordats can be found in I. C. IBÁN, M. GONZÁLEZ, *Textos de Derecho eclesiástico. (Siglos XIX y XX)* (Madrid, 2001) pp. 87-112 and 140-155.

⁴ Although, as is known, the *contractual theory* was not consolidated until the late 19th century; see J. T. MARTÍN DE AGAR, *Passato e presente dei concordati*, in *Ius Ecclesiae*, 12 (2000), p. 620.

⁵ There is an extensive bibliography on the 1953 Concordat crisis in the final years of the Franco period; refer for all to P. LOMBARDÍA, *El procedimiento de revisión del concordato en España*, in IDEM, *Escritos de Derecho Canónico y de Derecho Eclesiástico del Estado*, vol. IV (Pamplona, 1991) pp. 401-433.

it is very significant that the rupture with the previous regime of Church-State relations and the establishment of the bases for the new framework that would govern these relations happened before this Act was passed; specifically, on 28 July 1976, an Agreement was signed between the Spanish State and the Holy See on relinquishment of the State privileges of presenting bishops and of the ecclesiastical privileges of clergy special jurisdiction. It includes the understanding that the relations between the State and the Roman Catholic Church would be regulated by means of concordatary agreements: “[both parties] believe it is necessary to use specific Agreements to regulate affairs of mutual interest that, under the new circumstances that have arisen since the signature of the 1953 Concordat, require a new set of regulations; they agree, therefore, to undertake, by mutual agreement, a study of these different affairs *in order to reach Agreements as soon as possible that will gradually replace the corresponding provisions of the current Concordat*”.

Based on the content of this Agreement with the Holy See of 28 July 1976, it can be affirmed that the current Agreements between the Spanish State and the Holy See of 3 January 1979, signed after the 1978 Constitution took effect, are not, strictly speaking, a development of the provisions of the constitutional text, since the negotiation of these Agreements had been announced and agreed on in a pre-constitutional legal text with the category of an international treaty.

In short, what we are trying to show with the above considerations is that there is no relation of exclusivity between the constitutional principle of cooperation between public authorities and religious denominations and the agreements with religious groups. In Spain, the concordatary relations with the Holy See have a long historical tradition, and in the period of transition from the Franco regime to democracy the decision was made to continue with the system of concordats. The Constitution did not include any significant novelties in this respect, and when it was being drawn up the drafters of the Constitution knew full well that concordatary agreements with the Holy See were being negotiated.

1. Typology of agreements

Based on the concordatary tradition existing in Spain, the set of rules concerning the religious phenomenon can be characterized as *bilateral* or *compromised* law. Although the State has the power or capacity to unilaterally regulate affairs involving the religious factor, a far-reaching

model of bilateral regulation is preferred that not only supplants the unilateral actions of the legislator in this field, but also conditions most of the normative actions in religious matters.⁶

From a historical perspective, this feature of Spanish legislation concerning religious matters is influenced by the Catholic confessionality of the State. However, the signature of agreements between public authorities and religious confessions has paradoxically increased in the period after the current Constitution of 1978 took effect, i.e. after declaration of the principle of non-establishment of churches or neutrality of the State.⁷ Furthermore, it should be remembered that the Constitution not only does not require that religious matters be regulated through agreements; it does not even expressly mention them. All this calls for an in-depth study of the reasons for the proliferation of these agreements.

(1) A preliminary issue: the proliferation of agreements between public authorities and religious denominations

In the last twenty-five years, agreements between public authorities and religious denominations have multiplied. The phenomenon is not exclusive to Spanish law; it occurs in other legal systems, e.g. in Italy.⁸ There are two main trends which define this phenomenon: on the one hand, agreements have been signed with minority religious confessions, which is a novelty in countries with a Catholic tradition such as Spain and Italy where conventional activity was limited to concordatary relations with

⁶ As an example of the importance of this fact, it suffices to say that the Roman Catholic Church enjoys a series of tax benefits in relation to Value Added Tax that are not included in the European Union norms that regulate this tax. These benefits are recognized to abide by the contents of the Agreement between the Spanish State and the Holy See on Economic Affairs dated 3 January 1979, which was signed before Spain joined the European Union.

⁷ Obviously, at present, neither the signature of agreements with religious confessions is in itself a sign of a State with a national church or with a church established by law, nor is the principle of neutrality or *laïcité* incompatible with the signature of agreements between public authorities and religious organizations; see J. GAUDEMET, *Laïcité e concordato*, in *Quaderni di diritto e politica ecclesiastica*, 1999/1, pp. 127-145; M. VENTURA, *La laicità dell'Unione Europea. Diritti, mercato, religione* (Torino, 2001) pp. 110-116.

⁸ To refer to this phenomenon, Italian scholars use the expression *dilatazione del principio di bilateralità*; see P. FLORIS, ‘Uguale libertà’ delle confessioni religiose e bilateralità tra Stato e Chiesa (teorie giuridiche e progetti di riforma), in *Rivista trimestrale di diritto pubblico*, 1 (1983) p. 40; A. VITALE, *Corso di diritto ecclesiastico* (8.^a edizione, Milano, 1996) p. 176; C. CARDIA, *Manuale di diritto ecclesiastico* (2.^a edizione, Bologna, 1999) p. 240. The latter author has also used the expression *bilateralità diffusa*; see IDEM, *Stato e confessioni religiose. Il regime pattizio* (Bologna, 1988) p. 369.

the Holy See; on the other hand, the concordats have become framework agreements that must be developed and put into practice by means of new covenants, generally signed by the dioceses or by the Episcopal Conference of each nation with public authorities. In this respect, the concordat is not only important for its own substantive content, but also because it determines the way and form in which multiple matters that affect the Church and its organizations will have to be regulated.

The reasons for the growing number of agreements between public authorities and religious denominations are complex: very diverse, and on occasion seemingly unrelated, circumstances influence the proliferation of agreements with the peculiarity that none of them is decisively significant in and by itself.

Nevertheless, it is possible, at least as regards the Spanish legal system, to point to a primary cause that could explain the proliferation of agreements between public authorities and religious denominations. This cause is *the multiplication of legal interlocutors*. In the system prior to the 1978 Constitution, both the State and the Roman Catholic Church were structured as strongly centralized, hierarchical institutions. Whereas in the case of the State, these two characteristics, understood as defining elements, no longer apply, they still apply to the Roman Catholic Church though they have undergone significant transformations.

So far as the State is concerned, the 1978 Constitution has been a radical innovation with implementation of the regional model and recognition of the autonomy of local corporations. Together with the central Government, there are now public territorial organizations with regulatory – normative – powers. In the case of the *Comunidades Autónomas* (regional entities), these powers include the power to enact Acts through their legislative assemblies. To this, which in itself is revolutionary if compared to the previous system, is added the transition from the nineteenth-century State ruled by law to the *social State*, which has led to a progressive interventionism of the public authorities in the most varied areas of the legal sphere. The new role of the public powers has required constant development and a gradual specialization of the public organization, which has weakened the principle of hierarchy in administrative structures and strengthened the principle of autonomy of the different Public Administrations and their different bodies. This has favoured a growing recourse to concertedness, between the public entities themselves and also between public and private parties.

So far as the Roman Catholic Church is concerned, as of the second half of the 20th century, and particularly with the Second Vatican Council,

the Episcopal Conferences and the single diocesan churches have played a more important role in relations with State authorities, and particularly in the negotiation and signature of agreements. Even though the authority of the Holy See to sign concordats with the different States has in no way been diminished – and even though the Episcopal Conferences and Bishops may not enter into authentic concordats – there are increasingly frequent references in the treaties between the Holy See and the States to future agreements of development to be signed between the Episcopal Conference or the Dioceses and the secular authorities.⁹

Regarding this multiplication of legal interlocutors, apart from the changes that the State and the Catholic Church have undergone, the appearance on stage of religious confessions other than the Catholic Church in traditionally Catholic countries must also be taken into consideration. The principles of neutrality and non-discrimination for religious reasons have required a reworking of the system of agreements between the Church and the State. And faced with the choice of abolishing this system or extending it to the other religious confessions, the second option has been chosen. Although it may seem paradoxical, these principles have given a new push to the practice of compromise and have strengthened the policy of agreements.

(2) Concordats

Concordats are agreements signed between a State and the Holy See. When the Holy See signs a concordat, it acts in representation of the universal Church and exercises its international legal status. Therefore, as established by canonical, and internationalist academic scholars, concordats fall within the framework of international relations and are put on the same footing as international treaties.¹⁰

The Spanish State has four agreements signed with the Holy See dated 3 January 1979: the Agreement on Legal Affairs; the Agreement on Economic Affairs; the Agreement on Religious Attendance of the Armed Forces and Military Service of Clergy and Members of Religious Orders;

⁹ See P. ERDŐ, *Le Conferenze episcopale nelle relazioni della Chiesa con lo Stato moderno*, in *Revista Española de Derecho Canónico*, 55 (1998) pp. 255-263; G. FELICIANI, *Gli episcopati nuovi protagonisti delle relazioni tra la Chiesa e gli Stati*, in *Periodica*, 89 (2000) pp. 661-680.

¹⁰ The classic work on this point is H. WAGNON, *Concordats et Droit international* (Gembloux, 1935). For a more updated exposition of the concordatarian theory and the nature of concordats, refer to P. A. D'AVACK, *Concordato ecclesiastico*, in *Enciclopedia del diritto*, vol. VIII (Milano, 1961), pp. 441-470; G. CATALANO, *Concordato ecclesiastico*, in *Enciclopedia Giuridica*, vol. VII (Roma, 1988).

and the Agreement on Educational and Cultural Affairs. Despite their denomination, these four Agreements are of a concordatary nature and are considered as international treaties by both the Constitutional Court and the Supreme Court¹¹. They were drawn up and incorporated into the Spanish legal system in accordance with the rules provided for international treaties in articles 93 to 96 of the Constitution; before being ratified, they were approved by Parliament and, following a consolidated tradition of Spanish law concerning international treaties, they were incorporated into the domestic law through publication in the *Boletín Oficial del Estado* without any need for dictating a specific decree or Act for this purpose.¹²

With these four Agreements, the 1953 Concordat signed in the Franco era was repealed in full. Taken as a whole, they provide a complete legal statute for the Catholic Church and its organizations. Specifically, the *Agreement on Legal Affairs* deals with the legal status of ecclesiastical organizations and entities, places of worship and archives, religious attendance and the civil effectiveness of canonical marriage. The *Agreement on Economic Affairs* addresses the funding of the Catholic Church through the State's general budgets, tax incentives for private contributions to ecclesiastical entities, and taxes on Church organizations and their assets. The *Agreement on Religious Attendance of the Armed Forces and Military Service of Clergy and Members of Religious Orders* deals with spiritual assistance to army members and the way in which ministers of religion and members of religious orders should fulfill their military obligations. Finally, the *Agreement on Educational and Cultural Affairs* regulates religion classes in public schools, the teaching activity carried out by the Roman Catholic Church, the regulation of ecclesiastical places and properties of historical-artistic value, and protection of religious feelings in public communication media.¹³

¹¹ Among many others, Constitutional Court Decision 66/1982, dated November 12th. As for Supreme Court case law, we should mention the Decision dated November 26th, 1991 (RAJ 8772). The case law of the Supreme Court in this respect dates back to the 19th century.

¹² In the Spanish legal system, international norms are automatically accepted and incorporated into domestic law without the need for dictating any domestic juridical act.

¹³ Article XVII.2 of the Agreement on Educational and Cultural Affairs reads: "However, the rights acquired by those Universities that the Church has established in Spain at the time of the signing of this Agreement are assured. These, however, may choose to adapt to the general legislation concerning private Universities". By virtue of this precept, an Agreement with the Holy See dated 5 April 1962 on recognition for civil purposes of non-ecclesiastical studies in Church Universities continues to be applied to the Church

In addition to these four Agreements, the Agreement of 28 July 1976 is still in force. With this agreement, as indicated above, the process of replacing the 1953 Concordat was begun. The content of this 1976 agreement is very symbolic; the State relinquished the privilege of presenting bishops, while the Holy See relinquished the privilege of clergy special jurisdiction. The purpose of these gestures was to manifest that Church-State relations should and would be channeled differently than in the concordat of the Franco period and more in tune with the legal atmosphere apparent after the Second Vatican Council and with the consolidation of human rights at the international level and in most Western European democracies¹⁴.

(3) Agreements promulgated as an Act of Parliament

Article 7 of Religious Freedom Act 7/1980 dated 5 July 1980 specifies that the State may, if appropriate, enter into cooperation agreements or covenants with religious denominations that meet two requirements: 1) they are entered in the Ministry of Justice Register of Religious Entities; 2) they have, thanks to their reach and number of believers, obviously taken root in Spain. There will be further discussion of the scope and meaning of these two requirements later.

As specified in this article, these agreements must be approved as law by Parliament. Therefore, once an agreement has been signed between the Administration (the central Government) and a religious confession, it must be passed by Parliament as an Act in order to be incorporated into the legal system. Otherwise, i.e. in the absence of parliamentary approval, it will be a mere political act without legal significance and its fulfillment cannot be exacted before the courts of justice.

There are no provisions in either the Religious Freedom Act or in the rules of Parliament regarding how parliamentary passage of these agreements should be accomplished. In principle, since they are approved by an Act of Parliament, they follow the same procedures as for any bill introduced by the Government. This point is clear, but there are doubts

Universities created before this 3 January 1979 Agreement took effect. This affects four Church Universities: the University of Navarra, the University of Deusto, the Pontifical University of Salamanca and the Pontifical University of Comillas.

¹⁴ There is also another concordat between Spain and the Holy See dated 21 December 1994, concerning issues of common interest in the Holy Land (*Tierra Santa*). As indicated by its wording, it deals with a very specific issue – administration of a series of religious assets of the Holy Places located in the Holy Land – and therefore has very little influence on regulation of the religious phenomenon in Spanish law.

about whether Parliament may amend the text agreed on between the Government and the religious confession. One group of scholars argues that this possibility should be admitted, as the introduction of amendments is an essential attribute of parliamentary sovereignty. By way of contrast, other authors argue that this possibility should be denied because, if not, the agreement reached between the Government and the religious confession would be modified. According to these scholars, the houses of Parliament should limit themselves to approving or rejecting the agreement.¹⁵ In our opinion, this is the criterion that should be followed to respect the agreement, as the opposite view distorts the meaning of article 7 of the Religious Freedom Act by allowing modification of the agreement reached with the religious confession without permitting the religious party to intervene and express its point of view.

The practice followed to-date confirms this consideration. Three agreements have been signed to date in keeping with article 7 of the Religious Freedom Act, and they have been approved by Act 24/1992 dated 10 November 1992, whereby the State's cooperation Agreement with the Federation of Evangelical Religious Entities of Spain (FEREDE) is passed, Act 25/1992 dated 10 November 1992, whereby the State's cooperation Agreement with the Federation of Israelite Communities of Spain (FCI) is passed, and Act 26/1992 dated 10 November 1992, whereby the State's cooperation Agreement with the Islamic Commission of Spain (CIE) is passed.

For purposes of parliamentary procedure, the Cabinet of Ministers agreed to send the bill to Parliament as one Act with a single article, including the agreement signed between the Government and the religious confession as an annex to the Act. The general committee of the Lower House of Parliament (the Congress) agreed to debate the Act by the single reading procedure, so that only total acceptance or rejection of amendments would be admitted, but not partial amendments on modification of some point in the covenant. In the Senate, on the other hand, the regular legislative procedure was followed, but no amendment was submitted. These options reveal or confirm that modifying the agreement signed between the Government and the religious confession in the parliamentary approval phase does not make much sense. If any clause in the agreement is not admissible in the view of the Houses of Parliament, the text should be resubmitted to the Government so that it can renegotiate its contents with the religious denomination.

¹⁵ Regarding these academic positions, see A. C. ÁLVAREZ CORTINA, *Los acuerdos con las confesiones religiosas distintas a la Iglesia católica en la doctrina española*, in *Anuario de Derecho Eclesiástico del Estado*, 8 (1992) pp. 577-578.

(4) Agreements between Public Administrations and religious denominations

This type of agreement is defined on a negative basis: they are not concordats, nor are they approved by parliamentary Act. As they do not have a concrete structure or configuration, a single legal status cannot be conferred on them because their typology is very varied. They share the characteristics inherent in the conventional activity of the Administration. As a result, the term *agreement* refers to different figures, and the characteristic common to all of them is that they have been signed between a religious entity and a public body which exercises its typically administrative powers.¹⁶

From the perspective of their object, the following types of agreements are distinguished: inter-facultative agreements, agreements of a normative nature, agreements on administrative acts and powers, and agreements on service provisions.

(i) *Inter-facultative agreements* are those in which public powers and religious powers (of the religious confessions) agree in a relationship of coordination and cooperation. In these agreements, the position of the religious entities, even though they are not public bodies, is not comparable to that of a simple administered or private entity. The religious group is not in a position of subordination, as the purpose of the agreement is to coordinate religious and secular authorities with a goal mutually agreed by both parties: guardianship of religious freedom, protection of the historical heritage, religious education, etc. These agreements are defined by two basic principles. The *first* is the State's positive attitude to the fundamental right of religious freedom; the State, abiding by the provisions of articles 9.2 and 16.3 of the Constitution, cooperates with the denominations to make its citizens' right to religious freedom real and effective and remove the obstacles that prevent or impede its full enjoyment. The *second* is the issues addressed in them: they refer to issues that the public authorities cannot determine by themselves by virtue of the principle of neutrality on religious matters, e.g. holy days and festivals, religious attendance or contents of religious education.

(ii) *Agreements of a normative nature* are a manifestation of the normative (regulatory) power of the Administration, but with the particularity that it is exercised on the basis of consensus with the religious confessions. These include different actions, although they all have an identical end result: renewal of the legal system. A substantial part of this type of agreement is linked to the four concordatarian Agreements

¹⁶ Regarding these agreements, see M. RODRÍGUEZ BLANCO, *Los convenios entre las Administraciones Públicas y las confesiones religiosas* (Pamplona, 2003).

signed with the Holy See on 3 January 1979, which foresee the general need for consensus in interpretation and development. Although the Administration, just like the legislative power, has the authority and obligation to apply the concordats on the internal or domestic level, the other party – in this case the Roman Catholic Church – has the power to demand that this application be accomplished by mutual agreement.¹⁷ Apart from this general provision, the concordatary Agreements of 3 January 1979 contain clauses that refer to later covenants between the parties. The structures of these clauses differ; at times they address a mere possibility of signing an agreement on a non-binding basis, whereas on other occasions the subsequent agreement is essential to define an issue or to regulate it in full. In the latter cases, the agreement is seen as a necessary normative action and, without it, the points agreed on would not be fulfilled.¹⁸

(iii) *Agreements on administrative acts and powers* concern actions of administrative bodies on exercising their own competencies. In these, the position of the religious denominations is the same as the position of any administered (private) entity. A basic classification of these agreements is one that distinguishes between agreements on discretionary powers and agreements of execution. The former are covenants in which two circumstances coincide: on one hand, the administrative decision rests on an assessment of the public interest, and on the other no administered entity has a right to have this discretionary decision of the Administration dictated with a specific content. The latter – agreements of execution – are characterized by the non-existence of discretionary elements in the administrative action. Therefore, their scope is that of the regulated powers of the Administration. In the case of the conventional practice between Public Administrations and religious confessions, the typical agreements on discretionary powers are those concerning public subsidies earmarked for repairing religious buildings. Agreements of execution, on the other hand, are signed mostly for urban development

¹⁷ Cfr. Article VII of the Agreement on Legal Affairs, article XVI of the Agreement on Educational and Cultural Affairs, article VI of the Agreement on Economic Affairs, and article VII of the Agreement on Religious Attendance of the Armed Forces and Military Service of Clergy and Members of Religious Orders.

¹⁸ These clauses can be extended to the broad figure of the *pacta de contrahendo*, by virtue of which the parties assume the obligation of negotiating in good faith the point indicated as the object of the agreement [see L. MARION, *La notion de «pactum de contrahendo» dans la jurisprudence internationale*, in *Revue Generale de Droit International Public*, 78 (1974), pp. 351-398]. In these cases, the State assumes the legal commitment to regulate a matter by consensus.

purposes. They are intended for executing the actions provided in urban planning. These agreements of execution also include those regarding regulated permits, such as licenses.

(iv) Finally, the purpose of *Agreements on service provisions* is the provision of services by a religious organization in the Administration's favour. These agreements should be qualified as administrative service contracts.¹⁹

2. *Parties to the agreements*

The description of the entities which subscribe to agreements between the public authorities and the religious organizations will distinguish between the State or secular party and the religious party. Likewise, the typology of agreements developed in the preceding section will be taken into account.

(1) *Concordats*

(i) *State or secular party*

As indicated, the Spanish legal system leaves no room for doubt about the consideration of concordats as international treaties. This consideration means they must be subscribed to by the central Government. Other territorial entities – *Comunidades Autónomas* and other regional districts – even though they have normative powers, are not authorized to enter into concordats with the Holy See.

The State's monopoly to sign concordats does not stem from the fact that they address issues concerning religion. In Spanish legal system, Church-State relations are not exclusively the province of the central Government. The *Comunidades Autónomas* and local corporations are empowered to regulate matters affecting the religious factor (including urban development, historical heritage or holy days). The reason why this type of regional entities cannot sign concordats is that matters concerning *international relations* are reserved exclusively for the central government (article 149.1.3. of the Constitution). And since concordats are qualified as international treaties, only the central government may enter into them.

¹⁹ An example of this can be found in the contract signed on 31 December 2001, between Euskal Telebista-Televisión Vasca S.A. and the Evangelical Council of the Basque Country. The public television of the Basque Country contracts the production and scriptwriting services for a religious program. These services are provided by the Evangelical Council of the Basque Country in exchange for a price expressly set in the agreement.

With regard to this matter, it should be noted that the distribution of powers between the central Government and the *Comunidades Autónomas*, as laid down in article 149 of the Constitution, causes conflicts in questions of relations between the State and the religious confessions because, as things stand, only the central Government is qualified to enter into concordats but does not have the monopoly to regulate issues regarding the religious factor. Therefore, when signing a concordat with the Holy See, the central Government should abstain from regulating matters that fall under the province of the *Comunidades Autónomas* or, if these matters are regulated, the regional entities should be consulted so they can take part in determining the content of the concordat.

Notwithstanding these considerations, the *Comunidades Autónomas* were not taken into account in the four Agreements subscribed between the State and the Holy See of 3 January 1979. This perhaps can be explained by the fact that these concordatarian agreements were drawn up at the same time as the Constitution. The territorial organization of the State was still not fully designed, and obviously the competencies that the *Comunidades Autónomas* would have were still not determined. This has resulted in some conflicts between the regional authorities and the central Government in matters such as holy days or tax benefits. To avoid these conflicts, the regional authorities should be taken into consideration on executing concordats and, in the case of some issues, they should be executed by the *Comunidades Autónomas* without requiring the intervention of the central Government. In fact, issues such as historical-artistic heritage or religious attendance are regulated by means of agreements between the *Comunidades Autónomas* and the dioceses of their territorial regions. However, it should be borne in mind that some coordination is required between the regional authorities and the central Government because in certain areas the existence of a common legal regulation is advisable, at least concerning substantial aspects. Their direct or indirect relation to the fundamental right of religious freedom – in issues such as religious education, holy days or religious attendance – requires some common guarantees and rights for all citizens anywhere in the national territory.²⁰

²⁰ As established in article 149.1.1 of the Constitution, the State is responsible for "regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties".

(ii) *The ecclesiastical party*

So far as the ecclesiastical party is concerned, the concordat is subscribed to by the Holy See, which acts in representation of the *universal* Church. Canon law academic scholars have proposed the possibility of bishops signing concordats. Although some authors have even attributed this power to ordinary diocesans based on historical precedents,²¹ the scholars who reject this possibility represent the majority opinion. Given the current conception of the concordatarian institution, which is compared to an international treaty in national legal systems, a concordat subscribed to by a bishop with a certain State is not admissible for the simple reason that the bishop is not a contractual party in International Law. In the legal qualification of concordats, the determining factor is the international status of the Holy See and its capacity to sign treaties, both of which are recognized by the international community. Agreements of intentions between bishops and State authorities do not fall under the scope of international relations, nor do they follow the drafting procedures inherent in international treaties. These same considerations apply to covenants subscribed by Episcopal Conferences.²²

Nevertheless, the covenants between public entities and the dioceses or Episcopal Conferences are, on occasions, linked to a concordat, which they execute or interpret. This link does not make them international treaties but it does produce juridical effects, as it affects the position of these agreements in the system of legal sources, a subject that will be discussed later.

(2) Agreements promulgated as an Act of Parliament

(i) *State or secular party*

Article 7 of the Religious Freedom Act provides that cooperation agreements will be established by the State (central Government) and that the Act approving them will be passed by Parliament. It would seem from this that these agreements can only be subscribed to by the central Government. However, a broader interpretation of the precept should be

²¹ See R. NAZ, *Concordat*, in *Dictionnaire de Droit Canonique*, t. III (Paris, 1942) pp. 1357-1358.

