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LE STATUT DES CONFESSIONS RELIGIEUSES DES ÉTATS CANDIDATS À L'UNION EUROPÉENNE
THE STATUS OF RELIGIOUS CONFESSIONS OF THE STATES APPLYING FOR MEMBERSHIP TO THE EUROPEAN UNION

UNIVERSITÀ DEGLI STUDI DI MILANO
FACOLTÀ DI GIURISPRUDENZA
PUBBLICAZIONI DI DIRITTO ECCLESIASTICO
(GIÀ DELL'ISTITUTO DI DIRITTO ECCLESIASTICO)

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EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH

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SOUS LA DIRECTION DE
FRANCIS MESSNER

ACTES DU COLLOQUE
Université Robert Schuman - CNRS, Strasbourg
17-18 novembre 2000

PROCEEDINGS OF THE MEETING
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PRÉFACE

Les convictions, les expressions et les modes d'appartenance religieux ont considérablement évolué ces dernières décennies. Si l'hypothèse extrême d'une progressive éradication du religieux ne fait plus recette parmi les spécialistes des sciences sociales des religions, force est cependant le constater que le "croire" s'est individualisé et surtout autonomisé par rapport aux instances d'autorité des Églises et des religions. Ces dernières conservent une fonction importante en tant qu'institution de référence. Cet aspect de la sécularisation de la société, que ne peut ignorer le juriste, est particulièrement prégnant dans les Églises chrétiennes historiques. Moins perceptible dans l'islam et le judaïsme, il s'impose massivement dans les pays de l'Europe du nord. Mais autonomisation et individualisation du croire semblent constituer une tendance lourde susceptible d'atteindre dans le temps toutes les religions et tous les pays occidentaux.

Ces transformations du religieux ne sont pas sans conséquence sur les relations entre les États et les religions dont la mise en œuvre tient compte des représentations sociales. Le contenu des programmes d'enseignement religieux, l'appartenance religieuse, le traitement des religions minoritaires, les revendications individuelles en matière de conviction et d'activité au regard de la garantie de liberté de religion, le financement des institutions et des personnels cultuels sont, pour ne citer que ceux-là, autant d'éléments du droit des religions ou du droit ecclésiastique dont les fondements et l'application sont remis en question. Une conception européenne faite d'acceptation du pluralisme religieux, de reconnaissance de l'impor-

tance du phénomène religieux, à la fois pour l'individu et la société, de la mise en œuvre des principes de liberté, d'égalité et de neutralité est en train de s'affirmer. N'en déplaise aux auteurs de la Déclaration 11 de l'Acte final du Traité d'Amsterdam (1), cette conception connaîtra à moyenne échéance une transcription formelle dans le droit de l'Union Européenne. La construction européenne, pour prendre toute sa dimension, doit être soutenue par une culture commune à laquelle contribuent les religions avec leur place, leur statut et leur rôle dans la société.

L'adhésion de nouveaux États ne bouleversera certes pas les équilibres actuels et les perspectives d'évolution en la matière. Mais elle peut servir d'indicateur par le biais de l'étude des modèles retenus par les pays candidats pour mettre en œuvre leur droit ecclésiastique. La présentation des droits des religions des États candidats de la première vague (Chypre, Estonie, Hongrie, Pologne, République Tchèque et Slovénie), d'un État candidat de la seconde vague (Bulgarie) et d'un État candidat d'une vague ultérieure (Turquie) ont été retenus dans le cadre de cette recherche. Cette sélection respectant la chronologie de l'élargissement prend également en compte la diversité religieuse. L'actuelle Union Européenne comprend essentiellement des pays de culture catholique ou protestante. La Turquie est un pays majoritairement musulman, alors que la Bulgarie comporte une majorité d'orthodoxes, à l'instar de la Grèce, seul pays monoconfessionnel orthodoxe membre de l'Union Européenne.

Les spécialistes invités ont présenté de manière succincte mais exhaustive le droit national des religions en vigueur dans ces États: perspectives sociologiques et historiques, principes fondamentaux du système décrit, statut des institutions et des personnels religieux, culture, éducation et religions, financement direct et indirect des institutions religieuses, droit de la famille. Chacun insiste sur les problèmes générés par les modifications du paysage religieux (institutionnalisation du pluralisme religieux, phénomène des sectes) et

(1) "L'Union Européenne respecte et ne porte pas atteinte aux statuts juridiques nationaux des Églises et associations religieuses des États membres. Elle respecte de la même manière le statut des organisations philosophiques et non confessionnelles".

le cas échéant par les bouleversements politiques (instauration de nouveaux statuts des cultes dans les anciens pays communistes) (2).

Cette publication devrait servir de point de départ à des recherches comparatives dont un premier volet a été développé dans l'ouvrage. Il résulte d'analyses croisées sur les thématiques de la liberté religieuse, du statut des minorités, du statut des cultes, du financement direct et indirect des activités et des institutions religieuses, de l'éducation et de la religion au sein des États candidats.

Cet ouvrage collectif, fruit du Colloque du Consortium européen pour l'étude des relations Églises-État réuni en novembre 2000 à Strasbourg, est un instrument de travail indispensable pour tous ceux qui étudient les institutions de la religion en Europe.

(2) Le plan proposé aux auteurs a été *grosso modo* repris sur le modèle de celui de l'ouvrage *État et Églises dans l'Union Européenne*, dir. Gerhard ROBBERS, Baden-Baden, Nomos, 1997, 370 p.

BRIGITTE BASDEVANT-GAUDEMET
Université de Paris XI

ÉDUCATION ET RELIGION DANS LES PAYS CANDIDATS À L'UNION EUROPÉENNE

RÉSUMÉ: 1. *Les religions à l'école publique.* — 2. *Les religions dans les écoles privées et dans les écoles confessionnelles.* — *A*) Le principe de liberté de l'inseignement et quelques situations de fait. — *B*) La conception di monde, l'orientation idéologique et la place de la religio. — *C*) L'organization administrative. — 3. *Les établissements d'enseignement supérieur confessionnels et la formation des clercs.*

Cette étude envisage huit États, tous candidats à une intégration au sein de l'Union européenne: la Bulgarie, l'Estonie, la Hongrie, la Pologne, la République Tchèque, la Slovénie, Chypre et la Turquie (1). À l'aube du troisième millénaire, ces pays présentent des aspects comparables les uns par rapport aux autres, ainsi qu'un certain nombre de similitudes avec les quinze États déjà membres de l'Union européenne; néanmoins, les différences et les spécificités de chaque cas apparaissent.

Pour saisir la place des religions dans le système éducatif de ces divers pays, il importe d'évoquer auparavant, ne serait-ce que sommairement, les situations religieuses d'un point de vue sociologique d'une part, les régimes juridiques des cultes d'autre part.

D'un point de vue sociologique, il apparaît sans ambiguïté que le fait religieux n'occupe pas partout une place identique. Les religions les plus répandues auprès des habitants sont diverses selon les

(1) Nous avons travaillé essentiellement à partir des rapports établis par nos collègues de chacun de ces pays, qui sont, chez eux, spécialistes de ces questions. Ce que nous présentons ici est une synthèse de leurs études.

États et elles concernent des pourcentages de population eux aussi extrêmement variables.

Les habitants de plusieurs pays sont, traditionnellement, majoritairement catholiques, ce qui ne conduit pas pour autant à une ignorance des minorités. La Pologne constitue l'exemple le plus marquant; en 1944, c'est-à-dire avant l'établissement du régime communiste, 90% des Polonais étaient catholiques. En Slovénie, plus de 71% de la population se disait catholique en 1991, au lendemain de la chute du régime socialiste. La proportion de catholiques est assez comparable en Hongrie, même si seulement 15% des baptisés pratiquent régulièrement. Dans ce pays, les réformés représentent environ 20%. En République Tchèque, 44% de la population appartient à une Église chrétienne, catholique ou protestante, les deux traditions étant l'une et l'autre assez solidement implantées.

Ailleurs, le protestantisme compte nettement plus de fidèles que l'Église catholique. Ainsi, même si l'Estonie se présente comme véritablement sécularisée depuis la domination soviétique, le luthéranisme y est cependant la principale religion. Il rassemblait environ 76% de la population avant le régime socialiste, mais n'en réunit plus que 45% aujourd'hui.

En Bulgarie, l'Église orthodoxe constitue la religion traditionnelle. L'orthodoxie est également très répandue dans la République chypriote, qui possède son Église orthodoxe autocéphale, ce qui n'empêche pas les pouvoirs publics de prendre en considération l'importante communauté musulmane.

Quant à la Turquie, pays laïc, 99% de la population y est musulmane.

La présence de l'Islam et celle de chacune des trois grandes confessions chrétiennes témoignent de la diversité des paysages religieux à travers l'ensemble de ces huit pays. D'autre part, les degrés de pratique religieuse effective, ou de sécularisation des sociétés, présentent également des écarts considérables; il s'ensuit que l'emprise sociale exercée par les religions varie elle aussi.

Outre ces spécificités sociologiques, les régimes juridiques des cultes en vigueur dans chacun de ces États comportent, eux aussi, un certain nombre de spécificités.

Les six pays de l'ancien bloc soviétique ont connu un régime où l'idéologie marxiste-léniniste tentait de réduire au maximum la pratique religieuse et l'influence des religions; inutile d'insister sur les brimades constantes, voire parfois les persécutions, dont furent victimes les Églises et les ministres du culte. Sans doute la Constitution hongroise de 1949 avait-elle inscrit dans son texte le principe de liberté religieuse, mais ces dispositions n'empêchèrent pas les gouvernements de mettre en œuvre de nombreuses mesures hostiles aux confessions religieuses. De même, si la Constitution polonaise de 1952 proclamait la liberté religieuse, il ne s'agissait que de dispositions de façade, bafouées par les autorités publiques. En Tchécoslovaquie, le principe de tolérance fut également d'une application très limitée. Ces situations incitèrent d'ailleurs souvent les Églises à prendre des attitudes d'opposition politique marquées à l'égard des gouvernements socialistes.

Lorsque cette idéologie officielle disparut, il y a un peu plus de dix ans, la liberté religieuse fut proclamée dans ces divers États, qui voulurent, dès lors, concrétiser leurs déclarations par la mise en place de nouvelles dispositions juridiques. Dans ces différents pays, l'organisation du système juridique des cultes est donc récente, parfois encore quelque peu incomplète ou incertaine, et nous constaterons des conséquences de cet état de fait à propos du système éducatif (2). Quelques caractères essentiels se retrouvent, d'un pays à l'autre.

— Le principe de liberté religieuse, sous ses divers aspects, est partout proclamé, avec sans doute d'autant plus de force qu'il y a pu avoir atteinte à cette liberté dans un passé qui reste extrêmement proche. On affirme, d'une part, la liberté de religion que garantit la neutralité de l'État, la reconnaissance expresse du pluralisme religieux et le principe de non discrimination entre les individus en fonction de leurs croyances. Parallèlement, on proclame la liberté des religions; les États reconnaissent l'autonomie, la liberté d'organi-

(2) Une question préoccupe, à juste titre, les autorités gouvernementales et religieuses de ces États, celle du statut juridique des immeubles affectés au culte ou des anciens biens possédés autrefois par les Églises qui furent, pour partie, confisqués par les gouvernements communistes. Faut-il opérer une restitution? Selon quelles modalités?

sation interne des diverses communautés religieuses. Les deux aspects de la liberté religieuse sont donc clairement et fermement affirmés.

— Chacun de ces États a mis en place un système d'enregistrement des religions auprès d'instances des pouvoirs publics, ministère de l'Intérieur ou Conseil des ministres le plus souvent; l'enregistrement se fait selon des critères propres à chaque législation étatique, mais assez comparables d'un pays à un autre. La procédure concerne les grandes religions et confère à celles qui s'y soumettent et en bénéficient un statut juridique déterminé. Le recours généralisé à ce mécanisme traduit la volonté des autorités séculières de voir ces religions s'organiser dans un cadre institutionnel précis, déterminé par le droit national (3).

— Ces pays, parce qu'ils ont connu le régime communiste, semblent particulièrement vigilants sur l'interdiction faite aux Églises de prendre des positions politiques. Réciproquement, l'État s'engage à respecter une stricte neutralité religieuse. Ces systèmes juridiques se présentent tous comme étant des régimes de séparation entre Églises et État, chaque État ayant d'ailleurs de cette "séparation" une conception particulière, éventuellement bien différente de la conception de ses voisins.

En somme, qu'il s'agisse de pays à dominante catholique, luthérienne ou orthodoxe, de sociétés plus ou moins sécularisées, les principes juridiques fondamentaux, constitutionnels ou législatifs, rejoignent largement ceux sur lesquels repose aujourd'hui le régime juridiques des cultes dans les quinze pays déjà membres de l'Union européenne (4).

(3) En Pologne, environ 140 religions sont ainsi reconnues.

(4) Les rapports qui figurent dans le présent volume font apparaître notamment les points suivants:

— En Pologne, le régime des cultes est réglé essentiellement par les lois de 1989 — prises avant le changement de régime, qui, depuis, ont été amendées mais non abolies —, la Constitution de 1997 et le concordat signé en 1993 et ratifié en 1998. Ces textes garantissent l'égalité des droits entre communautés religieuses, la neutralité de l'État, le principe de séparation Église/État. Néanmoins, cette séparation est aussi collaboration. Les religions peuvent se faire enregistrer et, parmi les confessions enregistrées, un petit nombre bénéficie d'une régulation individuelle leur conférant un statut particulier.

— La République Tchèque confirme les principes de neutralité, d'égalité des confessions et d'autonomie des Églises. Les relations diplomatiques furent rétablies avec le Saint-Siège en 1990, mais aucun accord formel n'est intervenu. Un système d'enregistrement permet aux confessions que leurs activités soient reconnues comme "religieuses".

— En Bulgarie, la Constitution de 1991 prévoit un système de pluralisme et de séparation Église/État, dans lequel tous les groupes religieux sont libres. L'enregistrement auprès du Directoire des confessions au Conseil des ministres permet d'acquérir la personnalité morale. Pourtant, dix ans après le changement de régime, la situation juridique des cultes n'est pas encore clairement établie.

— La Hongrie est le seul pays de l'Est qui n'ait pas élaboré une nouvelle constitution après la chute du régime communiste. La Constitution de 1949 avait inscrit le principe de liberté religieuse, même s'il fut parfois violé. La Hongrie a un régime de séparation Église/État. L'État est neutre, ce qui ne signifie pas pour autant indifférence. L'État doit assurer positivement la liberté religieuse. Deux accords successifs sont intervenus avec le Saint-Siège, en 1994 et en 1997. Les religions enregistrées auprès des pouvoirs publics, selon certains critères, ont toutes les mêmes droits. Un projet de réforme est actuellement en cours.

— En Estonie, la Constitution de 1992 (art. 40) et la loi de 1993 sur l'organisation des Églises posent le principe d'une stricte séparation ainsi que le principe de non discrimination. Toutefois, des différences de fait, qui ne sont peut-être pas conformes à la Constitution, existent entre les "vieilles" et les "nouvelles" religions et entre les "grandes" et les "petites". Par l'enregistrement auprès du Ministère de l'Intérieur, les confessions acquièrent la personnalité morale.

— En Slovénie, la loi sur la position juridique des communautés religieuses, promulguée en 1976 est en principe toujours en vigueur, bien que nombre de dispositions soient en pratique obsolètes. Cette loi a été modifiée en 1986 puis en 1991. L'article 41 de la Constitution de 1991 dispose que la liberté religieuse ne peut jamais être suspendue. Les religions sont égales et leurs activités sont libres. Toute discrimination est interdite. Église et État sont séparés. Laïcité et neutralité de l'État s'imposent. L'enregistrement confère aux religions un statut de droit privé. Néanmoins, les critères de définition d'une religion demeurent flous.

Hors de ces six pays anciennement communistes, la Turquie se proclame État laïc. La laïcité est un principe constitutionnel et l'article 2 de la Constitution de 1982 parle d'un État séculier. Les constitutions antérieures contenaient déjà des dispositions comparables. La laïcité doit ici se combiner avec une population musulmane qui représente 99% des habitants; elle implique aussi une organisation du système éducatif conforme à ce principe fondamental. La définition du concept de laïcité, et la détermination du contenu qu'il convient de lui donner, font l'objet d'importants débats doctrinaux dans la communauté politique ou juridique. En 1999, en liaison avec sa candidature à l'Union européenne, la Turquie a pris de nouvelles mesures, qui ne semblent pas satisfaire pleinement les Églises chrétiennes.

Enfin, la Constitution chypriote de 1960 promulguée au lendemain de l'indépendance de la République de Chypre établit un État

non confessionnel dans lequel il n'y a pas d'Église dominante. D'après la Constitution, les principales religions sont reconnues comme "groupes religieux", disposant de certains droits. Il s'agit de l'Église orthodoxe autocéphale, des communautés musulmanes, mais aussi des Arméniens, Maronites, et Catholiques romains.

Pour étudier la présence des confessions religieuses dans le système éducatif de ces pays, nous traiterons successivement de la place des religions dans l'enseignement public (I), de l'enseignement privé et des écoles confessionnelles (II), enfin de l'enseignement supérieur et de la formation des ministres des cultes (III).

1. Les religions à l'école publique

Dans les divers pays envisagés, l'école publique est, à des degrés variés, la catégorie d'établissements scolaires qui rassemble incontestablement le plus grand nombre d'élèves. Ces écoles dépendent de l'État, des communes ou autres collectivités territoriales, selon les pays et selon le niveau scolaire concerné.

Le plus souvent, l'enseignement religieux est assuré dans ces écoles publiques. Ce principe général rejoint le système pratiqué dans presque tous les pays actuellement membres de l'Union européenne (5). Toutefois, cet enseignement peut être plus ou moins limité ou développé et son organisation répond à des conceptions assez diversifiées. Pour la commodité de l'exposé, envisageons tout d'abord la Slovénie et l'Estonie dont les situations sont assez proches, puis les quatre autres pays de l'ancien bloc communiste pour terminer par la Turquie et par Chypre.

A) En Slovénie et en Estonie, l'éducation religieuse à l'école publique est soit exclue, soit très limitée.

— En Slovénie, la Constitution de 1991 reconnaît aux parents le droit de donner à leurs enfants une éducation morale et religieuse en accord avec leurs propres convictions, mais les activités religieuses doivent être séparées des activités éducatives. L'école publique est neutre. Les pouvoirs publics déduisent de ce principe de neutralité que toute activité religieuse est strictement interdite dans ces établissements scolaires publics. Il s'agit là d'une neutralité qui s'accompagne d'une certaine exclusion des religions, alors que dans d'autres pays, d'autres conceptions de la neutralité génèrent des situations faisant leur place à diverses confessions. Cette interdiction est apparemment totale dans les écoles maternelles et dans les écoles *which have been granted licences*. Elle porte sur les cours ayant pour objectif d'éduquer les enfants dans une religion donnée, selon des programmes déterminés par la religion; les célébrations religieuses sont également prohibées. Toutefois, ce principe d'interdiction connaît quelques limites: exceptionnellement, un enseignement de religion peut être assuré dans l'école publique, dans l'hypothèse où aucune autre structure extérieure ne permet son organisation. D'autre part, des négociations se déroulent actuellement sur ce sujet entre les autorités étatiques et l'Église catholique. Diverses questions sont envisagées: faut-il des cours relatifs à la religion catholique, ou consacrés aux diverses religions et à l'éthique? Ces enseignements doivent-ils être intégrés dans les programmes scolaires officiels? Quel doit être la formation de l'enseignant choisi pour les dispenser? L'orientation changera selon que la fonction est confiée à un prêtre, à un philosophe ou à un sociologue. Aujourd'hui, la loi sur les écoles élémentaires est la seule qui prévoit que les établissements, à ce niveau primaire, doivent donner des cours sur les religions et l'éthique, mais il ne s'agit pas d'une éducation de la foi, dans une religion déterminée.

La question des signes religieux ne paraît pas soulever d'amples conflits. Les crucifix sur les murs des classes ne sont pas expressément interdits; néanmoins, l'opinion dominante estime que le principe de séparation entre Église et État implique leur exclusion. Il semble que dans les faits, aucune école publique n'ait jamais tenté d'apposer un crucifix sur les murs d'une classe. Le port de signes distinctifs par les élèves n'est, quant à lui, pas interdit et aucune autorité scolaire n'a jamais cherché à le sanctionner.

— L'Estonie connaît également une situation spécifique. Elle se

(5) On sait que l'absence d'enseignement religieux dans les écoles publiques en France constitue une exception, résultat de l'histoire propre à ce pays, au cours des années 1880 et suivantes.

présente, nous l'avons noté, comme un pays véritablement sécularisé. On peut sans doute soutenir qu'en Estonie l'éducation religieuse à l'école publique n'existe pratiquement pas. D'après le *Church Congregation Act* de 1993 et d'après les textes réglementant le système éducatif, l'enseignement de la religion est possible tout en demeurant facultatif. A priori, cette solution rejoint celles adoptées par le plus grand nombre des législations étatiques et ne présente rien de spécifique. Toutefois, cet enseignement est qualifié de "non-confessionnel", caractéristique importante. Il consiste en un enseignement sur les religions, dispensé comme une éducation œcuménique. L'objectif est de donner les connaissances aidant à une compréhension du monde, à l'appréciation du rôle des croyances dans la société. Mais l'instruction propre à une religion spécifique n'est pas donnée à l'école publique. Elle est organisée par les religions, dans leurs propres locaux (6). En outre, il semble qu'aujourd'hui les modalités de la coopération entre les Églises et l'État pour le développement de l'éducation religieuse ne soient pas clairement définies. Le système est susceptible d'évoluer dans un proche avenir.

B) Ainsi, à l'exception de la Slovénie et avec quelques nuances de l'Estonie, dans les autres pays de l'ancien bloc communiste qui retiennent notre attention — Pologne, République Tchèque, Hongrie, Bulgarie — un certain enseignement religieux est dispensé à l'école publique, sous une forme ou sous une autre. Ces pratiques rejoignent celles mises en œuvre dans l'Union européenne, sauf en France.

Pour la plupart, ces pays avaient connu, avant leur soumission au socialisme, des systèmes dans lesquels l'enseignement religieux occupait une place importante. Celui-ci était parfois obligatoire, comme en Pologne. Cet enseignement religieux était théoriquement celui dispensé par les diverses communautés reconnues; en pratique, c'était essentiellement celui de l'Église catholique; si les parents

(6) En Estonie, les bases de l'enseignement religieux à l'école publique sont les suivantes: être en conformité avec la Déclaration universelle des Droits de l'Homme; être une éducation œcuménique et non propre à une confession; aider à la réflexion sur le monde; renforcer l'identité nationale; aider à la formation morale; reconnaître le pluralisme et la tolérance; guider éventuellement un choix personnel de l'enfant; prêter attention à la vie quotidienne de chaque élève; permettre un dialogue.

n'avaient pas manifesté une opinion différente, l'enseignement catholique devenait automatiquement obligatoire pour l'élève. Un système comparable existait en Tchécoslovaquie, où les enfants appartenant à une religion enregistrée avaient eux aussi l'obligation de suivre l'éducation religieuse donnée à l'école publique.

Pendant le régime communiste, l'instruction religieuse avait, le plus souvent, complètement disparu de l'école publique. Parfois, ces cours demeuraient théoriquement autorisés tout en étant facultatifs, comme en Tchécoslovaquie, mais les enfants qui les suivaient faisaient fréquemment l'objet de mesures de brimade et de discrimination.

L'instruction religieuse fut rétablie lors des changements de régime, dans chacun de ces quatre États. Aujourd'hui, dans ces pays, l'instruction religieuse est possible à l'école publique, mais garde un caractère optionnel. Elle doit se combiner avec un régime de séparation de l'Église et de l'État et avec la neutralité ou la laïcité de l'école publique. Ainsi, en Hongrie, l'école publique, dont on affirme le caractère neutre, est tenue de dispenser un enseignement sur les religions; en outre, les Églises ont le droit de proposer une instruction relative à leur propre croyance, à la demande des parents. En Bulgarie, le caractère laïc de l'éducation primaire et secondaire est un principe général inscrit à l'article 4 de la loi sur l'éducation publique. Mais, par application du principe de tolérance, l'éducation religieuse est possible, dès lors qu'elle reste optionnelle.

Cette éducation religieuse au sein des écoles publiques semble répondre à des conceptions assez comparables dans chacun de ces quatre pays.

— Le droit de dispenser cet enseignement est accordé à toutes les confessions religieuses officiellement reconnues comme telles, c'est-à-dire, selon le régime juridique en vigueur dans ces États, à chacun des cultes enregistrés.

— La neutralité de l'État impose que ces cours ne soient pas obligatoires, mais seulement optionnels, au choix des parents ou des enfants (7). Le taux de participation varie, mais reste souvent assez

(7) En Pologne, la loi de 1991 sur le système éducatif autorise l'enfant à effectuer lui-même ce choix, à partir d'un certain âge; en revanche, le concordat de 1993 confie cette mission aux parents, non pas à l'enfant. En Estonie, les parents décident tant que l'enfant est

faible. À titre d'exemple, en République Tchèque, il est de 2 à 10% selon les diocèses.

— Des dispositions prévoient que l'instruction ne sera assurée que si suffisamment d'enfants sont intéressés; la législation polonaise fixe à sept le nombre minimal d'élèves qui souhaitent s'inscrire pour qu'un enseignement soit créé. En pratique, un peu partout, si les grandes religions parviennent à organiser, ou à faire organiser ces cours, il n'en est pas de même en ce qui concerne les religions minoritaires. Les situations varient aussi selon les régions. L'une des raisons pour lesquelles la religion n'est pas toujours enseignée est peut-être davantage le manque de professeurs plutôt que la mauvaise volonté des pouvoirs publics. Pour remédier à ces difficultés concrètes, dans la République Tchèque qui compte une majorité de catholiques mais cependant un nombre important de protestants, les autorités religieuses encouragent la coopération œcuménique; on admet également que les cours d'éducation religieuse soient suivis par des élèves qui ne sont pas membres de cette confession, ou par des non-croyants.

— Lorsque ces cours existent, une durée de deux heures par semaine peut être prévue comme en Pologne; ou bien comme en République Tchèque, les cours ont lieu pendant la demi-journée laissée libre par les autres enseignements. Les professeurs attribuent éventuellement des notes aux élèves; en Pologne ces évaluations sont inscrites sur le livret scolaire, mais sans mention de la confession. Dans aucun pays, elles ne sont prises en compte pour le passage de l'enfant dans la classe supérieure.

— Ces cours sont financés, pour tout ou partie, sur fonds publics. Des subventions spécifiques sont accordées en Hongrie; ou bien, le salaire des professeurs de religion est assuré par l'État, comme en République Tchèque, sur les mêmes bases que les traitements des autres enseignants.

— En Pologne et en Hongrie, les professeurs sont nommés par les confessions religieuses elles-mêmes. Ailleurs, comme en Répu-

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à l'école primaire; la décision appartient aux élèves dans les écoles secondaires. En Slovénie, les parents décident jusqu'à ce que l'enfant ait 18 ans; mais un projet est actuellement en cours de discussion pour accorder aux enfants le droit de choisir eux-mêmes dès l'âge de 14 ans.

blique Tchèque, ils sont désignés avec l'accord des confessions concernées.

— Déterminer le contenu du programme de ces enseignements constitue l'une des questions essentielles. Il importe de savoir quelle est l'autorité compétente pour effectuer ces choix et quels doivent être les caractères et orientations des cours. L'élaboration des manuels peut relever de la compétence de chaque religion, ou des autorités étatiques, ou d'une collaboration entre les deux. Il ne semble pas que les pouvoirs publics cherchent à composer seuls de tels ouvrages scolaires. En Pologne et en Hongrie, cet enseignement religieux est donné selon des manuels rédigés sous le contrôle des confessions religieuses, expressément approuvés par elles, sans intervention de l'État. En Bulgarie, les manuels doivent recevoir une approbation du Ministère de l'éducation, mais ce sont les religions qui prennent l'initiative de leur rédaction. Une solution identique a été adoptée en Estonie.