²² Nevertheless, it should be taken into account that these ecclesiastical entities play an important role in the drafting and signing of concordats. Canon Law confers authority on them for these purposes and their attitude plays a relevant role in the adoption of concordat commitments. In this respect, in §2 of canon 365 of the Code of Canon Law, after pointing out that the Pontifical Legate should work on the negotiation of concordats and other conventions of this type and make sure they are put into practice, it indicates that, on developing these functions, it shall ask for the opinion and advice of the bishops of the ecclesiastical district and inform them of the progress of the proceedings.

made and the possibility admitted that agreements promulgated as an Act be signed at the regional level by the *Comunidades Autónomas*. Since these agreements do not fall within the framework of international relations, there is nothing that prevents the *Comunidades Autónomas* from reaching agreements with those religious confessions that have obviously taken root in their territorial districts and these agreements from being approved as an Act by the regional legislative assembly. Obviously, the purpose of the regional agreement should concern matters that are the province of the *Comunidad Autónoma* that signs the covenant and it will only be valid in that *Comunidad Autónoma's* territorial district.²³

The 1992 Agreements entered into with Evangelists (FEREDE), Jews (FCI) and Muslims (CIE) have been subscribed to by the central Government by exercising its executive powers. When the agreement is signed, it is not a legal norm; it merely contains a political commitment not exactable before the courts. By virtue of its signature, the government only binds itself to submit it to Parliament for parliamentary debate, but it does not assume the commitment of having it approved as an Act because it cannot compromise the sovereignty of the Houses of Parliament, i.e. it does not have the authority to assume this obligation. Only when the agreement has been passed as law in Parliament will it form part of the legal system and be binding on all entities that make up the State. After it is passed through Parliament and officially published in the *Boletín Oficial del Estado*, it is obvious that a change of Government will not affect its force.

(ii) *Ecclesiastical party*

Article 7 of the Religious Freedom Act specifies that cooperation agreements will be reached with those denominations that fulfill two requirements: 1) they are entered into the Register of Religious Entities; 2) they have, thanks to their reach and number of believers, obviously taken root in Spain.

²³ Notwithstanding the preceding considerations, the truth is that, to date, no *Comunidad Autónoma* has made use of this possibility. The different agreements that have been signed with religious confessions on a regional level have not followed the channels provided in article 7 of the Religious Freedom Act and they have not been passed as Acts by the regional legislative assemblies; see the list of agreements signed by *Comunidades Autónomas* contained in *Anuario de Derecho Eclesiástico del Estado*, 14 (1998), pp. 885-897. Added to these is the Agreement between the Xunta de Galicia and the Evangelical Council of Galicia dated 3 February 2000.

The first requirement – registration – should be related to the provisions of article 5 of the Religious Freedom Act, according to which “Churches, confessions and religious communities and their federations shall acquire legal personality once registered in the corresponding public Register, which is created for such purpose and kept in the Ministry of Justice”. This Register is the *Register of Religious Entities*, whose basic regulation is laid down in Royal Decree 142/1981 dated 9 January 1981, which defines its organization and functioning.

The Ministry of Justice is responsible for deciding on applications for registration in the Register of Religious Entities submitted by religious denominations, although this power is delegated to the General Director for Religious Affairs, who must resolve the procedure in a maximum of six months. Registration is not done automatically; it must be requested by the religious organization in writing and the application must be accompanied by the following documents and data: literal attestation of the duly authenticated document of creation or notary document of its foundation or establishment in Spain; name of the organization; address; religious aims with respect to the limits established in article 3 of the Religious Freedom Act; operating regime and representative bodies stating their powers and the requirements for valid appointment; and, optionally, the nominal list of people who legally represent the organization²⁴.

The powers held by the Administration over registration records are regulated powers; consequently, it is limited to verifying that the circumstances required for registration are met and it is not empowered to make any kind of discretionary assessment of the submitted data and documents. It will only be possible to deny the registration when the requirements are not duly certified.²⁵ This is clearly laid down by the Constitutional Court in Decision 46/2001, dated February 15th: “the Administration responsible for this instrument does not function in a realm of discretion that gives it a certain margin of judgment to agree or not agree to the requested registration, but rather its action in this realm can only be qualified as limited”.

²⁴ Cfr. article 5.2 of the Religious Freedom Act and article 3 of Royal Decree 142/1981.

²⁵ Cfr. article 4.2 of Royal Decree 142/1981. In administrative practice, the limited nature of the power has frequently been ignored and requirements not mentioned in current legislation have been demanded in order to grant the registration (see A. MOTILLA, *El concepto de confesión religiosa en el Derecho español. Práctica administrativa y doctrina jurisprudencial* (Madrid, 1999) pp. 164-170). This administrative practice has been partially corrected by the *Audiencia Nacional* (a national court of justice) in Decisions dated 5 December 1997, 3 March 1999 and 2 December 1999.

The limited nature of the administrative powers does not convert the registration into an automatic procedure. The Administration must necessarily examine the submitted documents as required by the principle of legality. Based on the submitted documentation, the Administration must confirm or verify if the legal requirements are met, and in particular if the organization in question belongs in the Register.²⁶

Registration can give rise to problems because the elements that delimit the Administration's powers include *imprecise legal concepts*. In these cases, the reality addressed by the norm is not precisely defined and the Administration must concretely focus on each application. The most problematic of these concepts are the notions of *religious aims or purposes* and *public order*.

The positive criteria used by the Administration to decide whether an organization has *religious aims* are as follows: it has a body of doctrine that expresses the religious beliefs it professes and wishes to convey to others; it has a liturgy that embodies the rites and ceremonies that constitute worship, with the existence of places of worship and ministers of religion.²⁷ Together with this positive determination, the Administration has used negative criteria that do not include the assessment of religious aims: commercial activities, cultural aims, philosophical aims and the aims set forth in article 3.2 of the Religious Freedom Act.²⁸ Finally, a basic requirement added to the above is the preponderance of religious aims over other types of purposes or activities.

As regards *public order*, a typical expression in the area of limits on fundamental rights, it has been used by the Administration as an objective limit, based on *a priori* judgment, to deny the access of groups to the Register of Religious Entities. The Constitutional Court has reacted against this practice in Decision 46/2001²⁹: "when art. 16.1 of the Spanish Constitution

²⁶ In this respect, the Constitutional Court has stated its position in Decision 46/2001, dated February 15th.

²⁷ See A. MOTILLA, *El concepto de confesión religiosa en el Derecho español...* cit., pp. 120-124.

²⁸ The precept establishes: "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 non-religious aims do not qualify for the protection provided in this Act".

²⁹ The Constitutional Court arguments are very similar to those used by the French *Conseil d'État* in two *arrêts* dated 23 June 2000, which refute the hypotheses of the Administration that the public order can abstractly work on the margin of specific violations of the public order by the religious group. Reference to these *arrêts* can be found in *Revue du Droit Public*, 6 (2000), pp. 1834-1837. The criticism of the Administration's position formulated by GARAY and GONI is very illuminating: "les limites d'un tel raisonnement sont flagrantes. En premier lieu, si le juge suivait ce raisonnement, il serait amené à sanctionner une atteinte

guarantees the freedoms of ideology, religion and worship «without any other restriction on their expression than may be necessary to maintain public order as protected by law», it means, by its mere wording, not only the importance of those rights to freedom as a fundamental part of all orders of democratic coexistence (art. 1.1 of the Spanish Constitution), but also the exceptional nature of public order as the only limit on the exercise of those rights, which legally translates into the impossibility of being applied by the public authorities as an open clause that can serve as the basis for mere suspicions regarding possible future behavior and its hypothetical consequences (...) the public order cannot be interpreted in the sense of a preventive clause against eventual risks, because in that case it itself becomes the greatest sure danger to exercising that right to freedom".

The second requirement stipulated in article 7 of the Religious Freedom Act for signing an agreement with the State – that the denomination has obviously taken root in Spain thanks to its reach and number of believers – is even more problematic. The expression *obviously taken root* refers to an imprecise legal concept, which is hard to define in practice. In any event, the term refers to a concrete legal category that will or will not apply to the religious confessions on the margin of any discretionary assessment by the Administration. Therefore, the administrative decision to recognize or reject can be appealed before the administrative tribunals and is fully controllable by the courts. Although the Administration does not have discretionary powers in the appraisal of this requirement, as long as there is not consolidated, consistent administrative practice regarding the requirements of *being obviously rooted in Spain*, there will be no criteria to judge the Administration's action because the courts will not have access to comparative terms for examining the rationality of the administrative pronouncement.

For signature of the 1992 Agreements, the Administration adopted the criterion of granting the concept of *being obviously rooted in Spain* to groups of denominations (Protestant, Jewish, Islamic) rather than to specific religious organizations. The religious groups were required to associate in representative *federations* – the FEREDE, the FCI and the

potentielle et non réelle à l'ordre public. En second lieu, et surtout, le moyen du demandeur requiert du juge qu'il procède à un contrôle in abstracto du dogme des Témoins de Jéhovah. L'affirmation selon laquelle le non respect de l'ordre public est constitué dès la profession d'une doctrine dont l'application est susceptible de générer des atteintes à l'ordre public s'appuie sur une conception objective de l'ordre public. Le dogme religieux se verrait opposer un ordre moral préétabli. Opérer un tel contrôle reviendrait à instituer une police de la pensée autoritaire et coercitive" [A. GARAY, P. GONI, *Note de jurisprudence administrative. Qualification des associations locales des Témoins de Jéhovah comme associations culturelles au sens de la loi de 1905*, in *Revue du Droit Public*, 6 (2000), p. 1827].

CIE – created for the sole purpose of signing the agreements with the State and acting as interlocutors recognized by the central Government.³⁰

This practice, the purpose of which is perhaps to prevent the proliferation of agreements, causes a perverse effect from a legal point of view: minority religious organizations that are barely established in Spain can benefit from an agreement with the State if they join any of the signatory federations of the covenants; on the other hand, denominations with a larger number of members and a longer tradition in Spain do not have a compromised legal status or the benefits that this involves. Furthermore, because the federations themselves decide which churches or communities can join, the State ultimately does not decide on the beneficiaries of the legal system laid down in the agreements. This is surely paradoxical, since these agreements are approved by an Act of Parliament.

(3) Agreements between Public Administrations and religious denominations

(i) *State or secular party*

These agreements are signed by bodies of the Administration on exercising functions inherent in administrative business and activity. They may be entered into either by territorial organizations of a national, regional or local reach or by non-territorial administrative bodies (e.g., a University). Only those administrative bodies that have been recognized as having this competence may enter into agreements with religious confessions. On using this premise to determine which bodies have contractual capacity with denominations, the rules that apply to public bodies and, even more particularly, the purpose of the agreement must be considered. For example, agreements of a normative nature may only be subscribed to by those bodies that hold normative powers.³¹

(ii) *Ecclesiastical party*

In the case of the Roman Catholic Church, the ecclesiastical entities entitled to reach agreements with Public Administrations are all those which hold jurisdictional, legislative or executive powers. The main parts with

³⁰ Regarding the characteristics and composition of these organizations, see J. MANTECÓN SANCHO, *Las confesiones como partes contratantes de los acuerdos de cooperación con el Estado*, in *Anuario de Derecho Eclesiástico del Estado*, 11 (1995), pp. 291-295.

³¹ Concerning this issue, see M. RODRÍGUEZ BLANCO, *Los convenios entre las Administraciones Públicas y las confesiones religiosas...* cit., pp. 147-167.

competency to subscribe to agreements are: the Holy See and the Ecumenical Council if the agreements affect the universal Church; Episcopal Conferences and particular Councils for agreements in their realm; diocesan bishops for agreements on affairs concerning their dioceses; the ordinary entities of any specific church or community comparable to it according to canon 368 of the Code of Canon Law; and the superiors of religious orders.

As regards non-Catholic denominations, it should be said that, in principle, all religious organizations entered in the Register of Religious Entities are entitled to subscribe agreements with an administrative body.³² Nevertheless, it should be remembered that the Evangelical, Jewish and Muslim communities that signed the cooperation agreements with the Spanish State in 1992 were required to create an organizational structure precisely for the purpose of channeling their covenants-based relations with the State. The agreements were not signed with single denominations, but rather with federations or groups of confessions – FEREDE, FCI and CIE – created for the purpose of signing cooperation agreements. Therefore, the most logical thing is that the agreements signed by the Protestant Churches, Israelite communities and Islamic communities be entered into by the FEREDE, FCI and CIE, especially if they are signed on a national level and in execution of the Agreements approved by Acts 24, 25 and 26/1992 dated 10 November 1992. The ultimate purpose of these organizations is to sign agreements and, even more importantly for practical purposes, they are admitted by the central Government as valid interlocutors for establishing conventional relations.

However, agreements have been entered into at the regional and local level with Evangelical, Jewish and Islamic organizations other than the FEREDE, FCI and CIE: the so-called regional *Evangelical Councils*,³³ Israelite Community of Madrid,³⁴ the Union of Islamic Communities of Spain,³⁵ and the Islamic Council of Granada.³⁶ Although some scholars have questioned the legitimacy of these religious organizations for signing

³² To determine the bodies of non-catholic denominations authorized to sign agreements with Public Administrations, the provisions of their statutes and the contents of the Register of Religious Entities will have to be considered.

³³ Among others, see the Framework Agreement of 21 May 1998 between the *Generalitat de Catalunya* and the Evangelical Council of Catalunya, and the Agreement of 3 February 2000 between the *Xunta de Galicia* and the Evangelical Council of Galicia.

³⁴ Framework collaboration agreement of 25 November 1997 between the *Comunidad Autónoma* of Madrid and the Israelite Community of Madrid.

³⁵ This is true of the Framework Agreement of collaboration dated 3 March 1998 between the *Comunidad Autónoma* of Madrid and the Union of Islamic Communities of Spain.

³⁶ This is the case of 25 October 2002 Agreement between the Granada City Council and the Islamic Council of Granada concerning assignment of a plot in the Granada municipal cemetery to this religious organization.

agreements,³⁷ they have been admitted as legitimate interlocutors by the *Comunidades Autónomas* and by local corporations. The proliferation of agreements with different religious organizations could result in situations of internal conflict between religious groups, but there is no doubt about the legal capacity of these organizations to subscribe to agreements provided they certify their valid constitution and represent a community of believers.

3. Position in the system of legal sources

(1) Concordats

Since concordats are considered as international treaties, they are binding on the legislator and may not be unilaterally modified by a subsequent statute law, unless this arises out of a denunciation or a renegotiation of the concordat. This doctrine, which is inherent in international treaties, is applied to concordats in the Supreme Court Decision of 8 February 1974 (RAJ 441): "as the 1851 Concordat and the Legal Agreement of 1860 are authentic international Treaties, they cannot be unilaterally modified by one of the High Parties, and therefore common Spanish Law is only applicable to the development of the rights and obligations provided therein as long as they do not distort the content (...) [therefore] the precepts of expiration provided in administrative Laws and in common Law cannot be applied to the case of judgments, because as these are duties and rights recognized by international agreements entered into by the Holy See in the 1851 Concordat and the 1860 Agreement, the former cannot be applicable without the existence of a due Agreement between both Parties".

Obviously, concordats are also binding on the Administration because, as generally established by article 103 of the Constitution, "the Public Administration objectively serves the general interest and acts (...) *in full submission to law*". Support of this point can be found, among others, in the Decision of the Supreme Court dated 3 February 1994 (RAJ 1133) that declares a series of regulatory precepts on teaching of religion in schools unlawful because their contents are contrary to the provisions of the 3 January 1979 Agreement between the Spanish State and the Holy See on Educational and Cultural Affairs.

Just as international treaties, concordats may be unilaterally interpreted by each of the parties (State or Church), but the other party has

³⁷ See A. GÓMEZ MOVELLÁN, *Convenios de colaboración entre Comunidades Autónomas y minorías religiosas*, in "Anuario de Derecho Eclesiástico del Estado", 15 (1999), pp. 441-451.

the right to demand a bilateral interpretation. This is important for purposes of enactment, development and execution of the concordats, because the State cannot impose on the Church a certain unilateral interpretation. In this respect, the four Agreements of 3 January 1979 between the Spanish State and the Holy See include a similar clause of the following tenor: "The Holy See and the Spanish Government will, by mutual agreement, proceed to resolve the doubts or problems that may arise in the interpretation or application of any clause of this Agreement, based on its underlying principles".³⁸ The essence of these clauses was emphasized by the *Consejo de Estado* (an advisory board) in a report dated 25 July 1996. The cause of the report was the following: after a tax was created by Act 39/1988 dated 28 December regulating Local Properties and Resources, the Catholic Church required from the State a bilateral interpretation of the Agreement on Economic Affairs of 3 January 1979, to decide if this tax was or was not included among the exemptions provided on a generic basis in the concordatarian agreement. The question was posed to the *Consejo de Estado*, and it clearly decided on the compulsoriness of the joint or bilateral interpretation: "The mentioned Agreement, which is internationally binding on Spain, requires (articles VI of the Agreement and 2 of its Additional Protocol) that fiscal benefits, tax exemptions and cases of non-submission *be bilaterally determined*, in accordance with the previously agreed principles (...) The *Consejo de Estado* understands that this determination of whether the Tax on Constructions, Installations and Works levied in articles 101 to 104 of Act 39/1988 dated December 28, regulating Local Properties and Resources, is included in the exemptions provided in the Agreement between the Holy See and Spain on Economic Affairs, *should be made by mutual agreement of both Parties*, bilaterally and in keeping with the principles previously agreed on in the mentioned Agreement".³⁹

(2) Agreements promulgated as an Act of Parliament

The cooperation agreements provided for in article 7 of the Religious Freedom Act are approved as an Act by Parliament. Therefore, their position in the system of legal sources will be the same as any other Act. In this way, there are no doubts about their capacity to renew the legal

³⁸ This is article VII of the Agreement on Legal Affairs; article XVI of the Agreement on Educational and Cultural Affairs, article VI of the Agreement on Economic Affairs and article VII of the Agreement on Religious Attendance of the Armed Forces and Military Service of Clergy and Members of Religious Orders have a practically identical text.

³⁹ CONSEJO DE ESTADO, *Recopilación de Doctrina Legal 1996* (Madrid, 1997) p. 1171.

system and repeal other Acts, but there are certain doubts about their passive resistance to future Acts. In other words: is it possible for a subsequent unilateral Act to modify the agreement?

Academic scholars are divided about this issue into two basic attitudes; for some, in keeping with the categories of *compromised law*, *special law* or *reinforced law*, it is not admissible to unilaterally modify the Act that ratifies the agreement; for others, on the other hand, since formally the agreements are simple unilateral Acts, they may be modified by Parliament without the need for counting on the signatory religious organizations.⁴⁰

Based on the Agreements signed in 1992 with Protestants, Jews and Muslims, as well as the Acts ratifying them, in our opinion the question has an obvious answer: the Parliament may unilaterally modify these Acts and legislate against that agreed on.⁴¹ However, this formally legitimate and fully valid parliamentary action involves a breach of, or at the very least an act of unbinding, the agreements, and consequently a minimum of consistency and, above all, due respect for the principle of *pacta sunt servanda* and legal security require that in such a case the agreed on texts be denounced or their contents renegotiated with the religious parties.

(3) Agreements between Public Administrations and religious denominations

In the case of these agreements, it only makes sense to refer to their position in the system of legal sources in those cases in which their objects are binding juridically. When their objects are administrative acts or contracts, they are contractually binding on the signatory parties, undoubtedly exactable before the courts of justice, but they are not nor do they create a general norm that becomes part of the legal system.

Normative agreements between Public Administrations and religious confessions are of a regulatory nature. The administrative bodies that sign them exercise their normative powers and, therefore, they are equivalent

⁴⁰ For a description of the different positions, see D. GARCÍA-PARDO, *El sistema de acuerdos con las confesiones minoritarias en España e Italia* (Madrid, 1999) pp. 151-156.

⁴¹ The single Final Provision of each of the 1992 Agreements with the FERED, the FCI and the CIE empowers the government to dictate the provisions required for developing and executing the agreement, and this power is reiterated in the first Final Provision of each of the approval Acts. No precept contains a previously agreed on development obligation; they only specify the creation of mixed joint committees for the application and follow-up of the agreements and stipulate the government's obligation to inform the signatory religious Federations of the legislative initiatives that affect the contents of the agreements so they can express their opinions.

to regulations. Although on many occasions these agreements are reached to execute or interpret a concordatary agreement with the Holy See, they are not considered as international treaties.

Notwithstanding their qualification as legal norms, in order to define their position in the system of legal sources, it is essential to take into consideration their possible relation or link to concordatary agreements, as well as the fact that they have been drawn up on a consensual basis with the participation of a religious organization. This circumstance is emphasized because, even though for purposes of official publication the agreements are usually included as an annex to a simple ministerial order or an administrative resolution, the way they are promulgated does not suffice to determine their position in the legal system.

The bilateral nature of formally unilateral provisions – ministerial orders or resolutions – that include or incorporate normative agreements into the legal system means that the criterion of normative hierarchy cannot be applied to them without further specification. In this type of provision, the *principle of competence* plays a leading role. The reason is that there are two grounds for drafting it: the existence of a previous agreement whose clauses must be fulfilled, and the religious nature of the regulated issue. In both cases, the religious organizations are recognized as having the competence to intervene in the regulation of a certain issue, either because the State has compromised this in an agreement,⁴² or else because the State does not have the competence to regulate it by itself.⁴³

4. Object of agreements

(1) Religious freedom, non-discrimination and non-establishment of churches

In the Spanish legal system, the State has the authority to unilaterally regulate religious matters. It is not required to enter into agreements with

⁴² Regarding this point, see article VII of the 3 January 1979 Agreement with the Holy See on Educational and Cultural Affairs: "The economic situation of teachers of the Catholic religion at the different educational levels, who are not part of the State's teaching staff, shall be arranged by the central Government and the Spanish Episcopal Conference, in order that it be applied when this Agreement takes effect".

⁴³ One of the most obvious examples is determination of holy days and festivals, an issue concerning which there is also a commitment of bilateral regulation. Article III of the 3 January 1979 Agreement with the Holy See on Legal Affairs states that: "The State recognizes Sunday as a holy day. Other religious activities or festivals to be recognized as holy days shall be decided by common consent".

religious organizations to legislate on religious issues.⁴⁴ Only by demand of the principle of non-establishment of churches or neutrality must it limit itself to indirectly regulating some matters, as it is not qualified to pass judgment on strictly religious issues; for example, it may decide that labor law will recognize a certain number of holy days of religious significance throughout the year, but it may not decide which days are the ones that have religious significance because the denominations are the ones responsible for that.

The State's full capacity to regulate religious matters means that, strictly speaking, there is no exact object of agreements with religious organizations. In Spanish legal system, there are no *res mixtae* in the traditional sense of the expression, and there is no provision indicating what the object of agreements or their contents should be. The objects of agreements vary widely; they address very diverse issues such as legal norms, coordination of State and religious powers, administrative acts and powers, and service provisions. The object is determined according to decisions of legislative policy or the choice of a certain administrative technique. The same is true of content: agreements deal with issues ranging from holy days, places of worship, ministers of religion, marriage, economic issues, religious attendance, teaching or historical heritage.

For these reasons, instead of strictly focusing on the object of agreements or describing their contents, we will refer to their purpose or motivation, which undoubtedly influences both the object and the content.

From a theoretical point of view – and thus on the margin of historical connotations and political circumstances – the primary cause of agreements between public authorities and denominations is promotion of the human right of religious freedom. Since the principle of religious freedom is central to Western democracies and the positive attitude of the State in matters of human rights is essential to guarantee their full effectiveness, agreements become an instrument of collaboration between public authorities and religious entities aimed at fully recognizing the religious freedom of the members of different denominations. The human right of religious freedom obviously corresponds to all citizens and to the different religious confessions without the need for entering into agreements with the State, in keeping with article 16 of the

⁴⁴ It is true that, on occasions, the State should regulate a matter by means of an agreement with a particular denomination, but this obligation, if it exists, results from a commitment acquired expressly in a previous agreement.

Spanish Constitution. This does not rule out, however, that covenants can contribute to the recognition of religious freedom, since through them the general norms on human rights are adapted to the peculiarities of each denomination.

This latter affirmation is directly linked to the principle of non-discrimination. Since the agreement makes it possible to account for the peculiarities and particular needs of each religious group – and consequently of the individuals of the group – conventional practice serves to prevent apparently neutral norms and practices from causing discrimination for religious reasons.⁴⁵ The concept of indirect discrimination introduced into European Union law serves to illustrate this argument: “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief (...) at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.⁴⁶ In this sense, agreements are a suitable instrument for inserting exceptions into neutral or general norms for the purpose of taking into account the characteristics of each belief and avoiding or remedying indirect discriminations.

Finally, another cause of agreements is the principle of neutrality or non-establishment of churches. This principle imposes neutrality on the public authorities in front of the religious factor and prevents them from assuming ecclesiastical functions. Both prescriptions, as part of the framework of the active position of the public authorities aimed at guaranteeing human rights, require the State to dialogue with religious groups in order to make the human right of religious freedom real and effective. As has been very graphically said, when public authorities cooperate with denominations they do not assume religious functions; they must cooperate precisely because they cannot assume these functions.⁴⁷ By means of the agreement, public authorities avoid decision-making in strictly religious matters by accepting the criteria of the religious organizations in

⁴⁵ On the violation of religious freedom by neutral norms and practices in the context of the European Convention on Human Rights, see S. STAVROS, *Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond?*, in *European Human Rights Law Review*, 6 (1997), pp. 607-627; C. EVANS, *Freedom of Religion under the European Convention on Human Rights* (Oxford, 2001) pp. 168-199.

⁴⁶ Cfr. article 2 of Directive 2000/78/CE dated November 27, 2000, establishing a general framework for equal treatment in employment and occupation.

⁴⁷ Vid. J. M. GONZÁLEZ DEL VALLE, *Derecho eclesiástico español* (5.ª edición, Madrid, 2002) p. 102.

these areas.⁴⁸ This effect of conventional relations has led Italian scholars to speak of *agreements of separation*.⁴⁹

(2) Limits on the object of agreements

If religious freedom, non-discrimination and non-establishment of churches are considered as the cause of agreements, at the same time, even though it may seem paradoxical, they represent limits on their object. These principles constitute basic values in which, ultimately, the essential content of norms and administrative practice is condensed, and therefore they are an indispensable limit that should be respected in conventional practice.

Agreements between public authorities and religious organizations are not an instrument for negotiating the recognition of the human right of religious freedom. As already indicated, agreements contribute to the effectiveness of this right by adapting the general rules and provisions to the peculiarities and particular needs of each denomination, but it should be clearly understood that the human right is unassailable, it should be guaranteed by secular legislation and its recognition must not be the object of any agreement. On one hand, religious organizations do not have the power to renounce manifestations of the right to religious freedom in exchange for other kinds of benefits or advantages, and on the other hand there is full recognition of the right and, according to constitutional law, public authorities have the obligation of guaranteeing this fullness (article 9.2 of the Spanish Constitution).⁵⁰

Moreover, the principle of non-establishment of churches must be respected in bilateral relations with religious groups. Public authorities are not empowered to assume religious functions by means of covenants, nor

⁴⁸ In this sense, see G. ZAGREBELSKY, *Principi costituzionali e sistema delle fonti di disciplina del fenomeno religioso*, in V. TOZZI (a cura di), *Studi per la sistemazione delle fonti in materia ecclesiastica* (Salerno, 1993) pp. 116-117.

⁴⁹ See, among others, P. A. D'AVACK, *Trattato di diritto ecclesiastico. Parte generale*, 2.^a edizione, Milano, 1978, pp. 219-221; R. BOTTA, *Un ramocello d'olivo a Santena (Itinerari separatisti nell'Accordo di Villa Madama)*, in *Il diritto ecclesiastico*, 98 (1987), Part I, pp. 117-136.

⁵⁰ As ONIDA has claimed, referring to the implementation of a common system of law for all religious groups in Italian legal system, the elimination of the agreements would result in the disappearance of certain privileges or benefits obtained by religious denominations, but it would never affect the recognition of religious freedom as such, as this is fully protected by the Constitution [see F. ONIDA, *L'alternativa del diritto comune*, in *Il diritto ecclesiastico*, 104 (1993), Part I, p. 902]. His considerations can be fully transferred to the Spanish case.

may the denominations assume secular functions for which the State is responsible.

The principles of religious freedom and non-establishment, in their role as a limit on the object of agreements, do not usually pose many problems at present. Constitutional and general jurisprudence on the scope of both principles is clear and its content is observed in conventional practice. The principle of non-discrimination, however, poses more significant problems.

From a theoretical perspective, the scope of the principle is clear: the Spanish Constitutional Court, in keeping with the European Court of Human Rights, has a consolidated jurisprudence according to which not all unequal treatment is an infraction of article 14 of the Constitution (principle of non-discrimination); only those differences in treatment that lack any objective, reasonable justification and that are disproportionate to the aim intended constitute an infraction.⁵¹ The problems occur when this jurisprudential construction is transferred to specific questions and an attempt is made to clarify the rationality and proportionality of a difference in legal treatment.

The characteristics of the current set of agreements between public authorities and religious groups existing in the Spanish legal system make it hard to reconcile them with the principle of non-discrimination. The four Agreements of 3 January 1979 with the Holy See contain a complete legal regime for the Catholic Church. The same is true of the 1992 Agreements with the FEREDE, the FCI and the CIE, which also have a practically identical content. Therefore, it cannot be said that the main purpose of the agreements is to account for the peculiarities and characteristics of each denomination in order to make the citizens' right of religious freedom real and effective, but rather it is to grant a special legal status to certain religious groups in very diverse matters: teaching, economic matters, marriage, places of worship, etc. On their part, religious organizations which have not signed an agreement with the State do not enjoy the advantages or the measures included in the covenants. It could be said that this does not violate the principle of non-discrimination because the degree of freedom among the different denominations should be the same but the degree of cooperation may differ. Nevertheless, it is obvious that dialogue or cooperation of public authorities with religious groups directly affects the religious freedom and rights of the members of that group.

⁵¹ This is the sense expressed in Constitutional Court Decision 110/1993, dated March 25th, which quotes several cases along the same lines.

In addition to the above, the differences between the religious organizations are not limited to the content of agreements. In the Spanish legal system, there is, from the early years of the decade of the 1980s, a consolidated tendency to introduce legislative measures – advantages or rights – only for the religious groups that have signed an agreement with the State. The result has been an absolute identification between the principle of cooperation and the agreements; that is to say: it is only possible to cooperate with public authorities through the signature of agreements. This orientation of the legislator has been supported by the Constitutional Court in Decision 46/2001, dated February 15th. According to the Court, the State only has to cooperate with the religious confessions that have obviously taken root in Spain, which means that the collaboration will only take place with the denominations that have entered into an agreement with the State.

The understanding of agreements as a *sine qua non* condition for cooperation with religious groups is not admissible. As a normative policy it is possible with certain limitations, but it is not the *only* possible interpretation of article 16.3 of the Constitution, because this article does not expressly mention agreements nor can it be deduced from it that covenants are the only cooperation technique.

This legislative policy has cast the denominations without an agreement into oblivion and diminished the possibilities offered by the constitutional framework to regulate the religious factor. In fact, the differences between the religious groups have grown and the number of legal statutes has increased: the non-Catholic denominations with an agreement have not attained the legal status of the Roman Catholic Church and a substantial disparity has been created between the confessions with an agreement and those without. There is now a status for the Catholic Church, another for denominations with an agreement, still another for those entered into the Register of Religious Entities, and a final one corresponding to unregistered confessions. This diversity has diminished the effectiveness of the 1980 Religious Freedom Act, which has ended up as a norm whose content is only applied to those denominations which have signed an agreement with the State.⁵² In this context, much has been correctly said about the transformation of agreements, which have gone from being an entitlement of the religious confessions to becoming a burden on them.

The risks created by the system of agreements to the principle of non-discrimination mean that it is essential to specify the requirements of the

religious organizations for signing agreements with public authorities.⁵³ Given the orientation of the agreements and the legislator's tendency to only take into account the denominations that have signed a covenant with the State, the Government's decision to enter into an agreement with a certain religious organization results in direct, important consequences for the legal status of that religious group and for the rights of its members. Therefore, their definition as a political decision outside jurisdictional control by courts cannot be accepted. The State may not decide with which denominations it negotiates without providing valid legal justifications that explain and lay the foundations for its choice.

Furthermore, this control should also be extended to the decisions of Parliament, as the enactment of Acts is controllable by the Constitutional Court and should respect the basic principles of the constitutional system, including non-discrimination for religious reasons. The dogma of parliamentary sovereignty can currently only be understood as a legal myth; the legislator must observe a series of impassable limits that include not only human rights, but also other principles such as the prohibition of arbitrariness (article 9.3 of the Spanish Constitution).

III. Administrative bodies created for cooperation with religious denominations

The principle of cooperation implies a dialogue between public authorities and denominations. This dialogue can be achieved by creating joint *ad hoc* bodies – mixed committees formed by representatives of public authorities and religious organizations – with the function of resolving a specific problems or collaborating in carrying out a specific action. At the same time, permanent committees that may or may not be part of the administrative organization can be set up for the mission of maintaining a dialogue of cooperation with religious organizations. The latter are primarily of two types: 1) mixed committees created to follow up and apply agreements subscribed to between public authorities and religious organizations; 2) the bodies that form part of the administrative structure and that are not linked to an agreement.

⁵³ Several years ago, FERRARI emphasized this aspect calling for more legal control of the use of the agreements, which leave too much space to the discretionary action of the contracting parties; see S. FERRARI, *Il fattore metodologico nella costruzione del sistema di diritto ecclesiastico in Dottrine generali del diritto e diritto ecclesiastico* (Napoli, 1986) pp. 232-235.

⁵² See J. M. GONZÁLEZ DEL VALLE, *Derecho eclesiástico español...* cit., pp. 153-154.

The four concordat Agreements with the Holy See of 3 January 1979 define the need for joint interpretation and application by the State and the Church, and for this purpose there are mixed committees formed by representatives of both sides. Likewise, the 1992 Agreements with the FEREDÉ, the FCI and the CIE provide for the existence of this type of committee.

As for the bodies that form part of the administrative structure, the main one is the Religious Freedom Advisory Committee, which was created by article 8 of the Religious Freedom Act. Its composition is joint and stable, including representatives of the central Government, representatives of the churches (in all cases including those that have obviously taken root in Spain), and people of recognized competence whose advice is considered of interest in areas of religious freedom and the legal status of the denominations.⁵⁴

This Committee is part of the Ministry of Justice and reports to the General Direction of Religious Affairs, a Ministry unit responsible for preparing, coordinating and executing Government policy concerning religious affairs, relations with churches, confessions and religious communities, issues regarding the exercise of the right to religious freedom, and relations with national and international organizations devoted to the promotion, defence and study of the right to religious freedom.

However, it should be remembered that religious affairs are not centralized in the Ministry of Justice, at least as regards decision-making capacity. To a certain extent, it could be said that the General Direction of Religious Affairs serves to channel the problems and demands of religious groups. Thus, the economic issues that affect religious organizations are dealt with in the Ministry of the Economy and Treasury, those regarding teaching are dealt with in the Ministry of Education and Science, and issues concerning religious attendance of the Armed Forces are the province of the Ministry of Defence.

Finally, the *Comunidades Autónomas* are able to regulate issues that affect the religious phenomenon (urban plans, cultural heritage, etc.), which has resulted in the creation of administrative units in these territories for the purpose of addressing issues concerning the religious factor.

⁵⁴ This is currently regulated by Royal Decree 1159/2001 dated October 26, and Order JUS/1375/2002 dated May 31.

LARS FRIEDNER

COVENANTAL AND NON-COVENANTAL COOPERATION OF STATE AND RELIGIONS IN SWEDEN

I. Concordats and settlements

There are no concordats in Sweden. The concordat – as a special legal form of a contract or a treaty between the state and a church or other denomination – is unknown to Swedish law.¹ There are of course treaties between the Swedish state and other sovereign states. From this point of view, a treaty between Sweden and the Holy See – that is, a concordat – is theoretically possible. But such a treaty with a church, which is not represented by a sovereign state, is a legal form that is not possible – or has at least until now not been used.

The Swedish reluctance regarding concordats is obviously an effect of Swedish religious history. Since the 16th century, Sweden has been a protestant country with a state church, the Evangelical-Lutheran church. It was not until the turn of the millennium, that Sweden abolished the state-church system.² And with a church dominated by the state there is no need for a concordat. In such a system, the state has no reason to regard the Church – or any church – as an equal party able to make a treaty. In fact, the state church is legally a component of the state.

In the historic relations between the Swedish state and the Evangelical-Lutheran Church of Sweden there has been no room for a concordat. In view of the fact that the other churches in Sweden have only very small numbers of people as members,³ the question of a concordat with any of these churches has never been raised (although the Swedish state has diplomatic relations with the Holy See⁴).

However, with the new relations between state and church in Sweden, the situation has changed. As the Church of Sweden is no longer a state

¹ Ekström, *Makten över Svenska kyrkan – om Svenska kyrkan, folket och staten* (Stockholm 2003), s. 237; *Staten och trossamfundet* (SOU 1994:42), s. 60.

² 1-2 §§lagen om införande av lagen om Svenska kyrkan (SFS 1998:1591); Ekström, s. 250.

³ www.sst.a.se

⁴ *Statskalendern 2004*, 10-14, 318.

church, a concordat could have been a possible way of regulating the legal links currently prevailing. But, as mentioned, referring to Swedish traditions, this approach has not been used.

Instead, the legal framework consists of two acts of parliament, an Act on Denominations,⁵ and a Church of Sweden Act.⁶ These acts prescribe the legal nature of the relations between the state and the churches. The Act on Denominations only makes provision on how to register a denomination. The Church of Sweden Act, on the other hand, makes provision regarding what the state and the Church of Sweden have to fulfil in respect to each other. In this respect, the relation between the Swedish state and the Church of Sweden is in fact quite close to a relation that could be decided through a concordat. But still, the relation formally is not one comprising two sovereign parties negotiating a contract but that of a law, decided on by the state in its supremacy.

The Swedish Humanist Association⁷ has applied to be registered as a denomination but has been refused. According to the Act on Denominations, only an association that arranges sermons can be registered.⁸

Although many representatives of churches and denominations other than the Church of Sweden were quite satisfied with the new arrangements for church-state relations in Sweden, there have been some criticisms of the fact that the *Riksdag* (Swedish Parliament) has decided on two different acts. The critics focus on the legal "special treatment" of the Church of Sweden through this legislative structure.⁹ The responsibility of the Church of Sweden for the Swedish funeral system has also been criticized.¹⁰ The response from the Church of Sweden has been that the Church of Sweden Act limits the freedom of the church rather than affording any special advantages and that no-one in Swedish society, except the Church of Sweden, has declared its readiness to administer a funeral system. The "special treatment" in Sweden concerning the Church of Sweden is merely due to its size and history. It must be noted, however, that the special parliamentary Church of Sweden Act implies some kind of special treatment.

As the Church of Sweden is no longer a part of the state, it has now been possible for the state and the church to establish contractual

⁵ *Lagen om trossamfund* (SFS 1998:1593).

⁶ *Lagen om Svenska kyrkan* (SFS 1998:1591).

⁷ *Humanisterna*.

⁸ 2 § *lagen om trossamfund*.

⁹ *Ekström*, s. 214, 217, 246.

¹⁰ *Ekström*, s. 216, 217.

relations. To date, one principal contract has been signed. This contract regulates cooperation concerning old Church of Sweden buildings and provides for the functions of state authorities in this regard.¹¹

In the relations between the state and churches other than the Church of Sweden (as well as other denominations), the state has granted many of these churches (and other denominations) the right to state subsidies,¹² and the right to solemnize marriages.¹³ Some of them have also been granted the right to use the taxation system for collecting their membership fees.¹⁴

The Swedish Humanist Association has none of these rights.

From the above is obvious that church-state relations in Sweden are principally a matter of public law (including constitutional law). However, in the field of church buildings there is a contract, which makes it a part of private law. Churches and other denominations in Sweden have no legal privileges. For example, the generally applicable labour law also applies to these legal entities.

There is no discussion in Sweden concerning the question of concordats. Consequently, nor is it to be expected that concordats might be used as a legal form in the future. On the other hand, one can guess that private law contracts regulating different matters between state and churches will become more frequently used henceforth.

II. Dialogue

The main body to enable cooperation between state and churches (and other denominations) in Sweden is the *Government's Council for Contacts with the Denominations*.¹⁵ All the large churches and denominations in Sweden are represented on the Council. The Council meets about four times a year, chaired by the Minister of Culture (who is also responsible for church relations).¹⁶ The Council has no decision-making power; it is simply a forum for discussion. The Swedish Humanist Association does not have a seat on the Council.

¹¹ Prop. 1998/99:38, s. 148.

¹² *Lagen om stöd till trossamfund* (SFS 1999:932).

¹³ *Lagen om rätt att förrätta vigsel inom andra trossamfund än Svenska kyrkan* (SFS 1993:305).

¹⁴ 16 § *lagen om trossamfund*; *Edqvist&al, Kyrkoordning för Svenska kyrkan med kommentarer och angränsande lagstiftning*, s. 845.

¹⁵ *Regeringens råd för kontakt med trossamfunden* (Ku 2000:F).

¹⁶ www.regeringen.se

The churches and other denominations have, of course, a lot of other contacts with state authorities, with the Government, and with many Members of Parliament. Concerning some questions, the churches and other denominations work together. Most Swedish Christian churches are members of the *Swedish Christian Council*.¹⁷ The Council often has contacts with the state in different matters. The Council also has contact with Islamic and Jewish organisations.

An important part of the law-making process in Sweden is the referral of various proposals and bills to numerous institutions in Swedish society for observation and opinion. The churches and other denominations (as well as the Swedish Christian Council¹⁸) often receive such referrals.

III. Dialogue with the European Union

Several Swedish churches are members of the Swedish organisation *EU Office of the Churches*.¹⁹ This organisation aims to establish contacts, conducts lobbying, etc. It has an office in Brussels. Some churches are also members of (or participants in) other EU-related organisations, such as the *European Church Conference (CEC/KEK)*²⁰ or the *Commission of the Bishops' Conferences of the European Community*.²¹

Besides the role of the Holy See within the Roman-Catholic Church, the Swedish Churches have no direct dialogue with the EU. Representatives of the EU Policy Advisory Committee to Religious Communities have paid some visits to Sweden, but till now there have not been any formal contacts between the churches (or other denominations) and the Committee.

The existence of the Committee obviously illustrates the interest the EU Commission has in establishing contacts with the churches and other denominations within the Union. It must be an important policy task for each church and denomination to decide whether it wants dialogue with the EU through the Commission or through the governments of the Member States (or in other ways). Perhaps is it even possible to ride these two horses at the same time. The Roman-Catholic Church, as represented by a sovereign state, enjoys a special status.

In a long-term perspective, I can see no obstacles to the EU concluding agreements, which may be termed 'concordats', with European

churches or other denominations. From a Swedish point of view, the churches (and other denominations) are free to make such agreements. One problem with an EU concordat is of course its content – in which respects would the EU or the church carry obligations through such an agreement? Another problem is deciding on which churches and denominations should be afforded the right to conclude such an agreement – any church? only the biggest? only the well-known?

¹⁷ www.skr.org

¹⁸ www.skr.org

¹⁹ www.kyrkornaseukontor.org

²⁰ www.cec-kek.org

²¹ www.comece.org

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THE CONCORDAT CONCEPT AS CONSTITUTIONAL
CONVENTION IN CHURCH-STATE RELATIONS
IN THE UNITED KINGDOM

In the United Kingdom, no church (or other religious organisation) has a concordat with the State (personified in the Crown) in the sense of a formal contractual written agreement, with status in domestic or international law, enforceable in State courts, and setting out in a general and comprehensive manner the whole field of relations between or respective competences of church and State. Formally, constitutional church-state relations are governed by laws not by concordats. However, the (unwritten) constitution is composed not only of laws but also of conventions, unwritten extra-legal rules of political practice, having the authority of agreed longstanding usage but not legally enforceable in the courts.¹ Constitutional conventions are concordat-like in substance if not in form. Some principles applicable to church-state relations may be classified as conventional quasi-concordats in that they are implicit in the practice that consensus or mutual agreement between them is necessary for matters of common concern to church and State.² The concept of informal concordat, or quasi-concordat, expressed in agreement, is a fundamental of constitutional practice, so much so that it is arguable that church-state relations are characterised in practice by the concordat concept in the same way that, in the absence of a written constitutional document, the UK is understood to have a constitution.

¹ Such as the convention that the Monarch must assent to legislation proposed by Parliament, or that Ministers of the Crown are responsible for the policies and actions of their departments.

² For convention see G. MARSHALL, *Constitutional Conventions* (Oxford, 1984). However, the application the constitutional convention idea to church-state relations does not appear in contemporary public law literature, nor has the idea of a quasi-concordat implicit in church-state convention.

I. Basic principle: church-state relations are governed by law not concordat

The fundamental formal constitutional principle operative in the United Kingdom is that church-state relations are governed by law created unilaterally by the state and not by a formal concordat negotiated bilaterally between a church and the state. Churches are neither founded nor regulated by compact with the state. The (Anglican) Church of England is by state law the established church in England, established by legislative process of the Sovereign in Parliament during the sixteenth century. Relations between the (Presbyterian) Church of Scotland, the national church in Scotland, and the state are found in the Church of Scotland Act 1921. Relations between the state and the (Anglican) Church of Ireland and the Church in Wales are governed respectively by the Irish Church Act 1869 and the Welsh Church Act 1914. All other churches and religious organisations – in England, Scotland, Wales and Northern Ireland – are non-established voluntary associations; whilst they are consensual bodies, their relations with the state, similarly, are governed not by contract but by the common law, unilaterally made by the courts, and by freedom of religion under the Human Rights Act 1998 giving effect to the European Convention on Human Rights.

The law unilaterally made by the State generally seeks equality in its treatment of churches and the distribution of benefits (liberties, rights or privileges), and burdens (prohibitions, conditions and duties). There is a *broad equality* as between churches, but, at the same time, unilateral state law is characterised by *inequalities* in its treatment of different churches; these in turn give rise to particular complexities, ambiguities and, sometimes, contradictions.³ It is a system which discloses a bewildering spectrum of church-state positions: from *identification* of church and state (one of the incidents of the establishment of the Church of England),⁴ to *separation* of state and church (illustrated by the disestablishment of the Church of England in Wales); from the existence of legal *liberties* to practise religion,⁵ through 'positive legal *rights*,⁶ to *exemptions* or

³ See generally, N. DOE, 'National identity, the constitutional tradition and the structures of law on religion in the United Kingdom', in *Religions in European Union Law*, Proceedings of the European Consortium for Church-State Research (Milan, 1998) 93.

⁴ See eg N. DOE, *The Legal Framework of the Church of England* (Oxford, 1996) 7ff.

⁵ For the legal liberty of Jehovah's Witnesses to be considered as suitable people to adopt children, see R. TERRELL, 'Religious considerations in custody and adoption', 9 *Family Law* (1979) 198.

⁶ Eg those of Quakers and Jews to conduct marriages in accordance with their own rites when also the civil requirements of marriage are satisfied: Marriage Act 1949, ss. 26 and 47.

privileges.⁷ Yet, as has been said by the courts, 'the starting point of our domestic law [is] that every citizen has a right to do what he likes, unless restrained by the common law...or by statute'.⁸

II. The need for church-state agreement

Despite the fact that church-state relations are governed formally by law, not by concordat, it is generally recognised that actual agreement between church and state, as the political foundation of state law on religion, is a practical necessity. In this sense the concordat concept is implicit in constitutional arrangements. This is not surprising. First, the State has a profound interest in religious affairs. The twentieth century saw a dramatic increase in State law across the spectrum of churches,⁹ and expressing a growth both in state interest in religion and the complexities of institutional religious life, including provisions on religious aspects of: abortion, child welfare, adoption, education, Sunday trading, heritage, and (driven by European law), religious freedom, data protection and religious discrimination.¹⁰ Pluralisation within churches, the turbulence caused, in conservative-liberal divisions (perhaps inherent in modernity), may also be fought out in the secular arena of the courts, as to (eg) female ministry,¹¹ ecumenism,¹² homosexual practice,¹³ divorce and remarriage.¹⁴

Secondly, needless to say, the need for church-state consensus about civil law on religion is underlined by the potential for social discord. Yet, the fact remains that church and state disagree on matters of common concern to them in key areas. In a recent survey, religious leaders interviewed expressed disquiet about establishment (Baptist, Methodist, Hindu); the Human Rights Act 1998 (Church of England, which has already been involved in litigation on the matter,¹⁵ and the Church of

⁷ See eg Motor-Cycle Crash Helmets (Religious Exemption) Act 1976.

⁸ *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 178 per Donaldson MR.

⁹ Welsh Church Act 1914, Church of England Assembly (Powers) Act 1919, Church of Scotland Act 1921, Methodist Church Acts 1939 and 1976, Baptist and Congregational Trusts Act 1951, United Reformed Church Act 1972.

¹⁰ Abortion Act 1967 (s.4); Children Act 1989 (ss.53,60,63), Adoption Act 1976 (s.7), Education Reform Act 1988 (ss.6,7), Sunday Trading Act 1994, Planning (Listed Buildings and Conservation Areas) Act 1990 (s.60).

¹¹ *Church Society* (1994).

¹² *Williamson* (1996).

¹³ *Amicus* [2004].

¹⁴ *Brown v Runcie* (1991).

¹⁵ *Aston Cantlow etc Parochial Church Council v Wallbank and Another* [2003] 3 All ER 1213.