Quant au contenu même de ces enseignements, il s'agit, dans les quatre pays envisagés, de l'étude spécifique d'une religion, celle choisie par les parents, ou par les élèves.

La question de savoir s'il faut organiser un enseignement alternatif, portant sur l'éthique, proposé ou imposé aux élèves qui ne suivent pas d'instruction religieuse, ne semble pas avoir préoccupé les divers législateurs. Cette alternative n'existe que rarement; on ne la trouve en tous cas ni dans la République Tchèque, ni en Estonie.

C) La situation de la Turquie, pays laïc où 99% de la population est de religion musulmane, est particulière. La Constitution de 1982 prévoit que l'éducation religieuse est obligatoire à l'école primaire et secondaire. Il s'agit évidemment dans l'immense majorité des cas d'un enseignement de l'Islam, sunnite le plus souvent. Pourtant, l'État ne doit pas proposer une instruction sunnite aux élèves musulmans qui ne se reconnaissent pas dans les communautés sunnites. Les enfants qui appartiennent à des minorités religieuses, reconnues comme telles d'après les critères du traité de Lausanne de 1923, sont dispensés de l'instruction religieuse musulmane. Des cours devraient être organisés pour eux, en fonction des diversités confessionnelles. Néanmoins, cette obligation se révèle souvent arti-

ficielle, qu'il s'agisse des religions chrétiennes ou du culte israélite. Certaines confessions réunissent un nombre relativement élevé de fidèles, par exemple les chrétiens syriaques; en conséquence, elles ne sont pas officiellement considérées comme des minorités, ce qui les place dans des situations parfois très délicates.

En application des principes de laïcité, le port du voile est interdit à l'école ou à l'université. Au cours de ces dernières années, une cinquantaine de professeurs et d'administrateurs ont été exclus de l'université pour avoir contrevenu à ces prescriptions, soit en portant le voile, soit en incitant à le porter. Dans le même esprit, pour lutter contre les fondamentalistes, la loi de 1997 prévoit le développement d'une éducation laïque.

D) À Chypre, des cours d'instruction religieuse sont assurés dans l'école publique, conformément à la tradition de l'Église orthodoxe. Les manuels de religion utilisés sont les mêmes que ceux circulant en Grèce. Dans l'enseignement secondaire, les professeurs chargés de cette tâche doivent être titulaires d'un diplôme universitaire en théologie; la plupart sinon tous ont, de fait, un diplôme de la faculté d'Athènes ou de Thessalonique. Les cours de religion sont obligatoires pour les élèves orthodoxes; les autres enfants n'y assistent pas. Doit-on conclure de ces éléments que l'école publique ne propose pas d'enseignement religieux autre que celui de la religion orthodoxe?

En définitive, ce panorama de l'enseignement religieux dans les écoles publiques fait apparaître sans doute un certain nombre de spécificités propres à chaque pays, selon l'histoire nationale, en fonction des traditions religieuses et aussi selon un passé récent. Mais partout, cette question de l'éducation, de la formation de la jeunesse, est réglementée, dans un esprit qui se veut respectueux du pluralisme même si en pratique les "petites" religions sont dans une situation défavorable et ne parviennent pas toujours à ce que l'enseignement religieux les concernant soit assuré.

2. Les religions dans les écoles privées et dans les écoles confessionnelles

Les huit pays envisagés possèdent tous des écoles privées, et/

ou des écoles confessionnelles, les deux termes n'étant généralement pas synonymes. Dans plusieurs de ces pays, la liberté de l'enseignement, donc la possibilité d'ouvrir des écoles privées, avait été supprimée par le régime communiste. Aujourd'hui, un secteur d'enseignement privé existe partout, plus ou moins développé et plus ou moins lié aux religions selon les États.

En outre, les religions organisent généralement des catéchismes, ou des "écoles du dimanche", dans leurs locaux. Il s'agit alors d'une instruction donnée hors du système scolaire, que nous n'évoquons pas dans ce rapport. Quelques considérations générales aideront à saisir la place des religions dans ces établissements scolaires, ainsi que les modalités leur organisation.

A) *Le principe de liberté de l'enseignement et quelques situations de fait*

Le principe de la liberté de l'enseignement est expressément inscrit dans plusieurs constitutions; en tout état de cause, il semble que l'on puisse considérer que, partout, il constitue un principe à valeur constitutionnelle. En conséquence, les religions ont le droit d'ouvrir des écoles, sous certaines conditions. Les règles relatives à la protection de la sécurité, de l'hygiène et des bonnes mœurs s'imposent naturellement. Les religions enregistrées peuvent solliciter, pour leurs écoles, un financement sur fonds publics, dans la mesure où ces établissements se plient à la même réglementation que les écoles publiques quant aux programmes et à l'organisation scolaire.

Comme dans la plupart des pays actuellement membres de l'Union européenne, école privée et école confessionnelle sont deux réalités distinctes, même si beaucoup d'écoles privées sont en même temps confessionnelles.

L'école privée se définit simplement comme étant celle qui n'est pas créée par les pouvoirs publics, mais par une personne privée, physique ou morale. L'école confessionnelle est, elle, fondée par une entité religieuse, diocèse, paroisse ou ordre religieux... La distinction se retrouve sans doute partout; elle est en tout cas très claire dans la République Tchèque, où les écoles privées, distinctes des écoles ecclésiastiques, sont généralement neutres. La même dis-

tinction existe en Hongrie, où l'école privée peut avoir un caractère confessionnel, mais peut aussi exclure l'instruction religieuse.

De fait, les établissements scolaires privés et/ou confessionnels fonctionnent dans les États que nous envisageons. Depuis la chute des régimes socialistes, ils connaissent, fréquemment, un essor récent et considérable.

En Hongrie, le nombre de ces écoles a été multiplié par vingt en dix ans et la progression se poursuit à un rythme rapide.

La République Tchèque compte, vers la fin de l'an 2000, environ 110 écoles ecclésiastiques, dont 88 catholiques et 22 protestantes. Les communautés juives ont fondé un établissement scolaire. Au total, ces institutions représentent 0,6% des écoles du pays, mais scolarisent 1,5% des élèves et sont souvent très recherchées. On constate que les écoles privées sont surtout fréquentées par des enfants de familles aisées.

L'Estonie a deux écoles privées religieuses, l'une catholique, l'autre appelée *Word of Life*.

En Slovénie, les écoles privées avaient été interdites en 1929 et l'interdiction avait été renouvelée en 1945. Dans ce système, les religions pouvaient seulement garder des institutions consacrées à la formation des ministres du culte; les diplômes qui y étaient délivrés n'étaient pas reconnus par l'État. Aujourd'hui, la liberté d'éducation constitue un principe garanti par l'article 57 de la Constitution. Les établissements scolaires religieux ne sont pas expressément prévus, mais leur autorisation découle de ce principe de liberté de l'éducation; de fait, depuis 1991, leur création est libre, ce qui a entraîné un notable changement de situation. La Slovénie possède, actuellement, trois écoles secondaires catholiques, qui bénéficient d'une reconnaissance publique, ainsi qu'un collège de théologie. Pourtant, il semble que, dans ce pays, la condition des écoles catholiques demeure un sujet de discussion. La situation n'est pas parfaitement claire. Cette ambiguïté témoigne, comme dans de nombreux autres domaines, d'un régime juridique des cultes que le législateur cherche encore à préciser. L'organisation générale des religions, de construction récente, n'est pas, actuellement, parvenue à un équilibre stable des relations entre confessions religieuses et pouvoirs publics. Certains débattent de

l'éventualité d'un accord entre le gouvernement slovène et le Saint-Siège; si une telle convention internationale devait être signée, il serait souhaitable que cette question soit traitée avec plus de précision.

En Turquie, les confessions religieuses possèdent également le droit d'ouvrir leurs propres établissements scolaires; cette faculté est accordée aux religions expressément reconnues comme étant minoritaires. Néanmoins, dans les faits, ces minorités rencontrent parfois de réelles difficultés pour organiser leurs propres classes. À Istanbul même, les obstacles ne sont pas insurmontables; ils sont en pratique plus importants dans les régions où la densité de population est moindre. Les missions catholiques ont organisé des écoles, qui ne sont pas qualifiées de "confessionnelles"; elles acceptent les enfants de croyance musulmane et ces derniers constituent 90% de leurs effectifs; ces enfants musulmans bénéficient, dans ces écoles des missions catholiques, d'un enseignement de la religion musulmane. Après de longues négociations, les chrétiens syriaques ont finalement obtenu l'autorisation d'ouvrir leurs propres classes en Anatolie en 1997.

D'autre part, les *Islamic Imam Hatip Schools* sont des écoles ecclésiastiques qui se consacrent à la formation des imams; elles sont sous le contrôle de l'État.

Terminons ce bref panorama par la république de Chypre. Chaque groupe, national ou religieux, possède le droit d'ouvrir ses propres écoles, avec des cours de religion correspondant à sa propre croyance. L'Église orthodoxe de Chypre a fondé à Nicosie un important séminaire, comportant plusieurs niveaux d'enseignement; l'un pour les enfants venant juste de quitter l'école élémentaire, un autre pour les élèves plus avancés. À Chypre fonctionnent également trois écoles élémentaires arméniennes et une école melchite. Signalons encore l'école privée anglaise de Nicosie, qui dispense, selon les croyances des élèves, des cours de théologie orthodoxe, arménienne, maronite, anglicane, etc.

Finalement, que ce soit en conformité avec un passé ancien, ou suite à une évolution récente, les législations de chacun de ces pays ont permis la mise en œuvre du principe constitutionnel fondamental de la liberté de l'enseignement. En conséquence, les divers cultes ont leurs propres écoles. Un caractère commun à tous les établissements

ainsi créés, et qui les distingue du secteur d'enseignement public, résulte de ce qu'ils ne sont pas soumis à une obligation de neutralité.

B) *La conception du monde, l'orientation idéologique et la place de la religion*

Si les établissements privés, qu'ils soient ou non ouverts à l'initiative d'une confession religieuse, ne sont pas astreints à l'obligation de neutralité, peut-on, dès lors, parler du respect du "caractère propre" de ces établissements? peut-être l'usage de la formule serait-il une transposition abusive d'un concept qui ne s'applique pas dans les pays envisagés; il semble préférable de s'abstenir de recourir à cette terminologie.

Dans les établissements scolaires confessionnels, l'éducation religieuse ou l'enseignement des religions peuvent être organisés; habituellement ils occupent, de fait, une certaine place. Les situations sont diverses car, un peu partout, une grande liberté est laissée aux confessions religieuses dans le choix tout d'abord des objectifs éducatifs à atteindre et d'autre part des modalités à mettre en œuvre pour leur réalisation. Certes, un contrôle étatique s'exerce; néanmoins, les religions peuvent mener leur propre politique scolaire avec une marge d'indépendance tout à fait appréciable.

Elles peuvent décider, comme en Slovénie dans les écoles privées catholiques, que les cours sur les matières religieuses sont obligatoires. Dans ce même État, il n'est pas interdit d'organiser des moments de prières dans l'établissement; dans trois des quatre écoles, ces prières sont permises, mais les élèves ne sont pas tenus d'y prendre part.

Dans la République Tchèque, l'école privée garde une totale liberté de choix pour organiser une éducation religieuse. Celle-ci peut être obligatoire ou optionnelle; elle peut concerner une religion donnée ou plusieurs religions, ou encore exclure toute religion. On reconnaît donc à ces établissements privés une complète liberté pour déterminer leur propre conception du monde et la proposer aux enfants. Dans les écoles confessionnelles, l'éducation religieuse demeure facultative, mais une matière alternative, un enseignement d'éthique, est proposée à ceux qui ne suivent pas ces cours de

religion, alors que cette option alternative relative à l'éthique n'est pas envisagée dans les écoles publiques.

Outre ces deux exemples, ailleurs, les écoles qui fonctionnent en dehors du secteur public, comme entre autres les "écoles d'Église" de Hongrie, ne sont pas astreintes au principe de neutralité qui ne vaut que pour l'enseignement public. Au sein de ces divers pays, l'école privée dispose d'une marge de liberté finalement très étendue, dans le choix des modalités de mise en œuvre d'une éducation religieuse. Cette large liberté se retrouve dans le choix, par ces écoles, tant de leurs maîtres que de leurs élèves.

Le plus fréquemment, le législateur a reconnu à ces établissements privés subventionnés sur fonds publics, le droit de choisir leurs élèves selon leurs propres critères. Telle est expressément la situation dans la République Tchèque, en Hongrie, ou encore en Slovénie. Dans ce dernier État, l'une des écoles exige des candidats à la scolarité un certificat de baptême et une lettre de recommandation d'un prêtre.

Le recrutement des maîtres s'opère avec une même liberté. En République Tchèque, dans les écoles confessionnelles, le directeur de l'école est nommé par l'autorité religieuse qui a fondé l'école. Les maîtres peuvent appartenir à une autre confession que celle professée officiellement par l'école, mais il leur est demandé une certaine loyauté à l'égard de l'orientation choisie par l'établissement. En Hongrie, les professeurs sont, eux aussi, recrutés très librement par l'école elle-même ou par les autorités religieuses; le contrôle étatique n'est guère pesant.

Ces sélections d'élèves et de professeurs, effectuées par les écoles selon les critères qu'elles fixent ou que les confessions dont elles dépendent établissent, constituent une autorisation officiellement reconnue de procéder à des discriminations, en fonction notamment de la religion ou du sexe. On doit se demander si cette liberté presque totale dans le choix des maîtres et des élèves a des conséquences sur le recrutement des uns et des autres, c'est-à-dire sur la composition de cette population scolaire. En somme, les écoles peuvent pratiquer des discriminations. Le font-elles? Et en quel est le résultat, dans l'emprise sociale que possèdent les religions,

mais également en ce qui concerne l'égalité des chances d'accès au savoir pour tous les enfants?

De fait, dans plusieurs de ces États, les écoles privées, ou les écoles confessionnelles connaissent un vif succès et sont de plus en plus recherchées par les familles aisées ces dernières années. Les motivations guidant les parents vers ces établissements pour leurs enfants sont parfois d'ordre pratique, mais ces écoles répondent aussi à un souci d'éducation de la part des familles et souvent à des préoccupations d'ordre religieux. Tel est incontestablement le cas en Hongrie et en République Tchèque.

C) *L'organisation administrative*

Les législations étatiques prévoient les modalités d'organisation et de fonctionnement de ces établissements; elles s'attachent notamment à définir le mode de financement et à préciser la valeur des diplômes conférés.

— Dans chacun de ces États, ces écoles privées reçoivent des subventions sur fonds publics, dès lors que les maîtres suivent les programmes de l'enseignement public et que les directives fixées par les pouvoirs publics pour les écoles publiques sont appliquées de façon identique dans les écoles privées sollicitant un financement public.

Le montant de l'aide financière apportée par l'État ou par les collectivités publiques peut varier selon les pays et selon les situations scolaires.

Le financement public peut couvrir la totalité des dépenses; il est alors calculé sur les mêmes bases que pour les établissements publics. Telle est la situation en Hongrie, dès lors que l'école d'Église répond à un certain nombre de critères équivalents à ceux demandés aux écoles publiques. Dans ce pays, les fonds proviennent pour partie du budget de l'État, mais aussi largement de celui des municipalités. Il en va de même en Slovénie, où le financement des écoles privées religieuses est assuré à 100% par l'État; mais les subventions cessent automatiquement si le directeur ne respecte plus les programmes de l'éducation nationale.

Dans d'autres hypothèses, l'aide matérielle des pouvoirs publics n'entend pas couvrir la totalité des frais. L'État subventionne,

mais les écoles privées doivent également trouver des ressources par elles-mêmes. Dans la République Tchèque, les écoles privées reçoivent un financement partiel de l'État, qu'elles sont contraintes de compléter. Une part de ces ressources complémentaires proviennent des droits d'inscription payés par les élèves. Toujours en République Tchèque, pour les écoles confessionnelles, le fondateur, entité religieuse, fournit les bâtiments. Dans ce système, l'État assure les dépenses de fonctionnement, parmi lesquelles figurent, postes importants, les salaires versés aux enseignants.

— Quelle est, d'autre part, la valeur officiellement reconnue aux enseignements ainsi dispensés et aux titres délivrés par ces écoles? Il semble que, généralement, les écoles privées qui se coulent dans le moule de la législation étatique soient compétentes pour attribuer des diplômes ayant la même valeur que ceux délivrés par les établissements d'enseignement du secteur public. Telle est incontestablement la situation en République Tchèque, et il ne s'agit sans doute pas là d'un cas isolé.

Notons toutefois qu'en Slovénie la loi de 1991 permettait aux écoles privées religieuses de délivrer des diplômes équivalents à ceux du secteur public; mais ces dispositions furent supprimées en 1996.

En définitive, le succès et l'essor des établissements scolaires privés semblent un phénomène assez général, surtout dans les pays où cette catégorie d'écoles avait dû disparaître un temps. Si les parents les réclament pour l'éducation de leurs enfants, parallèlement, les gouvernements accueillent ces demandes et accordent d'indéniables facilités d'organisation et de financement, tout en respectant les options très librement définies par ceux qui prennent l'initiative de ces créations scolaires.

3. Les établissements d'enseignement supérieur confessionnels et la formation des clercs

Ici comme pour d'autres institutions, le régime marxiste-léniniste avait entraîné la disparition d'un certain nombre d'établissements d'enseignement supérieur confessionnels. Ainsi, en Tchécoslovaquie, en 1948 toutes les écoles confessionnelles et les séminaires

furent supprimés. Les Églises gardèrent seulement le droit d'avoir, pour la formation de leur clergé, trois facultés de théologie (catholique, protestante, hussite), qui fonctionnaient sous le contrôle de l'État peut-être plus que selon la volonté des autorités religieuses.

Aujourd'hui, dans les divers pays, les confessions peuvent ouvrir des établissements d'enseignement supérieur, dispensant leur enseignement dans les matières religieuses ou profanes, selon des modalités variées.

Dans plusieurs États, comme en Slovénie ou en Bulgarie, cette situation résulte du principe de l'autonomie des universités. Les établissements créés doivent cependant respecter les lois relatives au système éducatif.

Il n'est pas toujours aisé de distinguer d'une part ce qu'il convient de qualifier de "séminaire", devant assurer la formation des ministres du culte, et d'autre part les établissements d'enseignement supérieur, ayant éventuellement le titre d'universités et proposant des formations plus diversifiées.

Il n'est pas non plus toujours facile de distinguer clairement entre établissement privé ou public.

A) *Quelques indications relatives à la situation de divers pays de l'ancien bloc communiste*

— En République Tchèque, deux catégories distinctes d'établissement coexistent. D'un côté, l'Église catholique a fondé trois écoles supérieures de théologie, et les protestants en ont fondé quatre. Les unes et les autres sont des universités privées dans lesquelles les étudiants n'obtiennent pas de diplôme académique; ces écoles forment essentiellement des enseignants de religion et des salariés au service des Églises. Il existe, d'autre part, trois universités d'État; l'une est catholique, une autre protestante et la troisième hussite. Ces universités d'État établissent leur statut en collaboration avec les Églises; les enseignants n'y sont admis qu'avec l'accord des Églises; les Recteurs de ces universités sont des représentants des Églises. Les futurs ministres du culte, enseignants de religion ou employés des Églises y étudient et obtiennent des diplômes reconnus par l'État.

— En Hongrie, les Instituts supérieurs de théologie furent reconnus dès 1990; ils prirent alors le titre d'université. Ces institutions religieuses bénéficient d'un financement sur fonds publics, selon les mêmes bases de calcul que celles utilisées pour le financement des universités d'État, dès lors qu'elles se conforment aux dispositions de la loi sur l'éducation. Ces universités assurent la formation des prêtres et des catéchistes. Elles proposent également de nombreuses formations profanes, technologiques par exemple; ces filières connaissent un vif succès et les effectifs d'étudiants augmentent considérablement chaque année. Les diplômes délivrés sont reconnus par l'État.

— En Pologne, les communautés religieuses peuvent organiser leurs propres écoles afin de former les ecclésiastiques. Les séminaires ecclésiastiques sont considérés comme des écoles professionnelles supérieures, pouvant délivrer la licence. Les enseignants, personnels et étudiants ont le même statut que dans les écoles supérieures de l'État. Il existe également plusieurs facultés de théologie pontificales, notamment à Lublin et à Varsovie, ainsi qu'une académie chrétienne de théologie située à Varsovie, à l'intention des chrétiens non catholiques.

— En Bulgarie, les Églises détiennent la même faculté de posséder des écoles de théologie, secondaires ou supérieures, dès lors que la confession prenant l'initiative de la création est enregistrée. Des facultés de droit canonique sont possibles. Ces établissements reçoivent des subventions du Directoire des Confessions auprès du Conseil des ministres.

B) *En Turquie et à Chypre*

— En Turquie, si l'on met de côté les écoles destinées à la formation des imams, la situation des autres cultes, très minoritaires, soulève éventuellement quelques difficultés. Ainsi, en 1971, le séminaire orthodoxe, qui assurait la formation des prêtres, fut fermé lorsque l'État nationalisa les institutions privées d'enseignement supérieur. En 1999, lorsque la candidature de la Turquie à l'Union européenne se précisa, le gouvernement décida certaines innovations. En particulier, un département de théologie chrétienne vient d'être créé et a ouvert ses portes, au sein de la Faculté de théologie de

l'Université d'Istanbul. Mais les Églises chrétiennes ont formulé des critiques, estimant qu'il n'était pas possible de former le clergé chrétien dans une école musulmane de théologie.

— À Chypre, il n'existe actuellement pas de faculté de théologie. Des projets étaient en cours avant l'invasion par les Turcs en 1974. Les difficultés politiques qui suivirent ne permirent pas de concrétiser ces propositions.

En somme, des établissements d'enseignement supérieur confessionnels fonctionnent presque partout; ils se proposent d'assurer la formation d'un clergé, mais dispensent également parfois d'importantes formations profanes. Ces établissements ont souvent le titre d'université. Leur financement est assuré largement ou entièrement par l'État. Les institutions d'enseignement supérieur restant, par leur nature même, en nombre limité, il est plus délicat d'établir des comparaisons entre les divers pays, ou bien de dégager des caractères communs, à travers les divers États.

Les huit pays étudiés accordent tous une place aux religions dans le système éducatif national. Aussi diverses que soient les législations, néanmoins, conformément à l'article 2 du protocole N° 1 additionnel à la Convention européenne des droits de l'homme, partout les États assurent le service de l'éducation et organisent l'enseignement, en respectant le droit des parents à ce que cet enseignement soit donné conformément à leurs convictions religieuses et philosophiques. Les systèmes mis en place traduisent tous un profond respect de la liberté religieuse; ils laissent, en définitive, aux confessions religieuses une grande liberté dans les choix éducatifs qu'elles font et accordent une importante aide financière.

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REMARKS ON THE PAPERS PRESENTED AT THE STRASBOURG MEETING (NOVEMBER 17-18, 2000)

SUMMARY: 1. *Preliminary Remarks.* — 2. *Common features.* — 3. *Specific features.* — 4. *The legal status of religious organisations.* — *a*) registration. — *b*) The particular position of Cyprus and Turkey. — *c*) Autonomy. — 4. *Final remarks.*

After some short preliminary remarks, in the following pages I shall try:

a) To identify a few elements which are common to the Church-State systems of Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Poland, Slovenia, Turkey (hereafter: the new States).

b) To identify a few other elements which are specific to some of them.

c) To analyse in more detail the legal status of religious communities.

d) To formulate a few final remarks, comparing the new States with the States that are part of the European Union (hereafter: the old States).

1. PRELIMINARY REMARKS

It is significant that the State Church model is not followed by any of the new States (and explicitly rejected by some of them: for example *Estonia*). Even in *Bulgaria*, where Eastern Orthodox Christianity is legally recognised as the traditional religion, the Constitutional Court has ruled that "religious communities and institutions

shall be separated from the State" (1). It is equally significant that, with one exception, no new State constitutionally upholds secularism or "laïcité", along the line of art. 2 of the French Constitution. A little paradoxically, the only exception is *Turkey*, which, from this point of view, follows a model which is declining in France itself.

All the new States fall in the middle ground defined by these two borders (State Church and secular State). They are characterised by some common features.

2. Common features

1) *Freedom of conscience and religion* is explicitly granted and protected at constitutional level (it should be noted that some constitutions of the old States contain no explicit protection of freedom of conscience: such is the case, for example, of the Italian constitution)

2) The principle of *non-discrimination* for religious purposes is widely but not universally affirmed. In a few countries (*Czech Republic, Poland, Hungary, Turkey*) there is no specific provision, at least as far as can be understood from the reports.

3) *Autonomy of religious communities*: many constitutions have a provision that grants self-government to religious communities. When such a provision does not exist, the Constitutional Court has nevertheless affirmed the autonomy of religious communities on the basis of other constitutional provisions granting the separation of Church and State (as in *Hungary*) or religion and politics (as in *Bulgaria*). *Turkey* is an exception: imams and muftis are appointed by a State-linked institution.

4) *Equality of religious organisations*. It is widely affirmed in the Constitutions (*Poland, Estonia, Slovenia, Cyprus*) or by the Constitutional Courts (*Hungary*), but it is always interpreted in the sense that "equal persons have to be treated equally and unequal persons unequally" (2). Therefore there is a wide range of different provisions for different religious organisations and that is not judged to be in contrast with equal treatment.

5) *Co-operation* between States and religious communities is another common feature. It is explicitly mentioned in the Polish constitution only (art. 25), but a number of countries (*Czech Republic, Cyprus, Hungary, Poland*) have signed concordats and agreements with religious communities. Moreover, even in the countries where co-operation is not constitutionally affirmed and no concordat has been signed, some level of co-operation is provided (for example by financing religious communities, granting religious assistance in prison, etc.). Nowhere is the separation between Church and State interpreted as preventing co-operation.

(1) See J. Peteva's paper in this volume.

(2) See M. Kiviorg's paper in this volume.

3. Specific features

1) *Traditional religion:* art. 13 of the Bulgarian Constitution declares that Eastern Orthodox Christianity is the traditional religion of the country. It is the only declaration of this type in the constitutions of the new States, as the Constitution of *Cyprus* (the other country with an Orthodox majority) does not establish any prevailing or traditional religion. Within the old States, Orthodox religion is declared to be the prevailing religion by the Greek Constitution (art. 3). The topic deserves some attention because such declarations do not appear exclusively in the Bulgarian and Greek Constitutions: therefore it is likely that the problem will recur again if and when new Eastern European countries ask to join the European Union. Basically, the problem is to ascertain whether such a declaration is compatible with the principle of religious freedom and equality. *Prima facie*, the answer is in the affirmative, given that the national Churches or State Churches of the old States are considered to be compatible with these principles (see for example the report of the European Commission in Darby, n. 11581/85, par. 45). Nevertheless this topic deserves some attention as traditional (or prevailing) religion on one hand and State (or national) Church on the other hand are not exactly the same thing.

2) *Identity of religious and communal membership* characterises

the system of *Cyprus*. It raises some questions as religious membership could influence the enjoyment of civil and political rights. For example, given that "those who belong to the Greek Orthodox Church constitute the members of the Greek community" (3) (the same applies to the Muslims, who are members by law of the Turkish community), what happens when somebody leaves the Greek Orthodox Church (or the Muslim religion)?

3) *Religious family law*. It is a feature that is particular to *Cyprus* and it is a point that needs some clarification. Notably, because of the plurality of systems of marriage and divorce, people are subject to different laws according to their religious membership. Although this difference is not completely unknown in some old States (Italy, for example), nowhere else is it so wide. Some problems could arise in reconciling this plurality of family law systems with equality of rights and duties irrespective of religion.

4. The legal status of religious organisations

a) *Registration*

A first group of countries has adopted a system of administrative (*Poland, Estonia, Bulgaria, Slovenia, Czech Republic*) or judicial (*Hungary*) registration. By reading the reports, one has the feeling that this definition (administrative or judicial registration) covers different situations: in *Slovenia*, registration seems to be quite easy, with scarce and informal control by the State; in *Bulgaria*, State control on the internal organisation of religious groups seems to be much stronger.

There are a few problems, which are common to many Church-State systems based on registration (also in the old States):

1) What are the criteria for registering a group as a "religious" group? Do we need a definition of religion? Shall we stick to formal criteria (number of members, etc.)? And what are these formal criteria (100 members as in the current *Hungarian* law and in

(3) See C. Papastathis' paper in this volume.

Poland, or 10,000 as in the *Czech Republic* and in the *Hungarian* proposals of 1993 and 1998)?

2) What happens when an application for registration is rejected? In the *Czech Republic* and in *Poland* you can appeal against the decision, in *Bulgaria* you cannot.

3) What kind of control is exercised by the State before registering a religious group? In *Slovenia* the lack of "any statutory criteria or conditions for the establishment of religious communities" prevents the State "from refusing to register certain groups of persons who wish to be registered as religious communities, although it is obvious that their activity bears no relation to religion" (4): from this statement one gets the impression that controls are very limited. But in *Poland* a religious group requesting registration must inform the Ministry of the Interior not only about its structure, but also its religious doctrine: does this mean that the State can raise objections concerning the contents of a religion? And what is the exact meaning of the confirmation of the articles of association of a religious group by the Council of Ministers in *Bulgaria*? Does it mean that the Council is entitled to refuse registration because the internal structure of a religious group does not respect democratic principles, for example? And the same might happen in *Estonia*, where "many basic requirements for democracy within the church and congregation are mandatory" (5)? We are far away from *Hungary*, where "churches do not have to have a democratic structure" and "church charters can be anti-democratic" (6). Anyway, even in Hungary, churches need to have elected administrative and representative bodies in order to get registration, but this provision does not apply to the churches already operating before 1990 (among them, the Catholic Church). So the new churches must be democratic, while the old ones can be anti-democratic: how does this relate to the principle of equal rights for religious groups?

4) What is the fallback for a religious group whose application for registration has been rejected? In *Estonia*, non registered reli-

(4) See L. Sturm's paper in this volume.
(5) See M. Kiviorg's paper in this volume.
(6) See B. Shanda's paper in this volume.

gious groups "cannot present themselves as legal persons" (7). Does it mean they cannot be legal persons at all (for example on the basis of the provisions regulating the legal personality of non religious associations)? If so, we might have here a problem similar to the problem that existed in Austria before the new law on associations. In *Hungary*, non registered groups have the same freedom as registered groups: does this mean they can get legal personality as non religious groups? What is the situation in the other countries?

b) *The particular position of Cyprus and Turkey*

What has been said in the previous paragraph does not apply to *Cyprus* and *Turkey*, where no system of registration of religious organisations is in force. In *Cyprus* the Orthodox Church is "a legal entity under public law, precisely because the Constitution confers upon it powers that appertain to the State" (8); particular Orthodox ecclesiastical corporations are legal entities according to the Charter of the Orthodox Church, which is recognised by the Constitution of *Cyprus*.

While the system of *Cyprus* shows some analogies with the systems existing in some old States, the position of *Turkey* is much more difficult to define, at least according to European standards. There is no constitutional mention of Muslim legal entities or of any system of registration or recognition by the State: nevertheless these entities exist and perform legal actions. In what capacity? As private law or public law entities? Is there a specific law governing the capacity and activities of Muslim (and non Muslim) organisations? Are they subject to the general provisions governing non religious organisations? Most important: are these questions meaningful from the point of view of the Turkish legal system?

c) *Autonomy*

It has already been said that self-government is granted to reli-

(7) See M. KIVIORG's paper in this volume.
(8) See C. PAPASTATHIS' paper in this volume.

gious groups in almost every new State. But what is the extent of the autonomy granted to religious groups? Does it cover only their strictly religious activities or is it extended also to their educational, charitable and social activities? In some countries (*Czech Republic, Slovenia*) educational, charitable and social activities (and the related institutions) are governed by the general law concerning them; in *Estonia* it is the same, but the trend is leading towards a widening of the sphere of religious autonomy, which in the next future could cover also "moral, ethical, educational, cultural and diaconal activities, social rehabilitation and other activities outside the characteristic confessional offices or services of churches and congregations" (9); in *Poland* the economic, social, cultural and educational activities of the religious organisations "jouissent d'une régulation plus avantageuse que celle universellement en vigueur" (10).

4. FINAL REMARKS

All in all, the systems of Church-State relations in Bulgaria, the Czech Republic, Estonia, Hungary, Poland and Slovenia do not raise particular problems when they are compared to the systems of the old States. Of course, there are points where they deviate more or less widely from the middle line along which the old States align themselves: but similar deviations are not uncommon among the old States themselves and respond to the peculiarities of national history, culture, traditions, etc. Generally speaking, one gets the impression that the basic institutions and the structure of the legal discourse is the same.

These remarks do not fit Cyprus and Turkey. A system of different religious family laws no longer exists in Europe: nowadays it characterises the Eastern (Israel, Lebanon, India, etc.) much more than the Western systems of law. Something similar can be said about the identity of communal and religious membership. In the past it existed in Europe too, but today it is a feature of the East,

(9) See M. KIVIORG's paper in this volume.
(10) See M. PIETRZAK's paper in this volume.

not of the West. As for Turkey, the problem is more cultural than legal. The Turkish system of relations between State and religion is quite different from those existing in the old States: some fundamental features (the autonomy of religious organisations, for example) are missing. Nevertheless, these legal differences do not seem to be absolutely irreconcilable: after all, in England bishops are appointed by the Prime Minister, so why should we wonder at the fact that imams are appointed by the Turkish Presidency of Religious Affairs? But it is difficult to overcome the feeling that the meaning of the words and the texture of the legal discourse are not exactly the same, due to a different philosophical and theological background. Any fruitful comparison depends on the existence of a common language: building a common language is the first step to open a way which will bring Turkey and the European Union States closer.

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DIRECT AND INDIRECT FINANCIAL SUPPORT FOR RELIGIOUS BODIES IN THE CANDIDATE COUNTRIES OF THE EUROPEAN UNION

Before attempting a synthesis of the material prepared by the national rapporteurs, it might be helpful to essay a typology of financial support for the churches and other religious bodies (1) and to sketch the pattern of support found in the existing Member States.

What such a methodology cannot deliver is any quantitative assessment of State support for the churches, expressed perhaps in euros per citizen or euros per Church member. The statistics are simply not available. In any case, the modes of support are so diverse that any such assessment would be highly unreliable. We are not able to prepare a "league table", or suggest financial targets for candidate countries to attain!

As the title of this report makes plain, financial support can be direct or indirect. Those terms are not self-defining, and a more elaborate analysis is needed.

Direct financial support involves a flow of funds through State channels to churches. Amongst the factors to be taken into account

(1) To avoid repetition, and where the context does not otherwise require, I use the term "church" hereinafter to cover all religious bodies, including Jewish and Islamic bodies and religious orders (congregations).

in an analysis of such support are the sources of financial support, the identity of the recipients, and the terms on which support is provided, the latter including in particular the extent to which the purposes for which the available funds may be used are limited or specified.

Indirect financial support includes all other forms of action by the State which improve the financial position of churches, notably relief from taxes which would otherwise fall due.

There may be a third category of case, in which the State and the churches both contribute to particular types of work. This can be seen as a direct contribution to a specific form of religious activity *or* as a form of indirect support, relieving the churches of costs which would otherwise fall to them. To identify the boundaries of this category could prompt almost endless, and probably unprofitable, debate. Is the repair by the State of church buildings, where the buildings are actually State rather than church property, an example? The clearest example may be in the field of education, with the capital and operational costs of certain schools being borne by church and State in specified proportions. I do not explore those cases in this report, as I imagine they fall more naturally in the report on Education and Religion by Professor Brigitte Basdevant-Gaudemet.

Taking the analysis rather further, direct financial support can take a variety of forms. Looking first at the matter of the *sources of financial support*, the funds may come from the national budget, voted by Parliament as one head of expenditure amongst many others. Or the funds may be derived more directly from individual taxpayers who either contribute to a specific church tax or 'earmark' a fraction of their general tax payments for church use. A similar range of possibilities could be applied to local (regional, municipal) budgets and taxes, and the churches could be identified as entitled to receive a benefit from certain types of indirect taxes or licence fees.

In terms of *the identity of the recipients*, the constitutional aspect of church and state law may well determine which church is entitled to support, or to a particular type of support. This may be most relevant where there is one church 'established' or recognised as the national or dominant church, or where the treaty-making capacity of the Holy See gives the Roman Catholic Church a privileged position. Where support is given to a wider group of churches, there will often be the familiar problem of drawing the boundary so as to exclude bodies which have adopted a religious form solely for the advantages it might bring. That is more likely to be an issue where indirect support, such as tax-exempt status, is concerned. It is also possible, however, that in a country with a number of recognised churches, financial support may be channelled through some ecumenical church body.

The *designation of the objects of expenditure*, the purposes for which the available funds may be used, raises further issues. It is of course possible for the State to make a general subvention to the church, regarding the church as entitled, perhaps as part of a wider understanding of church autonomy, to decide for itself how the money is to be spent. An alternative approach is for the State to accept the responsibility for meeting certain costs (such as the stipends, housing or pensions of the clergy). Or there may be grants targeted very specifically, for example to meet the "heritage" costs of maintaining historic buildings which remain in the ownership of the churches (2).

In many countries, the State may employ members of the clergy as military or hospital chaplains or in similar roles, paying a salary on the scales applicable to others serving in those contexts (e.g. as an army officer or hospital social worker). These are not payments to the churches as such and are not mentioned further in this report.

1. The position in the Member States

A full account of financial support for the churches in the 15 Member States is well beyond the scope of this report, and all that can be attempted is a very brief summary to enable comparisons to be drawn (3).

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(2) In some countries, historic church buildings no longer required for regular worship may be vested in foundations, which may receive financial support from both church and state; an example of my possible third category.

(3) The most convenient source is G. Robbers (ed.), *State and Church in the Euro-*

Austria Some payments continue to be made to the major churches (including the Jewish community) by way of compensation for losses during the Nazi regime. Under a system akin to the church tax system, the Roman Catholic, Old Catholic, and Protestant churches may levy a legally-enforceable church contribution under a law dating from 1939; a similar arrangement exists for the Jewish community.

Belgium The salaries and pensions of the clergy (and of some lay ministers) are a charge on the national budget, as a result of an express constitutional provision (4). There are also some exemptions from property taxes.

Denmark The Evangelical Lutheran Church, as the national church, is closely integrated with the State and its finances are governed by a special Act. There is a church tax, paid with other taxes by church members, and other State support for clergy stipends and pensions and for general administration. The national church has a guaranteed amount for the restoration of historic church buildings and artefacts, and other churches may also receive grants for this purpose.

Finland The Evangelical Lutheran Church and the Orthodox Church may levy legally-enforceable contributions from their members, collected with national or local taxes; and they enjoy exemption from income taxes. An unusual feature is that companies and other legal persons are assessed for the church contribution payable to the Evangelical Lutheran Church.

France In the three départements of Alsace-Moselle, the stipends, housing and pensions of the clergy, and some administrative costs, of the four 'recognised' churches are paid by the State, a survival of the system introduced in the settlement after the seizure of church property by the State in 1789. In the rest of France, although most church buildings are maintained by the secular au-

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pean Union (Baden-Baden, Nomos, 1996) [and the other language versions of the same text]. Fuller (but less up-to-date) reports on the position in Germany, Greece, Italy, Spain and the United Kingdom appear in the first of the Consortium's volumes, *Church and State in Europe: State Financial Support; Religion and the School* (Giuffrè, Milano, 1992).

(4) Constitution, art. 181.

thorities (in whom are vested all pre-1905 church buildings), other financial support is limited to a favourable tax régime and to support for works of 'public utility' by religious bodies organised as *associations* under a law of 1901.

Germany Some grants are paid to the churches by way of compensation for the secularisation of much church property, especially in the early 19th century. More than three-quarters of the churches' income is derived from the church tax, levied by the church to which the taxpayer belongs and collected (for a fee) by the State tax administration. Grants are also made to a number of church-run institutions, notably hospitals. In common with other charities, there are tax exemptions for donations.

Greece The Greek State is responsible for the stipends and pensions of the clergy (and some lay officers) of the Orthodox Church, and there are a large number of specific subventions (e.g. to Athens Cathedral) and exemptions from property and other taxes. No other church is supported in these ways.

Ireland There is no financial support except for tax relief on donations (as with other charities) and some exemptions from local property taxes.

Italy A percentage of income tax paid by an individual tax-payer is assigned, according to his election, to the Roman Catholic Church, to one of a number of other churches, or to the State (for overseas aid, famine relief and similar causes, and for the maintenance of historic buildings). There are further tax reliefs for donations for clergy stipends and some limited exemptions from property taxes.

Luxembourg The stipends of the clergy and some lay office-holders are a charge on the State budget. There are also certain tax exemptions.

Netherlands There is no State support, but tax relief is given on donations and there are some exemptions from property taxes.

Portugal There is no State support, but the Roman Catholic Church (and only that church) has exemption from many forms of national and local taxation.

Spain A percentage of the taxes (income tax, capital gains tax, etc) is paid, at the nomination of the taxpayer either to the Roman

Catholic Church (but no other church) or other social purposes. In practice the sum receivable by the church in this way is supplemented by a grant from the national budget to ensure that the total equals the sums received by way of State support under the previous system. Donations may also attract tax exemptions as with other charities.

Sweden Under the recently-revised arrangements between Church and State (5), members of the Church of Sweden pay a legally-enforceable church levy and non-members pay a smaller levy in respect of church costs in providing for funerals. A transitional arrangement also provides for State grants towards building maintenance costs.

United Kingdom There is no financial support except for tax relief on donations (as with other charities) and some grants in respect of the repair of historic buildings.

2. Summary of the Position in the Member States

At the risk of doing considerable violence to the complexities even the above brief summary reveals, three main groups of countries may be discerned:

a) Those financing the costs of the clergy (at least) from the national budget: Belgium and Luxembourg; Alsace-Moselle, Greece.

b) Those allocating a percentage of general tax payments at the wish of the taxpayer: Italy and Spain.

c) Those operating some sort of church tax or levy as the principal method of financial support: Austria and Germany, Denmark, Finland, and Sweden.

d) Those providing no direct support but allowing a range of tax exemptions (many common to other charitable or non-profitmaking organisations): France, United Kingdom and Ireland, Netherlands, Portugal.

Despite some similarities on a regional basis, hinted at in my listings, the pattern largely depends on the historical development of

(5) See L. Friedner, "Church and State in Sweden in 1998", (1999) 6 European Journal for Church and State Research 181, at 184-186.

church-state relations in each country. Countries with "established" churches can be found in most categories (see the position of Greece, Denmark and England). Countries known for the strength of religious sentiment amongst the population (e.g. Luxembourg and Ireland) are similarly found in different categories.

One feature which this crude typology obscures is that in a number of countries church property has been expropriated at some time in the past, and one justification for State subventions is the notion of compensation for the loss of Church property. That situation has distinct echoes in some of the candidate countries.

3. Two special cases: Cyprus and Turkey

Most of the candidate countries have emerged from the period of Soviet influence or from a particular form of Socialist or Communist rule. Cyprus and Turkey stand apart from this pattern, and can only be treated as individual, and for our purposes, "special" cases.

For almost a century *Cyprus* was under British rule, and it is not unduly surprising therefore to find an absence of financial support for the churches similar to that in the United Kingdom. The British administration inherited a situation in which the various religions enjoyed autonomy, and (apart from issues as to the jurisdiction of the Orthodox ecclesiastical courts in matrimonial matters, which were recognised as legally effective both in Cyprus and under English private international law) maintained a non-interventionist stance. The concomitant of non-intervention is an absence of financial support. There are reverse echoes of "no taxation without representation".

Turkey is also a "special" case. It has a very substantial Muslim majority *and* an avowedly secular State, an increasingly unusual combination and one of course unique in Europe. Secularism does not involve equal treatment. Substantial control over (Sunni) Muslim affairs is vested in the Presidency of Religious Affairs financed from the national budget. I assume that this budget meets the stipends of those it appoints, and possibly also the administrative costs of mosques, but this is not entirely clear from Professor Niyazi Öktem's survey.

4. Restitution of Expropriated or Nationalised Property

The issue of the restoration of, or the payment of compensation for, church property seized or secularised under earlier régimes is an important issue in a number of Eastern European countries. An account is given in the *Hungarian* report of the settlement of that issue, with some properties restored and a compensation fund established. It is a live, and it seems not wholly resolved, issue in the *Czech Republic*, *Poland*, and *Slovenia*.

a) *Tax concessions*

Churches enjoy various forms of tax concessions in all the States now being considered. This takes various forms but is at least as generous as that extended to other non-profitmaking bodies operating in the charitable field. Almost all countries also allow the individual taxpayer some relief in respect of donations to church funds: *Hungary* is the exception.

b) *Church taxes or levies*

Hungary has introduced a system, akin to those found in Italy and Spain, under which a taxpayer can nominate a church (or other specified causes) to receive a percentage of the tax paid. No other candidate country has such a system.

c) *Direct subsidies to the churches*

A number of the countries make direct subventions to the churches. In the *Czech Republic*, this covers the stipends of the clergy and some lay employees. In *Slovenia* the social security contributions of the clergy are paid by the State, and some small sums are available for grants for other specific purposes (6). In *Bulgaria* the relevant legislation, dating from 1949, appears to make it possible for grants to be made to the churches; I am unclear as to what use, if any, is made of this power, and the legislation seems primarily concerned with the transparency (to the State) of the churches' budgets. In *Estonia* a relatively small grant (125,000 euros) is made to the Council of Churches rather than directly to the churches themselves.

(6) The report gives details expressed in tolars. The conversion rate to the euro is currently 0.00475.

In most national reports mention is made of the possibility of grants to the churches in respect of the cultural heritage: historic buildings and artefacts, archives and museums. In *Hungary* and *Poland*, there is support for theological education. The *Hungarian* report gives details of the support given to the social welfare activities of the churches, at the same level as that given to secular bodies; that practice may well exist in other countries even where it is not mentioned in the national reports.

5. A General issue: Equality of Treatment

It has to be admitted that in some Member States it has only been in recent years that steps have been taken to minimise the differences in treatment as between the majority church (whether it be the Roman Catholic Church with its position governed by concordats and treaties, or a church of the Reformation with its close historical links to the nation-state) and smaller churches of undoubted authenticity. Amongst the candidate countries, there seems an obvious inequality of treatment in *Turkey*, and national or ecclesiastical politics may have led to the exclusion of some churches from the benefits available in other countries. This is a matter which the Declaration made at the time of the Treaty of Amsterdam leaves very much to the national law of Member States of the European Union, but many national legal systems contain guarantees of equal treatment which may not always be fully observed.

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FREEDOM OF RELIGION AND THE LEGAL POSITION OF RELIGIOUS MINORITIES

SUMMARY: 1. *The Historical Background.* — 2. *The Religious Situation.* — 3. *The Legal Transformation regarding "Freedom of Religion".* — 4. *Minority Rights.*

1. THE HISTORICAL BACKGROUND

I would like to begin my considerations with this question: What do the countries to which we dedicate this meeting have in common, especially regarding their manifold religious landscape? It would be too easy to focus our attention only on the second half of the 20th century, from the time of the communist domination in the majority of these countries. We also have to keep in mind the historical and social preconditions of these central and eastern European countries, rooted in the past in a very special way and differing in more than one aspect from the historical experience of the western European nations.

1. *First* the geographical position of the countries represented here must be considered. They are situated in a wide strip, with a North-South extension from the Baltic Sea to the core areas of the Byzantine and Ottoman Empires on the Balkan Peninsula and in Asia Minor. Concerning the East-West-extension of this strip, it is important to keep in mind that no precise borderline is determinable. This is often misjudged, when the eastern border of Western Christianity at the beginning of modern times is seen as a significant "fault-line", which may give — in the words of Samuel Huntington's famous book — the background for the apocalyptic scenery of

a "Clash of Civilisations". The main argument is that those countries east of the border, characterised by Orthodoxy and Islam, missed the essential experiences of the Renaissance, the Reformation and the Enlightenment, as well as the French and Industrial Revolutions (1). Without underestimating the importance of these different historical experiences, in my opinion the idea of a "watershed" across Europe, where everything is flowing towards an ocean of freedom in the West, whereas in the East, everything is supposed to be stuck in the mud of despotism, is a dangerous simplification. Such a concept represents more a projection of the recent historical experience of the continent being divided by the "iron curtain" than the result of a historical analysis.

First of all, it should be emphasized that the "iron curtain" did not correspond at all with the imaginary border between the Latin West and the Orthodox East. The majority of the reformed states taking part in our meeting do not belong to the Orthodox East.

Beyond that, one has to take into consideration the spatial extension and the diversity of this area, on repeated occasions showing political structures which did not reflect this alleged East-West dividing line.

Finally the history of two metropolises dominating this area as focal points — Constantinople and St. Petersburg — indicates that from a geopolitical as well as a religious-political point of view, an important and central part of Europe is concerned. Both of them were founded by emperors who were trying to fortify their power by transferring their imperial centres bearing their name to that new area and — which is interesting in our context — simultaneously carrying out crucial religious-political decisions.

2. *A second essential feature* of these states is the fact that practically all of them were part of multinational and multi-confessional empires — the Russian Empire, the Hapsburg Monarchy and the Ottoman Empire — throughout a long period of their history.

(1) WALLACE W., *The Transformation of Western Europe* (London: Pinter; 1990); HUNTINGTON, S.P., *The Clash of Civilizations and the Remaking of World Order* (New York et. al.: Simon & Schuster; 1996), map 7.1.

Until the 17th century, the Polish Kingdom also belonged to this category on account of having been an especially tolerant political body. Up until the end of the First World War, nearly all of the states dealt with were part of one of the multi-confessional empires mentioned above, an important fact that we have to take into account when describing the historical background of the law on religion in these countries. Bulgaria had left the Ottoman Empire already in 1878, and Cyprus had been under British administration since 1878, before becoming a "crown colony" and thus formally part of the British Empire, which can be qualified as a multi-confessional Empire too.

Therefore, we have pay attention to the law on religion of these multi-confessional empires. According to a typology of tolerant societies, Michael Walzer (2) describes the great multinational state as the oldest of four tolerant institutional prototypes. In his opinion, under imperial sovereignty nothing was left to the different nations and confessions except the practice of tolerance between each other. These empires had come into being through violent expansion, with a privileged people or a privileged religion acting as an important factor of this expansion. After establishing their sovereignty, however, they succeeded quite well in integrating differences and carrying out a peaceful co-existence.

This general attitude of tolerance, nevertheless, contrasted with some negative aspects:

— First it has to be mentioned that within this concept of tolerance individual rights did not play any role throughout a long period. The individual was included in the community concerned, which functioned as a kind of compulsory society.

— Secondly — as a result of this — tolerance as usually practised was not frequently guaranteed to dissidents, especially where the dominant religion was concerned; that means Orthodoxy in Russia, Catholicism in Austria and Islam in the Ottoman Empire. For this reason, discrimination against Protestants occurred in Aus-

(2) WALZER, M., *On Toleration* (New Haven: Yale University Press; 1996).

tria, against members of the Uniate churches and the Raskolniki in Russia, and against Shiites and Alevites in the Ottoman Empire.

— Thirdly, especially in the Balkans, the concept of so-called "confessional nations" (Kirchennationen) (3) arose, implying a close unity of confession and nation. The dhimmi-system of the Ottoman Empire (4), based on the Islamic concept of tolerance, was an example for this construction of political self-rule. This system was partly applied to the orthodox minorities in the Hapsburg Monarchy, before being superseded by national bodies of Serbs and Romanians as a consequence of the Revolution of 1848. Not only orthodox, but also catholic and protestant peoples and ethnic groups showed structures similar to that of a national church; this was the case for instance with the Poles, the Slovaks, the Croats and the German-protestant minority in Transylvania. In the course of the foundation of new states in the area of the Ottoman Empire, this tradition led to exchanges of populations, which at the same time always involved a process of ethnic and religious cleansing. This concept has had effects up to the present day, insofar as every ethnic group has desperately tried not to become the dhimmi of another group, which has been demonstrated in connection with the dissolution of Yugoslavia in the last ten years.

— Finally the concept of tolerance practised in the empires was developed to guarantee full religious freedom only after a long process of overcoming great difficulties. For a long time, in the East the real conditions of life of religious minorities were better than in the West, where the principle "Cuius regio, eius religio" was the prevailing slogan. This difference between East and West can be observed even within the Hapsburg Empire. The catholic Counter-Reformation was carried out in a brutal way in the western part of the Empire (nowadays: Austria, the Czech Republic and Slovenia).

(3) TURCZYNSKI, E., "Orthodoxe und Unierte", in WANDRUSZKA, A./URBANITSCH, P. (eds.), *Die Habsburgermonarchie 1848-1918* (Vol. IV: Die Konfessionen; Wien: Verlag der Österreichischen Akademie der Wissenschaften; 1985), 399-478; esp. 405-428; cf. TURCZYNSKI, E., *Konfession und Nation: Zur Frühgeschichte der serbischen und rumänischen Nationsbildung* (Geschichte und Gesellschaft, 11; Düsseldorf: Schwann; 1976).

(4) Cf. the chapter by ÖKTEM, N., "Religion in Turkey" in the present volume.

In the Hungarian countries of the Empire, however, the Hapsburgs did not succeed in establishing confessional unity in spite of all endeavours. When the western concept of religious freedom, surpassing tolerance, came into force, a change occurred concerning the different conditions between East and West. It was a challenge which the multi-confessional Empires could hardly cope with, when they were called upon to provide a comprehensive guarantee to religious freedom. This can be demonstrated especially with regard to the Ottoman Empire. The reforms in this Empire were forced by the European powers in the 19th century, and their goal was the abolition of the millet-system and the establishment of the principle of equality for all Ottoman citizens, whatever their religious belief. The re-organisation of self-administration within the millet-system was a necessary precondition to achieve this goal. The religious minorities reacted with a kind of double strategy. On the one hand, they requested complete equality in accordance with the concept of religious freedom, and on the other hand, they opposed all changes to the traditional millet-system involving restrictions to the practice of self-administration that had been part of the system. This double strategy succeeded to a certain degree only in Cyprus. There, some regulations of the Ottoman Hatt-i-Humayun of 1856 (with its implementation of the religious law of each religious community and religious group, especially in family law) are still in force, although the Cypriote Constitution guarantees full religious freedom (5).

3. *A third characteristic feature*: Most of these countries underwent three transformations in the 20th century. Only Cyprus had a different history because of its colonial status which lasted up to 1960.

The *first transformation* was the dissolution of the old empires after World War I, which led to the emergence of national states following the western tradition. Although by claiming self-determination smaller entities replaced the empires, some of the new countries remained multi-ethnic and/or multi-confessional because of the

(5) Cf. the chapter by PAPASTATHIS, Ch. K., "The Legal Status of Religions in the Republic of Cyprus" in the present volume.

traditionally mixed ethnic and confessional population. There were some important population exchanges only on former Ottoman soil, but in central and eastern Europe the demographic situation remained more or less unchanged.