Scotland); financial assistance from the state in the maintenance of redundant places of worship is highlighted by one leader (Church in Wales); retention of charitable status by another (Presbyterian Church of Wales); and discrimination against Muslims in the field of housing.¹⁶

III. The expectation of agreement: potential religious partners in dialogue

That there may be a constitutional convention which obliges the State to obtain agreement or cooperate with churches, before it acts on matters of common concern, is perhaps evidenced by the respective expectations of each party. Whilst there is no single government department dedicated to religious affairs, commonly government expresses its expectation that religious groups will participate in public debate on public issues to give 'expression to our own values of tolerance and respect for religion'.¹⁷ Indeed, there has been consideration recently of greater involvement of churches in political debate and a more widespread contribution from churches to the work of a reformed House of Lords to include greater representation of religious organisations other than the Church of England.¹⁸ Government consultation with religious groups is now a feature of administrative practice.¹⁹ Religious groups too are increasingly equipping themselves institutionally for dialogue with government.

1. Denominational institutions

First, a host of institutions within individual denominations may be involved in domestic public affairs. The London Agent of the General Assembly of the Church of Scotland liaises between the Church of Scotland and the Westminster parliament. The Church of Scotland also has a

¹⁶ J. OLIVA, 'Sociology, law and religion in the United Kingdom', 152 *Law and Justice* (2004) 8

¹⁷ HL Debs, 512, cols. 79. However, the Cohesion and Faiths Unit of the Race, Cohesion and Faiths Directorate is located in the Home Office.

¹⁸ For the Wakeham report see Analysis, *Public Law* (2000) 49: the representation of the Church of England would remain, though decreased from 26 bishops to 16 representatives chosen in a manner decided by the church (and not necessarily bishops); there would also be 5 church representatives from other parts of the United Kingdom, 5 from other Christian churches in England, and 5 from other faiths.

¹⁹ Eg concerning: Royal Peculiars, the ecclesiastical patronage of the Lord Chancellor, and the Department of Trade and Industry Consultation on the employment status of ministers of religion.

Church and National Committee 'to watch over developments of the national life in which moral and spiritual considerations specially arise, and to consider what action the Church may from time to time be advised to take to further the highest interests of the people'. A recent annual report of the Committee recommends church action on such secular matters as criminal justice, electoral reform, human rights, welfare reform, and Europe and Scotland.²⁰ In the Roman Catholic Church, the episcopal conference of England and Wales has a Department of Christian Responsibility which, in turn, has a Committee of Community Relations; its concern is 'social and racial justice in British society with particular regard for ethnic minority communities and poor and marginalised people in urban priority areas'.²¹ The Seventh-Day Adventist Church issues 'position statements' expressing opinions on, for example, the family, the environment, health-care institutions, racism, homelessness and poverty.²²

Secondly, British membership of the European Union has had an impact on the institutional links between churches and the State. It has led churches to establish internal bodies charged with advising central church authorities on political matters relating to the Union. For example, in the Roman Catholic Church, the function of the Committee for European Affairs, in the Department of International Affairs of the episcopal conference of England and Wales, is: 'To monitor developments in Europe with particular reference to the life of the Church and to monitor the legislation of the European Union'. Indeed, in 1999 in the Church of Scotland, the Church and Nation Committee reported to the General Assembly that: 'The [European] Union lacks a vision of its ideals, aims and objectives, and lacks also strategies for setting out this vision, for disseminating it, for gathering the views of citizens of the EU and for encapsulating it in a clear, simple constitutional document'.²³

2. Inter-denominational alliances

Recent years have also seen the development of religious alliances, some involved in litigation,²⁴ to enter dialogue with public authorities. The

²⁰ A. HERON, *The Law and Practice of the Kirk* (Glasgow, 1995) 375,403.

²¹ See N. DOE, *The Legal Framework of the Church of England* (Oxford, 1996) 90.

²² Seventh-Day Adventist Church, Statements, Guidelines and Other Documents (1996).

²³ Church and Nation Committee Report (1999).

²⁴ *Amicus* [2004]: *The Evangelical Alliance et al challenged the Employment Equality (Sexual Orientation) Regulations 2003*.

Churches Main Committee exists 'to advance the charitable work, religious or otherwise, of the Churches by furthering their common interest in secular matters relating to their work (other than educational work)', 'to conduct negotiations relating to those matters and to take such action as may be thought fit', and 'to act as a liaison body between the Churches and the machinery of Government, such as Government Departments, Local Authorities and Parliament'.²⁵ Its membership includes established churches, disestablished churches, free churches, ecclesiastical alliances, and Jewish bodies,²⁶ and it keeps in touch with other religious groups through its Inter-Faith Network.²⁷ Similarly, Churches Together in Britain and Ireland seeks to engage with society and 'secular authorities'.²⁸ Churches Together in Wales (CYTUN), an ecumenical association including Baptists, Methodists, Anglicans and Roman Catholics, has a Laws Committee 'to review the effect of legislation on faith communities in Wales' enacted by the National Assembly for Wales.²⁹ Under its constitution, the British Evangelical Council is 'to represent the evangelical viewpoint to government and public bodies regarding matters of common concern and interest at home and abroad'.³⁰ The Evangelical Alliance communicates the voice of the church to the government and 'to make a difference to the political scene today'.³¹

3. Religious contributions to public debate

Over last ten years, the Roman Catholic episcopal conference of England and Wales has issued documents on reform of the House of

²⁵ *Wrestling with Caesar: the Role of the Churches Main Committee in Relations between the Churches and the State: 1941-2001* (London, 2000) 4.

²⁶ Eg: United Synagogue; Church of Christ Scientist; Association of Strict Baptist Churches; Assemblies of God in Great Britain and Ireland; Apostolic Church; Church of England; Church of Scotland; Fellowship of Evangelical Churches; Free Churches' Council; Roman Catholic Church.

²⁷ For example, it has worked with Hindus over the increased costs of water for their temples.

²⁸ CTBI, Constitution.

²⁹ CYTUN was set up in 1990 and its Laws Committee in 1999.

³⁰ Constitution of the British Evangelical Council (1969, amended 1998), 2; constituent members of the Council include the Evangelical Presbyterian Church in England and Wales, the Evangelical Fellowship of Congregational Churches, and the Free Church of Scotland.

³¹ The Evangelical Alliance has a Public Affairs Department and a parliamentary office at Westminster: websites carry prayers for the support or defeat of proposed parliamentary legislation.

Lords, on human rights and the church, and on child abuse.³² However, a document from 1996 (*The Common Good*), is perhaps the most celebrated: this presents the social teaching of the church – it advocates that 'Every public policy should be judged by the effect it has on human dignity and the common good'.³³ Indeed, some see the Church of England's connection with the State as an educational symbol of 'a continuing Christian presence in public affairs, a recognition of the Church's role in England's historical development and, not least, a channel through which the Church can continue to exercise political influence'.³⁴

Churches expect to contribute to the political process. In Scotland, for example, a wide range of churches expect to work in partnership and cooperation with the Scottish Parliament. The Scottish Churches Parliamentary Office has recently been established to build 'a fruitful relationship' with the new Scottish Parliament. The office has three principal functions: 'to engage effectively in the new political process'; 'to translate their commitment to the welfare of Scotland into parliamentary debate'; and to 'contribute the range and depth of their experience, and their faith reflection on that, to the decision-making process'; the office will also be involved in briefings to members of the Scottish Parliament and in bringing people together for dialogue. The Church of Scotland also expects to work closely, and already works closely, with the Scottish Parliament, mainly through its Church and Nation Committee.³⁵

³² Reform of the House of Lords (1999), Human Rights and the Church (1998), Child Abuse (1994).

³³ The Common Good and the Catholic Church's Social Teaching (1996): 'Religion is always personal, but never just a private affair'; 'The Church has the right and duty to advocate and protect a social order in which the human dignity of all is fostered, and to protest when it is in any way threatened'; 'The Church does not present a political programme, still less a party political one. The social teaching of the Church expounded in this document, provides a set of consistent and complementary principles, values and goals'.

³⁴ G. MOYSER, 'The Church of England and politics: patterns and trends', in G. MOYSER (ed), *Church and Politics Today* (Edinburgh, 1985) Ch. 1.

³⁵ Church of Scotland: Church and Nation Committee Report (2000): the Church and Nation Committee has recently submitted responses to consultation with the Scottish Parliament in relation to immigration and asylum legislation, ethical standards in public life, and the human rights commission proposals; it has submitted evidence to committees and has held meetings with members of the Scottish Parliament, and is in contact with parliamentary staff in the early stages of policy development, and has recently met with Scottish members of the House of Commons and has given evidence to the Westminster Scottish Affairs Committee in its study of poverty in Scotland.

IV. The practice of agreement and lobbying

There are countless instances of lobbying, dialogue, and agreement between religious organisations and the State resulting in or influencing the enactment of law. The churches were influential in the inclusion of the rule in the Human Rights Act 1998 that if a court's determination of any question might affect the exercise by a religious organisation (itself or of its members collectively) of the right of freedom of religion, the court must have 'particular regard to the importance' of that right.³⁶ Church lobbying, at least in part, has resulted in the rules in the Education Acts that religious education in schools must reflect the 'fact' that religious traditions in Britain are in the main Christian (though syllabuses must take into account the other principal religions), and that the act of worship in schools must be 'wholly or mainly of a broadly Christian character'.³⁷ Consultation with religious groups has occurred with the recent introduction of legislation forbidding discrimination on grounds of religion in employment.³⁸ The Sunday Trading Act 1994 was in part a result of the expectation of Christian churches that the State would protect shopworkers who objected for religious reasons to working on Sundays.³⁹ The applies to the establishment of complaints systems to process dissatisfaction with the portrayal of religion in the press,⁴⁰ the provision of religion on television,⁴¹ and the oversight of religion in the media generally.⁴² And there have been agreements between the state and churches with regard to indirect and modest State financial aid, in the form of fiscal relief with regard to their charity work, some grant aid with respect to

³⁶ Human Rights Act 1998, s. 13.

³⁷ See N. DOE, M. HILL, and R. OMBRES (eds), *English Canon Law* (Cardiff, 1998) Ch. 11; see also the Sunday Trading Act 1994 and, for lobbying concerning it, eg Viscount BRENTFORD, 'In favour of keeping Sunday special', 2 *Ecclesiastical Law Journal* (1990-92) 14.

³⁸ See generally L. VICKERS, 'The Employment Equality (Religion or Belief) Regulations 2003', *Industrial Law Journal* (2003) 32 (3), 190.

³⁹ For background to the Sunday Trading Act 1994, see Viscount BRENTFORD, 'In favour of keeping Sunday special', 2 *Ecclesiastical Law Journal* (1990-92) 14.

⁴⁰ Press Complaints Commission, Code of Practice: 'The press must avoid prejudicial or perjorative reference to a person's race, colour, religion, sex or sexual orientation... It must avoid publishing details of a person's race, colour, religion, sexual orientation'.

⁴¹ See eg BBC Licence Agreement, Clause 3.2(c): the BBC is required to include in its services 'programmes of an educational nature' which are defined to include 'religious programmes'.

⁴² The Central Religious Advisory Committee (CRAC) advises the BBC 'on religious broadcasting policy and to comment on programmes once broadcast'; membership of the committee is 'both clerical and lay and drawn from the main Christian denominations and from other world religions, which are part of the fabric of British religious life'.

the maintenance of redundant churches, and exemption from rates in favour of places of religious worship, church halls, chapel halls and similar buildings.⁴³ Finally, churches have been active in the establishment of State provision for the spiritual care in prisons (required by law),⁴⁴ and hospitals (as a matter of policy and guidance).⁴⁵

V. Quasi-concordats, law and practice

The concordat concept has been institutionalised in a number of legal contexts. The following illustrate the ways in which the State has used in legal texts the idea of concordat as a fundamental in the regulation of matters of common concern to churches and the State.

1. *The possibility of church-state contracts*

Whilst legislation is the primary means by which the State governs, contracts (legally binding agreements) are also available to government as a method of regulation. Indeed, in recent years contracts have been used by government to regulate a host of matters: management of prisons, the privatisation of public utilities; and framework agreements for the governance of executive agencies.⁴⁶ The contracts of public authorities are subject to the general law of contract as applies to private persons, though contracts made on behalf of the Crown are subject to exceptions under the Crown Proceedings Act 1947. There is no law which forbids the establishment of contracts between religious organisations and public authorities of the State: in Wales, for example, the Church in Wales can enter agreements with a local authority for the maintenance of burial grounds.⁴⁷

2. *The opportunity for formal concordats*

Laws may also provide the opportunity for churches to enter concordats with public authorities. For example, the Government of Wales Act 1998,

⁴³ See D. McCLEAN, 'State financial support for the church: the United Kingdom', Proceedings of the European Consortium for Church-State Research (Milan, 1992) 77.

⁴⁴ Prison Act 1952 and Prison Rules 1964, SI 1964/388.

⁴⁵ See eg HSG (92)2.

⁴⁶ For one commentator: 'the techniques of public administration have been refashioned in the mould of the private commercial sector'; 'contract has replaced command and control as the paradigm of regulation': see A.W. BRADLEY and K.D. EWING, *Constitutional and Administrative Law* (13 edn., London, 2003) 768ff.

⁴⁷ N. DOE, *The Law of the Church in Wales* (Cardiff, 2002) 275.

which deals with the National Assembly for Wales, provides a mechanism to enable relevant voluntary organisations to be consulted by the Assembly in the exercise of its functions. Relevant voluntary organisations are those bodies whose activities are carried out otherwise than for profit and directly or indirectly benefit the whole or part of Wales. The assembly is under a duty to make a Scheme setting out how it proposes 'to promote the interests of relevant voluntary organisations'. A religious organisation, as voluntary organisation, is eligible to be party to a Scheme, a matter for the Assembly. Schemes are procedural concordats. They must specify how the Assembly will consult relevant voluntary organisations about the exercise of its functions affecting, or of concern to, those organisations. The Assembly must consult such organisations as it considers appropriate before making, remaking or revising a Scheme.⁴⁸ To-date, it is understood that no Scheme has been entered between the Assembly and a religious organisation.

3. *Statutory contracts: fictional concordats*

As a result of the Welsh Church Act 1914, the Church of England in Wales was disestablished in 1920. The 1914 statute also resulted in the foundation of the contemporary institutional Church in Wales. Under the statute, pre-disestablishment English ecclesiastical law ceased to exist for the Church in Wales as the law of the land. However, it continued to be 'binding on the members...of the Church in Wales in the same manner as if they had agreed to be so bound', unless and until altered by the church. In short, in this case church-state affairs are governed by the terms of a statutory contract imposed by the State but fictitiously agreed by the church.⁴⁹

4. *Statutory inter-church covenants*

State law enables religious organisations to enter concordat-like agreements between themselves. The Sharing of Church Buildings Act 1969 provides for the sharing of buildings between a church and a prescribed number of other churches.⁵⁰ The statute applies to places of worship,

⁴⁸ Government of Wales Act 1998, s.114.

⁴⁹ Welsh Church Act 1914, s. 3.

⁵⁰ The statute applies to the Church in Wales, the Church of England, the Roman Catholic Church, the Methodist and United Reformed Churches, any church of the Baptist denomination, any congregation of the Association of Churches of Christ in Great Britain and Ireland (s. 11(1) and Sched. 2); in addition, any church represented on

church halls or other centres, and residences for ministers.⁵¹ Any church to which the statute applies may make agreements to share such buildings and carry into effect their agreements.⁵² The parties must be such persons as may be determined by the appropriate authority of the church in question, who must obtain such consents as are required by that authority.⁵³ The agreement is in the form of a covenant under seal, and binds the parties and their successors.⁵⁴ The agreement must provide for its own termination, and may provide for the withdrawal of a church, and may be amended only with the agreement of the parties.⁵⁵ The statute requires the agreement to deal with finances and other obligations of the parties for the management of the shared building.⁵⁶ The agreement may provide for the holding of joint services on such occasions as may be approved by those churches.⁵⁷

5. *Conventional compacts*

Non-legal conventional compacts may be made between a church and the State, such as that enabling the Prime Minister to be involved in the appointment of bishops in the Church of England. On the basis of four Church of England *Church and State Reports*,⁵⁸ some commentators claim a conventional reciprocity between the Church of England and the State: parliament recognises the 'spiritual independence' of the Church of England, its freedom to manage doctrinal affairs, and the church has come to 'an unwritten agreement that, in return for the "spiritual" areas, it accepts that politics...is the responsibility of the State'.⁵⁹

the General Council of the British Council of Churches or the governing body of the Evangelical Alliance or the British Evangelical Council may give notice that the statute should apply to that church (s. 11(3)).

⁵¹ s. 12(1): schools are expressly excluded.

⁵² s. 1(1),(2).

⁵³ s. 1(3), (4) and Sched. 2.

⁵⁴ s. 1(8)-(10).

⁵⁵ s. 9.

⁵⁶ s. 3.

⁵⁷ Sharing of Church Buildings Act 1969, s. 4(1).

⁵⁸ The Selbourne Report (1917); the Cecil Report (1935); the Moberley Report (1952); the Chadwick Report (1970); see also A. HASTINGS, *Church and State: The English Experience* (Exeter 1991), especially 67-76.

⁵⁹ A. DYSON, "Little else but the name" - reflections on four church and state reports', in G. MOYSER (ed), *Church and Politics Today* (Edinburgh, 1985) 282.

6. *Consensual relations and statutory relations*

The agreement between the Church of Scotland and the State, as to their relations, is set out in the Church of Scotland Act 1921 and the 'Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual', appended to the statute. The church is the national church in Scotland.⁶⁰ The preservation of the Church of Scotland was an essential term of treaty as to the legal union of Scotland and England in 1707; the church's courts are recognised as fora of public jurisdiction; the monarch is bound by oath to protect the church, and appoints a Lord High Commissioner to attend the meetings of the church's annual General Assembly; the 1921 statute provides a co-ordinate jurisdiction of church and state and secures, in their respective spheres, the independence of the church from the State.⁶¹

7. *Tacit concordats?*

The legal position of the Roman Catholic Church is much the same as most other Christian churches, including the Anglican Scottish Episcopal Church and the Church of Ireland (in Northern Ireland).⁶² In State law, the Roman Catholic Church is a denomination,⁶³ a consensual body and voluntary association whose members are organised and bound together as a matter of contract. Its canon law may be enforced in State courts, particularly when property is involved, as a matter of contract, or when it is incorporated into the terms of a trust deed. There is no formal concordat between the church and the Crown, but the church is recognised at common law and in statute with regard to such subjects as education, the sharing of church buildings, and marriage. The Ecclesiastical Titles Act 1871 recognises the church's hierarchy and government, but does not provide for any coercive jurisdiction for the church.⁶⁴

⁶⁰ See eg C. MUNRO, 'Does Scotland have an established church?', *Ecclesiastical Law Journal*, 4 (1997) 639.

⁶¹ See generally, F. LYALL, *Of Presbyters and Kings* (Aberdeen, 1980).

⁶² See N. DOE, *Canon Law in the Anglican Communion* (Oxford, 1998) Ch. 1.

⁶³ *R v Registrar General, ex p Segerdal* [1970] 3 All ER 886; *Re Schoales* [1930] 2 Ch 75.

⁶⁴ See generally N. DOE, *The Legal Framework of the Church of England* (Oxford, 1996) Ch. 1.

8. *Mutual cooperation*

The use of agreements with the State, which become incorporated in law, is also evident with the free churches, such as the Baptists and the Methodist Church (also voluntary associations). When parliament passed the Baptist and Congregational Trusts Act 1951, enacted to authorise the appointment of trust corporations as trustees of Baptist and Congregational charities, it implicitly agreed to give statutory recognition to the "constitution" in the Baptist "handbook". Similarly, when parliament enacted the Methodist Church Act 1976, it gave statutory recognition to and made further provision for the internal "constitution" of the Methodist Church in its deed of union and model trust deeds. The Methodists, the Baptists and the United Reformed Church have to promote Acts of Parliament to modify their constitutions and their trust deeds for holding property. However, statutory recognition of this sort does not destroy the contractual nature of their association and organisation.⁶⁵

VI. Conclusion

There are no formal concordats between church and state in the United Kingdom. Church-state relations are governed by law created unilaterally by the state. However, there may be evidence of an unwritten agreement or informal quasi-concordat, perhaps best classified as a constitutional convention, that there should be consensus and dialogue between church and State in relation to matters of common concern. Both the state and churches share the conviction that agreement is a fundamental underlying the unilateral creation of law by the state. Both expect there to be negotiation and agreement before church-state law is enacted or reformed. The concordat spirit, therefore, is present in constitutional practice. Moreover, institutional structures within denominations increasingly assign to designated church authorities the function of dialogue with the state and public authorities. Recent years have also seen the establishment of inter-denominational alliances designed to engage collaboratively with government bodies. There is clear evidence of government developments based on the input of, dialogue with, or the agreement of, religious organisations. In point of fact, there is no formal legal obstacle to concordats being entered between churches and the state. Indeed, today public

⁶⁵ *Ibid.*; see also the **United Reformed Church Act 1972** and the **Salvaton Army Act 1980**.

authorities commonly govern by contract. There are also indications that contract-like devices are used by government in relation to religious matters: statutory contracts, conventional compacts, consensual statutory regimes, are all a feature of the many means by which church-state relations are regulated in the United Kingdom.

BALÁZS SCHANDA

COVENANTAL COOPERATION OF STATE AND RELIGIONS
IN THE POST-COMMUNIST MEMBER COUNTRIES
OF THE EUROPEAN UNION

On 1 May 2004 eight countries, having been cut off from the Western part of the continent by the Iron Curtain, joined the European Union. They differ in many respects but nevertheless share certain aspects of a common history.

Both the history and the identity of the new Central European Member States of the European Union are linked to Western Christianity. (Even heavily secularized societies, such as Czech society, are shaped by this link: by the denial of it). The new member states of the Union are rather small countries: the population of Poland itself is larger than that of the other new member states put together.

The new member states of Central-Eastern Europe suffered communist governance for over four decades. Religious freedom was curtailed in all of these countries. Even when directions may have been issued by Moscow, there were significant differences between countries and periods. Probably believers in the former Soviet Union suffered the most. The record of Czechoslovakia is definitely worse than that of Poland. Hungary played an experimental role in the *Ostpolitik* during the "goulash communism". Slovenia as part of Yugoslavia followed a somewhat different path than the Soviet Bloc countries. Practices changed from open persecution to administrative harassment and discrimination with one common element: there was no religious freedom as such.

I. The religious factor in the new member states

The historical background, the process and the effects of the imposed secularization of society indicate great differences. In Poland, and also in Lithuania, Catholicism played a significant role safeguarding the national conscience. Slovenia is also predominantly Catholic. Estonia is the only new member in which Lutherans outnumber Catholics, whereas Hungary and Slovakia have a Catholic majority, with firmly established Protestant minorities (Calvinists in Hungary and Lutherans in Slovakia). Latvians are

divided between Catholics and Protestants. Orthodoxy in the new member states is linked to the national minorities, especially to Russians in the Baltics. The Czech Republic is the most secular country among the new members, and it became in this way the most secularized country within the Union, but Estonians are not particularly devout either (not to speak of the new German *Länder*).

Whilst there has therefore been an increase in the proportion of Catholics within the Union, no new member has a significant Muslim population (Bulgaria as a candidate country has, whereas in practice the Cypriot government does not exercise its sovereignty over the Muslim inhabitants of the island). Hungary is the only new member country where the Jewish community remained a significant mainstream religious community. New religious movements were active throughout the region in the 1990s, but their activity did not bring significant changes to the denominational landscape. It is to be noted that notions of church membership vary from country to country as well as from denomination to denomination. Consequently, it is hardly possible to paint a comparable picture on the proportion of various denominations.

Denominations in the new member states of the European Union¹

	Catholic	Mainstream Protestants (Lutherans, Reformed)	Orthodox	Others (No answer, no affiliation, minorities)
Cyprus	–	–	96%	4%
Czech Republic	27%	3%	–	71%
Estonia	–	11%	10%	70%
Hungary	55%	19%	–	26%
Latvia	17%	21%	15%	47%
Lithuania	79%	1%	4%	15%
Malta	95%	–	–	4%
Poland	96%	–	1%	3%
Slovakia	73%	9%	1%	17%
Slovenia	58%	1%	2%	23%

(It is to be noted, that notions of church membership vary from country to country as well as from denomination to denomination.)

¹ Data based on reports published in: G. ROBBERS (ed), *State and Church in the European Union* (2nd edn, Baden-Baden, 2005).

In some cases only the registered church members are regarded as church members, whereas in other countries even cultural affiliation matters. Some countries regard those having no religious affiliation as atheists, whereas in others only those declaring to be atheists are regarded as such.

Churches – despite the heavy losses they suffered during the communist rule – were among the most respected and trusted social institutions at the time of the transition. Churches needed to catch up rapidly with developments in the world, while their countries themselves were changing rapidly. At the same time, nostalgia played a significant role, as many strived to reconstruct pre-war structures.