So we can find three examples of new multi-confessional countries: Poland, Yugoslavia and Romania. In Poland, one third of the population was neither Polish nor Roman-catholic: the large 20% Ukrainian and Bielorussian minority was half Orthodox and half Greek-catholic, and there were also a 10% Jewish minority and a small German Protestant minority. The political concept was to freeze the existing religious proportions and to maintain the dominance of the Roman-catholic church (6). Therefore, full individual religious freedom was restricted to the members of seven recognised religious communities.

Also, in Yugoslavia, a new multi-ethnic and multi-confessional state came into being. Because this country remained deeply rooted in the tradition of confessional nations, the change towards the concept of a common state of Serbs, Croatians and Slovenians provoked a critical situation. Although a system with a certain degree of parity between Catholicism and Orthodoxy was established, including to a certain extent the Islamic community, the Serbian Orthodox Church was de facto in a leading position since the Serbs were the dominant population and the royal dynasty Karageorgevic was closely linked with the Orthodox Church. Former laws on the relationship to the Catholic Church continued to operate: in Slovenia and Croatia, the Austrian Concordat of 1855, in Bosnia the Concordat of 1881, in Montenegro the Concordat of 1886, and in Serbia the Concordat of 1914. The consent of the Parliament of Yugoslavia to a new Concordat was hindered in the thirties by the Serbian Orthodox Church.

The Czechoslovak Republic adopted the system of the Hapsburg Monarchy with some changes, which led to the separation of church and state, e.g. in the field of marriage law. For public opinion, the Catholic church was too closely connected to the Hapsburg

(6) Cf. the chapter by PIETRZAK, M., "Le statut juridique des communautés religieuses en Pologne" in the present volume.

dynasty and to the idea of the (in the eyes of the Czechs pseudo) supranational monarchy, resulting in a great number of Catholics leaving the church (7).

Hungary remained a kingdom in formal continuity with the eastern half of the Hapsburg monarchy. The old system of parity between the incorporated churches was kept alive, and, as in Poland, the traditional dominance of the Catholic Church was maintained (8).

The Estonian constitution of 1920 contained a relatively short regulation modelled on the Swiss Constitution of 1874 and the Constitution of the German Weimar Republic. It proclaimed the separation of state and church and the full guarantee of individual religious freedom. Although in fact the Evangelical-Lutheran Church has played the role of a "national church", the German Lutheran Church and the Russian Orthodox Church have been favoured since 1925 through a far reaching status of cultural autonomy for the respective ethnic minorities (9).

The Soviet Union was able to regain the status of a multinational empire under the auspices of Marxism, which established a pseudo-religious secular belief, denied the fundamental importance of religion for the identity of people, and declared religion and religious conflicts the result of class rule and class conflicts.

Like Russia, Kemalist Turkey underwent a fundamental political and social change. According to the French concept of separation between state and church, the Republican Constitution of 1924 adopted a secular system ("laïcité"). In connection with this, it can be mentioned that the "ethnic cleansing" on the soil of the former Ottoman Empire was more or less a "religious cleansing" in the spirit of the Ottoman millet-system. The victims were Greeks, Turks, Bulgarians and the remaining Armenians after the genocide, mainly because of their religious denominations. According to the Treaty of

(7) Cf. the article by TRETERA, J., "The Principles of the State Ecclesiastical Law in the Czech Republic" in the present volume.

(8) Cf. the chapter by SCHANDA, B., "Church and State in Hungary" in the present volume.

(9) Cf. the chapter by KIVIORG, M., "State and Church in Estonia" in the present volume.

Lausanne of 1923, only Christian and Jewish minorities in small parts of the country were recognised and protected. As a result, modern Turkey formally has a overwhelming majority of Muslims, but because of the diversity of Islam, this doesn't mean that there is a monolithic religious society. Moreover, one has to keep in mind the fact that important Muslim ethnic minorities, such as the Kurds, were officially not recognised because the Turkish legal concept acknowledges only Christian and Jewish minorities (10).

Finally, another significant point of development for religious freedom and religious minorities in most East European countries was the period between the two wars. Of course, the situation of religious communities was influenced by their relationship to the respective authoritarian regimes and the intensity of their resistance against Nazi occupation. In the Czech lands and in Slovenia, Catholics actively participated in the resistance and the church became more popular (11), but the opportunity of playing a more active role in reconstructing a free and democratic society after the war soon ended with the communist take-over of power.

The *second transformation* was the predominance of Soviet influence after World War II. Some of the countries, like the Baltic states, were re-integrated into the Soviet Union as former possessions of the Russian Empire. Most of the countries became satellite countries which had to adopt the Soviet political system.

As a result of the near complete extermination of the Jewish population through the Holocaust, the expulsion of the German population from most of the countries, and population exchanges in some of the countries, the ethnic and religious homogeneity of several countries after World War II was much greater than it had been after World War I.

The evolution in Turkey was again different: being part of the western military system, it looked for its own method in a mixture between traditional Kemalism and further westernization. While the Constitution of 1961, drafted after the example of the German Fundamental Law (Grundgesetz), was an important step in the direction of a liberal-democratic system, the Constitution of 1982 again resulted in a more autocratic system. During that time individual religious freedom made no significant progress, as Niyazi Öktem points out.

(10) Cf. ÖKTEM, *op. cit.*

(11) Cf. TRETERA, *op. cit.*

The *third transformation* was the revolution of 1989, after the breakdown of the Soviet system in Russia. Democratization and the granting of fundamental rights brought a totally new attitude towards religion in society and towards the work of religious communities. According to the internationalistic concept of communism in the framework of Marxist ideology, religion had been repeatedly attacked not only because of its importance in relation with class divisions, but also as a factor of nationalism. After the fall of communism, religion was rediscovered as an element of national identity in countries with an orthodox tradition as well as in countries with a tradition of "national Catholicism". At the beginning of the nineties, the countries experienced what was called a "return of the religious worldview". In some countries, we can even discern an enthusiastic revival of religion. One should not forget that religious freedom was one of the most important topics on the agenda of the CSCE process, and that the churches played a very active role in the peaceful transformation of the communist system, especially in Poland, the former GDR, Lithuania and Latvia, and partially in Czechoslovakia and the Ukraine. In this political process, protestant as well as catholic churches were involved. The orthodox churches were far more rarely involved, a fact which is often said to reflect the typical attitude of orthodox churches in their relation to political power. There was even a noticeable role of religion in the emergence of new states, especially as a result of the dissolution of Yugoslavia, but to a certain degree also in the disintegration of the Soviet Union, which brought the rebirth of "Christian" and "Muslim" sovereign states in the Caucasus and Central Asia.

Although this first post-communist period seems to be over — social-empirical research shows a decline of religiosity in most of the countries — religious communities have regained a more or less firm position in the states and societies of former communist countries.

In Turkey, with its different history, we can also note new devel-

opments. On the one hand, there is an attempt to replace the Kemalist system of "laïcité" through a re-islamisation of society, or at least with a political order in which an Islamic party could play a role in a multi-party system, like the Christian-democratic parties in most European countries. The question of whether such a political system is possible is one of the most discussed topics of current Islamic political theory (12). On the other hand, we can observe an increasing number of human rights guarantees, which has the consequence of opening a new official dialogue with the non-Muslim population.

In 1995, amendments abolished about 20 articles and the preamble of the former constitution, in which had been stated the people's will to accept military rule. Civil servants will be allowed to engage in collective bargaining, and trade-unions may take part in politics. Such measures, in my view, demonstrate an attempt to establish a civil society. In July 2000, President Sezer suggested constitutional reforms in connection with possible membership in the European Union. By the way, it is remarkable that among the applications to enter the European institutions from the countries studied in this book, those involving human rights issues with a religious content have been very rare up to now, with one exception: Turkey.

2. The Religious Situation

Taking into account this historical and political background, one must now analyse the recent situation of religion especially in the reformed countries. Demographic diversity in these countries seems to be greater than in the fifteen EU member states.

Some of the countries have official religious statistics (Czech Republic, Slovenia, Bulgaria). In other countries, like Hungary, religious convictions as well as membership of religious communities are regarded as sensitive data, so that no corresponding data are provided in the population census. In Turkey, there is no religious census because of the secular concept of the state.

Official and unofficial membership data provide the following

(12) Cf. Öktem, *op. cit.*

picture: in Estonia, 17% of the population declare themselves as being members of a religious community; in the Czech Republic, 45%; in Slovenia, 76%; in Poland, Hungary and Bulgaria, more than 95%. In Cyprus, practically the whole population belongs to a religious community. In Turkey, the small minorities are defined by their religious denominations and the great majority, more than 99% of the population, is seen as Muslim.

Beside these data, there are some interesting socio-empirical studies concerning the religious situation in the countries in question. For the following examples, I refer to the European Values Study of 1990/91 and to an Austrian-Hungarian survey by Miklós Tomka and Paul Zulehner, which was published in 1999 under the title "Religion in the reformed countries of Eastern Central Europe".

I have selected some interesting figures from these studies in order to underline my introductory statement, that there is no clear border dividing Europe into a western and an eastern part. On the contrary, the surveys show different historical, social, confessional and political conditions in a vast European region with a variety of transitions.

First of all, it is an interesting fact that we can distinguish three types of countries according to their degree of religiosity and the number of "confessing" atheists among their population, following the selfunderstanding of the interviewees of the Tomka-Zulehner study:

1. Two countries have the lowest degree of religiosity: the Länder of the former German Democratic Republic and the Czech Republic, where only between 20 and 30% of the population declare themselves to be religious or very religious. These two countries had very similar results concerning all the questions in the opinion poll. At the same time, the results were remarkably distinct from those of the other countries.

2. In a second group, 50 to 60% of the population declare themselves to be religious. This group includes Slovenia, Slovakia, Hungary, the Ukraine and Romania; that is, countries with catholic as well as orthodox majorities, stretching from West to East and not from North to South. In the light of the chapter by Jenia Peteva, Bulgaria must also be included in this group.

3. In a third group, we find three countries with a high degree of religiosity (60 to 80% of the population): Lithuania, Poland and Croatia. They have in common a catholic church with a traditionally strong connection to state and nation.

An interesting figure in the European Values Study of 1990/91 concerned the religious education of the population between the ages of 18 to 30. At that time four groups of countries were distinguished:

1. In the first group, there was only one country: Poland, where nearly 100% declared that they had received religious education.

2. Three countries fell into a second group: Slovakia, Slovenia and Romania, where 60 to 70% had received religious education.

3. A third group included Lithuania and Hungary, with 40 to 50% figures.

4. To the fourth group belonged all the other countries. Belarus, Russia and Estonia had the lowest percentage, with 10% and even below.

The latter figure reflects the especially bad conditions for practising religion in the Soviet Union during the time of the communist rule.

A last example I wish to quote concerns the question whether the Catholic Church has expressed its opinion too often or too rarely. Characteristically, more official statements by the church are requested in the Czech Republic, the Ukraine and the Länder of the former GDR. On the list of the countries in which people ask for more self-restraint by the Catholic Church, Poland is far ahead, and then come Slovenia, Croatia, Slovakia and Lithuania. Obviously, the Catholic Church has problems in finding the right way of co-operating in the construction of a civil society.

3. The Legal Transformation regarding "Freedom of Religion"

With the end of the communist system in all the reformed countries, religious freedom was granted in the form of the classical liberal concept of the first generation of human rights. It is notable that the principle of freedom of religion had been included in all the

communist constitutions (except Albania). So, discrimination against religion was more a question of ideological reasoning, which had consequences through the application of the restriction clause and the corresponding administrative practice. In the words of Lovro Sturm, "the laws were enacted in a completely different constitutional system, based on the principle that everything that was not expressly allowed was prohibited" (13). All of the countries — with one exception — got a new constitution in the years from 1991 to 1993, and therefore also a new regulation on religious freedom. Hungary continues to work with the constitution of 1948, although some fundamental changes were made in 1989 (14).

While the legal position of the religious communities shows significant differences in the new constitutions in quantity as well as in quality, the guarantees of religious freedom as an individual right were formulated in a very similar way. In the new constitutions, the wording of individual religious rights is regularly taken from the United Nations Universal Declaration of Human Rights and its corresponding Covenants, from the European Convention of Human Rights, or from the CSCE documents.

Special regulations with implications for the field of individual religious freedom are set within frameworks borrowed from other European countries. Let me quote a few examples:

According to some constitutions, human rights instruments are directly applicable (Slovenia Art 8, Czech Republic Art 10, Bulgaria Art 5) (15) or have precedence over national laws (Bulgaria Art 5, Czech Republic Art 10).

Freedom of conscience belongs to the constitutional rights and freedoms that can never be suspended (Bulgaria Art 57, Slovenia Art 16 sect 2). The right to conscientious objection is granted in most of the countries — an exception is Turkey — as far as military service and health care are concerned.

Sometimes explicit regulations maintaining religious freedom

(13) Cf. the chapter by Šturm, L., "State and Church Relationship in Slovenia" in the present volume.

(14) Cf. Schanda, *op. cit.*

(15) Cf. Šturm, *op. cit.*; Tretera, *op. cit.*; Peteva, *op. cit.*

in society can be found: explicit prohibitions against inciting to religious discrimination and inflaming religious hatred and intolerance are found in the Constitution of Slovenia (Art 63) (16); in the Constitution of Bulgaria, the state is obliged "to assist in the maintenance of tolerance and respect between the believers from different denominations, and between believers and non-believers" (Art 37 sect 1). In the case of Cyprus, Art 18 sect 5 prohibits "the use of physical or moral compulsion for the purpose of making a person change or preventing him from changing his religion" (17).

On the level of specific laws for the realization of the fundamental right of religious freedom, most of the countries have enacted new regulations. In one case — Poland — the law on freedom of religion and confession was part of the so-called May legislation of 1989, which began with a special law on the relationship to the Catholic church (18). The new laws contain mostly regulations on freedom of religion and conscience as well as new regulations for the legal status of religious communities, providing both for the individual and the corporate spheres of religious freedom. Laws of the same kind were first enacted by Hungary in 1990, a few months before the first democratic elections, then by Czechoslovakia in 1991 and by independent Slovakia in 1993. Similar laws were enacted in practically all the states of the former Soviet Union.

In two recent cases, the already existing laws were amended. In Slovenia, a law from 1976 was amended twice, and a new law has been in discussion since 1996 (19). In Bulgaria, where a new law has been discussed since 1992, the relevant legal regulation in force is non-systematic and, for the most part, does not comply with the Constitution. The still existing Act on Confessions of 1949 — as far as I can see — was amended only once (20).

In Estonia, because of the guiding principle of separation of state and church, the respective law is related as *lex specialis* to the

(16) Cf. ŠTURM, *op. cit.*
(17) Cf. PAPASTATHIS, *op. cit.*
(18) Cf. PIETRZAK, *op. cit.*
(19) Cf. ŠTURM, *op. cit.*
(20) Cf. PETEVA, *op. cit.*

Non-Profit Organisations Act without mentioning the field of individual religious freedom directly (21).

Cyprus has no corresponding specific legislation, and neither has Turkey because of its secular concept.

4. MINORITY RIGHTS

Finally, I would like to say a few words about the situation of religious minorities. As we have seen, the constitutional guarantees concerning individual religious freedom are relatively uniform, whereas the legal status of the religious communities as such show remarkable differences. The consequence is that the single believer *grosso modo* is protected adequately, with only Turkey showing some deficiencies. The different regulations regarding the corporate rights of religious communities, though, have negative effects especially for minorities.

In this context, the above-mentioned historical, theological and social conditions in each country play an important role. Most of the countries have their typical religious minorities with special social and legal problems.

In the Czech Republic, e.g., we can find two typical small minorities, the Czech Brethren and the Czechoslovakian Hussite Church. In spite of their small membership, they have a renowned reputation for historical reasons, so that there is rather positive discrimination towards them.

In Estonia, there is the special problem of a large Russian minority, which creates ethnic as well as religious conflicts. As a result, in recent years a schism nearly occurred between the Patriarchates of Constantinople and Moscow.

In Poland, the dominance of the Catholic church is reflected in the constitution. The Preamble of the Constitution mentions "our culture rooted in the Christian heritage of the Nation" and emphasizes in article 25, which concerns the status of religious communities, that "the relations between the Republic of Poland and the

(21) Cf. KIVIORG, *op. cit.*

Roman Catholic Church shall be determined by an international treaty concluded with the Holy See, and by statute". Michal Pietrzak therefore rightly points out that between 1989 and 1999 Poland has shown elements of an "Etat confessionnel", which of course has discriminatory consequences for religious minorities (22).

In the Bulgarian constitution — as in other countries with an orthodox tradition — special attention is given to Eastern Orthodox Christianity, which is considered to be "the traditional religion in the Republic of Bulgaria" (23). Although it is said that this statement has no normative aspects and is only a historical remark, its formulation primarily implies discrimination against the old 10% Muslim minority.

The peculiarity of Cyprus consists in a special ethno-religious partition between the Greek and the Turkish communities in the tradition of the Ottoman millet-system. Therefore, the religious groups defined in the Constitution had to decide which of the two communities they wanted to join. The three religious groups, i.e. the Armenians, the Maronites and the Roman Catholics, opted for the Greek community (24).

In Turkey, non-Muslim minorities are demographically insignificant. Although the Great Church of Constantinople is the first See of the autocephalous orthodox Churches, today there are only a few thousand Greeks living in Constantinople. Islam in comparison with Christianity has no confessions in a strict sense, but there are analogous phenomena, so that we can speak of Muslim minorities in Muslim societies in a social and religious sense. In Turkey, about 15 to 20% of the population belong to the Alevites, and quite a number of confraternities have significant social and political influence and are involved in party politics.

Hungary and Slovenia have no outstanding religious minority problems, the denominational composition of the population being more or less comparable to other European countries with a traditional catholic majority.

(22) Cf. PIETRZAK, *op. cit.*
(23) Cf. PETEVA, *op. cit.*
(24) Cf. PAPASTATHIS, *op. cit.*

Beside the presence of traditional religious minorities, all the countries are confronted with new religious movements. Generally speaking we can say that in most of the countries there is a liberal policy in principle. There are no special restrictions for "sects" on the level of religious law, so that often nearly all religious or pseudo-religious communities have been registered (in Slovakia 40 citizens are sufficient; in Poland first 15, then 100 citizens; in Hungary more than 100 citizens are necessary for a religious community to be registered). This openness has been heavily criticised mainly by the traditional churches. In Hungary, where Scientology, UFO-believers and witch-associations have been registered, there are motions in Parliament to exclude non-religious groups from this status (25).

Let me conclude with a quotation from Will Kymlicka, which I have adopted for focusing on our topic: "Minority rights are not only consistent with individual religious freedom, but can actually promote it" and therefore "the cause of liberty" often "finds a basis in the autonomy of religious groups" (26).

(25) Cf. SCHANDA, *op. cit.*
(26) KYMLICKA, W., *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford et al.: Clarendon Press; 1995), 118.

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CHURCH AND STATE IN HUNGARY

SUMMARY: 1. *Social background.* — 2. *Historical remarks.* — 3. *Sources of law concerning Churches.* — 3.1. The Constitution. — 3.2. The Act on the Churches and other relevant legislation. — 3.3. International agreements. — 4. *Fundamental principles of Church-State Relations.* — 5. *Status of Churches.* — 6. *Internal organization of Churches - autonomy.* — 7. *Education and the media.* — 7.1. Religious instruction in state (public) schools. — 7.2. Church schools. — 7.3. Institutions of higher education. — 7.4. Churches and the media. — 8. *Labor Law and the Churches.* — 9. *Funding and property of churches.* — 9.1. The regulation on nationalized property. — 9.2. Public services. — 9.3. Funding through 1% of the income tax. — 9.4. Others channels of funds. — 10. *Exercise of religion under special circumstances.* — 11. *Status of clergy and members of religious orders.* — 12. *Church and marriage law.* — 13. *Conclusion.*

1. SOCIAL BACKGROUND

Data on religious conviction are regarded as sensitive data (1). Data referring to religious conviction must not be entered into official records (2). This, however does not rule out surveys for scientific or public purposes, if giving an answer is not mandatory and if the answers are anonymous (3).

Representative surveys show that about 70% of the population

(1) Act LXIII/1992. (on the protection of personal data and the publicity of data of public interest) § 2.2 (Notice on abbreviations: Acts of Parliament are referred to as "Act No. Z. of year X". Acts are numbered with Roman numbers, starting every year with I. Government decrees and the decisions of the Constitutional Court (AB) have numbers (starting with 1 every year) and the day of official promulgation is shown. Acts and decrees have sections (referred to as: §), subsections (referred to with numbers: (1)) and may have points (referred to with letters: a)).

(2) Act IV/1990. (on the freedom of conscience and religion and on churches) § 3. (2).

(3) Decision 72/1992. (XII. 28.) AB.

declares itself to be Catholic (2-3% of which are of Greek Catholics, while the large majority belongs to the Latin Church), 20% Reformed, 4% Lutheran and 0.5-1% Jewish. All the other denominations together represent less than 2% of the population. The data show that while the vast majority of the population has a religious (denominational) identity, the level of religiosity itself is low, by comparison with European figures; many non-believers tend to declare themselves "Catholic", or "Reformed". No more than 15% of the population can be regarded as regular churchgoers. The majority of children are baptized, but only about 30% of primary school children frequent religious education. Hungary became a heavily secularized country during the first three decades of socialism. Since the late 70's there have been signs of a religious revival. The political transition has brought a widespread, but not very deep, growth. After a few years of enthusiasm, the churches have found a solid social position again (4).

2. Historical remarks

Prior to World War II Hungarian law on churches (5) was a highly complex system of laws emerging from history. When during World War II a collection of legal norms necessary for the administration of churches was compiled (6), the editor had to remark that there were possibly also some laws from the period prior to 1514 that were not included in the collection despite being still in force. Indeed, Hungary had no written constitution before World War II, and there was no concordat or civil code. The Hungarian lawyer worked

(4) For the data and the social role of churches see M. Tomka, *Changes in the Structure of Denominations in East and Central Europe*, in *Review of Sociology* (Special Issue) 1996. 88-103.; M. Tomka, *The Church-State Relationship*, in É. Molnár (ed.), *Hungary. Essential Facts, Figures and Pictures*. Budapest, MTI Media data Bank 1997. 258-265.

(5) The general term that has gradually come to be used in Hungarian law to refer to religious communities is "church". Of course, religious communities are not obliged to use this term and are free to call themselves in any other way. The term "church" is used in this paper not as a theological concept but as the official term used in Hungarian law.

(6) L. Harai, *A vallás- és közoktatásügyi igazgatás hatályos jogszabályainak gyujteménye. II. rész: Vallásügyi igazgatás*, Budapest 1944.

with the Corpus Iuris Hungarici. Although freedom of religion was guaranteed by Act XLIII of 1895, the legal status of "incorporated" churches (that is the Catholic, the Orthodox, the Reformed (Calvinist-Presbyterian), the Lutheran and the Unitarian (Anti-Trinitarian) Churches, as well as the Jewish Community) remained different. These churches were also referred to as historical churches, as their status was not fundamentally determined by the Act of 1895 but by history. The old system preserved some elements of establishment, while it developed to ensure freedom of religion too.

These features of pre-war Hungarian "Staatskirchenrecht" make it clear that there was no possibility — not even in the technical sense, for reestablishing the legal system or the principles of the pre-communist era. Hungary, probably the oldest state in the region, used to be a highly traditional one.

The post-war period brought fundamental changes in the legal system. As the communists took power, a written constitution was promulgated in 1949 (since then, it has been amended several times). This constitution provided for the separation of church and state as well as (from 1972 to 1989) for the leading role of the Marxist-Leninist party. As this party was based on a materialistic ideology, believers were reduced to be second class citizens. Although religious freedom was mentioned in the Constitution as being guaranteed by the state, the practice developed from open persecution in the 50's to harassment and administrative discrimination in the later periods of the regime.

Hungary is the only country in Central and Eastern Europe that has not elaborated a new constitution since the fall of communism. The Constitution, however, has undergone fundamental changes. As there was no revolution in the legal sense of the word, the legal system acknowledges the continuity with the pre-transition legal system.

3. Sources of law concerning Churches

3.1. *The Constitution*

According to Section 60 of the Constitution of the Republic of Hungary

"(1) *In the Republic of Hungary everyone has the right to freedom of thought, conscience and religion.*

(2) *This right includes free choice or acceptance of religion or other convictions, and the liberty to publicly or privately express or decline to express, exercise and teach, such religions and convictions by the way of religious actions, rites or in any other way, either individually or in group.*

(3) *In the Republic of Hungary the Church functions in separation from the State.*

(4) *The ratification of the law on the freedom of conscience and of religion requires the votes of two thirds of the MPs present*".

3.2. *The Act on the Churches and other relevant legislation*

The Act on Freedom of Conscience and Religion and the Churches (7) was passed a few months before the first democratic elections. The Act was a major step to realize religious freedom: it provided both for individual and collective freedom and for a strict but benevolent separation.

The Act on Settlement of Ownership in Respect of the Former Real Estate of the Churches (8) was a major step in 1991 to enable churches to regain a social role especially serving the public and providing space for religious life. A number of norms affected church activities (given in detail below). In 1997 a separate Act was passed on the Financial Conditions of Religious and Public Activities of Churches (9).

3.3. *International agreements*

Hungary is party to a number of international agreements that are of significance in matters of religious freedom. Hungary signed and ratified the International Covenant on Civil and Political Rights (10),

(7) Act IV/1990.
(8) Act XXXII/1991.
(9) Act CXXIV/1997.
(10) Ratified by law decree 8/1976.

the Convention on the Rights of the Child (11) as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (12) with its additional protocols.

On 9 February 1990 — a few days after Parliament had passed the new law on the freedom of religions, but still before the new law was promulgated, the Holy See and Hungary reestablished diplomatic relations on the highest level. The accord signed in Budapest states that issues related to the church are settled by the new *Codex Iuris Canonici* and the new law on religious freedom (13). This means, on the one hand, that the Hungarian law on churches is primarily not based on agreements but on the law (14), and, on the other hand, that the law enjoys the positive acknowledgment of the Catholic Church. Two further agreements were concluded with the Holy See. On 10 January 1994 an agreement was signed on the military ordinariate (15), as this was a precondition for the Government to set up the army chaplaincy (16). On 20 June 1997 a third accord was signed solemnly in the Vatican on the financial issues concerning the Catholic Church (17).

Other churches too have entered into contractual relations with the state — certainly devoid of international character. Contracts have been signed on the army chaplaincies and on financial issues. The latter have been promulgated by the government (18).

(11) Ratified by Act LXIV/1991.
(12) Ratified by Act XXXI/1993.
(13) Published in the official gazette Magyar Közlöny 1990/35.
(14) P. ERDO, *Aktuelle staatskirchenrechtliche Fragen in Ungarn*, in *Österreichisches Archiv für Kirchenrecht* 40 (1991), 390.
(15) AAS 86 (1994) 574-579, 19/1994 international agreement from the minister of defense; E. BAURA, *L'Accordo tra la Santa Sede a la Repubblica di Ungheria sull'assistenza religiosa alle Forze Armate e di Polizia di Frontiera*, in *Ius Ecclesiae*, 7 (1995), 374-381.
(16) Government Decree 61/1994. (IV. 20.) Korm.
(17) Ratified by the decree of the Parliament: 109/1997. (XII. 8.) OGY, promulgated by Act LXX/1999; for the Holy See: AAS 90 (1998) 330-341.
(18) Government Resolution 1056/1999. (V. 26.) Korm. (Agreement with the Lutheran Church); 1057/1999. (V. 26.) Korm. (Agreement with the Reformed Church); 1058/1999. (V. 26.) Korm. (Agreement with the Federation of Jewish Communities).