II. Bilateral relations with the Holy See

All the countries established or re-established diplomatic relations with the Holy See after the fall of communism. Generally, nuncios became the deans of the diplomatic corps (Cyprus, Estonia and Latvia are exceptions). Since the fall of communism the Holy See stipulated a set of agreements with the countries in transition: concordat agreements reach out from Albania² to Kazakhstan.³ It is a remarkable feature that all the new member states of Central and Eastern Europe have some kind of concordat settlement: agreements vary from Poland,⁴ where the impact of the Catholic Church cannot be overestimated, which concluded a solemn convention (a concordat), to Estonia,⁵ which exchanged a verbal note with the Holy See to regulate the situation of the tiny Catholic community. The Czech Republic,⁶ Latvia,⁷ and Slovenia,⁸ concluded comprehensive agreements with the Holy See, while Lithuania⁹ and Slovakia¹⁰ concluded a set of agreements – the first convention with Slovakia bears the title “basic agreement”. Also

² Agreement stipulated on 8 July 2002.

³ Agreement stipulated on 24 September 1998, ratified in 1999.

⁴ AAS (1998) 310-329.

⁵ AAS (1999) 414-418.

⁶ Agreement signed on 25 July 2002.

⁷ AAS 95 (2003) 102-120.

⁸ Signed on 14 December 2001. Ratified by Parliament on 28 January 2004, after the Constitutional Court did not raise objections (in an interpretative decision the Court held that in conflict cases state law was applicable).

⁹ Lithuania: Agreement concerning the Juridical Aspects of the Relations between the Catholic Church and the State AAS (2000) 783-816, Agreement on Cooperation in Education and Culture AAS (2000) 783-795, Agreement on the Pastoral Care of Catholics serving in the Army AAS (2000) 809-816.

¹⁰ Basic Agreement AAS (2001) 136-155. Separate agreements were signed on the army chaplaincy (2002) and on education (signed in 2003, ratified in 2004).

Hungary¹¹ has concluded three agreements of a highly technical nature. Agreements between the Holy See as well as (on the domestic level) with other religious communities is characteristic of several European countries (Germany, Italy, Spain). From the “old” member states of the Union, however, the majority (Belgium, Denmark, Greece, Finland, Ireland, Luxembourg, The Netherlands, Sweden and the United Kingdom: Belgium and Ireland having a Catholic majority) has no bilateral agreements with the Holy See, whereas in the new members states this seems to be the general rule.

The general legal form of recent treaties is “agreement” – the Holy See did not seek formal concordats, but opted rather for this more flexible solution (as in the earlier case of Spain or in the case of Croatia).¹²

The following chart provides an overview of agreements between the Holy See and post-communist EU member states:

	Qualification	Scope	Date of signature	Entry into force
Czech Republic	Agreement	Comprehensive	25-07-2002	Ratification failed
Estonia	Verbal note	Comprehensive	12-03-1999	–
Hungary	Agreement	Diplomatic relations	09-02-1990	26-04-1994
	Agreement	Military ordinariate	10-01-1994	3-04-1998
	Agreement	Financial issues	20-06-1997	–
Latvia	Agreement	Comprehensive	8-11-2000	25-10-2002
Lithuania	Agreement	Juridical issues	5-05-2000	16-09-2000
	Agreement	Education and culture	5-05-2000	16-09-2000
	Agreement	Military ordinariate	5-05-2000	16-09-2000
Poland	Concordat	Comprehensive	28-07-1993	25-03-1998
Slovakia	Basic agreement	Comprehensive	24-11-2000	18-12-2000
	Agreement	Military ordinariate	21-08-2001	28-10-2002
	Agreement	Education	13-05-2003	09-07-2004
Slovenia	Agreement	Comprehensive	14-12-2001	28-01-2004

¹¹ Agreement on Pastoral Care in the Army and the Border Guard AAS (1994) 574-579, Agreement on Financial Issues AAS (1998) 330-340.

¹² Since Vatican II only Columbia and Lower Saxony (both 1973) and recently Poland and Portugal concluded agreements entitled ‘concordat’. Some authors refer to all international agreements signed by the Holy See as concordats: see eg Franz Heribert Köck, *Die völkerrechtliche Stellung des Heiligen Stuhls* (Berlin, 1975) 316. Others distinguish between concordats in the strict sense (being general, complex and solemn agreements) and concordats in the broad sense, embracing all conventions stipulated by the Holy See with states and international organizations, like José T. Martín de AGAR, *Raccolta di concordati. 1950-1999* (Città del Vaticano, 2000) 10. Other authors qualify as concordats only the agreements entitled as such, distinguishing concordats from other types of conventions stipulated by the Holy See: eg Péter ERDŐ, *Egyházjog* (Budapest) [1992] 63.

1. Political objections – ratification issues

Concordat settlements arise without controversy. The time gap between signature and ratification is often critical here. Slovakia ratified very rapidly the treaties signed with the Holy See, indicating that the government signing the treaty had a clear backing in Parliament to do so. In Poland ratification of the concordat had to wait for a whole legislative period, and became the subject of heated debate. In Slovenia the agreement was referred to the Constitutional Court for preliminary review: Parliament voted two years later when the Court had cleared the way for ratification. In the Czech Republic the ratification failed: the agreement was elaborated in lengthy debates and was not appreciated by the majority in parliament; though parliament may come back to the issue later and change its decision.

The preference for concordat solutions was in some countries dictated by historical tradition, as they had concordats before World War II., like Latvia or Poland. In other cases the conclusion of the conventions was in the nature of an expression of the national conscience, especially in newly emerging states (like Slovakia). Some agreements are very similar (and almost seem to be translations), whereas others were obviously shaped for the country concerned. The agreement on the pastoral care of Catholics serving in the Army of Lithuania (2000) and the agreement with Slovakia (2002) are almost identical to the same agreement with Hungary (1994).¹³ The agreement with Latvia is very much in line with the agreements with Lithuania (both 2000), simply that it is consolidated in a single document. The Convention with Slovakia (2000) follows – although with a more concise wording – the concordat with Poland (1993). The agreement with Slovenia follows closely the wording of the first part of the agreement with Croatia (1996) concerning juridical aspects of the relation of church and state, however this agreement basically only repeats the constitutional safeguards on religious freedom, without granting any additional ones to the church (like holy days, recognition of canonical marriage, army chaplaincy). The Czech agreement is characterized even more by this type of restraint – even the non-confessional

¹³ A minor difference may be that whereas the Hungarian government has the right to raise political objections against appointment of the candidate to the office of ordinary, in Lithuania the President receives prior notice of the nomination, but has no right to raise objections. In Slovakia no such communication is foreseen – the basic agreement applies. Certainly, agreements on pastoral care of Catholics serving in the army (police, border guards) are quite similar (Bolivia 1986, Brasilia 1989, Croatia 1996) since promulgation of the relevant Apostolic Constitution *Spirituali militum curae* (1986).

character of the state is expressly stated. The agreement with Hungary on financial issues (1997) is exceptional due to its highly technical nature.

A pragmatic reason behind the treaty regulations may be that these countries went through a very rapid legal transition with lots of uncertainties after the fall of communism. Whereas in a more continuous legal development, when emerging problems are settled as they arise, in these countries the legal order as such had to be reconstructed in a very short period of time. The Catholic Church did not seek privileges with the agreements, but rather legal certainty. Bilateral regulations were favourable for safeguarding the rights of the Church under rapidly changing circumstances and they could guarantee achievements under politically uncertain conditions. Legal certainty – as well as the positions achieved – could be beneficial for all religious communities. Many agreements postpone some “sensitive” issues for successive agreements with the Holy See,¹⁴ or – in less delicate issues – the Bishops’ Conference¹⁵. Under transitional circumstances the Holy See preferred to settle at least some (or most) issues or to defer matters until all questions were settled – a further reason for concluding separate agreements instead of a single concordat. For example, the agreement with Latvia leaves open the issue of the Catholic Theological Faculty at Riga University, and financial issues are left to later agreements with Latvia and Slovakia.¹⁶

2. The content of the agreements

(1) Mutual recognition, religious freedom, and legal personality

Juridical persons in canon law enjoy juridical personality in the civil law of Estonia, Latvia, Lithuania, Poland, Slovakia and Slovenia according to the agreements concluded with the Holy See. They need to be registered by the

¹⁴ For example the basic agreement with Slovakia (2000) foresees four partial agreements. Two of them (on army chaplaincy and the one on education) have been signed and ratified since then, the one on conscientious objection is close to signature, whereas a further one is foreseen on financial issues.

¹⁵ For example according to the agreement on financial issues with Hungary (1997) on the funding of eventual new institutions of higher education, on the subsidy for the preservation of ecclesiastical cultural heritage such agreements should be concluded.

¹⁶ De AGAR, José T. Martín, ‘*Studio Comparativo di Concordati tra la Santa Sede e gli Stati dell’Europa Centrale e Orientale*’, in ŠMID, MAREK-VASIL’, CYRIL (Eds), *International Bilateral Legal Relations between the Holy See and States of Central and Eastern Europe: Experiences and Perspectives* (Vatican, 2003) 61-88.

competent state authority in Estonia and Slovenia, and communicated to the competent civil authorities in Latvia. Similar obligations apply in Lithuania and Poland, but apparently recognition is automatic in Slovakia. The agreement with the Czech Republic remains silent on this issue, whereas in Hungary juridical personality of internal church entities is acknowledged by law.

The agreements generally maintain that the establishment, modification, recognition and suppression of dioceses is an exclusive church competence – an issue that has been a sensitive part of institutional freedom for a long time. Some agreements prescribe that the nomination of bishops (who shall be citizens of the given country in Latvia, Lithuania and Poland) is to be communicated to the governments (Estonia, Poland – the Slovak agreement even contains a clear prohibition on the government side not to express its opinion) or to the head of state (Latvia, Lithuania) out of courtesy – countries which maintain a greater distance from religious communities, like the Czech Republic or Slovenia, seem to be less interested in the citizenship of a bishop or in knowing in advance the nominee of the Holy See. The agreements with the Czech Republic, Lithuania, Poland, Slovakia and Slovenia guarantee – in a manner reminiscent of state sovereignty – that the borders of dioceses must not cross state borders. The agreements comply with the claim of independence underlined by the second Vatican Council,¹⁷ and canon law,¹⁸ as the agreements do not grant any rights to civil authorities to influence the nomination of bishops.

(2) Education and culture

Agreements recognize the rights of the parents to determine the education of their children. Generally religious education in the region has found its way back to the public schools, but on an optional basis. Technical details show slight differences from country to country. The programme for the teaching of Catholic religion in public schools is conducted on the basis of a curriculum approved by the bishops’ conference in agreement with the competent state authorities in Latvia and in Lithuania.¹⁹ In Poland the ecclesiastical authority only has to let the competent civil authority know of the programme and the textbooks²⁰.

¹⁷ E.g. CD 19-20.

¹⁸ CIC can. 377. §5.

¹⁹ Latvia, Art. 15.; Lithuania – Agreement on cooperation in education and culture Art. 6. §1.

²⁰ Art. 12. §2.

Religious education is "optional obligatory" in Slovakia.²¹ Education alternative to religion (ethics) is foreseen in Lithuania.²² Teachers of Catholic religion need a certificate of competence issued by the bishops' conference in Latvia,²³ a written authorization of the local bishop (*missio canonica*) in Lithuania and Poland,²⁴ or an authorization of the "Catholic Church" in Slovakia.²⁵

Equal funding for church schools is granted in Hungary,²⁶ Lithuania,²⁷ and Slovakia,²⁸ and financial support is foreseen in Latvia²⁹, whereas in Poland the criteria for subventions are to be determined by the civil laws.³⁰ The Slovenian state is supposed to grant equal public subsidies to church schools as are due to private schools.

(3) Marriage

Canonical marriage has civil effects in Estonia,³¹ Latvia,³² Lithuania,³³ Poland,³⁴ and Slovakia,³⁵ but also Czechs have a free choice between church and civil weddings; Lithuania and Slovakia also acknowledge the decisions of ecclesiastical tribunals on the nullity of marriage, whereas in Poland there is separation in this respect. Civil effects of canonical marriages depend upon the explicit wish of the spouses in Poland. Church and state marriage law is absolutely separate in Hungary and Slovenia, which seems to be something of an exception in the region. Church and state must cooperate to defend the institution of marriage and family according to the agreements with Poland and Slovakia.

²¹ Education agreement, Art. II. §4.

²² Agreement on cooperation in education and culture, Art. 3. §1.

²³ Art. 15.

²⁴ Poland, Art. 12; Lithuania, Agreement on cooperation in education and culture, Art. 3. §2.

²⁵ Slovakia Art. 13. §5. Education agreement Art. III. §1.

²⁶ Agreement on financial issues, Part I, Art. 2.

²⁷ Agreement on co-operation in education and culture Art. 9. §1.

²⁸ Art. 13. §2. Agreement on education Art. I. §8.

²⁹ Art. 19.

³⁰ Art. 14. §4.

³¹ §8: "marriages celebrated in the Catholic Church, upon registration and for which a certificate of marriage has been issued by the civil registry office, have civil effect".

³² Art. 8.

³³ Agreement concerning juridical aspects Art.13.

³⁴ Art. 10.

³⁵ Art. 10.

(4) Financial issues

Restitution of confiscated church property and public subsidies to church activities qualify as sensitive issues in all countries that have been under communist rule. Whereas the 1997 agreement with Hungary explicitly aims to consolidate this question, other agreements only refer to financial issues as a matter to be dealt with by further agreement.³⁶ Some agreements are remarkably tacit on the issue, only proclaiming the right of the church to acquire property,³⁷ and to enjoy tax exemptions.³⁸ In Poland a special commission should deal with the necessary changes in state law. The Czech agreement contains an undertaking to find an acceptable solution to the issue of church patrimony, as well as guarantees for public subsidies to the church.³⁹

The costs of the cultural heritage maintained by the church will be shared between church and state in Latvia,⁴⁰ and subsidy for this purpose is also foreseen by the Czech,⁴¹ Hungarian,⁴² and Polish⁴³ states.

(5) National peculiarities

While recent agreements seem to be similar in many respects of form, language and content, preambles provide space for paying tribute to historical aspects and national peculiarities; the solemn language of the preamble of the agreement on juridical aspects of the relation with Lithuania, the basic agreement with Slovakia, and especially the concordat with Poland are good examples. The Latvian agreement contains a special section on the Shrine of Aglona. The agreement with Estonia ensures that foreign priests, members of religious congregations and lay persons invited by the ecclesiastical authority to fulfill the duties of pastoral ministry, receive residence and work permits in Estonia. Generally, the agreements reflect particular situations, and are far from being uniform. In scope and tone the concordat with Poland and the basic agreement with Slovakia seem to be the most "friendly", whereas the agreements with the Czech Republic and Slovenia, as well as to

³⁶ Slovakia – basic agreement, Art. 20. 1.

³⁷ Slovenia – Art. 9.

³⁸ Lithuania – juridical agreement, Art. 10.

³⁹ Art. 12. 2.

⁴⁰ Art. 22.

⁴¹ Art. 12. 4.

⁴² Part. I. Art. 4.1.

⁴³ Art. 22. 4.

some extent the agreement with Latvia, seem to be somewhat more reserved.

III. Agreements with other denominations

Some countries – for the purposes of parity – also concluded agreements with other denominations, whereas in others the development of cooperation agreements between the state and various religious communities seems to be independent of relations with the Holy See.

Prior to the agreement with the Holy See, the government of Slovenia signed an agreement with the Bishops' Conference of the Catholic Church in Slovenia in 1999 and a year later with the Bishops' Conference of the Evangelical (Lutheran) Church in Slovenia. Currently, there are also negotiations with the Serbian Orthodox Church, the Adventist Church, and the Islamic Religious Community in Slovenia.⁴⁴

Upon Article 25, §5 of the 1997 Polish Constitution “the relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.” Poland seems to follow the Italian model of laws upon agreements, having traditions from the mid-war period. At present fifteen statutes of this nature are in force.

The Hungarian Government signed agreements with the Reformed (Calvinist), Lutheran, Baptist and Serb Orthodox Church as well as with the Alliance of Jewish Communities. The agreements were necessary to settle restitution issues, but the occasion was used to mention a number of other issues of common interest.

The Slovak Republic concluded two common agreements with registered denominations (a small Christian community and the Jehovah's Witnesses did not join these); the first agreement, signed by the president of the republic, is almost identical with the basic agreement concluded with the Holy See.⁴⁵

In the Czech Republic the Bishops' Conference and the Ecumenical Council of Churches concluded agreements with the Ministry of Defence (1998) as well as with the Prison Administration (1999) on pastoral service in the army as well as in prisons. There is also a cooperation

⁴⁴ Lovro ŠTURM, 'State and Church in Slovenia', in G. ROBBERS (ed), *State and Church in the European Union* (2nd edn, Baden-Baden, 2005) 473.

⁴⁵ Michaela MORAVČIKOVA, 'State and Church in the Slovak Republic Slovenia', *ibid.*, 499.

agreement with public radio and the Czech Bishops' Conference, and the Ecumenical Council of Churches in the Czech Republic (1999).⁴⁶

Also in Estonia formal agreements, negotiated directly between the government and religious institutions, play a role. The agreements between the State and religious organizations may also have the nature of administrative agreements or cooperation agreements under civil law. As literature suggests “the agreements are perhaps becoming an increasingly important source for regulating the relationship between religious communities and the State. As a relatively new way of approaching this relationship in Estonia, it is not without difficulties and controversies – mainly concerning the equal treatment of religious communities.”⁴⁷

The Constitution of the Republic of Lithuania⁴⁸ provides for the opportunity to define the legal status of a religious body by mutual agreement between the State and a religious association; nevertheless, so far only the relationship between the Roman Catholic Church and the State is regulated by agreements.⁴⁹

IV. Conclusion

The standards of religious freedom in the new member states are generally in compliance with European standards. It can be observed that none of the new member states established a state church model, but none of them followed a laicist, rigid separation model either. Most new member states have established models that can be described as “benevolent separation” or “coordination” models. The concurrence between the German and the Italian model is very visible in some issues: the (re-)integration of theological faculties into state universities, funding, the opting out or opting in model of religious education are issues which highlight differences. Hungary has rather followed Italy, being stricter concerning institutional entanglement between church and state, whereas other countries permitted a closer connection. The Czech Republic, Latvia and Slovenia show somewhat less understanding towards the religious phenomenon (fear of religion may be still present), whereas Lithuania, Poland and Slovakia are more accommodating. Concordatary settlements seem to be a remarkably common feature of the new EU-member states, even if there

⁴⁶ Jiří Rajmund TRETERA, 'State and Church in the Czech Republic', *ibid.*, 43.

⁴⁷ Merilin KIVIORG, 'State and Church in Estonia', *ibid.*, 100.

⁴⁸ Art. 43 (5).

⁴⁹ Jolanta KUZNECOVIENE, 'State and Church in Lithuania', in G. ROBBERS, *op cit.*, 287.

are significant differences from country to country. Generally these agreements do not grant privileges to the Catholic Church, but serve as guarantees for rights ensured by the national legislator, providing as a 'spin-off' effect a contribution to legal certainty that is beneficial for all religious communities.

With enlargement of its membership, there has been an increase in the proportion of Catholics in the European Union. The new member states have a lively experience with forced atheisation, but lack the difficulties of integration of Muslim communities. Religious freedom is definitely treasured in a special way by those who have experienced a lack of this. The difference of historic experiences enriches Europe in a special way.

ABBREVIATIONS

AAS	<i>Acta Apostolicae Sedis</i> (the official gazette of the Holy See)
CD	<i>Christus Dominus</i> (Decree concerning the pastoral office of bishops in the church, 1965 Vatican II Ecumenical Council)
CIC	<i>Codex Iuris Canonici</i>

Content of concordatarian agreements between the Holy See and New Central-European member states of the European Union

	Marriage	Annulment of marriage	Seal of confession	Holydays	juridical persons of canon law	nomination of bishops	subsidy for church schools
Czech Republic	If conditions fulfilled	-	-	-	if state regulations fulfilled	-	part of public education system
Estonia	Upon registration with civil certificate of marriage	-	-	-	Upon registration	freely chosen by the Holy See, communicated to civil authorities	-
Hungary	-	-	-	-	-	-	as public institutions
Latvia	From the moment of celebration	-	Inviolable	-	shall enjoy juridical personality in civil law	exclusive right of the Holy See, only citizens, communicated to president	in accordance with the law
Lithuania	From the moment of celebration	Reported	Inviolable	Listed	recognized as juridical persons in public or private law	exclusive competence of the Holy See, president informed	Public programmes financed

	Marriage	Annulment of marriage	Seal of confession	Holydays	juridical persons of canon law	nomination of bishops	subsidy for church schools
Poland	From the moment of celebration	-	-	Listed	recognized upon notification	exclusive competence of the Holy See, only citizens, government informed	funded as prescribed by law
Slovakia	According to canon law	Upon communication	Inviolable	Listed	generally recognized	exclusive right of the Holy See, government informed, but shall not express opinion	equal to all other schools
Slovenia	-	-	-	-	recognized upon notification and registration	exclusive competence of the Holy See	equal to private schools

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LES RELATIONS ENTRE L'UNION EUROPEENNE ET LES EGLISES

Présentation du sujet

1. L'intitulé de cet exposé en limite la portée aux relations entre d'une part l'Union Européenne et d'autre part les Églises. Le mot "églises" désigne, en principe, les seules églises chrétiennes.¹ **Il faut donc présenter les relations entre l'Union européenne et les églises chrétiennes.**

Est-ce pourtant suffisant? Cette interprétation étroite ne pourrait-elle être élargie, comme elle le fut parfois dans l'intitulé français de notre consortium? Certains travaux portent en effet: "Consortium européen: Rapports Religions - État".² N'est-ce pas aussi l'évolution suivie dans la rédaction du Préambule du Projet de Traité établissant une Constitution pour l'Europe (ci-après "le projet de Constitution"): la formulation l'héritage judéo-chrétien s'est élargie à l'héritage religieux? Le sujet - la pratique l'impose - comprend les relations de l'Union Européenne avec **non pas seulement les églises mais aussi les religions.**

2. Les religions, sans doute, mais seulement les religions? Il existe pourtant des organisations qui, défendent non des croyances religieuses mais des "convictions," au sens de l'article 9 de la Convention européenne des droits de l'homme (ci-après "CEDH"),³ et II-70 de la Charte des

¹ "Société religieuse fondée par Jésus - Christ. Toute communauté chrétienne". V^o Église, Petit Larousse en couleurs, 1972.

² La version anglaise de l'article 2 des statuts du Consortium énonce d'ailleurs: "The general purpose of the Consortium is to promote the development (...) of the relations between states and **religious confessions in Europe**".

³ La Fédération Humaniste Européenne (FHE) est une association internationale de droit belge créée en 1991. Elle est composée d'associations humanistes et laïques nationales de pays européens. Au nombre de ses objectifs: promouvoir le développement des valeurs humanistes et laïques en Europe, et représenter ses membres auprès des institutions européennes. Faut-il y voir l'inspiratrice du premier paragraphe du Préambule du Projet de Traité établissant une Constitution pour l'Europe: "(...) Conscients que l'Europe est un continent porteur de civilisation pour ses habitants venus par vagues successives depuis

droits fondamentaux (ci-après “la Charte” et qui entretiennent des relations avec la Communauté. Elles ne font pas partie du sujet, mais elles pourraient être évoquées, ne serait-ce que pour rendre compte, même “en passant” de la question dans son ensemble.

3. Le second terme du sujet “l’Union européenne” sera nécessairement éclairé par la pratique de la Communauté européenne dans le domaine envisagé et par le projet de Constitution européenne dont le texte a été signé à Rome, le 29 octobre 2004.

4. Enfin, le sujet a été élargi, à la demande de notre hôte, le Professeur Richard Puza. Il m’est particulièrement agréable de lui exprimer publiquement nos remerciements pour sa chaleureuse hospitalité ainsi que pour celle de Madame Puza. Le Président Puza a souhaité, que l’exposé fasse aussi mention de la jurisprudence. Je le remercie, ici, de sa suggestion amicale et très bien venue dont il a été tenu compte dans cet exposé qui comprend les trois parties suivantes:

- La religion en tant que liberté fondamentale dans la jurisprudence et les textes I
- Les Églises en tant qu’institutions dans les textes fondateurs II
- Les relations Communauté européenne – Religions III

I – La religion: liberté fondamentale dans la jurisprudence et les textes

5. Pour s’en tenir au “marché commun”, à la Communauté européenne, la religion, en tant que liberté de conscience, ou les religions en tant qu’institutions ne sont pas mentionnées dans ce traité économique.⁴ C’est d’abord la jurisprudence, -§1- puis ultérieurement les textes – §2- qui ont dégagé progressivement la liberté de religion, en tant qu’élément des droits fondamentaux de la personne et des institutions.

§1 – La jurisprudence de la CJCE sur le respect de la religion comme droit fondamental individuel

6. Les droits fondamentaux ont été énoncés, par la jurisprudence, de la Cour. L’arrêt **STAUDER c. ULM du 12 11 1969** se réfère déjà “aux

les premiers âges, y ont développé progressivement les valeurs qui fondent l’humanisme: l’égalité, la liberté, le respect de la raison.”