4. Fundamental principles of Church-State relations

Neutrality can be seen as the most important principle governing the state in relation to religious communities as well as to other ideologies. The state should remain neutral in matters concerning ideology; there should be no official ideology, religious or secular. The state should have no ideology, however "*from the right to freedom of religion, follows the State's duty to ensure the possibility of the free formation of personal convictions*" (19). Neutrality means on the one hand that the state should not identify itself with any ideology (or religion), and consequently on the other hand that it must not be institutionally attached to a church or to churches. This shows that the underlying doctrine behind the principle of separation (explicitly stated in the Constitution) is the neutrality of the state. It is to be noted that neutrality has to be distinguished from indifference, which is not meant by the Constitution — as follows from the concept of neutrality elaborated by the Constitutional Court (20). Neutrality is not equivalent to "laïcisme"; the state may have an active role in providing an institutional legal framework as well as funds for the churches to ensure the free exercise of religion in practice. The state should not become institutionally entangled with any organization that is based on an ideology, whether religious or secular. Freedom of religion and freedom from religion are equally protected — neither case should be treated as an exception.

The meaning of separation can be defined on the one hand as respect of the autonomy of the churches ("*the State must not interfere with the internal workings of any church*") (21), and on the other hand with the principle stated in the law on religious freedom: "*No state pressure may be applied in the interest of enforcing the internal laws and rules of a church*" (22). Religious communities should have no possibility of making use of state power. The state

(19) Decision 4/1993. (II. 12.) AB.
(20) Ibid.
(21) Ibid.
(22) Act IV/1990, § 15. (2).

should respect the autonomy of religious organizations and should not interfere with their internal affairs. The state provides an appropriate legal form for religious organizations and registers those that meet the required formal criteria. The registered religious organizations all have the same legal standing; there should be no privileged or underprivileged group. Different levels of accommodation are not permissible (while it is true that groups with the largest numbers of followers find it easier to practice their faith, this is outside the scope of the Constitution).

The state has an active role in ensuring freedom: neutrality does not mean indifference. The state should promote an environment in which ideas and values (which are not to be judged by the state) can appear and develop. The state must keep away from the world of ideas and values, while at the same time appreciating and enhancing their existence (even by using public funds). Its role is to work out legalized compromises concerning issues where constitutional rights and interests come into conflict.

5. Status of Churches

According to the law on Freedom of Conscience and Religion and on the Churches "*Those following the same religious beliefs may, for the purpose of exercising their religion, set up a religious community, religious denomination or church (hereafter together referred to as 'churches') with self-government. (...) Churches may be founded for the pursuance of all religious activities that are not contrary to the Constitution and do not violate the law*". The registration of churches is performed by the county courts (similarly to the registration of associations, political parties and foundations). The requirements are highly formal: the church must be founded by 100 private individuals, and it must have a charter (containing at least the name, the seat, the organizational structure and the names of the organizational units of the church that are legal entities) as well as elected organs of administration and representation. The founders have to submit a declaration stating that the organiza-

tion that they have set up has a religious character and that its activities comply with the Constitution and the law (sections 8-9).

All churches that are registered have the same rights and the same obligations. Equality, however, is a matter of legal status, not of social significance. As the Constitutional Court has stated: "*Also, treating the churches equally does not exclude taking the actual social roles of the individual churches into account*" (23). It does not raise a constitutional issue that groups with large numbers of believers find it easier to practice their faith (e. g. their religious services are easier to accede to), or that the state makes distinctions between churches according to their social significance. For example the State has set up army chaplaincies for four denominations after having concluded respective agreements with them, while the free exercise of religion (not only in private but also in public) among the military is ensured for every denomination. As the Constitutional Court stated in its decision, the Government had the right to single out the churches that had members in significant numbers in the army (24) (these were: the Catholic Church, the Reformed and the Lutheran Evangelical Churches (sharing a military bishop) as well as the Federation of Jewish Communities). The scheme remains open for further churches, if they conclude an agreement with the State. One of the debated issues is how far the distinctions between different religious groups, that is between different social realities, are permissible without infringing upon the principle of freedom or crossing the threshold of discrimination. When do distinctions amount to discrimination?

Unlike associations, churches do not have to have a democratic structure (church charters can be anti-democratic). However, according to the law on churches, a church wishing to be registered is expected to have "*elected its organizations of administration and representation*" (section 9 (1)*b*)). The churches that had already been operating (and recognized) before 1990 were not subjected to a new registration; their new registration was carried out *ex officio*.

(23) Decision No. 4/1993. (II. 12.) AB.

(24) Decision No. 970/B/1994. AB, ABH 1995, 739.

This means that these churches were not required to have "elected" representatives. In the course of this registration process, the "Hungarian Catholic Church" was registered — a legal entity that does not exist under canon law. However, the agreement on the diplomatic relations between the Holy See and Hungary signed on 9 February 1990 states that the new law on religious freedom and the Code of Canon Law imply that the status of the Catholic Church has been "fundamentally settled". This is an example where the laws of a church and those of the state are not in complete compliance with each other, but the state legal framework can still be accepted by that church since it does not infringe upon its freedom.

The present system of registration of religious communities has been the target of criticism almost since the law on churches was passed in 1990. Many representatives of traditional churches felt offended at having been put into the same legal category as "sects". Some Protestant ecclesiologists have asked for a status in public law for the mainstream religious communities (25) (but such a status would hardly comply with the principle of separation as elaborated in recent years, since public legal entities are established by law and can make use of state power). It is true that an unexpectedly large number of "churches" have been registered (the number of churches is over a hundred by now), and that in a number of cases the religious nature of these organizations is doubtful. (The case of Scientology is well known, but UFO-believers and the association of witches could be mentioned too as examples of the broadness of the requirements.) Some individual members of Parliament handed in motions to change the law in 1993 and in 1998, raising the necessary minimum number of founders to 10,000 or requiring at least 100 years of presence in the country of the given faith. They would have imposed the additional requirement of submitting a creed with the registration, and that this creed should not violate public order, health, morals and the rights of others. These motions were not taken on the agenda of the Parliament; however, they con-

(25) E.g. L. BOLERATZKY, *A magyar evangélikus egyházjog alapjai és forrásai*, II. rész (The foundations and sources of Hungarian Lutheran ecclesiastical law), Budapest 1998, 381.

tributed to the discussion over the status of churches. The fact that a group can easily accede to the rank of a legal entity called "church" has become an invitation to various controversial groups and even to doubtful commercial undertakings to claim this privileged status. The government that came into power in 1998 intends to have the law changed.

A feasible compromise on the amendment would be to exclude the possibility of registering as "churches" groups lacking religious character. If the law provided a definition of religion and if it defined the activities that cannot be considered as religious, court practice of registration could be changed. In this case not only formal criteria would matter, but judges deciding on registration would have to determine if a group has a religious character or not. Instead of the present situation where registration can be performed by all the county courts, registration should become the competence of a single court in Budapest in order to ensure the consistency of the practice (26). It is to be noted that the practice of religion, whether in private or in public, whether alone or with others, is bound to no special legal status or structure. Groups registered as associations, or groups not registered at all, enjoy the same freedoms as registered ones; associations or unregistered groups have the same right to manifest their beliefs as the groups that have the legal status of a "church" (27).

6. Internal organization of Churches-autonomy

The legal personality of internal church entities is acknowledged by the state without any further registration if the statutes of a church provide for legal personality — as for parishes in the case of the Catholic Church. "Independent religious entities", such as religious orders, need court registration. The representatives of such organizations need to attach to their claim for registration a declaration from the church to which they are affiliated.

(26) The concept of the amendment has been published: B. Schanda, *Szakmai koncepció a lelkiismereti és vallásszabadságról valamint az egyházakról szóló 1990. évi IV. törvény módosítására*, in *Magyar Jog* 47 (2000) 1, 10-17.

(27) Decision No. 8/1993. (II. 27.) AB.

All church offices are to be filled by the exclusive decisions of the church concerned. No state body (including the courts) is entitled to rule over the canonical aspects of church offices. The government is not involved in any kind of nomination and the names of candidates or appointees are not communicated to the government. No oath of any kind is required by the state from any person taking a church office. An interesting and unique exception is the military ordinariate. According to the Government Decree on the Army Chaplaincy, the appointment of the army bishops, the rabbi and the pastors to the army chaplaincy is performed according to the agreements concluded with the religious communities concerned (28). The accord between the Holy See and the Republic of Hungary signed on 10 January 1994 requires the Holy See to communicate the name of the candidate designated to become the *ordinarius militaris*, and the government has the right to raise "general objections of a political nature" (29). These "objections" are not legally binding, so in the legal sense it is not a kind of a veto.

7. Education and the media

7.1. *Religious instruction in state (public) schools*

Most schools in Hungary are maintained by local authorities. The Constitution gives positive acknowledgment to the right of parents to decide on the education of their children (30). Corresponding to this right, churches have the right to provide religious instruction in public schools on demand of the pupils or the parents (31). (Non-public schools, such as church schools, are not obliged to provide religious instruction). Public schools must be of neutral character and should be accessible to everyone (32).

Being neutral, public schools should not endorse any religion or

(28) Government decree No. 61/1994. (IV. 20.) Korm. § 8. (4).

(29) International treaty No. 1994/19. from the minister of defense.

(30) Constitution § 67 (2).

(31) Act IV/1990. § 17. (2), Act LXXIX/1993. (on education) § 4. (4), § 10. (3) d), § 13. (3).

(32) Decision 4/1993. (II. 12.) AB; Act LXXIX/1993. § 4. (2).

ideology, but must provide objective information about religions and philosophical convictions. Schools must provide fundamental ethical knowledge (33). Public education on religion and church education of religion (religious instruction) are of a different nature. Religious instruction is not part of the program of public schools, religious instruction teachers are not members of the school staff, the marks given in religious instruction courses do not appear in school reports, and the churches decide freely on the contents of religious instruction classes as well as on their control (34). Religious instruction teachers are in the service of the churches, but the state provides funding to the churches in order to pay their salaries. Schools are only required to provide teaching facilities and an appropriate time for religious instruction classes (this is a difficult issue in many cases). Churches are free to transmit their beliefs during religious instruction classes: they do not have to provide neutral education. Religious instruction is not part of the public schools' task to provide information on religion, but is a form of introduction into the life of a given religious community on behalf of the parents.

7.2. *Church schools*

Hungarian law does not mention "denominational" or "religious" schools: the term used is "church" schools. Schools maintained by non-public entities are not bound by the principle of neutrality (35). This means that private schools can have a religious character, but also that they can exclude religious instruction delivered by the churches. Through a period of transition, there were some municipal schools as well as some classes in public schools with a religious character. This scheme was accepted only for a period of transition (36). Church schools are free to identify themselves with the teachings of a given religion (37). It is to be noted that the number

(33) Act LXXIX/1993. § 4. (2)-(3).
(34) Act LXXIX/1993. § 4. (4).
(35) Act LXXIX/1993. § 4. (2).
(36) Act LXXIX/1993. § 125. (1).
(37) Decision 4/1993. (II. 12.) AB.

of educational institutions (from kindergartens to secondary schools) maintained by churches rose from 10 secondary schools to 262 institutions by the year 1998/99 (38). The percentage of pupils attending church schools is still rising year by year, as newly founded schools are filling rapidly. However, these pupils are not likely to exceed 10% of the total, which means that this figure will remain below the percentage of active believers and way behind social demand.

7.3. *Institutions of higher education*

Prior to the elections in 1990, the law on education was changed in the sense that institutions of higher theological education were acknowledged as such, while existing theological faculties were granted the title of "theological universities" (39). This, however, did not affect the purely ecclesiastical charter of these institutions. Church institutions — including institutions of higher education — have been granted state subsidies just like public institutions (40). A list of theological institutions — that has been extended several times — has been published in the official gazette; this list is now attached to the law on higher education (41). The law on higher education requires the accreditation of theological institutions, but the contents of theological courses are not subjected to scrutiny (42). Theological degrees are recognized by the state. The law has detailed provisions that provide for exemptions from various obligations for church institutions, while in other cases there are no distinctions made. Beside the training of clergy, the training of catechists has become a major activity of church theological institutions.

(38) 69 kindergartens (1.4%), 168 primary schools (4.5%) and 77 secondary schools (7.4%). 5,000 children attend church kindergartens (1.3%); 39,000 study in primary schools (4%); and 20,000 in secondary schools (5.3%).
(39) Act XXIII/1990. on the modification of Act I/1985.
(40) Act XXIV/1990. on the modification of the budget (Act L/1989).
(41) Act LXXX/1993 (on higher education); at present, there are five "church universities" (one Catholic, one Lutheran, one Jewish and two Calvinist, as well as 23 other institutions of higher education, 13 of which are Catholic, while a number of smaller religious communities operate such institutions, like the Baptists, Adventists, Pentecostals, Buddhists, etc.).
(42) Act LXXX/1993. § 114.

Churches have also the right to maintain universities and other institutions of higher education that provide training in fields other than theology. Training in secular professions provided by the churches is subjected to the same kind of scrutiny in the procedure of accreditation as public universities, the degrees have the same value, and the institutions are to be funded to the same extent as public institu- tions (43). The number of subsidized student places is set every year within the framework of agreements concluded between the maintaining church and the government. After the Reformed Church had set up a teachers training college, the Catholic Theological University in Budapest was extended to become the "Péter Pázmány Catholic University", which has, beside a Faculty of Theology, a Faculty of Humanities, a Faculty of Information Technology and a Faculty of Law and Political Science as well as an Institute of Canon Law "ad instar facultatis" and acknowledged as such by the Congregation of Edu-cation (44). A few months after the Catholic University was founded, the Reformed Church founded a university too, extending its Faculty of Theology in Budapest with a Faculty of Humanities (a Law Faculty was added later, along with a teachers training college integrated into the university).

It is to be noted that there are no theological faculties in state universities in Hungary. The interpretation of separation and neutrality rule out the possibility of religious institutions maintained by or entangled with the state. Certainly courses *on* religion can be delivered in state institutions, but courses *of* religion cannot.

7.4. *Churches and the media*

The public media in Hungary are managed by shareholding companies. The governing bodies of these companies are public foundations. The board of the Hungarian Television Foundation and that of the Hungarian Radio Foundation are composed of 21 persons delegated by various organs of civil society. The "Hungaria Television Public Foundation", which manages a satellite program, is

(43) In this respect difficulties have been constantly arising.

(44) C. InstCath, Decr. Sacrorum canonum, 30. Nov. 1996: AAS 89 (1997) 148-149.

composed of 23 members. The Catholic Church, the Reformed Church, the Lutheran Church and the Alliance of Jewish Communities rotate on one seat in each board. All the other churches delegate together one person to each board (45). The special treatment of the "four historical churches" has been criticized on the one hand, but on the other hand the smaller religious communities that rotate on the other seat represent together less than 2% of the population. Both the small and the large churches can claim that the others are over-represented.

The public media allocate time for broadcasting services and other programs to religious communities. This allocation takes confessional percentages into account, while reducing the differences. The allocation is based on an agreement with the churches. The Catholic Church has 50% of the time, the Reformed Church 12.5%, the Lutheran Church 12.5%, and five other denominations share the remaining 12.5%.

8. Labor Law and the Churches

Labor law and social security law provide some particular schemes for persons — defined by the internal law of churches — who are in special "ecclesiastical labor schemes" within churches (46).

Discrimination on the basis of religion is prohibited by the Labor Code (47). Distinctions established by the nature of the requirements of the job are not considered as discriminatory. This exemption concerns the nature of the work and not that of the employer. This could suggest that the standards to be applied to the teachers of church schools can be different from those applied to the cleaners, for example. There is no court practice established yet defining how far ecclesiastical employers can go in requiring belief, membership or loyalty when selecting their employees. Employees in the public institutions of churches are not public employ-

(45) Act I/1996. section 56 (1) b)-c); (2) b)-c).

(46) Act LXXX/1997. (on social security and private pensions) § 26. (3).

(47) Act No. XXII of the year 1992. § 5.

ees: they are under the labor code scheme and not under the Civil Service scheme like their colleagues in municipal institutions. In practice churches usually provide a quasi civil service scheme in the framework of the labor contract.

Concerning Sunday laws, an interesting case was brought before the Constitutional Court by representatives of the religious Jews in Hungary. They challenged the provisions of the Labor Code (48), arguing that the free exercise of their religion was not assured by the legislation to an equal extent with that of the Christian religion, as the Labor Code determines only Christian holidays as days of rest (the 25th and the 26th of December, Easter Monday and Pentecost Monday). Furthermore, Saturdays can occasionally be designated as workdays by the Minister of Labor in order to provide "long weekends" (for example if a Thursday or a Tuesday is a public holiday, the day between this holiday and the weekend is declared a holiday too, and a Saturday of the previous week or the following week becomes a workday instead). Unlike Saturdays, Sundays cannot be turned into workdays. The Constitutional Court stated that the constitutional obligations of the state prohibit the privileged treatment of one religion (for example by declaring all of its holidays as days of rest). On the other hand, the state has to ensure the free exercise of all religions. However, although it is true that historically religious motives did determine the state's decision when choosing official holidays, the present holidays are the ones that the vast majority of society (not only practicing Christians) celebrate. Christmas and Easter for example are closely connected to family and folklore traditions. No Jewish holiday has gained such popular acceptance. The protection of Sunday used to have a religious background, but this is no longer the case. Sunday as a uniform day of rest is almost universal. The uniformity of this day of rest has a secular purpose (49). The solution that the Constitutional Court reached in this case is similar to what the Supreme Court of the United States of America ruled in the McGowan v. Maryland case: "*There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces.*" However "*(the present purpose and effect (...) is to provide a uniform day of rest for all citizens) the fact that this day is Sunday, a day of particular significance for dominant Christian sects, does not bar the State from achieving its secular goals*" (50). Several European jurisdictions, however, continue to regard "the protection of Sunday" as an institution that serves the free exercise of religion (51).

(48) Act No. XXII of the year 1992 § 125.

(49) Decision No. 10/1993. (II. 27.) AB, ABH 1993, 105.

9. Funding and property of churches

9.1. *The regulation on nationalized property*

In Hungary there was no re-privatization of property after the transition. Nationalization was regarded to be unjust, harmful and also illegal, but not invalid. The economic situation left by "real socialism" did not enable full restitution of or full compensation for lost property. Private individuals who had lost their property got partial compensation, by receiving compensation vouchers that they could use throughout the course of the privatization process. Churches were the only juridical persons to be compensated, on the basis of a special law (52). Churches could reclaim buildings secularized after 1948 and originally used for specific purposes in so far as these properties were — at the time when the Act came to force — the property of the state or of a local municipality. These specific purposes did not cover economic use, but a wide range of religious and non-profit activities like religious life, education, culture, health care institutions and houses of religious orders. The buildings claimed are to be used for one of these purposes too. The guiding principle of the Act was that churches should be

(50) 366 U. S. 420 (1961).

(51) Through the fact that a number of concordats and church-state agreements (e.g.: Germany), as well as laws on the free exercise of religion, enumerate the religious holidays and ensure the protection of Sundays in the context of religious rights (e.g.: Poland).

(52) Act XXXII/1991. (on settlement of ownership in respect of the former real estate of the churches); Dobszay J., *Restoring Church Property Constitutionally*, in *East European Constitutional Review* 7 (1998) 2 (Spring), 91-95.

helped to reestablish their means of functioning: this was regarded as constitutional, as it was considered as a necessary step towards ensuring again religious freedom (53). A joint committee, consisting of representatives of the church and of the government, was established for each denomination, and it drew up a motion for the transferring of the properties in question. In the case when no agreement could be reached, the government was to make the final decision. The law took into consideration the compensation of the current owner of the property (the municipality in most cases). As this financial burden made the procedure much slower than foreseen, in 1997 the deadline for the settlement was changed from the 10 years originally planned to 20 years (54). Following a financial agreement with the Holy See (55), a new law (56) passed in 1997 provided for the possibility of turning the value of non-restituted property into an inaugural fund that grants a sum every year to the church concerned (this is a kind of *Staatsleistung*). Beside the accord with the Holy See, similar agreements were concluded with the Alliance of Jewish Communities, the Lutheran Church, the Reformed Church, the Baptist Church and the Serb Orthodox Diocese.

9.2. *Public services*

Churches are free to perform any public activity that is not reserved to the state. Churches performing public activities (maintaining schools or engaged in social service) are granted from the budget a level of support that is supposed to be equal to the support received by the public institutions that serve the same purpose (57). Because of some changes in the system of education

(53) Decision 4/1993. (II. 12.) AB.

(54) Act CXXV/1997.

(55) Accord signed on the 20 June 1997. See P. ERDO, *Accordo tra la Santa Sede e la Repubblica d'Ungheria*, in *Anuario de Derecho Eclesiástico del Estado*, XIV (1998) 721-728.; *Ius Ecclesiae* 10 (1998) 652-659.

(56) Act CXXIV/1997. (on the financial conditions of the religious and public activities of churches).

(57) Act IV/1990. § 19. (1).

funding, the state failed to provide the same level of funding to church education for several years (58). This led to a Constitutional Court case that stated that equal funding was required by the Constitution as a consequence of religious freedom and of the principle of non-discrimination (59). Following this, the principle of equal funding was fixed bilaterally by an accord with the Holy See and by agreements with the other major churches. Other public activities (like health and social care) are supposed to receive equal funding too. Schemes for the funding of these activities are now being elaborated.

9.3. *Funding through 1% of the income tax*

Until 1998, direct state funding was provided to the churches. Since the tax report on the year 1997 (which was due in March 1998), taxpayers have been given the possibility of deciding that 1% of their income tax should be directed to a church of their choice or to a public fund (another 1% can be directed to NGOs, museums, theaters and other public institutions) (60). Until 2002, the state guarantees to complement the amount up to 0.5% of the total income tax revenue, according to the proportion of income tax reports declaring to give the 1%.

As the system is fairly complicated (partly due to reasons of data protection, churches were given so-called technical numbers that were to be filled in on a special form that had to be attached in a closed envelope to the tax report or be handed over to the employer if the employee received his/her salary only from that employer, so that he/she did not need to fill in a separate tax report), in the first year only 10.25% of the taxpayers (practically only regular churchgoers) filled in the declaration (61). A review of the

(58) B. SCHANDA, *The Relationship between State and Church in Hungary: The Financing of the Church*, in A. SAJÓ, S. AVINERI (eds.), *The Law of Religious Identity. Models for Post-Communism*, The Hague/London/Boston, Kluwer Law International, 1999, 175, 187.

(59) Decision 22/1997. (IV. 25.) AB

(60) Act CXXIX/1996. (on the use of a specified amount of personal income tax in accordance with the taxpayer's instruction).

(61) 62% of the declarations were to the benefit of the Catholic Church, 18% to the

system is planned in the agreement on financial issues between the Holy See and Hungary for the year 2001.

One of the difficulties of the system is that — contrary to the Italian model — Hungarian taxpayers decide on 1% of their own income tax, which means that those having a larger income and paying more progressive income tax have a larger say in distributing this sum. Another unfortunate aspect is that pensioners (who pay no income tax in Hungary if their only income is the pension) and low income taxpayers are excluded from the system. The consequence is that it is not the community of citizens but a small part of the active population who decide on the distribution of those funds. The data concerning the first two years may be of interest. The total number of declarations given in 1998 (with the tax report of the year 1997) was 478,181 (in 1999 this figure grew to 493,052, and in 2000 to 524,867). Denominational proportions did not bring great surprises: 66.7% of the declarations were made in benefit of the Catholic Church, 19.1% in benefit of the Reformed Church, 5.7% in benefit of the Lutheran Church. The proportion of the declarations show that the Faith Church (a charismatic-evangelical congregation) has become the fourth largest religious community, while the four communities regarded as "mainstream" remain the Catholic, Reformed and Lutheran Churches, and the Jewish Community (62).

9.4. *Others channels of funds*

Churches can receive subsidies from the central budget for the maintenance of religious and cultural heritage, historical buildings, archives, libraries and museums (63).

Reformed Church and 5% to the Lutheran Church. 12,000 declarations were in favor of the "Faith Church", an evangelical congregation, and 2,600 in favor of the Jewish Community.

(62) Smaller communities may display significant changes in their support. For example the declarations to the benefit of the "Faith Church" dropped to 8,000, while the declarations to the benefit of the Jewish Community doubled. For further details on funding see B. SCHANDA, *Church and State in Hungary in 1999. The Funding of Churches in Hungary*, in *European Journal for Church and State Research* 7 (2000).

(63) Act CXXIV/1997. § 7. (1).

Churches are free to receive donations (which, however, are not tax-deductible). Churches also have the right to act as entrepreneurs enjoying some benefits. In practice, the business activity of churches is insignificant (except for some "new religious movements"). Churches enjoy benefits of various kinds, similar to those of non-profit organizations: for example they are exempt of local taxes (64) and fees (65).

10. EXERCISE OF RELIGION UNDER SPECIAL CIRCUMSTANCES

Individual and collective worship should be made possible in institutions of social and health care (66) as well as in penal institutions (67).

For those serving in the army, a Military Chaplaincy has been set up (68) for the denominations that can show up a minimum level of demand within the military. All other religious communities are free to operate within the military organization in harmony with the order of the army. The Constitutional Court has accepted to leave a margin of appreciation to the state, which allows the state to handle religious communities differently when there are significant differences in practice. As the Constitutional Court has stated, the existence of the Chaplaincy does not lead to an unconstitutional entanglement between the state and religion, as the Chaplaincy does not function as an institutional part of the military but works next to it (69). Army chaplains are nominated by their churches and they are at the same time appointed officers with a military rank. They must comply with military orders, but their religious activities are not subordinated to the hierarchy of the army. The Chaplaincy is maintained by the state.

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(64) Act C/1990. (on local taxes) § 3. (2).

(65) Act XCIII/1990. (on duties) § 5.

(66) Act IV/1990. § 6; Act CLIV/1997. (on health care) § 11. (6).

(67) 6/1996. (VII. 12.) IM r. § 93-99.

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

(69) Decision No. 970/B/1994. AB, ABH 1995, 739.

11. Status of clergy and members of religious orders

There is no special status in private law provided for members of the clergy and for members of religious orders. Clergymen serving with a church are exempt from military service (70) and future clergymen (seminarists) are not drafted either.

12. Church and marriage law

Marriage law has been separated in Hungary since the introduction of the compulsory civil wedding in 1895. Due to the strict interpretation of separation, church (canonical) marriages, as well as the church jurisdiction on marriage issues, are ignored by the state. Following a change in the law in 1962, the celebration of a church marriage prior to (or without) a civil marriage is not punishable any more, as it is regarded as an internal church affair. Of course, as a matter of international private law, church marriages celebrated under the jurisdictions of states that acknowledge them are also acknowledged by the Hungarian State.

13. Conclusion

In a comparison with other European countries, the Hungarian situation seems to show the greatest similarities with the Italian-Spanish pattern. The separation — especially the institutional separation — between church and state in Hungary is definitely stricter than in the "coordination model" of Germany, but the Hungarian state provides favorable conditions for church activities to a much greater degree than in the case of secular ("laïque") France. The Hungarian model that emerged in the 90's can be described as a benevolent separation well respecting the freedom of churches and enhancing their activities.

(70) Act CX/1993. (on national defense) § 103. (1) g), § 134. (1).

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LE STATUT JURIDIQUE DES COMMUNAUTÉS RELIGIEUSES EN POLOGNE

RÉSUMÉ: 1. *Données historiques.* — 2. *Données sociales.* — 3. *Les sources du droit confessionnel.* — 4. *Les caractéristiques essentielles de la position de l'État à l'égard des communautés religieuses.* — 5. *Les droits des communautés religieuses.* — 5.1. Droits concernant le culte religieux. — *a*) Les activités cultuelles et pastorales. — *b*) La propagation des principes et valeurs religieux. — *c*) L'instruction religieuse dans les écoles publiques. — *d*) La formation des ecclésiastiques. — *e*) Les mariages religieux. — 5.2. Droits autonomes des communautés religieuses. — *a*) Autonomie et gestion indépendante. — *b*) Ordres religieux et diaconats. — *c*) Statut juridique des ecclésiastiques. — 5.3. Droits patrimoniaux et financiers des communautés religieuses. — *a*) La personnalité juridique des communautés religieuses. — *b*) Les droits patrimoniaux des communautés religieuses. — *c*) Les édifices et les cimetières cultuels. — *d*) Les revenus et l'imposition des communautés religieuses. — 6. *Les activités extra-religieuses des communautés religieuses.*— 7. *Remarques finales.*

1. Données historiques

Avec le baptême, en 966, du prince Mieszko I[er], la Pologne devint un État chrétien, où la religion remplissait d'importantes fonctions étatiques. Créée en l'an 1000, la province ecclésiastique de Gniezno, qui comptait quatre diocèses, renforçait la position internationale de l'État et fortifiait l'administration encore fragile du pays. Au XIV[e] siècle, suite à l'incorporation de la Ruthénie de Halicz et à la conclusion de l'union avec la Lituanie, l'État Polonais accueillit un groupe nombreux de fidèles de l'Église orthodoxe, ainsi que de petits groupes de musulmans et de karaïtes. Avec la population juive, qui affluait en Pologne depuis le XII[e] siècle, toutes ces populations constituaient le groupe des minorités religieuses, appelés aussi dissidents, par contraste avec les catholiques, groupe numériquement dominant et bénéficiant d'une position juridique privilégiée.

Avec le consentement des autorités publiques, les minorités religieuses avaient leurs propres structures, bénéficiaient de la liberté de culte, possédaient des édifices consacrés au culte et des cimetières. La noblesse orthodoxe ne subissait plus de discriminations depuis le XV[e] siècle dans les nominations aux fonctions publiques. Sous l'influence de la politique de liberté religieuse pratiquée par les rois de Pologne, les rapports entre les adeptes de la religion dominante et ceux des religions minoritaires étaient empreints de tolérance, et cette situation se voyait consolidée par les opinions progressistes d'auteurs politiques. Ces derniers écrivaient en effet que l'État pouvait exister et fonctionner sans unité religieuse de la société, et que cette unité pouvait être rétablie, s'il y avait lieu, par des méthodes uniquement pacifiques (1).

Les derniers rois de la dynastie des Jagellons se montrèrent tolérants à l'égard des idées de la Réforme protestante propagées dans le pays. Contraints par les légats et les évêques catholiques, ils rendaient certes des édits rigoureux contre les proclamateurs de la Réforme. Mais ces édits n'étaient pas appliqués en pratique, par suite de la résistance de la noblesse qui y voyait une menace pour la liberté individuelle. Au XVI[e] siècle aucun noble calviniste, luthérien ou anabaptiste ne fut condamné à mort. Cette tolérance des rois polonais était déterminée par la raison d'État, car si une guerre religieuse avait éclaté en Pologne, cela aurait pu provoquer la désintégration de cet État à religions multiples (2).

Après la mort de Sigismond Auguste, dernier roi de la dynastie des Jagellons, les députés catholiques, orthodoxes et protestants se réunirent en Diète en 1573, afin d'établir les règles régissant l'élection du nouveau souverain. A cette occasion, ils adoptèrent l'acte de confédération, loi qui reconnaissait la légalité des religions existantes, garantissait la paix religieuse, et prohibait l'effusion de sang pour cause de convictions religieuses. Ses principales dispositions firent ensuite partie des Articles dits d'Henri, considérés comme lois fondamentales de la monarchie et que chaque roi élu était tenu

(1) Cf. P. Wlodkowic, *Tractatus de potestate papae et imperatoris respectu infidelium*. Starodawne Prawa Polskiego Pomniki, Kraków, t. V, p. 188.

(2) Cf. J. Tazbir, *Państwo bez stosów (Un État sans échafauds)*, Warszawa 1967, p. 89.

d'appliquer sous peine de destitution. Ces articles constituaient le fondement juridique de la liberté de religion et de l'égalité des droits politiques entre orthodoxes, protestants et catholiques; cependant, seuls la noblesse et les bourgeois des villes royales en étaient bénéficiaires (3).

Les progrès de la Contre-Réforme amenèrent une limitation progressive de la liberté de culte des minorités religieuses. En 1658, la Diète vota une loi ordonnant aux "Ariens" (les Frères Polonais, une fraction radicale du calvinisme) de changer de religion ou de quitter la Pologne dans un délai de trois ans. Celui qui, sans changer de religion, refusait de quitter le pays était menacé de la peine de mort et de confiscation de ses biens. L'année suivante il fut interdit aux Polonais d'adopter le calvinisme. En 1668, une nouvelle loi sur l'apostasie interdit aux catholiques d'abjurer, sous peine de confiscation de leurs biens et de bannissement. On cessa de confier des fonctions officielles à des nobles protestants ou orthodoxes. La destruction des temples protestants par des fanatiques catholiques dans les villes royales ne fut pas combattue par des mesures efficaces des autorités publiques (4). La Constitution du 3 mai 1791 continuait à déclarer que la religion catholique était religion d'État et menaçait de peines son abandon, mais accordait à d'autres religions la liberté de culte et la protection des autorités publiques. Elle accorda les droits politiques aux protestants et aux orthodoxes, à l'exception de l'exercice de la fonction de ministre (5).

A l'époque des partages (1795-1918), les divisions religieuses de la société polonaise subsistaient. La religion catholique n'était plus religion d'État et subissait diverses restrictions dans les régions occupées par la Russie et la Prusse. Le clergé catholique jouait un

(3) Cf. S. Salmonowicz, *Konfederacja Warszawska 1573* (La Confédération de Varsovie 1573), Warszawa 1985, p. 19 et suiv.; J. Maciuszko, *Konfederacja Warszawska 1573* (Confédération de Varsovie 1573), Warszawa 1979.

(4) Cf. W. Kosman, *Protestanci i Kontrreformacja. Z dziejów tolerancji w Rzeczypospolitej XVII-XVIII wieku (Les protestants et la Contre-Réforme. Cartes de l'histoire de la tolérance dans la République aux XVII[e]-XVIII[e] siècles)*, Wrocław 1978; J. Tazbir, *Bracia Polscy na wygnaniu (Les Frères Polonais en exil)*, Warszawa 1977.

(5) Cf. B. Leśnodorski, *Dzieło Sejmu Czteroletniego (Histoire de la Diète de Quatre Ans)*, Wrocław 1951, p. 281.

rôle éminent dans les activités tendant à l'entretien de la vie nationale et s'opposait à la russification et à la germanisation. A cette époque s'affirmèrent les liens étroits de la majorité des Polonais avec le catholicisme (6).

Après le recouvrement de l'indépendance en 1918, la politique de l'État en matière confessionnelle fut déterminée par les divisions religieuses et politiques de la société ainsi que par les traditions historiques du pays. La structure religieuse de la population montre une étroite relation avec la division de celle-ci en nationalités. Dans leur grande majorité les Polonais étaient catholiques de rite latin (environ 65%), tandis que les minorités religieuses s'identifiaient à des minorités nationales: les gréco-catholiques (11%) à la minorité ukrainienne, les orthodoxes (10%) aux minorités biélorusse et ukrainienne, les luthériens (3%) à la minorité allemande, et les adeptes de la religion judaïque (10%) à la minorité juive. Les antagonismes et conflits nationaux, étroitement associés au phénomène religieux, contribuèrent à une intensification de l'intolérance religieuse. Dans l'État redevenu indépendant, le pouvoir politique fut conquis et conservé jusqu'en 1939 par des couches sociales et des groupes politiques liés au catholicisme, qui voyaient dans cette religion le point d'appui de l'existence et du développement de l'État Polonais. La Cour Suprême déclarait que la religion n'était pas seulement un bien des groupes confessionnels mais un important élément constitutif de la vie sociale, nationale et étatique.

La Constitution du 17 mars 1921 consacrait beaucoup de place aux questions religieuses. Ses dispositions étaient axées sur la liberté de conscience et de religion, et sur la situation juridique des communautés religieuses. La Constitution divisait ces dernières en communautés juridiquement reconnues et communautés juridiquement non-reconnues, indiquait le mode de régulation de leur situation juridique, et définissait les procédés de légalisation de celles qui viendraient à se constituer. Parmi les communautés juridiquement reconnues, la Constitution accordait la première place à la

(6) Cf. J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia ustroju i prawa polskiego (Histoire des régimes constitutionnels et du droit polonais)*, Warszawa 1999, p. 412.

religion catholique, ce qui en pratique plaçait celle-ci en position dominante. Le statut juridique de l'Église catholique romaine étaient réglé par le concordat de 1925, qui accordait à celle-ci de nombreux privilèges. La régulation du statut des religions juridiquement reconnues par les États copartageants rencontrait résistances et difficultés. Sur les 42 communautés concernées, sept seulement furent traitées conformément à la Constitution. Jusqu'en 1939, aucune nouvelle communauté religieuse ne fut reconnue, malgré les instantes tentatives des intéressées (7).

Les activités cultuelles et organisationnelles des communautés minoritaires étaient soumises à une surveillance rigoureuse des autorités administratives. La division en communautés juridiquement reconnues et non-reconnues avait pour effet que les personnes affiliées à ces dernières, ainsi que les non croyants, ne pouvaient contracter mariage, car les dispositions du droit matrimonial en vigueur sur la majeure partie du territoire national étaient applicables seulement aux adeptes des communautés reconnues. Tous les jeunes fréquentant l'école primaire ou l'école secondaire devaient suivre l'instruction religieuse indépendamment de la volonté des parents. Dans les écoles pouvaient être donnés des cours d'instruction religieuse des communautés reconnues. La liberté religieuse de l'individu fut en pratique ramenée à la possibilité de choisir parmi les communautés reconnues. Le refus de reconnaître juridiquement de nouvelles communautés religieuses traduisait la tendance des autorités publiques à vouloir préserver la position dominante de l'Église catholique romaine, et à maintenir les divisions religieuses existantes dans la société (8).

Après 1944, la Pologne se retrouva dans le camp des pays socialistes totalitaires, politiquement dominés par l'Union Soviétique. La politique confessionnelle de ces pays, déterminée par la doctrine marxiste-léniniste, visait à créer un État athée. Malgré une phraséologie libérale dans les constitutions et les lois, cette politique avait pour effet la limitation de la liberté religieuse, la liquidation de l'autonomie

(7) Cf. J. Osuchowski, *Prawo wyznaniowe RP 1918-1939 (Droit des cultes de la R.P. 1918-1939)*, Warszawa 1967, p. 244.

(8) Cf. K. Krasowski, *Związki wyznaniowe II Rzeczypospolitej (Les communautés religieuses de la II^e République)*, Warszawa - Poznań 1988, p. 310.

des communautés religieuses et la tendance à les utiliser dans la réalisation des objectifs de l'État socialiste. La séparation, formellement acceptée, de l'Église et de l'État, n'avait pas d'importance pratique, et elle ne garantissait nullement l'indépendance des communautés tant en ce qui concerne leur organisation que leur fonctionnement (9).

La situation juridique des communautés religieuses en Pologne dans les années 1944-1989 manifestait des particularités notables par rapport aux autres pays du camp socialiste. Par suite du déplacement des frontières et des échanges de populations, la Pologne devint un pays quasi homogène au plan religieux (90% de catholiques). Ceci fit croître l'importance de l'Église catholique romaine et de son clergé dans la vie de la société, fait dont les autorités socialistes étaient obligées de tenir compte. La politique confessionnelle des gouvernements successifs était déterminée par l'idéologie marxiste-léniniste, mais l'influence de cette dernière était principalement théorique. En pratique, cette politique oscillait entre l'option dogmatique d'inspiration idéologique, et l'option réaliste tenant compte des réalités sociales, dont l'attachement de la population à la religion. Dès les années soixante, cette seconde option prévalut et trouva son expression normative dans les lois dites confessionnelles du 17 mai 1989 (10).

L'Église catholique romaine exerçait une influence notable sur la politique de l'État. Dirigée par un homme politique de grande envergure, le cardinal S. Wyszyński, l'Église sut s'adapter à la nouvelle situation. Elle concentra son attention sur la défense de son organisation autonome et sur le libre exercice de ses fonctions religieuses. Cependant, les activités de l'Église ne se limitaient pas à des tâches religieuses et à des démarches visant à assurer de bonnes conditions pour leur réalisation. Exerçant son activité pastorale, l'Église ne pouvait rester indifférente aux conditions sociales et politiques de la vie des catholiques. Dans le système totalitaire qui existait en Pologne, "à défaut d'organisations indépendantes des autorités publiques, l'Église catholique romaine prenait les fonctions

(9) Cf. G. BARBERINI, *Stati socialisti e confesioni religiose*, Milano 1973; M. STASZEWSKI, *Stosunki między państwem i kościołem w europejskich krajach socjalistycznych (Les rapports de l'État et de l'Église dans les pays socialistes européens)*, Warszawa 1976.

(10) Cf. M. PIETRZAK, *Prawo wyznaniowe (Droit des cultes)*, Warszawa 1999, p. 164.

de porte-parole des intérêts et des aspirations de la société, en devenant un parti d'opposition", comme le déclarait M. Duverger au Congrès des politologues à Paris en 1985. En exerçant, par substitution, cette fonction supplémentaire d'intermédiaire entre la société et les pouvoirs publics, l'Église utilisait les formes accessibles de communication religieuse (homélies, lettres pastorales), la Commission mixte du Gouvernement et de l'Épiscopat (qui a fonctionné pendant toute cette période), et les rencontres périodiques du Primat avec le Premier Secrétaire du Parti Communiste. L'Église exerçait une influence marquante non seulement sur la politique confessionnelle, mais aussi sur d'autres décisions des pouvoirs publics. Elle défendait les droits de l'homme, revendiquait l'égalité en droit des croyants dans la vie politique, et préconisait des changements constitutionnels démocratiques. Après l'instauration de l'état de guerre (d'exception) en 1981, elle défendit les personnes internées, aida leurs familles et appela au dialogue avec l'opposition de "Solidarnosc". Elle joua un rôle incontestable en amenant les adversaires politiques à dialoguer aux entretiens de la Table ronde en 1989 (11).

Les solutions normatives de la Constitution du 22 juillet 1952 garantissaient la liberté de conscience et de religion, la liberté d'exercice des fonctions religieuses par les communautés religieuses, la séparation de l'Église et de l'État, l'égalité des citoyens en droit sans distinction de religion. Ces dispositions avaient un contenu général, ce qui permettait leur interprétation arbitraire, en fonction des besoins du moment des autorités publiques. En pratique, il s'agissait de dispositions de façade. Elles ne représentaient pas des directives obligatoires pour les pouvoirs publics lors de l'adoption des lois et des règlements d'application, et même si, pour des raisons de propagande, elles étaient concrétisées par ces pouvoirs, leur réalisation dépendait des autorités administratives. Leur application n'était soumise à aucun contrôle, en l'absence, jusqu'en 1980, d'une juridiction administrative et de tribunaux de droit commun indépendants, mais aussi à cause de l'existence d'une censure préventive imposée aux

(11) Cf. G. BARBERINI, *Stato socialista e Chiesa Cattolica in Polonia*, Bologna 1983; G. KACZYŃSKI, M. TEDESCHI, *La Chiesa del dialogo in Polonia*, Milano 1980; P. MICHEL, *Kościół Katolicki a totalitaryzm (L'Église Catholique et le totalitarisme)*, Warszawa 1995.

médias. Aussi les dispositions juridiques ne reflétaient-elles pas la situation des communautés religieuses, notamment le champ de libre exercice des fonctions religieuses et des activités non-religieuses.

Les transformations socio-politiques de 1980 eurent une influence marquante sur le processus d'extension des droits et libertés de l'individu, y compris la liberté de culte. Ce processus aboutit à l'adoption, le 17 mai 1989, de trois lois portant sur le statut de la religion: loi sur la position de l'État envers l'Église catholique, loi sur les garanties de la liberté de conscience et de religion, et loi sur les assurances sociales des ecclésiastiques. L'œuvre de ces textes est d'avoir créé une nouvelle situation juridique pour les communautés religieuses, correspondant aux valeurs des États libéraux-démocratiques. Ces lois garantissaient aux communautés religieuses l'autonomie et la liberté d'activité religieuse ainsi qu'extrareligieuse. Elles ont aussi donné à l'état un caractère neutre au plan confessionnel, instauré une procédure libérale d'enregistrement des nouvelles communautés religieuses, accordé aux communautés des allégements et des privilèges financiers. Ce nouveau statut juridique des communautés devait fonctionner dans l'État socialiste. Les auteurs de ces lois ne prévoyaient pas qu'à partir de 1989 elles seraient en vigueur dans un État démocratique (12).

2. Données sociales

Les transformations politiques de 1989 ouvrirent le processus d'installation en Pologne du système démocratique. Les changements opérés ne demeurèrent pas sans influence sur la politique des nouveaux pouvoirs publics en matière de religion. Cette politique subissait l'incidence de nombreux facteurs, tels que les rapports au sein de la société sur le plan religieux et la position dominante des catholiques, la réaction aux événements d'un passé récent et l'activité politique de la hiérarchie et du clergé catholiques romains. Se-

(12) M. Pietrzak, *Les rapports entre l'État et l'Église en Pologne à la lumière des lois dites confessionnelles du 17 mai 1989.* Anuario de Derecho Eclesiástico del Estado, 7 (1991), p. 279 et suiv.

lon l'Annuaire statistique qui tire ces informations de sources ecclésiastiques, on compte en Pologne 34,7 millions de catholiques, soit 90% de la population du pays. Les minorités religieuses comptent 870.000 fidèles, soit 2,2% de la population; il s'agit-là des orthodoxes, des luthériens, des calvinistes, des vieux-catholiques, des témoins de Jéhovah, des baptistes, des adventistes et des méthodistes. Le nombre de Polonais sans confession s'élève à trois millions, soit 7,8% de la population. Tout ceci confère un rôle particulier à l'Église catholique romaine dans tous les domaines de la vie collective, et explique son influence sur l'orientation de la politique des autorités publiques en matière religieuse.

L'Église catholique romaine dispose d'une organisation efficace qui comprend 13 métropoles, 40 diocèses et presque 10.000 paroisses. L'activité pastorale est exercée par 27.000 ecclésiastiques, dont 5.000 membres du clergé régulier, assistés de 1.500 moines, 24.000 religieuses, et 4.700 séminaristes. Avec un dispositif aussi développé, l'Église peut influencer efficacement la vie sociale et politique en déployant diverses formes d'activité religieuse ou non-religieuse. Les autres communautés religieuses, dont les possibilités organisationnelles et financières sont restreintes, limitent leurs activités au domaine religieux.

Les transformations constitutionnelles démocratiques commencées en 1989 ont imposé à toutes les communautés religieuses la nécessité de se situer dans la vie de la communauté politique. Le choix de ses buts et de ses formes d'activité apparut comme une tâche difficile pour l'Église catholique romaine, qui n'avait pas l'intention, contrairement aux autres communautés, de limiter son activité au domaine religieux même compris au sens large. L'Église a eu à choisir entre deux attitudes distinctes.

La première attitude consiste à accepter le caractère laïque et neutre de l'État, reconnu comme bien commun tant par les croyants de toutes religions que par les incroyants, et à accepter que la société civile soit fondée sur une pluralité d'intérêts, de valeurs et de façons de vivre. Dans une telle société, l'Église exerce son influence sur l'orientation de la politique de l'État par l'intermédiaire d'organisations de laïcs catholiques. La seconde attitude se manifeste par

une remise en cause de la neutralité de l'État laïque, par la recherche d'une place pour l'Église dans les structures de l'État, et par la tendance à vouloir imprégner les activités de l'État avec les priorités et les valeurs catholiques. Cette seconde attitude trouve son expression dans le modèle d'État catholique où les prescriptions de la religion constituent des prémisses ou des indications pour la législation de l'État, où les décisions prises en vertu du droit canon produisent effet le droit d'État, et où les tâches ecclésiastiques sont réalisées par des institutions publiques et payées par l'État. Dans un État ainsi conçu, les réponses des catholiques aux questions laïques ne sont pas plurielles, mais déterminées ou suggérées par la hiérarchie et le clergé catholiques. Les autorités ecclésiastiques prétendent censurer les controverses politiques et sociales. Les comportements politiques des catholiques subissent la pression des prescriptions religieuses, voire du contrôle du clergé.

Malgré l'absence d'options claires et de divergences internes, l'Épiscopat catholique romain se prononce plutôt pour la seconde attitude. En témoignent le fait que l'Église a inspiré et soutenu l'introduction d'éléments de l'État confessionnel dans la législation nationale dans les années 1989-1999, ainsi que l'influence exercée par l'Église sur la conduite des autorités administratives.

3. Les sources du droit confessionnel

Le système et la hiérarchie des sources du droit sont définis par la Constitution du 2 avril 1997. Au sommet de cette structure figure la Constitution. La place suivante est occupée par les conventions internationales ratifiées par le parlement et revêtant forme de loi. La place suivante est accordée par la Constitution aux lois et ensuite aux règlements d'application rendus par les organes compétents en vertu d'une délégation de la loi.

Les dispositions constitutionnelles relatives aux questions religieuses règlent les rapports de l'État et des communautés religieuses ainsi que le contenu des notions de liberté de conscience et de religion. Elles prennent effet directement, sauf dans les cas où la Constitution impose aux lois une régulation spéciale. Les dispositions des

accords internationaux sont, elles aussi, directement applicables, à moins que leur application n'exige l'adoption d'une loi. Les conventions, les pactes relatifs aux droits de l'homme et les déclarations internationales signés et ratifiés par la Pologne, ont une portée obligatoire générale. Les plus importants sont: la Déclaration Universelle des Droits de l'Homme du 10 décembre 1948, le Pacte International du 16 décembre 1966 relatif aux Droits Civils et Politiques, la Convention Européenne du 4 novembre 1950 sur la Protection des Droits de l'Homme et des Libertés Fondamentales avec ses Protocoles additionnels. Le concordat signé le 28 juillet 1993, ratifié le 23 février 1998, a une portée obligatoire seulement pour les catholiques.

Les sources légales du droit Confessionnel peuvent être divisées en trois groupes. Le premier groupe comprend la loi du 17 mai 1989 sur les garanties de la liberté de conscience et de religion, plusieurs fois amendée, la dernière fois en 1998. Elle remplit les fonctions de loi d'application des dispositions de la Constitution relatives aux questions religieuses. Elle concrétise les droits individuels et collectifs résultant de la liberté de religion, et règle la procédure de légalisation des nouvelles communautés religieuses. Le deuxième groupe comprend les lois définissant la situation juridique des différentes communautés religieuses. Ce mode de régulation, adopté en 1989, a été maintenu par la Constitution en vigueur. Le troisième groupe comprend les lois réglant les manifestations déterminées des activités de toutes les communautés religieuses.

Les sources autres que les lois comprennent les règlements d'application des lois et les statuts du droit interne des communautés religieuses. Le pouvoir de statuer sur leur droit interne résulte de l'autonomie de ces communautés. Ce droit définit l'organisation et le fonctionnement des organes internes, et règle les droits et les devoirs des fidèles. Le droit national (de l'État) reconnaît l'efficacité de certaines dispositions de ce droit interne dans l'ordre juridique de l'État.

4. Les caractéristiques essentielles de la position de l'État à l'égard des communautés religieuses

Le système juridique régissant les rapports de l'État et des

communautés religieuses est déterminé par plusieurs prémisses, lesquelles ont leur source dans les libertés universellement acceptées, principalement dans la liberté de conscience et de religion. En définissant ses relations avec les communautés religieuses, l'État doit tenir compte des besoins et intérêts religieux de la population. Les formes juridiques sous lesquelles les différents États définissent le statut juridique des communautés religieuses sont notablement diversifiées.

En Pologne, selon le principe en vigueur, élaboré au cours de l'histoire, la situation juridique des communautés religieuses est réglée par les dispositions des lois universellement en vigueur, sauf les dispositions concernant exclusivement ces communautés et prévoyant des règles spéciales (*lex specialis*). Ces dispositions plus avantageuses que celles universellement en vigueur se fondent sur la reconnaissance de l'utilité des fonctions de la religion pour la vie des individus ou des groupes. Ceci se reflète dans la procédure régissant la naissance de nouvelles communautés, dans la régulation de la situation juridique des communautés légalement existantes, et dans les prérogatives leur garantissant le libre exercice des fonctions religieuses. Les solutions adoptées composent le système de la position de l'État à l'égard des communautés religieuses.

Dans la régulation du statut juridique des communautés religieuses, on distingue deux niveaux: 1° la légalisation de leur création, 2° la régulation de la situation juridique des communautés légalement existantes.

Le premier niveau est régulé par la loi sur les garanties de la liberté de conscience et de religion, amendée en 1998. Sous l'influence d'une campagne menée contre les nouveaux mouvements religieux, cette loi a rendu sensiblement plus difficiles les conditions d'enregistrement de nouvelles communautés religieuses. La demande d'inscription au registre doit être signée par au moins 100 citoyens polonais (précédemment 15 signatures étaient suffisantes), et doit contenir des informations relatives à la doctrine religieuse concernée et indiquer le siège de la communauté. La demande s'accompagne du dépôt des statuts précisant l'organisation et le fonctionnement de la communauté. Si la demande d'enregistrement est refusée, il y a possibilité de déposer un recours devant la Cour Administrative. Si aucune

réserve n'est soulevée, le Ministre de l'Intérieur et de l'Administration inscrit la communauté au registre. Dès ce moment la communauté est légale et acquiert la personnalité juridique. De 1990 à la fin de 1998, 134 communautés religieuses ont été enregistrées, en 1999 aucune.

La procédure individuelle de régulation des communautés légalement existantes a été maintenue par la Constitution du 2 avril 1997. Elle règle à part le statut de l'Église catholique romaine. Cette régulation s'opère par la voie d'un accord international conclu avec le Saint Siège et par des lois (art. 24, al. 4). La situation juridique des autres communautés religieuses est réglée par des lois votées sur la base des accords conclus par le Conseil des ministres avec leurs représentants (art. 25, al. 5). Douze communautés ont bénéficié de la régulation individuelle jusqu'en 1997, aucune régulation n'est intervenue depuis.

Outre la procédure spécifique de régulation du statut juridique des communautés religieuses, la Constitution impose aux autorités publiques le devoir de respecter des directives déterminées. Ce sont: l'égalité en droit des communautés religieuses, la neutralité des autorités publiques en matière religieuse, idéologique et philosophique (art. 25, al. 2), l'indépendance organisationnelle et fonctionnelle de l'État et de ces communautés.

La Constitution déclare l'égalité en droit des communautés religieuses (art. 25, al. 1). Il en résulte le devoir imposé à tous les organes de l'État, notamment aux organes législatifs, d'accorder à toutes les communautés religieuses légalement existantes, quel que soit le mode de régulation de leur situation juridique, les mêmes droits, et de les charger des mêmes obligations. Les autorités judiciaires et administratives, elles aussi, doivent prendre en considération cette règle quand elles tranchent des cas concrets. Cette règle s'étend aux adeptes de ces communautés, qui bénéficient tous d'un catalogue identique des droits résultant de la liberté de conscience et de religion.

La Constitution reconnaît la neutralité religieuse et idéologique de l'État. Elle impose aux autorités publiques d'observer l'impartialité en matière de convictions religieuses, de visions du monde et d'opinions philosophiques (art. 25, al. 2). Elle interdit aux autorités publiques de contraindre qui que soit à révéler sa conception du monde, ses convictions religieuses ou ses croyances (art. 53, al. 7).