⁴ P. HETSCH, «Émergence des valeurs morales dans la jurisprudence de la C.J.C.E.», *Rev. trimestrielle de droit européen* (1982) 511-525.

droits fondamentaux de la personne compris dans les principes généraux du droit communautaire, dont la Cour assure le respect”.

L’arrêt **RUTILI du 28 10 1975** “comporte la première référence explicite à la CEDH”,⁵ ainsi **la liberté de pensée, de conscience et de religion, garantie par l’article 9 de la CEDH, entre dans les “sources” appliquées par la Cour.** Il est fait encore référence à ces principes généraux, dans l’arrêt **Vivien Prais c. Conseil des Communautés européennes du 27 10 1976**: Une candidate à un concours demande le report de la date des épreuves pour des **motifs religieux**.⁶

7. C’est que la religion des personnes n’est pas étrangère à l’application du traité: certaines prescriptions ou comportements à caractère religieux ou prétendus tels (repos dominical, abattage rituel des animaux, enregistrement des données sensibles à caractère religieux,⁷ etc) pourraient générer des discriminations, constituer une entrave à la liberté de circulation des travailleurs⁸ ou de prestations de services, voire aux règles de la concurrence. Le respect des convictions religieuses se trouve à l’arrière plan de plusieurs arrêts. Quelques exemples:

- Une politique culturelle qui comporte, en particulier, l’interdiction de publicité télévisée certains **jours de la semaine** et pour certains produits peut constituer une raison impérieuse d’intérêt général justifiant une restriction à la libre prestation des services.⁹
- Donner des informations sur une activité économique, mais non pour le compte d’un opérateur économique, n’est que l’exercice de la liberté d’expression et non une prestation de services au sens de l’article 60 du traité. “De ce fait **le droit communautaire ne s’oppose pas à ce qu’un État membre, où l’interruption médicale de grossesse est**

⁵ Jean-Pierre PUISOCHET, juge à la CJCE, «La Cour de justice des Communautés Européennes et la protection des droits fondamentaux», Conférence prononcée à la Cour de Cassation, Paris, 13-05-1996.

⁶ “(...) S’il est souhaitable que l’autorité investie du pouvoir de nomination s’informe, de façon générale, des dates qui pourraient ne pas convenir pour des motifs d’ordre religieux, et tâche d’éviter de fixer les épreuves à de telles dates, on ne saurait, pour les raisons indiquées ci-dessus, considérer que le statut des fonctionnaires ou les **droits fondamentaux** déjà mentionnés font obligation à l’autorité investie du pouvoir de nomination d’éviter de méconnaître une obligation religieuse de l’existence de laquelle elle n’a pas été informée” aff. 130/76, 13-20.

⁷ C-101/01, Bodil Linqvist, 6-11-2003

⁸ Application du système de sécurité sociale néerlandais à un prêtre néerlandais appartenant à l’Ordre des Prémontrés: CJCE 300/84, 23-10-1986, Van Roosmalen, Rec. 1986, p. 3067.

⁹ CJCE, C 288/89, Gouda c. Commissariaat voor de Media, 25-07-1991, 23-27.

prohibée, interdise à des associations d'étudiants de diffuser des informations au sujet de la désignation et du lieu d'implantation de cliniques d'un autre État membre où sont légalement pratiquées des interruptions volontaires de grossesse, ainsi que des moyens d'entrer en contact avec ces cliniques, lorsque les cliniques en question ne sont en aucune manière à l'origine de la diffusion des dites informations".¹⁰

- Une politique culturelle ayant pour but de sauvegarder la liberté d'expression des différentes composantes notamment sociales, culturelles et religieuses ou philosophiques existant dans un État membre, peut constituer une raison impérieuse d'intérêt général justifiant une restriction à la libre prestation des services (...).¹¹

Plus récemment, la Cour a fait référence aux considérations d'ordre moral, religieux ou culturel qui conduisent tous les États membres à restreindre l'organisation de loteries et de jeux d'argent,¹² "au respect du droit fondamental à la dignité humaine et à l'intégrité de la personne",¹³ enfin elle a dit pour droit que: "Le droit communautaire ne s'oppose pas à ce qu'une activité économique consistant en l'exploitation commerciale de jeux de simulation d'actes homicides fasse l'objet d'une mesure nationale d'interdiction adoptée pour des motifs de protection de l'ordre public en raison du fait que cette activité porte atteinte à la dignité humaine".¹⁴

8. Ces droits fondamentaux, et notamment la liberté religieuse des personnes, se trouvent désormais incorporés dans l'article 6 du Traité sur l'Union Européenne,¹⁵ complété par l'article 7 qui prévoit la compétence du Conseil pour sanctionner un État en cas de violation grave et persistante des principes énoncés à l'article 6 §1.

¹⁰ CJCE, C-159/90, *Society for the protection of unborn children Ireland Ltd c. Stephen Grogan*, 4-10-1991.

¹¹ CJCE, C- 353/89, *Commission c. Pays-Bas* 25-07-1991.

¹² CJCE, C- 275/92, *Schindler* 24-03-1994.

¹³ CJCE, C- 377/98, *Pays Bas/ Parlement et Conseil*, 9-10-2001.

¹⁴ CJCE, C - 36/02, *Omega*... 14-10-2004 et conclusions Mme Christine Stix-Hackl.

¹⁵ Article 6

1. L'Union est fondée sur les principes de la liberté, de la démocratie, du respect des droits de l'homme et des libertés fondamentales, ainsi que de l'État de droit, principes qui sont communs aux États membres.

2. L'Union respecte les droits fondamentaux, tels qu'ils sont garantis par la convention européenne des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950 et tels qu'ils résultent des traditions constitutionnelles communes aux États membres, en tant que principes généraux du droit communautaire"(...).

§2 – L'article 13 du traité de la Communauté européenne: la lutte contre la discrimination, la Directive 2000/78 du 17 11 2000

9. L'interdiction de toute discrimination exercée en raison de la nationalité existe depuis l'origine (art. 12 CE). En revanche, le Conseil dans les conditions prévues à l'article 13 CE, introduit par le Traité d'Amsterdam, signé le 02 10 1997: "peut prendre les mesures nécessaires en vue de combattre toute discrimination fondée sur le sexe, la race ou l'origine ethnique, la religion¹⁶ ou les convictions, un handicap, l'âge ou l'orientation sexuelle."

10. Cet article 13 a permis l'adoption par le Conseil, de la **Directive 2000/78 du 17 11 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail**. Dans ce texte important, deux dispositions sont pertinentes pour le présent propos: les articles 1 et 4.

a – L'article 1 place en tête de la liste des discriminations à combattre: celle fondée sur "**la religion ou les convictions**",¹⁷

b – L'article 4 de la directive traite des "**emplois de tendance**", ceux pour lesquels la considération de la croyance ou de la conviction constitue une exigence professionnelle.¹⁸ Leur prise en compte par l'employeur ne constitue pas une discrimination.

¹⁶ La Cour européenne des droits de l'homme avait déjà décidé: "Nonobstant tout argument contraire possible, on ne saurait tolérer une distinction dictée pour l'essentiel par des considérations de religion", *Cour, Hoffmann c. Autriche*, 23-06-1993, 36; "La Cour se borne à constater que l'Église requérante, propriétaire de son terrain et de ses bâtiments, s'est vue empêchée d'ester en justice pour les protéger alors que l'Église orthodoxe ou la communauté juive peuvent le faire pour protéger les leurs sans aucune formalité. Eu égard à sa conclusion sous l'article 6§1 de la Convention, la Cour estime qu'il y a eu de surcroît violation de l'article 14 combiné avec l'article 6 §1, car aucune justification objective et raisonnable pour une telle différence de traitement n'a été avancée", *Cour, Église catholique de La Canée c. Grèce*, 16-12-1997, 47.

¹⁷ Art 1er: "La présente directive a pour objet d'établir un cadre général pour lutter contre la discrimination fondée sur la religion ou les convictions, l'handicap, l'âge ou l'orientation sexuelle, en ce qui concerne l'emploi et le travail, en vue de mettre en oeuvre, dans les États membres, le principe de l'égalité de traitement". C'est le lieu de rappeler une courte citation de l'arrêt de la Cour, *Hoffmann c. Autriche*, 23-06-1993, 36 "Nonobstant tout argument contraire possible, on ne saurait tolérer une distinction dictée, pour l'essentiel, par des considérations de religion".

¹⁸ Art. 4 – Exigences professionnelles. – 1. Nonobstant l'article 2, paragraphes 1 et 2, les États membres peuvent prévoir qu'une différence de traitement fondée sur une caractéristique liée à l'un des motifs visés à l'article 1er ne constitue pas une discrimination lorsque, en raison de la nature d'une activité professionnelle ou des conditions de son exercice, la caractéristique en cause constitue une exigence professionnelle essentielle et déterminante pour autant que l'objectif soit légitime et que l'exigence soit proportionnée.

2. Les États membres peuvent maintenir dans leur législation nationale en vigueur à la date d'adoption de la présente directive ou prévoir dans une législation future reprenant

Voilà quelques observations qu'appelait cette première partie: La religion liberté fondamentale dans la jurisprudence et les textes. La deuxième partie s'intitule:

II – Les églises en tant qu'institutions dans les textes fondateurs

11. L'article 4 de la Directive 2000/78 vise la religion des individus, la croyance à laquelle adhère l'entreprise et qu'elle souhaite voir partager par son personnel.¹⁹

Sans amoindrir la place de la religion dans les droits fondamentaux de la personne, les textes fondateurs prennent en compte les religions sous leur forme institutionnelle: d'abord la Déclaration relative au statut des Églises et des organisations confessionnelles – §1-; ensuite l'article I – 52 du projet de Constitution "Statut des Églises et des organisations non confessionnelles" – §2. Ces deux textes seront successivement présentés.

§1 – La Déclaration relative au statut des Églises et des organisations non-confessionnelles

12. Les Églises et les communautés religieuses, en tant qu'institutions, apparaissent dans cette importante déclaration n° 11,²⁰ annexée au Traité d'Amsterdam:

des pratiques nationales existant à la date d'adoption de la présente directive des dispositions en vertu desquelles, dans le cas des activités professionnelles d'églises et d'autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, une différence de traitement fondée sur la religion ou les convictions d'une personne ne constitue pas une discrimination, lorsque, par la nature de ces activités ou par le contexte dans lequel elles sont exercées, la religion ou les convictions constituent une exigence professionnelle essentielle, légitime et justifiée eu égard à l'éthique de l'organisation. Cette différence de traitement doit s'exercer dans le respect des dispositions et principes constitutionnels des États membres, ainsi que des principes généraux du droit communautaire et ne saurait justifier une discrimination fondée sur un autre motif.

Pourvu que ces dispositions soient par ailleurs respectées, la présente directive est donc sans préjudice du droit des églises et des autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, agissant en conformité avec les dispositions constitutionnelles et législatives nationales, de requérir des personnes travaillant pour elles une attitude de bonne foi et de loyauté envers l'éthique de l'organisation". V. J. DUFFAR, Religion et travail dans la jurisprudence de la Cour de justice des Communautés européennes et des organes de la Convention européenne des droits de l'homme, *Rev. Dt. Public* (1993) 695-718.

¹⁹ Cette situation rappellerait les circonstances de l'affaire Rommelfanger c. RFA, Commission Europ. des dts de l'homme, D 12242/86, 06-09-1989, DR, 62/170.

²⁰ J. DUFFAR, «Liberté de religion et droit européen en 1997», *Revue européenne des relations Églises-États*, 5(1998), 145 et 6 (1999) 197.

“L'Union européenne respecte et ne préjuge²¹ pas le statut dont bénéficient en vertu du droit national les Églises et les associations ou communautés religieuses dans les États membres.

L'Union européenne respecte également le statut des organisations philosophiques et non confessionnelles”.²²

13. Les **déclarations** n'ont pas la même valeur juridique que celle des Protocoles annexés, dont l'article 239 CE indique qu'ils "font partie intégrante" du Traité. La déclaration n°11 est le vestige d'un projet que ses promoteurs n'ont pas réussi à faire incorporer dans le traité et, partant, qui n'a pas valeur obligatoire,²³ même si sa valeur symbolique n'est pas contestée. En tout cas elle figure en annexe et justifie déjà un examen particulier, même si son contenu a été introduit dans l'article I – 52 du projet de Constitution, qui sera présenté après.

14. L'usage du mot "**statut**", *stricto sensu*, paraît impliquer un acte constitutif ou un ensemble d'actes, rédigés par écrit qui indiquent au moins les finalités de l'institution, ses règles de fonctionnement interne et externe et ses ressources. (Statuts d'une société, d'un territoire, etc). En l'absence de précision dans le texte, le "statut" pourrait désigner à la fois les règles internes à l'institution religieuse et celles du droit national relatives à cette institution.

Il n'est pas déraisonnable de comprendre le "statut" au sens large. Le mot pourrait non seulement comprendre cet ensemble de règles, mais aussi une "**situation**" qui peut être un état de fait.

²¹ Préjuger: juger d'avance; prévoir par conjecture. (Petit Larousse). L'emploi de ce verbe appelle un rapprochement avec l'article 295 du TCE: "Le présent traité **ne préjuge** en rien le régime de la propriété dans les États membres". Est exprimée par ce verbe la neutralité du TCE à l'endroit des réglementations nationales relatives au régime de propriété (concl. Capotorti, sur aff. 44/79, Hauer, Rec, 3747). L'usage de la même expression semble marquer l'indifférence de l'Union à l'endroit du statut, éventuellement avantageux, des organisations religieuses dans les droit nationaux.. C'est aussi l'approche de la Cour Européenne des droits de l'homme: "L'autonomie des communautés religieuses est indispensable au pluralisme dans une société démocratique et se trouve au coeur de la protection offerte par l'article 9, Cour, Hassan et Tchaouch, c.Bulgarie, 26-10-2000, 62; Église métropolitaine de Bessarabie, c. Moldova, 13-12-2001, 118.

²² Les deux paragraphes de la Déclaration n° 11 ont été reproduits, dans les deux premiers paragraphes de l'article I – 52 du projet de constitution, avec deux légères variantes (v. infra).

²³ Th. JANSEN, «The dialogue between the European Commission and the churches and religions communities», European Commission, Forward studies Unit, Brussels, 20-04-1999 TJ D (99) 449. L'auteur rappelle que les gouvernements d'abord Allemand, puis Autrichien et Italien, furent à l'origine de cette initiative. Le compromis constitué par la Déclaration fut considéré comme un succès.

La Déclaration serait alors susceptible de s'appliquer, également et sans difficulté, aux Églises et organisations non confessionnelles qui dans certains États séparatistes, comme par exemple la France, n'ont pas de véritable statut et plus généralement à tous les systèmes qui ne reconnaissent pas les cultes.

Comment la Déclaration traite-t-elle respectivement les Églises et les organisations non confessionnelles?

15. L'Union marque un égal respect pour le statut des Églises et des associations et communautés religieuses ainsi que pour celui des organisations philosophiques et non confessionnelles.

Ce verbe "**respecter**" est déjà employé dans le paragraphe 2 de l'article 6 du Traité sur l'Union Européenne: "L'Union respecte les droits fondamentaux, tels qu'ils sont garantis par la CEDH (...) et tels qu'ils résultent des traditions constitutionnelles communes aux États membres, en tant que principes généraux du droit communautaire." Le verbe "**respecter**" emporte une connotation positive: la déférence, l'honneur, les égards, bref le respect témoigne d'une considération pour des institutions qui le méritent car elles sont jugées dignes et bonnes.²⁴

Le même mot est utilisé, par exemple à l'article 22 de la Charte, à l'article 8 de la CEDH, 1 et 2 du protocole additionnel:²⁵ l'identité du vocabulaire pourrait conduire à un rapprochement dans l'interprétation. Le "**respect**" pourrait impliquer, à la charge de l'Union, des obligations non pas seulement de s'abstenir mais aussi de faire.²⁶ C'est ainsi que respecter l'autonomie des religions peut exiger des mesures positives

²⁴ V° Respecter, Petit Larousse en couleurs.

²⁵ Art. 22 de la Charte des droits fondamentaux: "L'Union *respecte* la diversité culturelle, religieuse et linguistique"; Art. 8 de la CEDH: "Toute personne a droit au *respect* de sa vie privée (...);" art. 2 P1 "(...) l'État *respectera* le droit des parents (...). art 1 P1 "Toute personne (...) a droit au *respect* de ses biens", v. Cour, Novoseletskiy c. Ukraine, 22-02-2005, 100.

²⁶ La seconde phrase de l'article 2 du Protocole additionnel à la CEDH, intitulé "Droit à l'instruction" énonce: "L'État dans l'exercice des fonctions qu'il assumera dans le domaine de l'éducation et de l'enseignement *respectera* le droit des parents d'assurer cette éducation et cet enseignement conformément à leurs convictions religieuses ou philosophiques". La Cour a déclaré à propos de ce verbe: "<Respecter>, ainsi que le confirme la substitution de ce mot à <tiendra compte> pendant la genèse de l'article 2, signifie plus que <reconnaître> ou <prendra en considération> en sus d'un engagement plutôt négatif, ce verbe implique à la charge de l'État une certaine obligation positive." Cour, Campbell et Cosans, 22-03-1983, 37. "La Cour estime depuis longtemps que si de nombreuses dispositions de la Convention ont essentiellement pour objet de protéger l'individu contre toute ingérence arbitraire des autorités publiques, il peut en outre exister des obligations positives inhérentes à un respect effectif des droits concernés". Cour, Ozgur Gundem c. Turquie, 16-03-2000, 42.

dérogatoires²⁷ aux mécanismes du marché, ou de la législation du travail ou de la sécurité sociale.

16. En revanche, dans la formulation de la Déclaration, les organisations philosophiques et non confessionnelles ne sont pas, malgré les apparences, "traitées à égalité" avec les Églises: elles passent après, dans le second paragraphe.

L'usage du verbe "**ne préjuge pas**", qui signifie une absence totale d'opinion préconçue, est réservé aux Églises. Faut-il en déduire que l'Union, ne s'interdit pas d'avoir sa propre opinion sur "les organisations philosophiques et non confessionnelles" indépendamment de leur statut en droit interne?

17. Oui, en plus du respect qu'elle leur porte, l'Union n'a aucune idée préconçue, aucun a priori, vis à vis "**du statut dont bénéficient**," dans les droits internes respectifs, les trois catégories visées au paragraphe premier: les Églises, les associations religieuses et les communautés religieuses, énumération qui peut couvrir l'ensemble des religions.²⁸

18. Cette affirmation est importante. L'usage du verbe "**bénéficier**" marque que le statut, n'est pas nécessairement neutre. S'il comporte des avantages accordés par le droit national²⁹ en faveur des Églises, des associations ou communautés religieuses, l'Union n'y fera aucune objection. C'est une application classique du principe de l'autonomie des cultes et des religions, qui existe dans le droit des États européens.³⁰

19. C'est le lieu de rappeler la grande diversité des situations en Europe et parfois à l'intérieur du même pays. La Cour europ. des DH a mentionné à titre d'exemple particulier qu'(...) «**Il n'existe pas au niveau européen un standard commun en matière de financement des églises**

²⁷ G. ROBBERS, «Les relations juridiques entre l'État et les communautés religieuses en Europe», Colloque des 12-13/1/2001, Bruxelles, Groupe des Conseillers Politiques auprès du Président de la Communauté Européenne et le Comité de coordination de l'initiative "Une âme pour l'Europe. Éthique et Spiritualité".

²⁸ R. PRODI, on Religion in the European Union, European Consortium Church and State Research, NEWS, Year 4 - Issue 4, April 2004, p. 1-2.

²⁹ Th. JANSEN, op.cit..

³⁰ J. DUFFAR, «Le régime constitutionnel des cultes, in Le Statut Constitutionnel des Cultes dans les pays de l'Union Européenne, Consortium Européen», *Rapports Religions-État*, Réunion de Paris, 1994, Litec- Giuffrè, 1995, (en particulier, p. 6-8: L'autonomie des cultes); S. FERRARI, «États, religion, Islam, Le modèle européen des rapports entre États et religions», en *Convergences musulmanes. Aspects contemporains de l'Islam dans l'Europe élargie* (Louvain-La Neuve, Bruylant. L'Harmattan, 2001) pp. 59-76.

ou cultes; ces questions sont étroitement liées à l'histoire et aux traditions de chaque pays».³¹

Une autre requête émanait de l'Église Baptiste: celle-ci demandait à être exonérée de taxe foncière, comme l'Église Catholique. Cette exonération est prévue par le Concordat, mais l'Église Baptiste n'a ni conclu, ni demandé à conclure un concordat avec le Gouvernement Espagnol.³²

§ – 2 L'article I – 52 du projet de Constitution signé le 29-10-2004: "Statut des églises et des organisations non-confessionnelles"

20. Sous cet intitulé, l'article est divisé en trois paragraphes, dont les deux premiers reprennent, à quelques détails près la déclaration n° 11 examinée ci-dessus. En voici le texte:

1. L'Union respecte et ne préjuge pas du statut dont bénéficient, en vertu du droit national, les églises et les associations ou communautés religieuses dans les États membres.
2. L'Union respecte également le statut dont bénéficient, en vertu du droit national, les organisations philosophiques et non confessionnelles.
3. *Reconnaissant leur identité et leur contribution spécifique, l'Union maintient un dialogue ouvert, transparent et régulier avec ces églises et organisations*"

21. Les italiques désignent les modifications et les compléments mineurs apportés au texte de la déclaration n°11 examinée ci-dessus. La différence essentielle tient, ici, à l'introduction du contenu de la déclaration dans le texte même de la future constitution, dans le droit positif. Les promoteurs du texte n'avaient pas réussi à le faire incorporer dans le Traité d'Amsterdam; au surplus le 3ème paragraphe renforce encore la situation des bénéficiaires.

22. La rédaction des deux premiers paragraphes affirme l'égalité entre les églises et les organisations non-confessionnelles³³: l'Union respecte le statut dont bénéficient les unes et les autres.

³¹ Cour, D d'irrecevabilité, 24-11-1999, Alujer Fernandez et Caballero Garcia c. Espagne...

³² Cour, D, 17522/90, Iglesia Bautista "Salvador" c. Espagne, 11-01-1992, DR, 72/256.

³³ Celle-ci est proclamée dès le Préambule de la Charte: "S'inspirant des héritages culturels, religieux et humanistes de l'Europe" (...) et confirmée dans l'article II, – 70 par l'égalité entre religion et conviction.

En revanche, l'article L-52-1 vise spécifiquement et exclusivement le statut dont bénéficient toutes les églises et dont il ne préjuge pas: autonomie et indépendance des cultes. Sous ce rapport du statut, le paragraphe 1 ne dit rien des organisations philosophiques et non confessionnelles, qui ne sont pas traitées à égalité. L'Union ne s'interdit pas, semble-t-il, de pouvoir exercer son jugement critique à l'égard du statut dont bénéficierait certaine organisation non confessionnelle en droit national (V.supra).

23. La formulation du troisième paragraphe intéresse directement cette présentation. Il comprend deux membres de phrase qui s'articulent autour des deux verbes reconnaître et maintenir.

A. Reconnaître

"Reconnaissant³⁴ leur identité et leur contribution spécifique". Trois mots importants: reconnaissant, identité et contribution spécifique.

24. D'abord, l'Union, non seulement connaît ces groupements mais elle les "**reconnaît**". La reconnaissance leur confère au moins une légitimité dans leur existence. Partant, l'Union s'engage, au moins, à ne pas les ignorer à l'avenir.³⁵ La reconnaissance est tout à la fois une constatation et une acceptation.

Le préambule de la Charte des droits fondamentaux de l'Union éclaire sur les conséquences de la reconnaissance puisque: "l'Union **reconnaît** les droits, les libertés et les principes énoncés ci-après".

25. Cette reconnaissance par l'Union porte, d'abord, sur l'**identité** de ces Églises et Organisations. C'est, il faut le souligner, la reconnaissance juridique de leur existence singulière, du moins au regard de la Constitution européenne.³⁶ dont l'article II – 82 énonce: "L'Union **respecte** ³⁷la **diversité** culturelle, religieuse et linguistique".

³⁴ L'article 2 de la loi française du 9 décembre 1905, concernant la séparation des Églises et de l'État: "La République *ne reconnaît*, ne salarie ni ne subventionne aucun culte."

³⁵ Art. II-112-6 du projet de Constitution: "Les législations et pratiques nationales doivent être pleinement prises en compte comme précisé dans la présente Charte".

³⁶ L'existence de la personnalité juridique de l'Église Catholique a été déjà contestée, avec pour effet de priver cette dernière de l'accès à un tribunal: violation de l'article 6 §1 de la Convention. Cour, Église Catholique de La Canée c. Grèce, 16 12 1997.

³⁷ V. supra, n° 15.

La reconnaissance est aussi un hommage aux spécificités qui fondent les différences de sensibilités religieuses. À titre d'illustration, la Conférence des Églises européennes regroupe quelques 124 églises. Leur reconnaissance peut apparaître comme la mise en pratique du pluralisme, de la non-discrimination et de la tolérance qui font partie des "valeurs de l'Union"³⁸ au sens de l'article I-2 de la Constitution et de la CEDH.