La neutralité de l'État trouve soutien dans le principe de séparation de l'Église et de l'État. Ce qu'exprime la Constitution, en affirmant que les rapports entre l'État et les communautés religieuses sont fondés sur le respect de leur autonomie et de leur indépendance respectives dans leur domaine, ainsi que sur la coopération dans l'intérêt commun et celui de l'homme (art. 25, al. 3). Ces formules garantissent l'indépendance organisationnelle et fonctionnelle des organes et institutions publics ainsi que des organes et institutions des communautés religieuses. L'indépendance de ces organes a pour effet l'indépendance du droit créé par eux. Le droit interne des communautés religieuses ne produit pas d'effets dans l'ordre juridique de l'État, tandis que le droit de l'État ne règle pas les questions religieuses ou organisationnelles de ces communautés. Le respect des prescriptions religieuses n'est pas sanctionné par une contrainte de l'État. L'indépendance des deux structures n'exclut pas leur coopération. Il était dans l'intention des auteurs de la Constitution de donner à la séparation de l'Église et de l'État un caractère amical (13).

5. Les droits des communautés religieuses

En prenant pour base de la classification le genre d'activité exercée, on peut distinguer quatre groupes de droits des communautés religieuses: 1° droits de culte religieux, 2° droits d'organisation autonome, 3° droits patrimoniaux et financiers, 4° droits d'exercer une activité extra-religieuse.

5.1. *Droits concernant le culte religieux*

a) *Les activités cultuelles et pastorales*

Les communautés religieuses ont le droit d'organiser et d'exercer le culte publiquement. Cet exercice est soumis aux orga-

(13) Cf. M. Pietrzak, *Prawo wyznaniowe (Droit des cultes)*, Warszawa 1999, p. 252 et suiv.; J. Brożyniak, *Konstytucyjne dylematy regulacji stosunków wyznaniowych we współczesnej Polsce (Les dilemmes constitutionnels de la régulation des rapports confessionnels dans la Pologne contemporaine)*, Warszawa 1996.

nes de direction des communautés, qui disposent d'une entière liberté d'exercice du culte. Seule la tenue de cérémonies religieuses sur les voies et places publiques exige une concertation avec les organes de l'administration publique (pour les processions et pèlerinages). L'exercice public d'un acte religieux bénéficie de la protection pénale (art. 195 du Code pénal). Les communautés religieuses ont le droit d'exercer le service pastoral dans l'armée, dans les établissements pénitentiaires ou rééducatifs, dans les hôpitaux, dans les établissements éducatifs ou tutélaires. Dans l'armée polonaise, les trois communautés religieuses les plus importantes ont chacune leur propre structure pastorale, leurs aumôniers ont le grade d'officier et sont rémunérés comme tels. Les communautés religieuses peuvent ouvrir et diriger des organismes appelés à former religieusement leurs adeptes, à promouvoir l'activité cultuelle, à combattre les pathologies sociales. Elles bénéficient de régulations juridiques plus avantageuses que celles prévues par les dispositions du droit des associations.

En pratique ce sont les communautés importantes et fonctionnant depuis longtemps qui jouissent de ces droits. Celles fondées après 1989 rencontrent divers obstacles et difficultés dans la réalisation de leurs droits. Cela se manifeste par le refus de la part des organes des collectivités locales de louer des salles pour des cérémonies ou réunions religieuses, par la rupture de contrats de bail de locaux, par des obstacles administratifs empêchant la construction d'édifices de culte, par le refus d'établir des aumôneries militaires pour les fidèles des petites communautés religieuses, par la réaction peu efficace de la police lorsque des réunions religieuses subissent des perturbations malveillantes, par la lenteur des poursuites engagées par les organes de la justice contre les auteurs de ces perturbations, ou encore contre les auteurs de propos anti-religieux diffamatoires tenus en public (14).

(14) Cf. *Równość kościołów, wyznań i światopoglądów w Polsce w aspekcie praw człowieka. Raport przygotowany przez Stowarzyszenie "Neutrum" (L'égalité des églises, des confessions et des idéologies sous l'aspect des droits de l'homme. Rapport de l'Association "Neutron")*, Warszawa 1997, p. 14.

b) *La propagation des principes et valeurs religieux*

La législation en vigueur accorde aux communautés religieuses le droit d'utiliser les moyens de communication de masse. Les dimensions de cette activité sont déterminées par les possibilités financières des communautés. L'État offre des conditions avantageuses pour les publications des communautés religieuses, en affranchissant des droits de douane les machines, les installations d'imprimerie et le papier reçus en don de l'étranger. L'État garantit aussi l'accès de la radio et de la télévision publiques aux communautés religieuses, mais il convient de préciser que seule l'Église catholique romaine bénéficie de ce droit sous forme d'émissions distinctes permanentes, tandis que les autres grandes communautés ne disposent que d'émissions fixées périodiquement. La direction de la télévision publique dresse des obstacles à la réalisation de leurs droits par les communautés les moins importantes. Comme motif de refus, on invoque le manque de temps libre à l'antenne. Des critiques sont également suscitées par l'absence à la radio et à la télévision d'informations objectives sur les communautés religieuses nouvellement formées. Seule l'Église catholique romaine a obtenu le droit d'ouvrir des stations de radio-télévision; ses unités d'organisation disposent d'une station TV et de 104 stations radio. Les autres communautés religieuses n'ont pas obtenu ce droit, et n'arrivent pas à obtenir la concession requise selon le nouveau système actuellement en vigueur, à cause, prétend-on, du manque de fréquences disponibles.

c) *L'instruction religieuse dans les écoles publiques*

Avant 1989, l'instruction religieuse était une question interne aux communautés religieuses, et elle était dispensée en dehors des écoles publiques. Introduite dans les écoles publiques par une instruction ministérielle de 1990, elle a depuis suscité de nombreuses divergences juridiques. Actuellement, l'instruction religieuse à l'école est réglée par les dispositions de la Constitution, du concordat, des lois et des règlements ministériels. L'élève est libre de suivre ou non le cours d'instruction religieuse. Ce sont les parents qui décident, mais ils sont aussi tenus de prendre en compte le degré de maturité de leur enfant, sa liberté de conscience et de religion et

ses convictions (art. 48, al. 1 de la Constitution). La loi de 1991 sur le système éducatif reconnaît que le degré requis de maturité est atteint par l'élève lorsqu'il entre à l'école secondaire, et à partir de ce moment-là le droit de codécider lui est accordé. Le concordat de 1993 prive de ce droit les enfants catholiques. La déclaration où les parents et les élèves indiquent leur choix concernant l'instruction religieuse doit être remise aux autorités scolaires (et non aux autorités ecclésiastiques), ce qui viole le droit de ne pas révéler ses convictions, pourtant garanti par la Constitution (art. 53, al. 7).

Le droit de dispenser l'instruction religieuse appartient à toutes les communautés religieuses légalement existantes. Mais le règlement ministériel fait dépendre la jouissance de ce droit de la présence à l'école d'un groupe d'au moins sept enfants d'une même religion. Il prévoit aussi, il est vrai, la possibilité d'organiser des cours d'instruction religieuse pour des groupes interscolaires d'au moins trois élèves, mais ceci ne garantit pas le respect du principe de l'égalité des droits de toutes les communautés religieuses et de tous les enfants.

L'instruction religieuse est donnée suivant les programmes et les manuels rédigés et approuvés par les autorités des communautés intéressées. Les autorités scolaires n'ont pas le droit d'établir des corrélations entre ces programmes et les programmes d'enseignement des matières laïques. Les enseignants des cours d'instruction religieuses doivent être officiellement délégués à cette fonction par les autorités des communautés intéressées; le retrait de cette délégation fait perdre le droit d'enseigner et entraîne la résiliation du contrat de travail précédemment conclu avec l'enseignant. L'instruction religieuse est donnée deux heures par semaine. La note de religion figure sur le bulletin scolaire, sans que soit nommée la religion concernée. Il n'est pas tenu compte de cette note pour le passage de l'élève à l'année suivante d'études. Selon la décision du Tribunal Constitutionnel, les notes d'un cours d'instruction religieuse dispensé en dehors de l'école ne peuvent figurer sur le bulletin scolaire, dès lors que le nombre d'élèves suivant cet enseignement est inférieur à celui fixé par le règlement ministériel. Ceci constitue une nouvelle discrimination envers les enfants des petites communautés religieuses.

Les dispositions juridiques régissant l'instruction religieuse à l'école sont de nature à privilégier les catholiques. Les enfants des autres communautés numériquement importantes ne bénéficient que partiellement de ce droit, lorsqu'ils sont suffisamment nombreux pour satisfaire au minimum prévu. Les communautés religieuses nées après 1989 ne bénéficient pas de ce droit et dispensent l'instruction religieuse dans leurs propres unités d'organisation. En même temps, les parents adeptes de ces communautés qui ont des enfants à l'école publique les inscrivent au cours de religion catholique, car ils redoutent les manifestations d'intolérance de la part des camarades de leurs enfants et même de la part des enseignants (des cas d'intolérance ont effectivement été signalés), et ils craignent aussi que l'absence d'une note d'instruction religieuse dans le bulletin scolaire n'entraîne des conséquences fâcheuses pour leurs enfants (puisque les notes d'instruction religieuse données en dehors de l'école ne peuvent figurer sur le bulletin). Pour ces raisons, ces communautés se prononcent en faveur d'une meilleure reconnaissance des cours d'instruction religieuse dispensés en dehors de l'école, ou même en faveur d'un système où les cours d'instruction religieuse de toutes les confessions seraient donnés en dehors de l'école publique (15).

d) *La formation des ecclésiastiques*

Les dispositions en vigueur garantissent aux communautés religieuses la liberté d'organiser des écoles et d'y former des ecclésiastiques selon des programmes librement établis. Les lois individuelles réglant le statut des communautés religieuses traitent les séminaires ecclésiastiques comme des écoles professionnelles supérieures, ayant le droit de conférer le titre de licencié. Les enseignants, les employés et les étudiants de ces écoles ont les mêmes droits que les personnels de catégories analogues dans les écoles supérieures d'État. L'Église catholique romaine forme son clergé au niveau de la maîtrise à l'Académie Papale de Théologie de Cracovie, à l'Université Catholique de Lublin, à l'Université "S. Wyszyński" (qui a remplacé l'Académie de Théologie Catholique de Varsovie), dans les Facultés

(15) *Ibidem*, p. 15.

de Théologie Papales, et aussi dans les Facultés de Théologie récemment instituées au sein des universités d'État d'Opole, de Poznań, de Wrocław et d'Olsztyn. Les Églises autres que l'Église catholique romaine forment des ecclésiastiques au niveau de la maîtrise à l'Académie Chrétienne de Théologie de Varsovie.

e) *Les mariages religieux*

Avant la ratification du concordat en 1998, le mariage religieux ne produisait pas d'effets juridiques. En 1989 avait été abolie l'interdiction de célébrer le mariage religieux avant la conclusion du mariage civil. La discussion sur la ratification du concordat, qui dura cinq ans, obligea les autorités publiques à étendre les droits consentis par le concordat à l'Église catholique romaine aux onze autres communautés religieuses qui avaient obtenu une régulation légale individuelle avant 1997 et uniquement à celles-ci. Cette mesure fut instituée par la loi de 1998 modifiant le Code de la famille et de la tutelle.

Les personnes qui veulent contracter un mariage religieux produisant des effets civils doivent obtenir du chef de l'office de l'état civil dont dépend leur lieu de domicile, une attestation constatant l'absence d'empêchements au mariage civil. Sans cette attestation, l'ecclésiastique ne peut recevoir la déclaration de volonté concernant les effets civils du mariage religieux. Le droit interne de la communauté religieuse désigne l'ecclésiastique devant lequel est faite cette déclaration de volonté. Le mariage civil est contracté quand l'homme et la femme, après la célébration de leur mariage religieux, déclarent en présence de l'ecclésiastique et des deux témoins majeurs leur volonté de contracter en même temps un mariage civil. Après ces déclarations, l'ecclésiastique rédige un certificat selon la formule prescrite par le ministre de l'Intérieur et de l'Administration. Ce certificat est ensuite signé par l'ecclésiastique, les époux et les témoins, et l'ecclésiastique est tenu de le communiquer, dans un délai de cinq jours, à l'officier de l'état civil qui dresse l'acte de conclusion du mariage civil. L'annulation ou la dissolution du mariage par les tribunaux d'État ne produit pas d'effet en droit ecclésiastique, et inversement, les décisions des tribunaux ecclésiastiques n'ont aucun effet sur le mariage civil.

5.2. *Droits autonomes des communautés religieuses*

a) *Autonomie et gestion indépendante*

L'autonomie des communautés religieuses trouve son fondement légal dans les dispositions de la Constitution (art. 25, al. 3), du concordat, de la loi sur les garanties de la liberté de conscience et de religion, ainsi que dans des lois spéciales (individuelles). Ces textes accordent aux communautés concernées le droit de diriger leurs affaires internes selon leur propre droit (autonomie), et le droit d'exercer librement leur pouvoir spirituel et de gérer leurs affaires (gestion indépendante). Ces communautés peuvent créer et modifier librement leur droit interne, sans que l'État ne contrôle ces processus. Ce droit est efficace à l'intérieur de la communauté seulement, à moins d'exceptions prévues par les dispositions édictées par l'État. Les dispositions du droit interne définissent les structures, le système de désignation des organes de la communauté et les modalités de leur fonctionnement. Elles règlent aussi les droits et devoirs des fidèles. Les autorités des communautés gèrent les questions organisationnelles et religieuses. Les restrictions à la liberté d'action consistent en l'obligation d'informer les organes de l'administration publique de la création, du changement de nom, de siège, de limites, d'union, de division ou de suppression de diocèses, de paroisses ou d'autres unités similaires ne portant pas ces noms. La même obligation concerne la nomination et la révocation des personnes remplissant les fonctions d'organe exécutif dirigeant dans la communauté religieuse, ainsi que dans le diocèse ou la paroisse. Si le candidat est un étranger, sa nomination exige l'acceptation du ministre de l'Intérieur et de l'Administration. Les lois individuelles imposent aux autorités des communautés religieuses l'obligation d'informer l'administration au sujet de la création de personnes morales et de la nomination de personnes remplissant les fonctions de leur organe (16).

(16) Cf. *Prawo wyznaniowe III Rzeczypospolitej (Droit des cultes de la III^e République* sous la dir. De H. MISZTAL) Lublin - Sandomierz 1999, p. 37.

b) *Ordres religieux et diaconats*

La législation en vigueur donne aux communautés religieuses le droit de fonder des ordres, des diaconats et des instituts de vie consacrée. Ceux-ci revêtent différentes structures selon les communautés. Leurs unités possèdent la plupart du temps la personnalité juridique. Dans l'Église catholique romaine, où les ordres sont les plus nombreux, un nouvel ordre peut acquérir la personnalité juridique seulement en vertu d'un règlement du ministre de l'Intérieur et de l'Administration, tandis que la création d'une unité d'organisation d'un ordre qui n'a pas jusque-là fonctionné en Pologne exige des consultations avec ce ministre.

c) *Statut juridique des ecclésiastiques*

La législation nationale ne donne pas de définition de ce qu'est un ecclésiastique ou un religieux. Cette définition relève du droit interne des communautés, et la législation n'est pas tenue d'utiliser les mêmes critères. Pour la législation, c'est l'exercice permanent des fonctions du culte religieux qui constitue le critère déterminant. Les ecclésiastiques jouissent des mêmes droits et sont soumis aux mêmes devoirs que les laïcs. Ils sont exemptés des devoirs publics incompatibles avec l'exercice des fonctions d'ecclésiastique ou de religieux, dans la mesure fixée par les lois. Les ecclésiastiques ont le droit de vote, mais ne remplissent pas de fonctions publiques, ce qui résulte des dispositions internes. Ils bénéficient de facilités en ce qui concerne l'accomplissement du service militaire.

Conformément à la loi de 1989 sur l'assurance sociale des ecclésiastiques, plusieurs fois amendée, les ecclésiastiques et les religieux sont obligatoirement assurés sociaux. Aux termes de la loi, est considérée comme un ecclésiastique la personne exerçant à titre permanent les fonctions d'ecclésiastique. Les personnes élues à une fonction ecclésiastique pour une durée déterminée ne sont donc pas considérées comme des ecclésiastiques. Les religieux deviennent assurés sociaux après avoir prononcé les vœux de religion. Sont exclus de l'assurance obligatoire les ecclésiastiques et les religieux assurés à un autre titre: les aumôniers dans l'armée, les hôpitaux et les prisons, les ecclésiastiques employés en vertu d'un contrat de travail dans des entreprises ecclé-

siastiques, ceux exerçant une activité économique, les ecclésiastiques déclarés par les institutions ecclésiastiques à l'assurance des travailleurs. Les séminaristes et les novices sont traités comme des étudiants.

Les prestations d'assurance ne différent pas de celles dont bénéficient les autres travailleurs. Ceci est avantageux pour les ecclésiastiques, car les modifications du système d'assurance des travailleurs leur sont applicables.

Les prestations d'assurance sont gérées par l'Établissement des Assurances Sociales, tandis que les prestations en nature sont fournies par les unités d'organisation du service de santé et d'assistance sociale. La base du calcul des cotisations est fixée à partir du salaire moyen mensuel dans la production matérielle de l'année précédente, elle est différenciée en fonction de la fonction exercée par l'assuré dans la communauté concernée, et représente de 30 à 100% de cette rémunération. Les ecclésiastiques couvrent 20% de la cotisation en puisant dans leurs propres ressources, et les 80% restants sont versés par le Fonds Ecclésiastique, doté par le budget de l'État. Les cotisations des ecclésiastiques travaillant à l'étranger sont couvertes à 100% par le Fonds Ecclésiastique. Les cotisations des religieux sont payées par les supérieurs des ordres concernés. Les communautés religieuses peuvent avoir leur propre système interne d'assurance en complément. Ceci n'est pas considéré comme une activité économique et n'est pas imposable (17).

Les ecclésiastiques, en ce qui concerne l'exercice des fonctions religieuses, sont soumis aux dispositions du droit interne de leur communauté, qui détermine les conditions et la procédure de leurs nominations ou élections à des postes ecclésiastiques, et de leurs mutations ou licenciements. Le même droit interne établit aussi leurs droits et devoirs, et leur responsabilité. Les litiges entre les ecclésiastiques et leurs supérieurs sont réglés par les organes internes des communautés religieuses. Dans les ordres, les rapports hiérarchiques sont régis par les règles de l'ordre concerné. Les tribunaux de droit commun ne sont pas compétents pour traiter des litiges qui surgissent dans le cadre de l'exercice des fonctions religieuses.

(17) Cf. U. JACKOWIAK, *Ubezpieczenie społeczne duchownych (L'assurance sociale des ecclésiastiques)*, Przegląd Ubezpieczeń Społecznych i Gospodarczych, 1998, n. 5.

Les dispositions du droit du travail, générales et spéciales, sont applicables aux ecclésiastiques et aux religieux dispensant l'instruction religieuse dans les écoles, employés dans les écoles publiques ou privées, aux ecclésiastiques exerçant la fonction d'aumônier, aux religieux employés dans des institutions sociales. Les dispositions du droit du travail sont applicables aussi aux religieux ou laïcs employés dans les unités ou institutions ecclésiastiques (personnel de service, fonctionnaires). Les communautés religieuses importantes élaborent leurs propres dispositions en matière de droit du travail concernant les employés laïcs. Ces dispositions ne doivent pas être moins avantageuses que celles prévues pour les autres travailleurs par le Code du travail.

Les revenus des ecclésiastiques de paroisse sont soumis aux dispositions de la loi relative à l'impôt sur le revenu des personnes physiques. Le trait spécifique du système appliqué, c'est l'existence d'un forfait, dont le montant dépend de la fonction de curé ou de vicaire, et du nombre d'habitants de la paroisse. Ce procédé de calcul de l'impôt est utilisé à l'égard du personnel ecclésiastique de la religion dont les fidèles sont les plus nombreux dans la paroisse. Les autres ecclésiastiques bénéficient de réductions proportionnelles au nombre des fidèles de leur religion. Ces impôts se situent à l'échelon le plus bas de l'échelle d'imposition du revenu des personnes physiques.

5.3. *Droits patrimoniaux et financiers des communautés religieuses*

a) *La personnalité juridique des communautés religieuses*

La législation polonaise a adopté le principe selon lequel les communautés religieuses peuvent agir dans les rapports de droit civil sous leurs propres formes d'organisation. Elle prévoit qu'en fonction de l'importance numérique de la communauté donnée, celle-ci peut être reconnue comme personne morale dans son ensemble, et aussi que ses unités d'organisation peuvent être reconnues comme personnes morales distinctes. Depuis 1989, c'est le système de déclaration et d'information qui est appliqué pour la formation des personnes morales religieuses. Selon le système en vigueur, la formation, le fonctionnement et la liquidation de personnes morales confessionnelles sont régis, s'il s'agit de communautés numériquement importan-

tes, par des lois individuelles, et, quand il s'agit d'autres communautés, par la loi sur les garanties de la liberté de conscience et de religion ainsi que par le droit interne de ces communautés (statuts).

Les lois individuelles établissent pour chaque communauté séparément quelles unités d'organisation ont la personnalité juridique, et indiquent leurs organes. Le concordat prévoit la reconnaissance de la personnalité juridique de toutes les unités ecclésiastiques (territoriales ou personnelles) qui ont acquis cette personnalité en vertu des dispositions du droit canon. Les communautés religieuses sont libres de former, transformer ou supprimer les personnes morales dont les catégories sont énumérées dans les lois individuelles. Elles sont tenues d'informer de tous ces faits les organes de l'administration publique. La copie de la pièce comportant une telle information avec un accusé de réception constitue la preuve d'acquisition de la personnalité juridique. L'obligation d'information concerne aussi la nomination ou la révocation de la personne exerçant les fonctions d'organe de la personne morale. Les autres unités d'organisation ayant la personnalité juridique sont formées, à la requête de la communauté intéressée, par un règlement du ministre de l'Intérieur et de l'Administration. Les communautés nouvellement créées, ainsi que leurs unités d'organisations indiquées dans leurs statuts, acquièrent la personnalité juridique dès leur inscription au registre tenu par le ministre de l'Intérieur et de l'Administration.

b) *Les droits patrimoniaux des communautés religieuses*

Toutes les personnes morales religieuses ont le droit d'acquérir, de posséder et d'aliéner des biens meubles et immeubles, d'acquérir et d'aliéner d'autres droits, et d'administrer leur patrimoine. Leur participation aux rapports de droit civil relève des dispositions du droit universellement obligatoires, sauf dispositions différentes des lois confessionnelles. Les restrictions à l'acquisition de droits patrimoniaux par succession, legs ou donations sont supprimées. En tant que personne morale, une communauté religieuse n'est pas responsable des obligations d'une autre personne morale faisant partie de la même communauté. En cas de liquidation d'une personne morale confessionnelle, le patrimoine de celle-ci passe à la communauté religieuse dans son ensemble.

Les personnes morales des communautés religieuses soumises à une régulation individuelle ont le droit d'acquérir à titre gracieux des immeubles agricoles situés dans les territoires de l'est et du nord du pays (ex-allemands), à savoir: paroisses d'une superficie allant jusqu'à 15 ha, diocèses jusqu'à 50 ha, séminaires jusqu'à 50 ha, établissements où vivent des religieux exerçant une activité caritative ou éducative jusqu'à 50 ha, et autres immeubles jusqu'à 5 ha. La réalisation de ce droit a conduit à une augmentation de la superficie des immeubles agricoles des communautés religieuses, principalement de l'Église catholique romaine, jusqu'à un total de 70.000 ha.

Après 1989, une question particulière a repris un caractère d'actualité: il s'agit de la restitution aux communautés religieuses des immeubles que l'État s'était approprié dans les années 1945-1989 en violation des lois en vigueur, à la suite de saisies des biens des débiteurs d'impôts ou de saisies opérées sans fondement légal. La procédure de restitution de ces immeubles a été définie par la loi de 1989 sur la position de l'État à l'égard de l'Église catholique, et par des lois individuelles. En 1998, cette procédure fut déclarée applicable à toutes les communautés religieuses qui revendiquent ces restitutions. Elle est dénommée procédure de régulation, et a un caractère de procédure de règlement amiable. Elle est conduite par une Commission Patrimoniale, composée de représentants des autorités publiques et des communautés religieuses. Cette procédure peut aboutir à la restitution de l'immeuble revendiqué, à l'attribution d'un autre immeuble en échange de l'immeuble revendiqué, ou encore à une indemnisation. Les transactions et les décisions de la Commission ont force de titre exécutoire délivré par un tribunal. Les décisions de la Commission ne sont pas susceptibles de recours. Si la Commission ne tombe pas d'accord sur la décision à prendre, c'est la voie judiciaire qui est applicable (18). Avant fin 1999, les Commissions patrimoniales avaient déjà examiné 64 % des demandes.

(18) Cf. P. PELC, *Kwestia zwrotu mienia kościelnych osób prawnych w świetle ustawy o stosunku Państwa do Kościoła Katolickiego w R. P. (La question de la restitution des biens des personnes morales ecclésiastiques à la lumière de la loi sur la position de l'État à l'égard de l'Église catholique dans la R. P.)*, Prawo Kanoniczne, 38/1995, p. 103 et suiv.

c) *Les édifices et les cimetières cultuels*

Toutes les communautés religieuses ont le droit de réaliser des édifices sacrés ou ecclésiastiques, en accord avec les dispositions en vigueur du droit du bâtiment et de l'aménagement du territoire. Les dimensions de ces investissements sont déterminées par les ressources financières des unités ecclésiastiques. La jouissance de ce droit par les communautés religieuses autres que la communauté catholique romaine, surtout celles formées après 1989, rencontre divers obstacles, notamment en ce qui concerne l'acquisition de fonds communaux et l'obtention de permis de construire. Cette situation est la conséquence de l'intolérance des fonctionnaires de l'administration publique, ceux-ci ayant été influencés par la campagne de propagande dirigée contre les nouveaux mouvements religieux (les "sectes").

Le droit d'aménager et d'administrer des cimetières appartient à toutes les communautés religieuses légalement existantes. Les cimetières cultuels sont leur propriété, en pratique celle de leurs personnes morales territoriales. Ces cimetières sont cinq fois plus nombreux que les cimetières communaux. Pour aménager un cimetière cultuel il faut le consentement de l'administration de la collectivité locale. La fermeture d'un tel cimetière exige le consentement de la communauté religieuse concernée. L'administration du cimetière cultuel est tenue d'assurer l'enterrement des corps des personnes d'autres religions ou des incroyants, s'il n'existe pas de cimetière communal dans la localité.

d) *Les revenus et l'imposition des communautés religieuses*

La loi sur les garanties de la liberté de conscience et de religion ainsi que les lois individuelles garantissent à toutes les communautés religieuses et à leurs personnes morales le droit de collecter des dons destinés à des activités religieuses, des activités caritatives et tutélaires, scientifiques, éducatives, des activités d'édition, ainsi que des dons destinés à l'entretien des ecclésiastiques et des religieux.

Il existe d'autres formes traditionnelles de collecte, comme le tronc pour les pauvres, les quêtes, etc. Celles-ci n'exigent pas le consentement des organes de l'administration publique si elles sont effectuées à l'intérieur d'une église ou d'une chapelle, ou dans des

lieux et circonstances et selon des formes qui respectent les usages traditionnellement établis.

D'autres sources traditionnelles de revenus existent encore. Dans l'église catholique romaine et dans d'autres églises chrétiennes, la principale source de revenus est constituée par les taxes (*iura stolae*) perçues à l'occasion des baptêmes, des mariages, des funérailles, des messes commémoratives, etc., dont le montant est généralement fixé par l'ecclésiastique. Dans les communautés protestantes domine un système de cotisations fixées par les autorités ecclésiastiques. Ce qui revêt un caractère spécifique, ce sont les prestations (en argent ou en travail fourni) des fidèles, offertes en soutien à des investissements ecclésiastiques ou sacrés. D'autres revenus encore sont tirés de la location de sièges à l'église, de taxes de cimetière, de différentes activités économiques, d'exploitations agricoles.