26. La reconnaissance par l'Union porte aussi sur la "**contribution spécifique**", sans autre précision. Chaque religion et chaque organisation philosophique et non confessionnelle, non seulement existe en tant que telle, mais aussi a pris et prend une part active et particulière dans la construction de l'Union.³⁹ Par leur diversité, ces contributions spécifiques ne constituent-elles pas les: "héritages culturels, religieux et humanistes de l'Europe" (Préambule), qui sont sa source première d'inspiration? En reconnaissant "leur contribution spécifique", l'Union proclame publiquement la réalité et la dignité de la participation de chaque religion et organisation, sans exception.

27. Cette "contribution spécifique" procède directement du **Livre blanc sur la Gouvernance européenne de 2001**: "La société civile joue un rôle important en permettant aux citoyens d'exprimer leurs préoccupations et en fournissant les services correspondants aux besoins de la population. **Les Églises et les communautés religieuses ont une contribution spécifique à apporter**". Selon certain commentateur, les religions et les organisations philosophiques non confessionnelles s'adressent directement à la formation de la conscience et partant de la citoyenneté. Elles ne seraient pas comparables à d'autres composantes de la société civile.⁴⁰

B. Maintenir

28. La conséquence de ce qui précède est que "l'Union maintient un dialogue ouvert, transparent et régulier avec ces Églises et organisations".

³⁸ Art. I-2: Les valeurs de l'Union "L'Union est fondée sur les valeurs de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de l'État de droit, ainsi que de respect des droits de l'Homme, y inclus des droits des personnes appartenant à des minorités. Ces valeurs sont communes aux États membres dans une société caractérisée par le pluralisme, la non discrimination, la tolérance, la justice, la solidarité et l'égalité entre les femmes et les hommes".

³⁹ D. Hervieu-Léger, *The role of religion in establishing social cohesion*, May 2003, 10p.

⁴⁰ J. VIGNON, «Le livre blanc sur la Gouvernance: perspectives à l'avenir», Colloque de Bruxelles, 2002.

29. Le **dialogue** vise à établir entre les interlocuteurs une communication, voire une entente égalitaire.. Le dialogue ne peut exister sans renonciation des participants à une certaine concurrence, ni sans la prise de conscience progressive d'un intérêt commun.⁴¹ Ce dialogue existait déjà entre la Communauté et ces groupements ⁴² "Donner une chance au dialogue",⁴³ fut le thème d'un colloque de la Commission en 2002.

30. L'idée de **maintenir** prolonge d'abord le passé: préserver une situation qui existe déjà et qu'il est souhaitable de conserver: le dialogue a déjà été entamé avant la rédaction du projet de constitution.

Mais le verbe regarde aussi vers l'avenir: il contient l'engagement d'entretenir ce dialogue et de veiller à sa préservation dans la durée. Voilà encore des obligations positives à la charge de l'Union.

31. L'ouverture – **dialogue ouvert** – apparaît comme une réminiscence rapprochée du *Livre blanc sur la gouvernance européenne*. Il rappelle à nouveau le pluralisme, la diversité culturelle et religieuse que l'Union respecte⁴⁴ et la non discrimination.⁴⁵

32. Celle-ci paraît commandée par la **transparence**: "Elle < l'Union > souhaite approfondir le caractère démocratique et transparent de sa vie publique (... Préambule)".

33. Enfin, la notion de régularité "**dialogue régulier**" évoque la périodicité des réunions qui existe déjà et qui doit être maintenue, voire institutionnalisée. Dans certains États européens, les églises sont, semble-t-il, entendues, préalablement à l'adoption d'un texte, sur les sujets qui les concernent.

⁴¹ A. AKOUN, V° DIALOGUE, *Dictionnaire de la Sociologie*, ROBERT, 1999.

⁴² Outre la contribution de Th. JANSEN (préc.), et parmi beaucoup d'autres: Cl. DURAND, *La dimension juridique d'un dialogue entre la future Union européenne et les communautés de foi et conviction*; M. KROEGER, «Des aspects juridiques et institutionnels d'un dialogue entre l'Union européenne de demain et les communautés de foi et de conviction» (Colloque, préc. Bruxelles, 12-13/11/2001). V. Le développement sur le dialogue inter religieux, en Ph. GREINER, «L'encadrement juridique du prosélytisme en droits grec, français, européen et en droit canonique catholique romain», Thèse, 2005, Université Paris-Sud XI, sous la direction du Professeur B. Basdevant-Gaudement, p.195-200.

⁴³ Groupe des Conseillers Politiques, COMMISSION EUROPEENNE, **DONNER UNE CHANCE AU DIALOGUE**: La contribution des convictions religieuses et philosophiques à une compréhension mutuelle dans des villes d'Europe d'aujourd'hui, Bruxelles, les 14 et 15 octobre 2002, Actes du colloque.

⁴⁴ Article II – 82: "Diversité culturelle, religieuse et linguistique".

⁴⁵ L'article II – 81 du projet de Constitution, intitulé "Non -discrimination" prévoit: "1.Est interdite, toute discrimination fondée notamment sur (...) la religion ou les convictions (...)"

Ici s'achève la deuxième partie intitulée: "les Églises en tant qu'institutions dans les textes fondateurs". Examinons plus brièvement.

III – Les relations entre la Communauté européenne et certaines religions

L'exposé présentera successivement: Les initiatives de la Communauté §1- celles des Religions §2 -; enfin la consolidation potentielle de ces relations §3-.

§1 – Les initiatives de la Communauté: une âme pour l'Europe et la cellule Prospective de la Commission

34. L'initiative revient au Président Jacques DELORS, dans son discours aux Églises du 14 avril 1992, à Bruxelles "Si, au cours des dix prochaines années, nous ne parvenons pas à donner une âme à l'Europe, à lui donner une spiritualité et un sens, c'en sera fait de l'unification européenne".

35. C'est l'origine de "**Une âme pour l'Europe**", né en 1994 et destiné à instaurer un dialogue entre les communautés religieuses et les institutions européennes.

"Une âme pour l'Europe" est une association à but non lucratif:⁴⁶ elle offre un forum de discussion inter confessionnelle, dans un esprit de tolérance, d'ouverture et de respect. Les membres renoncent à tout prosélytisme au sein du groupe.

Au 27 01 2004 les membres de UNE AME POUR L'EUROPE sont des communautés de foi et de conviction à dimension européenne:

- La Commission des Conférences épiscopales de la Communauté européenne
- La Commission Église et société de la Conférence des églises européennes
- Le Bureau de l'Église Orthodoxe
- La Conférence des Rabbins européens
- La Fédération humaniste européenne
- Le Conseil Musulman de coopération en Europe

A l'avenir il y aura probablement les membres titulaires et les membres associés.

⁴⁶ Centre Oecuménique, 174, rue Joseph II, 1000 Bruxelles.

36. Ces communautés regroupent déjà un grand nombre de personnes. Toute organisation représentant officiellement une tradition religieuse et philosophique dotée d'une structure européenne peut devenir membre de l'association. Il faut à celles -ci un mandat des membres.

37. La "Cellule de Prospective" de la Commission a encouragé ces communautés à présenter des projets (rencontres séminaires, activités sociales etc) devant favoriser la prise de conscience de la dimension éthique et spirituelle de l'unification européenne. Les projets retenus peuvent bénéficier de subventions de la Commission européenne.

§2 – Les initiatives des Églises

38. Il faut mentionner, d'abord, le Saint Siège qui est représenté par un nonce auprès de la Communauté, par application, semble-t-il, du Canon 363 §2: "**Représentent** aussi le siège apostolique les personnes qui sont désignées pour une mission pontificale comme Délégués ou Observateurs auprès d'Organismes internationaux, ou bien auprès de Conférences et d'Assemblées".⁴⁷

39. Par ailleurs, existent des institutions qui gravitent autour de la Communauté Seules, certaines seront descriptivement évoquées.

Parmi ces organisations, existent des institutions ⁴⁸ fédératives qui ont été citées comme membres d'une âme pour l'Europe. Cette présentation en retiendra deux la Commission des évêchés de la Communauté Européenne: la COMECE – A; et la Conférence des Églises européennes – la kek – B.

A – La COMECE

40. La COMECE a été précédée par le Conseil des Conférences Épiscopales d'Europe (CCEE) créé en 1971.⁴⁹ Le Comité du CCEE réunit les présidents des Conférences Episcopales d'Europe, au sens géographique

⁴⁷ G. BARBERINI, *Le Saint Siège sujet souverain de droit international*, préface du Cardinal TAURAN (Cerf, 2003) 236p.

⁴⁸ Certains des développements qui suivent sont puisés dans le riche mémoire de DEA de doctorat de Droit Canonique de Anne FORNEROD "Les représentants des cultes auprès des pouvoirs publics nationaux et communautaires" rédigé sous la direction du Professeur Brigitte BASDEVANT – GAUDEMET, Université Paris XI-Sceaux, Faculté Jean Monnet – Institut Catholique de Paris, 1999, p.88-118.

⁴⁹ F. MARGIOTTA BROGLIO, *Il fattore Religioso nell'Unione Europea continuità e nuovi problemi*, Studi in onore di Francesco Finnochiario (CEDAM, Milano, 2000) 1252-1278.

du mot. Cette institution semble davantage orientée vers les questions d'intérêt commun – mise en place de structures (conseils presbytéraux et pastoraux, commissions spécialisées) et domaines d'activités (oecuménisme, justice et paix, migrations et évangélisation).

41. La COMECE a succédé au Service d'information Pastorale Européen Catholique (SIPECA 1976-1980). Ce service était chargé d'informer les évêques et les conférences épiscopales sur les dossiers traités par le Conseil de l'Europe et par la Communauté présentant un intérêt pour les Églises catholiques.

Créée le 03-03-1980, la COMECE est composée de 21 évêques délégués des conférences épiscopales des pays membres de la Communauté Européenne,⁵⁰ celles-ci financent son fonctionnement. Elle est dotée d'un secrétariat permanent à Bruxelles.

42. Les évêques se réunissent, en session plénière, deux fois par an. Le Nonce apostolique auprès des Communautés européennes y participe. Les lignes directrices, que le Secrétariat appliquera, sont arrêtées au cours de ces sessions. Dans l'intervalle, un comité exécutif composé du Président, des deux vice-présidents et du Secrétaire général assure la continuité.

43. La COMECE poursuit, selon sa propre présentation, les objectifs suivants:

- Accompagner et analyser le processus politique de l'Union européenne
- Informer et conscientiser l'Église sur les développements de la législation et des politiques européennes
- Encourager la réflexion basée sur l'enseignement social de l'Église, sur les défis posés par la construction d'une Europe unie
- Certaines organisations affirment que la Comece aurait déployé beaucoup d'énergie pendant toute la préparation de la Constitution.

B. La Conférence des Églises Européennes (K E K)

44. La KEK est une organisation oecuménique régionale d'Europe. Elle rassemble Anglicans, Baptistes, vieux Catholiques, chrétiens,⁵¹ Luthériens, Méthodistes, Orthodoxes, réformés au total 124 Églises et 25 organisations associées de tous pays d'Europe.

⁵⁰ Allemagne, Angleterre et Pays de Galles, Autriche, Belgique, Ecosse, Espagne, France, Grèce, Hongrie, Irlande, Italie, Lituanie, Luxembourg, Malte, Pays-Bas, Pologne, Portugal, République Tchèque, Scandinavie, Slovaquie et Slovénie. La Conférence épiscopale de la Suisse est un membre associé.

⁵¹ Ces catholiques ne sont pas membres de l'Église Catholique Romaine. Celle-ci entretient des rapports avec la KEK, mais n'en fait pas partie.

Simple association d'Églises, en 1964 elle se constitue en Conférence régionale d'Églises dont l'organe suprême est l'Assemblée générale. Toutes les Églises membres y sont représentées. L'Assemblée élit un Comité Central qui se réunit tous les ans, élit lui-même un comité exécutif. Le Secrétariat est chargé de l'administration, il se trouve au Centre oecuménique à Genève.

45. Elle comprend 7 groupes de travail spécialisés dans les secteurs suivants:

- Processus d'intégration européenne: ce groupe informe les églises et les institutions européennes
- Questions de sécurité et Politique extérieure
- Questions Nord-Sud
- Questions économiques, environnement et domaine social
- Droits de l'homme et liberté religieuse
- Bioéthique
- Législation communautaire surveiller la législation qui peut réagir sur les intérêts des églises

46. La Commission oecuménique européenne "Église et Société" qui a des bureaux à Strasbourg et à Bruxelles a été intégrée par l'Assemblée générale de 1997.

47. Les objectifs présentés par la KEK sont la nouvelle pauvreté, les réfugiés, l'Islam en Europe etc. Il faut signaler ici trois documents importants pour notre propos: Les Églises et le processus d'intégration européenne; la Charta Oecumenica et les contributions de la KEK à la Convention. Tous ces documents font ressortir des convergences manifestes avec les objectifs de l'Union européenne.

(i) Les Églises et le processus d'intégration européenne Bruxelles mai 2001

48. C'est le premier document qui reflète les discussions régulières entre représentants des églises et fonctionnaires et parlementaires européens. Le document exprime l'intention d'accompagner activement la construction et l'élargissement de la Communauté.

49. Il retient l'attention, en particulier dans sa quatrième partie intitulée: "Les Églises dans le processus d'intégration européenne". Certaines des divisions anticipent la rédaction de l'article I – 52 déjà examiné:

- Quel est le rôle des églises aujourd'hui?
- La contribution des Églises (Roms, gardiennes des valeurs traditionnelles)
- L'église en tant que communauté de valeurs

(ii) Deuxième document: La "CHARTA OECUMENICA", Lignes directrices en vue d'une collaboration croissante entre les Églises en Europe, signée à Strasbourg le 22 04 2001, par le Métropolitain Jérémie Président de la Conférence des Églises Européennes et le Cardinal Vlk, Président du Conseil des Conférences Episcopales européennes.

50. La troisième partie de ce document s'intitule: "Notre responsabilité commune en Europe" il comprend six divisions qui font aussi apparaître les convergences déjà signalées:

- 1 *Prendre part à la construction de l'Europe*: «Les Églises encouragent une unité du continent européen "L'héritage du christianisme représente une forme d'inspiration enrichissante pour l'Europe». Suit un résumé de la doctrine chrétienne dans tous les domaines.
- 2 *Réconcilier les peuples et les cultures*: La paix entre les Églises; condamnation de toute violence spécialement à l'égard des femmes
- 3 *Sauvegarder la création*: L'environnement
- 4 *Approfondir la communion avec le judaïsme*: Avec les extraits pertinents de l'épître aux Romains (Rom, 9, 4-5) condamnation de l'anti-sémitisme et de l'anti-judaïsme
- 5 *Cultiver les relations avec l'Islam*: intensifier le dialogue islamo-chrétien
- 6 *Rencontre avec d'autres religions et idéologies*: engagement de reconnaître la liberté de conscience et de religion de tous les hommes de bonne volonté.

Engagement, car sous chacune de ces six intitulés les signataires s'engagent concrètement à mettre en oeuvre les conséquences qu'ils impliquent. Il n'échappe pas que ces intitulés convergent avec ceux de l'Union européenne.

(iii) Autres documents de la KEK

51. Il faudrait ajouter d'autres documents qui s'inspirent des mêmes préoccupations que les précédents et qui sont des contributions à la Convention sur l'avenir de l'Europe sur le site <http://www.ccc-kek.org>

52. Il existe d'autres instances fédératives déjà mentionnées ainsi que des instances qui émanent d'églises nationales: Bureau de l'Église évangélique d'Allemagne, Bureau de l'Église de Grèce, Bureau de l'Église d'Angleterre et d'autres encore.

§3 – La consolidation potentielle des relations entre l'Union Européenne et les religions

53. Les constatations faites précédemment, trouvent désormais dans le texte de l'article I-52 et dans son contexte des potentialités de consolidation.

54. La limite réside dans la portée du paragraphe 3 de l'article I- 52. Il serait contraire à l'esprit du projet de Constitution que l'Union doive réserver sa reconnaissance et les faveurs de son dialogue aux seules églises, communautés religieuses et organisations philosophiques et non confessionnelles qui bénéficient d'un statut en vertu du droit national. L'Union ne peut pas être subordonnée aux qualifications et catégories des droits internes. Deux conséquences:

Quid des systèmes juridiques qui ne prévoient pas un tel statut? Les églises et organisations non confessionnelles seraient elles, pour cette raison, automatiquement privées de l'accès à l'Union, à sa reconnaissance et à son dialogue? Non, car l'Union qui ne préjuge pas de ce statut ou a contrario de l'absence de statut, peut leur appliquer ses propres critères. Ces termes pourraient être des "notions autonomes" concept familier de la Cour européenne des droits de l'homme.

55. De même, cette observation prolonge la précédente, si une organisation – qui doit être, *à la fois*, philosophique et non confessionnelle – bénéficie d'un statut en vertu du droit national, l'Union conserve sa pleine liberté d'appréciation pour lui faire ou non application du paragraphe 3.

56. Cette réserve rappelée, les relations entre l'Union et les églises, sont désormais fondées sur une disposition constitutionnelle qui leur confère expressément "un statut". Celui-ci comporte des obligations à la charge de l'Union.

57. Dans la Partie 1 du Traité, l'article I-52 est le dernier article du Titre VI – LA VIE DÉMOCRATIQUE DE L'UNION (articles I-45 – I-52). "La jurisprudence de la Cour Européenne des droits de l'homme sur l'article 9 de la CEDH porte aussi sur "la place qu'occupe la religion dans une société démocratique et au sein d'un État démocratique (...) La liberté de pensée, de conscience et de religion représente l'une des assises d'une <société démocratique> (...) dans une société démocratique où plusieurs religions coexistent au sein d'une même population (...) l'une des principales caractéristiques de la démocratie réside dans la possibilité qu'elle offre de résoudre par le dialogue et sans recours à la violence les problèmes que rencontre un pays"(...).

Dans le projet de Constitution, le statut des églises et des organisations non-confessionnelles se définit, aussi, au regard de la vie démocratique de et dans l'Union.

ALEXANDER HOLLERBACH

RELIGION ET DROIT EN DIALOGUE: L'ÉLÉMENT
CONTRACTUEL DANS LA COOPÉRATION ENTRE L'ÉTAT
ET LES COMMUNAUTÉS RELIGIEUSES

I.

Pour la première fois dans son histoire de quinze ans, l'“European Consortium for Church and State Research” se présente au public de l'université dont nous sommes l'hôte et j'ai l'honneur de pouvoir vous familiariser avec le travail du consortium en général; tel est le but de cette réunion à Tübingen.

En ce qui concerne le premier point, je cite le passage essentiel de nos statuts – le texte authentique étant en anglais:

“The general purpose of the Consortium is to promote the development of studies of Ecclesiastical Law and of the relations between states and religious confessions in Europe.

In particular, it will be the Consortium's task: a) to promote collaboration between universities and other European cultural institutions undertaking research in this field; b) to make available funds and facilities for research to the members of the Consortium and to young scholars; c) to promote meetings and contacts between scholars (including non-members); d) to facilitate co-operation in the development of research and of specialist courses; e) to provide consultation and co-operation services on behalf of public and private, national and international institutions in relation to the activities carried out by the Consortium.”

Pour résumer ceci en d'autres termes: nous cherchons à promouvoir le droit comparé dans le domaine du *Staatskirchenrecht* ou du droit civil ecclésiastique et à observer ainsi qu'à accompagner les développements de cette matière dans le cadre de l'Union européenne.

Dans cette perspective principale, le Consortium se consacre au cours de cette année aux instruments et aux procédures qui sont caractéristiques des relations entre l'État et la religion. Au delà des textes constitutionnels et législatifs existe un instrument classique: le contrat, le traité, l'accord. Le contrat: c'est lui qui est ici au premier plan. Mais il ne faut pas se limiter au contrat formel conclu dans les formes appropriées. Il faut,

par contre, également porter notre attention sur les mécanismes qui ne mènent pas à un contrat formel mais qui, comme résultat de négociations ou de dialogue, sont intégrés dans une réglementation formellement unilatérale. Ainsi, les deux aspects de notre sujet: le contrat formel dans sa forme spécifique et, dans un sens général, l'élément ou la dimension contractuelle ou conventionnelle dans le droit civil ecclésiastique.¹

Si nous parlons de contrat ou d'élément contractuel nous faisons référence à une dimension qui est régie par un style approprié, à savoir le style qui cherche le consensus, la coordination volontaire des intérêts, l'accord libre, le respect de la liberté réciproque. Le contraire serait le commandement et l'obéissance, la souveraineté et la subordination.

Pour le moment il s'agit certes de remarques provisoires et élémentaires, mais elles nous permettent peut-être d'ouvrir une perspective fondamentale: il s'agit de savoir quelle est exactement la position juridique et quel est le rôle du contrat et de l'élément contractuel dans l'ordre de l'État ou d'une institution supranationale pour qui certainement la loi et la constitution sont les instruments prédominants. En d'autres termes, quels sont les rapports entre la constitution et la loi d'une part et les contrats ou l'élément contractuel d'autre part. Il faut donc mettre en relation ces deux aspects. Mais avant de discuter de ce thème, je souhaiterais apporter quelques informations relatives à des points qui sont caractéristiques des développements récents.

II.

Un premier point: le contrat ou l'élément contractuel présupposent deux partenaires, dans notre cas: le partenaire séculier et le partenaire religieux. Ceci reflète un état de choses fondamental: la séparation des pouvoirs entre l'État et l'Église, entre le temporel et le spirituel, entre la politique et la religion, soit la séparation caractéristique du monde ayant

¹ Ce qui suit est dans la ligne de mes travaux portant sur cette manière, surtout: *Verträge zwischen Staat und Kirche in der Bundesrepublik Deutschland* (Frankfurt a. M., 1967); *Die vertragsrechtlichen Grundlagen des Staatskirchenrechts*, en: Joseph LISTL et Dietrich PIRSON (éd), *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland* (2^{ème} édition, Berlin, 1994) pp. 253 – 287; Art. *Konkordate*, en: *Religion in Geschichte und Gegenwart* (4^{ème} édition, vol. 4 (2001)), pp. 1599 – 1603; Développements récents du droit concordataire en Europe (Feuille de liaison de la conférence Saint-Yves, n° 104, 2003, pp. 3 – 12); *Aspekte der neuen Entwicklung des Konkordatsrechts*, en: Alexander BLANKENAGEL, Ingolf PERNICE, et Helmuth SCHULZE-FIELITZ (éd), *Verfassung im Diskurs der Welt. Liber amicorum für Peter Häberle zum siebzigsten Geburtstag* (Tübingen, 2004) pp. 821 – 839.

connu l'histoire de l'Europe, une sorte spécifique de séparation des pouvoirs et de garantie de la liberté.

Quels sont les partenaires concrets?

Du côté du monde séculier nous avons un schéma assez simple. Les partenaires ou les acteurs sont les États, soit dans la perspective de notre Consortium, les États membres de l'Union européenne et cette dernière étant considérée comme institution supranationale ce qu'on appelle en allemand *Staatenverbund* en français «Confédération d'États». Il existe une certaine différenciation d'un point de vue des États de l'Union, selon que ceux-ci sont eux-mêmes divisés ou si les unités respectives sont reconnues comme partenaires contractuels. Dans l'organisation fédérative en Allemagne, c'est le cas des *Länder*, mais aussi en Espagne des communautés autonomes. Dans certains cas les communes ou autres institutions publiques peuvent être également en relations contractuelles avec un partenaire religieux.

La situation est toute autre pour le monde spirituel. En théorie toutes les communautés religieuses entrent en ligne de compte, soit toutes les communautés organisées ou institutionnalisées qui sont issues des grandes religions du monde, à savoir du Christianisme, du Judaïsme, de l'Islam, du Bouddhisme et de l'Hindouisme.

En réalité donc le champ se rétrécit d'autant plus si nous accentuons la perspective européenne et prenons pour base l'expérience de l'histoire et de la politique concrète.

1. C'est là que nous rencontrons un phénomène remarquable ou presque vénérable, à savoir le concordat, soit l'instrument spécifique pour le règlement des relations avec l'Église catholique.

Le concordat a une longue histoire comme vous le savez. Dans les mélanges en hommage à Richard Puza, *Jean Gaudemet* et *Brigitte Basdevant-Gaudemet* ont apporté des esquisses précieuses sur ce thème.² On trouve ses origines au 12^{ème} siècle; à partir du 15^{ème} siècle le concordat prend alors une forme spécifique. En 1801, date du concordat napoléonien, cet instrument entre dans une nouvelle ère. Du point de vue de l'Église, le deuxième concile du Vatican marque une coupure ou plus exactement un changement de paradigme: les principes clefs dans les relations entre l'Église et l'État sont la liberté réciproque et la coopération,

² Andreas WEBB et Stefan IHLI (éd), *Flexibilitas Iuris Canonici: Festschrift für Richard Puza zum 60. Geburtstag* (Frankfurt a. M., 2003); Jean GAUDEMET, Les Concordats dans l'histoire, pp. 557 – 568; Brigitte BASDEVANT-GAUDEMET, Les concordats, une procédure parmi d'autres, pp. 585 – 600.

une coopération «saine» dans les limites de l'ordre du bien public. Sur ce fondement nous assistons actuellement à une nouvelle époque de l'utilisation du concordat.

Avant d'entrer dans les détails, il semble utile de clarifier la terminologie.

En ce qui concerne la notion de concordat, il faut distinguer entre une signification large et une signification stricte ou étroite. Dans la signification large, le terme «concordat» veut dire tout accord ou traité entre le Saint-Siège et un État ou une organisation politique quels que soient sa forme, son contenu ou sa portée. C'est la signification dont parle le canon 3 du Code de droit canonique: «*conventiones initae ab Apostolica Sede cum nationibus aliisque societatibus politicis*». En revanche, le terme «concordat» stricto sensu signifie un accord ou une convention solennelle entre le Saint-Siège et un État ou une institution politique conclu sous forme diplomatique et qui porte en principe sur toutes les matières d'intérêt commun entre l'Église et l'État. Si vous m'autorisez l'expression, je proposerais le titre «accord codificateur».

Il est remarquable que les deux significations apparaissent ensemble dans le canon 365 du Code de droit canonique qui parle des concordats et d'autres conventions de ce genre («*concordata aliaque huiusmodi conventiones*»).

Si nous examinons l'État actuel du droit concordataire, il est évident qu'un rapport ou des observations ne peuvent se limiter aux concordats stricto sensu, parce que depuis 40 ans nous ne connaissons que trois traités qui ont le titre officiel de concordat³, à savoir le concordat avec la Basse-Saxe de 1965, celui avec la Colombie de 1973, celui avec la Pologne de 1993 et tout récemment celui avec le Portugal.⁴ On voit que le Saint-Siège utilise ce titre avec beaucoup de réserve. En revanche, le nombre des accords dits simples est assez important et on en connaît quelques formes aussi différentes que traditionnelles, par exemple le *modus vivendi*, l'échange de lettres ou de notes ou encore le protocole. Dans le cas des exemples récents on trouve parfois dans le titre une indication de la matière spécifique, par exemple accord de coopération ou accord scolaire ou une indication de la portée, par exemple «*fundamental agreement*» ou «accord cadre». On constate en tout cas une plus grande flexibilité qu'autrefois.

La base juridique des concordats, que ce soit au sens étroit ou au sens large, est le droit international public ou droit des gens. Traditionnellement

et enraciné dans le droit coutumier, le Saint-Siège jouit de la personnalité juridique sur ce plan. Il a en conséquence le droit de conclure des traités, soit le «*ius tractandi*». Ceci n'est actuellement contesté ni en théorie ni en pratique. Mais quelle est la place des concordats en relation ou dans le cadre de la constitution de l'État en cause? Je ne peux certes que poser maintenant cette question, mais j'y reviendrai par la suite.

Un autre phénomène mérite sous cet angle notre attention. Il existe également des accords conclus entre l'État et un évêque ou la Conférence épiscopale d'un pays donné. Même si ces accords ne disposent certainement pas du caractère international, il faut se poser la question de leur classification juridique.

Jetons un coup d'œil sur la carte géographique où nous trouvons des concordats, mais laissons à part l'Amérique, l'Afrique et l'Asie. En Europe: l'Italie, l'Espagne, l'Allemagne et l'Autriche sont des pays concordataires classiques. Ici un régime concordataire est en vigueur, naturellement pas de manière uniforme. Mais le signe du développement actuel ou plus récent est marqué par le renouvellement d'une sorte de «*favor concordati*» dans l'Europe de l'Est. Pendant la domination de cette région par l'Union soviétique, en d'autres termes pendant la période du rideau de fer dans cette partie de l'Europe, il n'y avait plus de place pour un accord avec le Saint-Siège. Il n'y a qu'en Yougoslavie et en Hongrie que l'on a tenté de régler des questions par une sorte d'«*agreement*». Après la chute du mur la situation a aussitôt changé. En Allemagne en particulier, les problèmes de la réunification sur le plan ecclésiastique ont été résolus par le biais d'accords. L'Allemagne de l'Est est redevenue une partie intégrante du système concordataire. Mais un mouvement en faveur des concordats s'est aussi développé dans les autres pays jusque-là satellites de l'URSS. De cette façon, l'Europe de l'Est est revenue dans la région du concordat et on a pu dans certains cas reprendre une tradition qui datait de l'entre-deux-guerres. C'est le cas de la Pologne, de la Lettonie et de la Lituanie. D'autres pays de l'Europe de l'Est s'y sont ajoutés: l'Estonie, la Slovaquie, la Hongrie, la Croatie et même l'Albanie, un pays qui avait eu une constitution extrêmement marquée par l'idéologie du marxisme soviétique. Un accord avec la République tchèque a été signé, mais pas encore ratifié. Peut-être la Slovénie et la Roumanie suivront.

La plupart des États mentionnés sont devenus membres de l'Union européenne, le reste constitue des candidats à l'adhésion à cette organisation. Ils ont établi des relations contractuelles avec le Saint-Siège de manière délibérée étant donné que ces relations fondées sur des accords de caractère international sont assurément un facteur de poids dans le processus de la renaissance de leur identité nationale.

³ Les textes sont publiés in: José T. Martín DE AGAR, *Raccolta di Concordati 1950 – 1999* (Città del Vaticano, 2000) p. 126 (la Colombie), p. 235 (la Basse-Saxe) et p. 682 (la Pologne).

⁴ Signé le 18 mai 2004, en vigueur depuis le 18 décembre 2004.

2. Dans le monde des relations contractuelles entre Église et État, il existe en parallèle des concordats un deuxième phénomène: le traité ou l'accord d'un État avec une Église protestante, en allemand *evangelischer Kirchenvertrag*. Le premier exemple de ce type a exactement 80 ans: l'accord de l'État de Bavière avec l'Église évangélique luthérienne sur la rive droite du Rhin – c'est le titre officiel – conclu le 15 novembre 1924. À partir de cette date commence en Allemagne un développement qui mène à un système d'accords paritaires (*paritätisches Vertragssystem*), un système qui, après la deuxième guerre mondiale ainsi qu'après le grand tournant des années 1989/90, fut agrandi et consolidé. Ces accords ne font pas partie des traités internationaux mais sont en vigueur comme des équivalents aux concordats.

Pendant longtemps les accords avec une Église protestante ont constitué une particularité allemande. La situation a cependant changé dans deux pays, à savoir en Italie et en Espagne et le modèle développé ici est en train d'être appliqué également dans des pays de l'Europe de l'Est, par exemple en Pologne et en Hongrie.

En Italie, nous constatons déjà un changement de direction dans la Constitution de 1947. Alors que l'article 7 souligne la position spécifique de l'Église catholique et constate que les relations entre l'État et l'Église catholique sont réglées par les accords du Latran, l'article 8 alinéa 2 parle des communautés religieuses non-catholiques et précise: «Leurs relations avec l'État sont réglées par la loi sur la base des accords avec les organes respectifs». Voici la forme de la loi pactisée⁵. Par cette forme l'État sauve ou défend sa souveraineté et évite la reconnaissance d'une position internationale des communautés religieuses. Il les accepte cependant comme partenaires d'un accord formel. C'est le cas de l'Église vaudoise et de l'Église évangélique luthérienne.

En Espagne, la constitution a également rompu la culture concordataire monolithique (*konkordatäre Monokultur*) et a ouvert la possibilité des relations contractuelles aux communautés religieuses non-catholiques⁶. L'article 16 alinéa 3 interdit le système de religion d'État, mais prévoit expressément que les pouvoirs publics tiennent compte des opinions religieuses de la société espagnole. Il est précisé par conséquent que l'État entretient des relations de coopération avec l'Église catholique et les autres confessions. Cette directive constitutionnelle est concrétisée par

⁵ Vittorio PARLATO, *Le intese con le confessioni acattoliche* (2^{ème} édition, Torino, 1996).

⁶ Coordinado por Joaquín MANTECÓN, *Los acuerdos con las confesiones minoritarias. Diez años de vigencia* (Madrid, 2003).

l'article 7 de la loi sur la liberté religieuse. Cet article prévoit expressément la possibilité des accords avec des communautés non-catholiques. Un jeune auteur allemand a caractérisé cette norme de *Quantensprung*, soit de saut dans un autre monde⁷. Un tel accord présuppose que les communautés respectives montrent – en raison de leurs activités et du nombre de leurs fidèles – un enracinement net en Espagne. Ces accords ont besoin de l'approbation par les Cortes sous forme de loi. En avril 1992 un accord de coopération avec l'association des communautés religieuses évangéliques de l'Espagne fut conclu sur ce fondement.

3. Les systèmes contractuels en Allemagne, en Italie et en Espagne et dans d'autres pays ne s'arrêtent pas aux frontières du christianisme. Dans chacun de ces trois pays nous trouvons des accords avec des communautés juives. Mais jusqu'à présent c'est uniquement en Espagne que l'Islam se trouve dans la position d'un partenaire contractuel: en avril 1992 un *acuerdo de cooperación* avec la Commission islamique en Espagne fut conclu.

4. Le schéma que je vous ai tracé contient les types essentiels, mais n'est pas complet. Il faut ajouter d'autres exemples qui montrent que la possibilité d'être partenaire de l'État n'est plus un privilège des Églises sociologiquement grandes ou des communautés qui représentent immédiatement les grandes religions du monde ou qui sont membres du Conseil œcuménique des Églises. En Allemagne nous avons par exemple des accords avec des Églises orthodoxes, avec les méthodistes et avec des communautés qui s'appellent «libre-religieuses». L'Italie connaît des accords avec les Adventistes, les Baptistes et même une société pentecôtiste.

5. Le résumé est clair: le développement tend à reconnaître la pluralité des religions. C'est le principe d'égalité ou de parité qui fait autorité. Mais il y a une présupposition essentielle: il est indispensable que l'Église ou la communauté en cause possède un «statut» juridique, soit une «constitution» qui fixe les structures de la formation de la volonté et les autorités qui ont le pouvoir d'être les interlocuteurs. Les critères pour fixer les conditions concrètes sont dans les mains de l'État qui exige par exemple l'enregistrement et qui – en vue de la tradition et de la réalité sociologique – peut faire quelques différences. En tout cas, l'État est contraint de mettre à disposition une forme juridique qui est adéquate à une communauté religieuse, soit en d'autres termes qui

⁷ Stefan MÜCKL, *Europäisierung des Staatskirchenrechts*, à paraître, manuscrit p. 280.

respecte le droit d'auto-détermination comme conséquence de la liberté religieuse.

6. Je reprends la question de la relation juridique entre la constitution et la loi d'une part et l'accord ou le traité d'autre part.

Le point de départ est incontestable: si le partenaire étatique veut conclure un accord (avec qui ce soit) il est lié à la constitution. Il est nécessaire en outre qu'une place soit accordée au contrat dans le système des sources juridiques afin que le rang du contrat en relation avec la constitution et la loi soit déterminé.

En ce qui concerne les accords avec le Saint-Siège nous connaissons tous la situation: ils sont qualifiés de traités internationaux, régis par le droit des gens. Par l'approbation du Parlement sous forme de loi, ils deviennent applicables en droit interne. Ils ont le même rang qu'une autre loi avec pour conséquence l'application du principe *Lex posterior derogat legi priori*. Cela signifie qu'une loi ultérieure peut abroger ou modifier la loi ancienne et peut ainsi s'opposer au contrat. C'est la souveraineté de l'État qui l'autorise en fait à violer le contrat. On dit: l'État le peut même s'il ne le doit pas.

C'est la position disons classique comme conséquence de la doctrine dualiste qui soutient un dualisme strict entre le droit interne et le droit international. En Allemagne, c'est toujours l'expression du droit en vigueur. On reconnaît d'autre part le principe de préférence du droit des gens et d'exigence de choix d'une interprétation de la loi conforme au contrat. Un autre moyen d'éviter des litiges est constitué par des clauses légales par lesquelles un contrat est déclaré ne pas être modifié par une loi, cela veut dire qu'il jouit de la priorité.

Mais la doctrine dualiste n'est pas plus incontestée. Il existe des constitutions modernes qui donnent aux traités internationaux un rang plus élevé qu'aux lois avec pour conséquence la nullité d'une loi ultérieure si elle heurterait un contrat. L'article 55 de la Constitution française va dans ce sens. Mais c'est surtout l'article 96 de la Constitution espagnole qui exclut une modification d'un contrat par la loi.

En ce qui concerne les accords avec des communautés religieuses qui ne jouissent pas d'un statut international, la question de la qualification et du rang d'un accord se résout d'après le droit de l'État en cause. En Allemagne depuis longtemps les accords avec les Églises et les communautés non-catholiques sont reconnus comme *Staatsverträge* ayant besoin de l'approbation parlementaire et qui jouissent du rang de loi. Les conséquences sont tout à fait les mêmes que dans le cas des concordats. Pratiquement la différence entre concordat et *Kirchenvertrag* est nulle.

Sur le plan des principes, ce résultat n'est cependant pas satisfaisant, du moins il soulève des questions. Quelle est l'essence de la position de l'Église catholique en droit international? Est-ce que la différence entre elle et les autres communautés religieuses est si grande qu'elle justifie l'application de systèmes différents? Est-ce qu'il est possible que la différence soit seulement historique ou même symbolique? Il m'est impossible cependant, dans cette brève communication, de discuter de ces questions dans le détail. Je me limite ainsi à une thèse: en vue du pluralisme religieux et confessionnel, il est nécessaire de trouver des solutions qui ont pour base le principe d'égalité parce que la raison d'être des relations contractuelles est la liberté religieuse ou la liberté de religion, liberté qui n'est pas seulement un droit subjectif des individus mais aussi un droit des institutions religieuses, en bref une liberté institutionnelle. Cette liberté est au fond l'expression de la séparation fondamentale entre le séculier et le spirituel, entre la politique et la religion – séparation qui est un facteur indispensable de l'identité de l'ordre politique en Europe.

Devant cet arrière-plan on peut accentuer et résumer: les accords ont la fonction de régler en responsabilité commune dans le cadre de la constitution une partie essentielle de la vie constitutionnelle et de former comme ordre consenti la base de toute communication et coopération.

III.

Le sujet de notre réunion n'est pas seulement les contrats formels. Les rapports sur la situation dans les pays de l'Europe montrent clairement que même là où des contrats n'existent pas ou ne sont pas prévus, les relations entre État et Église sont marquées par des éléments contractuels. C'est le cas partout et nous trouvons ce phénomène surtout dans le système de séparation et dans le système d'Église nationale. Là aussi ou plus exactement même là, il existe une nécessité pratique de clarifier les positions, d'articuler les intérêts réciproques, de délibérer et de trouver des solutions consensuelles. Pour le Royaume-Uni, *Norman Doe* a caractérisé la pratique «as a constitutional convention that there should be consensus and dialogue between church and state in relation to matters of common concern».⁸ De cette manière beaucoup de lois sont ainsi des lois pactisées. Je me réfère au rapport de *Brigitte Basdevant-Gaudemet* sur la

⁸ Norman DOE, 'The concordat concept as constitutional convention in church-state relations in the United Kingdom', p. 15.

France: elle décrit différentes formes de contacts et de dialogues et constate que les nombreux mécanismes sont «parfois d'autant plus efficaces qu'ils sont informels».⁹

Mais cette pratique constitue-t-elle quelque chose d'extraordinaire dans une démocratie participative? N'est-ce pas normal que l'État cherche le dialogue avec ses citoyens et leurs organisations au moins afin d'augmenter la chance d'acceptation d'une loi? En effet, cette tendance générale s'applique aussi aux relations entre l'État et l'Église. Mais il faut tenir compte de la sensibilité spécifique de ces relations. Je recours à une idée que j'ai exprimée tout à l'heure: dans ce domaine est en cause une liberté fondamentale qui non seulement comme les autres libertés limite la compétence de l'État, mais qui concerne l'essence de l'État comme institution séculière. Elle fait partie du contexte de la séparation fondamentale entre le séculier et le spirituel, entre la religion et la politique. C'est pourquoi cette liberté a un poids spécifique et justifie les instruments de coordination et de dialogue.

Naturellement dans la réalité politique, la possibilité d'un conflit ne peut pas être exclue si on ne trouve pas une solution acceptable. On n'aboutit peut-être qu'à l'alternative *Einigung oder Kulturkampf*, accord ou lutte de culture. Voici toujours l'heure de la souveraineté de l'État. Il possède le droit du dernier mot si tous les mécanismes des procédures légales sont épuisés. Il doit être le garant d'une coexistence paisible et – le cas échéant – il a par exemple le droit légitime de repousser l'exigence d'une communauté religieuse. En d'autres termes: la relation État – Église n'est pas une relation de coordination stricto sensu, mais une relation de coopération sur la base de la séparation et du respect de la liberté et de l'autonomie des communautés religieuses et en même temps de la reconnaissance de la souveraineté de l'État en vue du bien public. C'est ce système de coopération qui est ouvert aux formes contractuelles.

IV.

L'ensemble de mon rapport se déroule d'un point de vue européen. Mais il est nécessaire maintenant que je me tourne vers l'Union européenne elle-même et que j'aborde notre question sous l'angle du droit européen¹⁰. Comme chacun le sait: avec la déclaration numéro 11 de la conférence

⁹ Brigitte BASDEVANT-GAUDEMET, 'Les processus des négociations entre les religions et les pouvoirs publics en France', p. 57.

¹⁰ Pour les informations fondamentales et élémentaires, cf. Gerhard ROBBERS, *Staat und Kirche in der Europäischen Union*, in: G. ROBBERS (éd), *Staat und Kirche in der Europäischen Union* (Baden-Baden, 1995) pp. 351 – 362. Pour les développements les plus

d'Amsterdam en allemand nous l'appelons *Kirchenerklärung* – le développement des relations juridiques entre l'État et l'Église est entré dans une nouvelle phase. Je cite le texte français: «1. L'Union respecte et ne préjuge pas du statut dont bénéficient, en vertu du droit national, les Églises et les associations ou communautés religieuses dans les États membres. 2. L'Union respecte également le statut dont bénéficient, en vertu du droit national, les organisations philosophiques et non confessionnelles».

Même si la force juridique de cette déclaration n'est pas parfaitement claire, elle exprime le fait que l'Union européenne prend note d'une manière positive des Églises et des communautés religieuses comme telles, soit comme institutions. Elles apparaissent non seulement sous l'aspect de la garantie des droits fondamentaux de l'individu, à savoir de la liberté religieuse ou du *Weltanschauung*, mais également comme des entités objectives. Depuis cette déclaration du 2 octobre 1997 on ne peut pas reprocher à l'Union européenne qu'elle soit aveugle envers le facteur religieux et les institutions ecclésiales ou religieuses.

Entre-temps les choses se sont développées. La déclaration d'Amsterdam fait partie du projet d'un traité établissant une Constitution pour l'Europe, traité qui a récemment été signé par les chefs d'État. C'est l'article 52 de ce traité qui a intégré le texte sans aucune modification dans le cadre du titre VI sur «La vie démocratique de l'Union». De cette manière la «Kirchenerklärung» aura le rang de droit primaire.

En ce qui concerne le contenu et la portée de cette norme je souligne deux points:

Premièrement, elle a une fonction de sauvegarde des structures nationales. Les différents systèmes – système de l'Église nationale, de la séparation, de la coopération – peuvent exister l'un à côté de l'autre. L'Union européenne ne touche pas, par conséquent, au système concordataire, s'il existe, et n'interdit pas l'instrument contractuel si les partenaires le préfèrent. L'Union n'a pas de compétence sur ce point.

Deuxièmement, la déclaration ou l'article 52 justifie qu'on donne aux Églises ou aux communautés religieuses une place dans les procédures de droit européen, soit dans la procédure législative, soit dans l'administration et la procédure de l'application du droit. Elles disposent au moins du droit d'être écoutées si leurs intérêts sont en jeu.

Cette fonction procédurale est maintenant renforcée, parce qu'on a ajouté au texte de la déclaration d'Amsterdam un supplément. Je cite:

récents, cf. Stefan MÜCKL, *Europäisierung des Staatskirchenrechts*, à paraître, manuscrit pp. 408 – 414.

«Reconnaissant leur identité et leur contribution spécifique, l'Union maintient un dialogue ouvert, transparent et régulier avec ces Églises et organisations.» Voilà le point essentiel: l'Union et les Églises ou les communautés religieuses sont des partenaires pour dialoguer. Dans cette perspective, je répète qu'elles ont au moins le droit d'être écoutées. Mais le sens normatif est plus considérable. Il est nécessaire et légitime de trouver des formes institutionnelles pour entretenir ce dialogue qui ne se restreint pas aux questions ou détails du jour mais qui porte aussi sur des questions principales et générales en vue de la vie démocratique en Europe.

Mais s'agit-il d'une chose extraordinaire ou même d'un privilège des Églises et des communautés religieuses? L'article 52 a sa place à la fin du titre VI sur la vie démocratique de l'Union, titre qui est dirigé par le concept de la société civile et de la démocratie participative. Je cite l'article 47 alinéa 2: «Les institutions entretiennent un dialogue ouvert, transparent et régulier avec les associations représentatives et la société civile.» Le texte de l'alinéa 3 livre une concrétisation en ce qui concerne l'instrument ou le mécanisme procédural. Cela est certainement valable aussi pour l'interprétation de l'article 52 où nous constatons une reprise littérale des notions «ouvert, transparent et régulier». Mais le texte montre une différence remarquable et frappante parce qu'il donne une sorte de justification: l'Union maintient le dialogue avec les Églises et les communautés religieuses en «reconnaissant leur identité et leur contribution spécifique». Identité: cela veut dire profil, le «*proprium*», le message qui est propre aux Églises et aux communautés religieuses. Elles ne sont pas des facteurs du marché commun, mais quelque chose d'une nature propre qui surpasse l'économie et la politique. Si le texte parle d'une contribution spécifique il reconnaît que les Églises et les communautés religieuses jouent un rôle positif pour la vie et le fondement de l'Union européenne. Leur contribution concerne non seulement le fonctionnement pratique mais surtout les fondements moraux et spirituels qui sont nécessaires non seulement pour l'État national mais aussi pour l'Union européenne. En considération de cette clause, il est permis de souligner que les Églises et les communautés religieuses ont le droit d'être respectées dans leur spécificité, ce qui veut dire qu'elles ne doivent pas être mises sur le même niveau que les associations «normales» de la société civile. Enfin on peut dire que l'article 52 prescrit le dialogue comme tâche permanente et par conséquent l'attention à un style de dialogue qui soit favorable à la coopération.

Mais est-ce que le dialogue peut se réaliser dans un contrat formel? Est-il concevable que l'Union européenne elle-même conclut un concordat ou

un autre accord avec une Église ou une communauté religieuse?¹¹ Je pense: en principe oui. Naturellement diverses questions se posent. L'Union européenne est-elle compétente? Quelles pourraient être les matières régies par un tel traité? Il est clair que l'Union n'a pas de compétence directe pour les relations Église-État et plus généralement pour les affaires religieuses. Mais il y a des matières où une compétence légitime touche indirectement ce domaine, par exemple dans le domaine du droit de travail, de l'éducation professionnelle, des activités socio-caritatives, des moyens publics de communication, de la protection des données etc. On peut imaginer qu'il soit utile ou même nécessaire de régler les questions pertinentes au moyen d'un accord ou au moins sur la base d'une entente formelle préalable à une réglementation unilatérale. Je pense que l'article 300 donne le fondement pour la conclusion d'un accord selon la procédure qu'il prévoit. Mais cette voie est seulement possible pour des accords avec le Saint-Siège en sa qualité de personne juridique internationale. Il est interdit d'autre part d'exclure les autres Églises et communautés religieuses du régime contractuel: le principe d'égalité qui est fondamental pour l'Union européenne interdit un tel traitement. Cependant l'article 300 ne peut être la base juridique dans ce cas, en l'absence de personnalité internationale. Mais on peut s'appuyer sur l'article 308 concernant les dispositions pour des cas imprévus.

Il est évident – en ce qui concerne les partenaires ou interlocuteurs non-catholiques – qu'il existe des problèmes qui doivent être résolus. Mais je suis sûr que l'évolution future doit s'accomplir sur la base de l'égalité de principe des Églises et des communautés religieuses. Peut-être – grâce à sa position juridique reconnue – l'Église catholique pourra jouer un rôle de précurseur ou de «piqueur». Mais le concordat comme instrument utilisé unilatéralement pour les relations avec l'Église catholique n'a point d'avenir. Enfin la collaboration entre les Églises ou les communautés religieuses sera d'autant plus nécessaire.

¹¹ Pour une discussion détaillée de cette question, cf. Iván C. IBÁN, 'Concordats in the European Union: a relic from the past or a valid instrument for the XXI century?' in: *Canon Law, Consultation and Consolation*, Monsignor W. Onclin Chair (Leuven, 2003) pp. 99 – 157.