Dernièrement, les subventions de l'État au profit des communautés religieuses ont été augmentées. Les bénéficiaires en sont les écoles confessionnelles supérieures, les facultés de théologie des universités d'État, l'instruction religieuse dans les écoles, les maternelles et les écoles tenues par les communautés, les aumôneries de l'armée, des prisons et des hôpitaux, les cotisations des assurances sociales des ecclésiastiques et des religieux (à hauteur de 80%), la protection des monuments historiques ecclésiastiques. Ces subventions sont estimées à 600 millions de zlotys, somme dont environ 95% revient à l'Église catholique romaine.

Les communautés religieuses bénéficient de nombreux allégements fiscaux. Les personnes morales religieuses sont exemptées de l'impôt sur les revenus de leurs activités non-économiques. Les revenus des activités économiques exercées par les personnes morales religieuses sont exemptés de l'impôt sur le revenu, s'ils ont été affectés, dans l'année fiscale ou l'année suivante, à des fins cultuelles, éducatives, scientifiques, culturelles, caritatives et tutélaires, à des centres de catéchisme, à la conservation de monuments historiques ou à des investissements sacrés ou ecclésiastiques. Ces sommes doivent être indiquées dans la déclaration d'impôts. Les personnes morales des communautés sont exemptées de l'impôt sur les immeubles ou leurs parties qui ne sont pas à usage d'habitation, sauf la

partie destinée à l'exercice d'activités économiques. Les successions et les donations au profit des personnes morales religieuses, si elles ont pour objet des biens et des droits qui ne sont pas destinés à une activité économique, sont exemptées de l'impôt. Les dons de l'étranger destinés aux personnes morales et affectés à des fins cultuelles, caritatives et tutélaires ou éducatives, à l'exception des articles de consommation frappés de l'impôt indirect (accise) et des voitures particulières, sont exemptés des droits de douane. Le montant des allocations compensatoires des allégements et exemptions est difficile à estimer parce que les organes de l'administration ne recueillent pas d'informations sur ce point.

6. Les activités extra-religieuses des communautés religieuses

Les communautés religieuses ne sont pas soumises à des restrictions juridiques concernant l'exercice d'activités autres que religieuses. Elles peuvent exercer, comme les autres entités, des activités économiques, sociales, culturelles, éducatives. En pratique, elles profitent de ces dispositions pour agir dans les domaines qui font traditionnellement partie de leur principal champ d'activité: charité et éducation. Elles jouissent d'une réglementation plus avantageuse que celle universellement en vigueur, sous la forme de lois individuelles. Les communautés numériquement importantes créent à cet effet des structures spéciales, tandis que les moins importantes exercent ces activités directement. C'est l'Église catholique romaine qui a l'activité caritative et éducative la plus développée, et celle-ci est subventionnée par l'État.

7. Remarques finales

Le statut juridique des communautés religieuses en Pologne est défini par la Constitution du 2 avril 1997, le Concordat, ainsi que par des lois. La directive constitutionnelle fondamentale qui indique la direction de la politique et de la législation en matière religieuse est l'égalité en droit des communautés religieuses, quelle que soit le

mode de régulation de leur statut juridique. La Constitution voit la garantie de cette égalité dans l'indépendance organisationnelle et fonctionnelle des communautés et de l'État, et dans le devoir d'impartialité des autorités publiques en matière religieuse. Le principe de l'égalité en droit n'est cependant pas absolu. Il est essentiellement relativisé par la position dominante des catholiques dans la société polonaise et par le rôle que l'Église catholique romaine a joué dans le passé et joue encore dans le présent. Les dérogations au principe de l'égalité en droit apparaissent aussi bien dans les actes normatifs que dans les pratiques des organes de l'État.

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STATE AND CHURCH IN ESTONIA

SUMMARY: 1. *Social Facts.* — 2. *Historical Background.* — 3. *Legal Sources.* — 4. *Basic Categories of the System.* — 5. *Legal Status of Religious Communities.* — 6. *Internal Organisation of Religious Organisations.* — 7. *Churches and Culture.* — 8. *Financing of Churches.* — 9. *Religious Assistance in Public Institutions.* — 10. *Legal Status of Holders of a Spiritual Office.* — 11. *Matrimonial and Family Law.*

1. SOCIAL FACTS

Today's religious picture in Estonia is a mosaic of different faiths and denominations. Along with traditional Christian Churches, many new religious movements have appeared. In the 1920s and 1930s, before the Soviet occupation, Estonia was more or less religiously homogenous. The large majority of the population (ca 76%) belonged to the Estonian Evangelical Lutheran Church (hereafter EELC) (1). The second largest Church was the Estonian Apostolic-Orthodox Church (hereafter EAOC).

Today approximately only 17% of the population are officially connected with various Christian Churches. In 1994 (2) and in 1998 (3) two broad surveys were organised about religious life in Estonia. According to the results, the number of people believing in

(1) According to the national census of 1934, there were 874 026 Evangelical Lutherans in Estonia, out of a total population of 1 126 413. See *http://www.einst.ee/society/So-religion.htm* 02.02.2000.

(2) The survey was organised by the Estonian Council of Churches, the Estonian Bible Society and the Estonian Evangelical Alliance. See H. HANSEN, "Elust, usust ja usuelust" ["Concerning life, belief and the religious life"- M.K.]. - *Eesti Kirik*, 16 Sept. - 25 Nov. 1994.

(3) The survey was organised by a research group headed by Prof. Harri Heino, from the Finnish Academy and the Estonian Gallup Centre - EMOR in March - April 1998.

God grew from 37% to 49%. At the same time, the number of people identifying themselves as atheists grew from 1% to 6%. 45% of the population identified themselves as Lutheran. According to an unofficial estimation "Christian beliefs are mixed with a pagan worldview" in Estonia (4). This means that although 45% identify themselves as Lutheran, their actual beliefs do not always reflect Church teachings. The EELC has been the dominant church in Estonia since the middle of the 16th century, and many Estonians traditionally identify themselves as Lutheran. This does not necessarily mean that they have any connection with the institutional structures of the church, nor does it always reflect their religiosity. In 1999, the Estonian population was estimated to number 1 445 580 people. Official membership of the EELC was ca 177 233 people (5). This number includes both the active and the passive members of the Church. For example, in 1997 only 54 481 members paid their annual membership fee. Although the results of surveys and the figures presented here leave considerable room for any kind of interpretation, they hopefully reflect to some extent the objective reality of religious life in Estonia.

The EAOC has 58 congregations and ca 18 000 members (6).

(4) V. VIHURI, "Ühest usutlusest, uskumisest ja kiriku rollist ühiskonnas" [an article by an EELC priest about belief and the role of Church in society- M.K.], *Postimees*, 16.08.1998.

(5) Information about current membership of religious organisations is based on data from the Ministry of Internal Affairs last up-dated December 31, 1999. It has to be mentioned that religious organisations are not obliged to provide the Ministry of Internal Affairs with statistical information about their membership, and that according to Art. 42 of the Constitution of the Republic of Estonia, no state or local government authority or their officials may collect or store information on the beliefs of any Estonian citizen against his or her will. Religious organisations have voluntarily informed state officials about the numbers of their adherents.

(6) It has been suggested that a majority of Orthodox believers belong to the Estonian Orthodox Church. The exact data are missing. The Estonian Orthodox Church, subordinated to the Moscow Patriarchate, has not been registered, because it applies for the same name (Estonian Apostolic-Orthodox Church) as the previously registered church. The issue is connected with the conflict between these two Orthodox Churches, one of which is the descendent in jure of the EAOC of 1923-1940 (subordinated to the Ecumenical Patriarchate of Constantinople) and the other one (subordinated to the Moscow Patriarchate) which was established with the help of the Soviet occupation authorities in 1945, eliminating the EAOC Synod in Estonia. Considering the complexity of the issue, it cannot be discussed here in detail.

The Roman Catholic Church has 7 congregations with ca 3 500 members. Among less influential (7) Christian movements, the Herrnhut or Brethren Movement can be mentioned. This started in 1738 as a spiritual awakening inside the Lutheran Church and spread very extensively in the 19th century; it has been recognised that the Estonian national cultural awakening in the 19th century owes a lot to this movement (8). Today the movement has ca 100 members and continues its activities in close connection with the Lutheran Church. In the 19th century the Free Faith Movement ("priilus") was a breeding ground for Baptist (1884), Adventist and Methodist denominations. During the first independence period (1918-1940) the Pentecostal movement was introduced. During the Soviet occupation, Baptists and other free churches (Adventists and Methodists) were forced to join the Union of Evangelical Christians and Baptists, according to the model imposed in Russia. The Pentecostal movement and the Jehovah's Witnesses were banned. Today, the Union of Evangelical Christians and Baptists has 89 congregations with ca 6 500 members, the Episcopal Methodist Church has 24 congregations with ca 2 000 members and the Union of Seventh Day Adventists has 18 congregations with ca 2 000 members. Since the end of Soviet occupation, several Christian congregations have been registered in Estonia, the most influential being the Estonian Christian Pentecostal Church, which has 39 congregations and ca 3 500 members, the Word of Life Congregation, the Charismatic Episcopal Church (ca 300 members) and some others. The Church of Jesus Christ of the Latter-Day Saints (the Mormons) has ca 482 members, the New Apostolic Church has 10 congregations and 2 086 members, and the Union of Congregations of Jehovah's Witnesses has 11 congregations with about 3 846 members.

Jewish and Muslim communities already practised their religion in Estonia under Czarist rule. The Jewish community has 3

(7) The expression "new religious movements" in this paper does not necessarily mean absolute or worldwide novelty, but rather novelty in Estonia. Neither does the expression "lesser religious movements" imply a lack of importance or influence of these movements, it simply refers to their small membership.

(8) *Eesti Entsüklopeedia*, II kd., Tartu, 1934.

independent congregations. There are approximately 2 500 Jews in Estonia. Before the Second World War there were two synagogues in Estonia, currently there are no synagogues and no Rabbis at all. The Estonian Islam Congregation has ca 1 467 members and is quite unique in character. In the same congregation there are both sunnites and shiites. In 1995, 13 believers left the congregation and formed the Estonian Muslim Sunnite Congregation. These 13 people left the Estonian Islam Congregation not because of religious reasons but rather because of personal misunderstandings. According to some unofficial estimations, there are ca 10 000 Muslims in Estonia, but they are more occupied with the preservation of their national and ethnic roots (there are Tatars, Azeris, Kazakhs, Uzbeks, and representatives of peoples of the Northern Caucasus and other mainly Muslim nationalities) than with religious questions (9). The first mosque is under construction.

The International Society for Krishna Congregation has ca 50 members, and the Baha'i Community has ca 85 members. The registered congregation (called House of Taara and Mother Earth People of Maavald) of the followers of the Estonian native religion has ca 287 members and 3 congregations.

These are only a few statistics to give a picture of the pluralistic religious life of Estonia. Altogether there are 7 churches, 8 associations of congregations and 60 so-called single congregations registered by the Ministry of Internal Affairs in the Register of Churches and Congregations in accordance with the Churches and Congregations Act (hereafter the CCA). The 35 religious societies are registered in accordance with the Non-Profit Organisations Act in the Register of Non-Profit Organisations.

After regaining independence at the beginning of the 1990's,

(9) "It is still too early to speak about the presence of a real Islamic culture in Estonia. It is not clearly structured due to a lack of knowledge in this field and the passive attitude among Islamic community members about the preservation of their religious identity. Long-term isolation [due to Soviet occupation- M.K.] of Estonian Muslims from the Islamic world has kept them unaware of new trends in Islam and has caused them to remain separated from contemporary Islamic civilisation". R. HAIRETINOV, "The Process of Estonia Joining the European Union: Islamic Legal Perspectives on the Protection of Muslim Minority Rights", *Conference on Law, Religion and Democratic Society*, University of Tartu, Estonia, 1999.

Estonia experienced what can be called a "comeback of religion", as was happening in all Eastern European post-communist societies. This process was partly an expression of national identity and partly a reaction to the suppression of individual freedom by the Soviet regime. But the religious enthusiasm caused by independence ended quickly and the extensive growth in membership of religious organisations ceased. Estonia can be considered as a quite secularised country today.

2. HISTORICAL BACKGROUND

Christianity is most likely to have arrived in Estonia before 1054. Estonia was christianised by the middle of the 13th century, through crusades and other coercive methods. Bishop Albert and the Order of the Sword Brethren combined forces so that the knights of the Order could conquer the land and the priests could baptise the people. As a result of the conquest, the Pope, as head of the universal church, became the highest suzerain of Estonia. The Pope personally took the Estonian neophytes under his protection, establishing a Church State on Estonian territory. In the 17th century, when Estonia came under the sovereignty of Sweden, a systematic ordering of life under the Lutheran Church began and the Catholic Church was practically expelled from Estonia. The Reformation turned the Church State relationship upside down, to that of a State Church, or, more precisely, a Land Church (10).

The history of law on religions in the Republic of Estonia can be divided into four main periods. The first one started with the formation of the independent state in 1918 and with the adoption of the 1920 Constitution, which set forth the principle of strict separation of state and church. The 1920 Constitution was followed by the 1925 Religious Societies and their Associations Act (hereafter the 1925 Act), which reaffirmed the idea of equal treatment of all religious organisations and the separation of state and church. The 1930s saw significant political changes in Estonian society, which

(10) For a more detailed history of religions in Estonia, see website *http://www.einst.ee/society/Soreligion.htm*, 02.02.2000.

can be illustrated by characteristics such as the centralisation of the state administration, the concentration of power, a decline of democracy and the expansion of state control. In 1934 the Churches and Religious Societies Act (hereafter the 1934 Act) was enacted by decree of the State Elder (President), not by parliament. This Act established unequal legal treatment for churches and other religious societies. The status of some churches, especially large churches, was to a certain extent similar to the status of a state church. The government of all churches was subjected to control by the State. According to Art. 84 (1)*b* of the 1938 Constitution, the leaders of the two largest and most important churches gained *ex officio* membership in the *Riiginõukogu* (Upper House of Parliament).

The third period started with the Soviet occupation of Estonia. The law on religions in the Soviet Union was based on the 1918 Leninist decree on the separation of church from state and school from church. The bizarre fact is that the separation of state and church (resp. religious organisations) was actually a non-separation, because of state control over all the aspects of religious organisations, including their leaders and sometimes even their members. In 1977 a new decree on the General Status of Religious Groups was adopted, but the basic principles remained the same.

The fourth period began with the regaining of independence at the beginning of the 1990s and with the adoption of the 1992 Constitution. The religious freedom clauses in the 1992 Constitution were followed by the 1993 Churches and Congregations Act. The draft Act on Churches and Congregations (hereafter the draft Act) is under preparation. Although Estonia is re-establishing its legal order on the principle of restitution, taking into account the legal situation before the Soviet occupation, it should also take account of new developments and obstacles and of the principles of European and International Law.

3. Legal Sources

In Estonia the right to freedom of religion is protected by the Constitution of 1992 and by the international instruments that have

been incorporated into Estonian law. Starting with protection by international instruments, Art. 3 of the Estonian Constitution stipulates that universally recognised principles and standards of international law (11) shall be an inseparable part of the Estonian legal system. Art. 123 states that if Estonian Acts or other legal instruments contradict foreign treaties ratified by the Riigikogu (parliament), the provisions of the foreign treaty shall be applied. Estonia is party to most European and universal human rights documents (12). By Art. 3 of the Estonian Constitution the universally recognised principles and standards of international law are adopted into the Estonian legal system and do not need further transformation. They are superior in force to national legislation and binding for legislative, administrative and judicial powers. The Estonian Constitution expressly provides protection to freedom of religion. Art. 40 sets out that: "Everyone has freedom of conscience, religion and thought. Everyone may freely belong to churches and religious associations. There is no state church. Everyone has the freedom to practise his or her religion, both alone and in community with others, in public or in private, unless this is detrimental to public order, health or morals." Art. 40 of the Constitution is supplementary to § 45 concerning the right to freedom of expression, § 47 concerning the right of assembly and § 48 concerning the right of association.

The legal sources of the law on religions in Estonia are as following:

1) Provisions set forth in national law (The Constitution of the Republic of Estonia, the Non-Profit Organisations Act, the Churches and Congregations Act and the other acts directly or indirectly regulating the individual and collective freedom of religion);

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(11) The constitutional notions of (1) "universally recognised principles of international law" and (2) "standards (norms) of international law" shall be interpreted in the context of the sources of international law that are set forth in Art. 38 (1) of the Statute of the International Court of Justice. (See also R. Narits, K. Merusk, *Constitutional Law - Suppl. 29. Estonia.- International Encyclopaedia of Laws. - Kluwer Law International*, The Hague, London, Boston, 1998).

(12) *Inter alia*, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and the International Covenant on Civil and Political Rights (1966).

2) Provisions set forth in international law;

3) The interpretation of fundamental freedoms and rights in the administration of justice (including the decisions of the European Court of Human Rights and the European Court of Justice (13), and the decisions of the Supreme Court of Estonia) (14).

4. Basic Categories of the System

As stated before, Art. 40 of the present Constitution states *inter alia* that "*there is no state church*". The 1920 Constitution of the Estonian Republic had already set forth that "*there should be no state religion*". The 1920 statement clearly followed the principle of the separation of state and church. Art. 1 section 2 of the 1925 Religious Societies and their Associations Act stated that all religious organisations had to be equally protected and that none of them could receive preferential treatment or support from the state (15). All religious organisations, including churches, had equal status with other private legal persons (16). The 1938 Constitution stipulated that "*there is no state church*" but added that the "*state can grant status in public law to large churches*". Large churches were churches with over 100 000 members. The churches with a membership over 100 000 were the Estonian Evangelical Lutheran Church and the Estonian Apostolic-Orthodox Church. The 1938 Constitution set forth the possibility of granting status in public law to large churches. Whether the aforementioned churches had a status in public law is debatable. Although the 1992 Constitution establishes the separation of State and Church, this has not been interpreted in administrative practice as a very strict separation. The co-operation between State and Church (resp. religious communities) has been accepted to a

(13) In so far as its decisions can be considered as value decisions, because Estonia does not yet belong to the European Union.

(14) See also K. Merusk, R. Narits, *op. cit.*

(15) RT 1925, 183/184, 96.

(16) E. Maddison, *Usuühingute ja nende liitude õiguslik iseloom (The Legal Character of Religious Societies and their Associations)*, Eesti Politseileht Nr. 11 (221), 13. märts 1926, p. 161-162.

certain extent (17). The Constitution does not *expressis verbis* provide legal ground for cooperation, but it can be deduced from the positive obligation of the State to guarantee freedom of religion as set forth in Art. 40. Estonian constitutional practice is spread over a relatively short period and not all the nuances of the relationship between State and Church (resp. religious communities) have yet been settled. Nonetheless, some principles concerning the relationship can be derived from the Constitution.

Art. 40 of the Constitution must be interpreted in conjunction with the other articles of the Constitution. Articles 11, 12, 13 and 19 especially need to be taken into account with respect to the State and Church (resp. religious communities) relationship. The principle of equality is anchored in the first sentence of the first paragraph of Art. 12 of the Constitution, which sets forth that all persons shall be equal before the law. This means that equal persons must be treated equally and unequal persons unequally — *iustitia cernitur in suum cuique tribuendo*. Although the wording of the first sentence of the first paragraph of Art. 12 does not explicitly say that the principle of equality has to be taken into account in legislation, it has been interpreted that the constitutional principle of equality is also binding for legislature. The second paragraph of Art. 12 of the Constitution sets forth the principle of non-discrimination, prohibiting discrimination *inter alia* on the grounds of religion or belief. As the Constitution protects both the individual and the collective freedom of religion, these principles have to be applied also to religious communities. The principle of non-discrimination is a special equality right and is deemed to protect minorities. Art. 11 of the Constitution affirms that: "rights and liberties may be restricted only in accordance with the Constitution. Such restrictions are necessary in a democratic society, and their imposition must not distort the na-

(17) For example, according to the Prime Minister's order, the co-ordination of the prisons' chaplaincy is delegated to one of the Estonian Evangelical Lutheran Church's diaconal centres; the Estonian Council of Churches is annually financed from the state budget, etc. There is an established committee of experts for the development of cooperation between the Estonian Government and the Estonian Evangelical Lutheran Church. The committee consists of members of the Estonian Government administration and representatives of the Estonian Evangelical Lutheran Church. See RTI 1999, 15, 250.

ture of rights and liberties." Thus, every case of restriction of rights and liberties, including the general equality right (the principle of equality) and the special equality right (the principle of non-discrimination), has to be justified and pass the test of proportionality.

In the process of drafting the new Churches and Congregation Act, debates about the preferential treatment of some religious organisations have intensified. Some attempts to set up a kind of preferential legal treatment for the EELC and EAOC have appeared. Those attempts rely mainly upon the argument that these churches had such a kind of treatment before the 1940 Soviet occupation, according to the 1934 Act and the 1938 Constitution, which is debatable (18). In the context of Estonia, it is rather difficult to determine whether the social need or tradition (incl. legal tradition) exist and are strong enough to justify the special legal treatment of some religious organisations (19). Furthermore, one can debate about whether the position of the mentioned Churches in society is equal or unequal compared to other religious organisations (20). Moreover,

(18) According to the proposal to complement the draft Act, the State will enter into agreements with the EELC and EAOC, recognising them and their congregations and convents as public legal persons. The proposed provision to the draft law affirms that the State may (but does not have to), on the basis of a proposal from the Ministry of Internal Affairs, enter into co-operation agreements with other churches and associations of congregations. The real distinction between the legal treatment of churches that will be public legal persons and churches that will have co-operation agreements with the State is left open. In theory, a co-operation agreement can also grant status in public law. With a cooperation agreement, the State can delegate public functions and obligations to religious organisations. The main known distinction is that agreements with the aforementioned churches are to be signed, but entering into co-operation agreements is at the discretion of the Government. According to one possible interpretation of the proposed law, agreements with other religious organisations (single congregations and religious societies) will not be possible. Agreements between religious organisations and the state can only be welcomed. But the constitutional principles of equal treatment and non-discrimination must also be taken into account. Furthermore, (co-operation) agreements between the State and religious organisations are allowed by present Estonian law. So the practical need for further regulation is debatable.

(19) See also the statistics presented at the beginning of the present paper.

(20) Playing with statistical information may seem cynical because more ought to be taken into account when establishing comparisons between religious organisations, for example, their contribution to the formation of national identity or of Estonian culture. But it remains problematic to say that the EELC with 177 233 members is equal to the EAOC with 18 000 members, and that the EAOC deserves a special status compared to the non-registered

taking into account the principle of non-discrimination, the distinction between "new" and "old" or between "large" and "small" religious organisations is unconstitutional. Another argument for setting up a different legal treatment for the aforementioned Churches has been that traditional Churches, like the Estonian Evangelical Lutheran Church and the Estonian Apostolic-Orthodox Church, cannot organise themselves under the present law in accordance with their own understanding of their internal organisation (primarily because of their episcopal structure), which is again debatable. By now seven churches have been registered, and all of these are required to have an episcopal structure, not only the EELC and the EAOC. According to the legal definition of a church set forth in Art. 2 of the CCA, an episcopal structure is indeed prescribed to all churches. Moreover, as far the autonomy of religious organisations is anchored in the constitutionally protected freedom of religion, the internal structure of all religious organisations should be protected.

Art. 9(2) of the Constitution extends the rights, liberties and duties listed in the Constitution to legal persons, to the extent that this is in accordance with the general aims of the legal persons, and with the nature of such rights, liberties and duties. Organisations with partial legal capacity that are not legal persons may also be holders of basic rights. The protection of basic rights extends to them only to the extent of their legal capacity (21). Although the constitution does not make any distinction between public and private legal persons, it has been suggested that public legal persons cannot be holders of the basic rights listed in the Constitution. Also, private legal persons cannot be holders of basic rights as far as they perform functions of public office. The aforementioned reasoning can easily and unnecessarily restrict the individual and collective freedom of religion. Unlike the situation in Germany, there is no general consensus in the Estonian discussion about whether churches (religious organisations)

Estonian Orthodox Church, whose membership is estimated to be much larger than the membership of the EAOC.

(21) M. ERNITS, *Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia*, in: *Juridica International. Law Review of the University of Tartu*, vol. IV, 1999, p. 11-34.

can enjoy the protection of basic rights even if they are legal persons in public law. As stated before, in the process of drafting the new Churches and Congregation Act, the idea was proposed to give status in public law to two churches. This, according to some explanations of the idea, does not necessarily mean integrating these churches into the State's structure or delegating functions of public power to these churches, but rather the extended recognition of their internal structure. It would be very problematic to exclude these organisations from constitutional protection of freedoms and rights. Therefore, it is reasonable to support the position that if the goal of a public legal person is the realisation of individual rights and freedoms, it can possess constitutionally protected freedoms and rights (22).

Art. 19 section 1 of the Constitution states that: "All persons shall have the right to free self-realisation." Section 1 of Art. 19 can be interpreted as an additional guarantee for the autonomy of religious organisations. The self-realisation of religious organisations is restricted by Art. 19 section 2 of the Constitution stating that: "In exercising their rights and liberties and in fulfilling their duties, all persons must respect and consider the rights and liberties of others and must observe the law".

Art. 13 of the constitution states that: "All persons shall have the right to the protection of the state and of the law... The law shall protect all persons against arbitrary treatment by state authorities." This means that both individual believers and religious organisations are protected against unconstitutional and unlawful interference into their affairs. Art. 15 of the Constitution states that: "Everyone has the right of recourse to the courts if his or her rights or freedoms have been violated. Any person whose case is being tried by a court of law is entitled to demand the determination of the constitutionality of any relevant law, or other legal act or procedure." Furthermore, Art. 48 concerning the right of association states *inter alia* that "the termination and suspension of the activities of an association, league... and its penalisation may only be invoked by a court, in cases where a law has been violated".

(22) See also R. NARITS, K. MERUSK, *op. cit.*

5. LEGAL STATUS OF RELIGIOUS COMMUNITIES

1. The CCA deems churches, congregations and associations of congregations to be legal persons and establishes the legal grounds for their activities. Churches, congregations and associations of congregations must be registered by the Ministry of Internal Affairs in the Estonian Church Register (an abbreviation for the Register of Churches, Congregations and Associations of Congregations). In order to be registered, a church, congregation or association of congregations must submit an approved application, the statutes and the minutes of the founding meeting, with the notarised signatures. The activities of religious societies are not regulated by the CCA, but by the Non-Profit Organisations Act, and they must be registered by a court in the Register of Non-Profit Organisations and Foundations. In accordance with the draft Act on Churches and Congregations, the Estonian Church Register and its respective functions are delegated to the courts. Under the present law, the authorities can refuse registration to a religious organisation only if its statutes are not in accordance with the law. There is a provision in the draft act stipulating that if the court suspects that the statutes of a religious organisation are not in accordance with the law, then it can ask for the opinion of a competent ministry or body of experts. One possible interpretation of this provision is that the legislator wants to extend the scope of (*ex ante*) control over religious organisations.

2. Art. 20 of the 1993 CCA states that churches, congregations and associations of congregations are non-profit organisations. The Non-Profit Organisations Act and the Churches and Congregations Act are related as *lex generalis* and *lex specialis*. Thus, generally under Estonian law, religious organisations (including churches) are legal persons under private law. Art. 6 of the General Part of the Civil Code Act divides legal persons into legal persons under private law (non-profit organisations, foundations and profit-making organisations) and legal persons under public law (state and local government). Art. 36 of the Code states that legal persons may be founded pursuant to Acts. Although the Code does not mention any legal persons under public law other than state and local governments, such persons can be founded and many of them are founded pur-

suant to an Act. Whether it is possible under the current law to consider religious organisations or some of them as legal persons under public law is debatable. Some religious organisations have the characters of corporations under public law.

3. Art. 2 of the CCA gives the following legal definitions:

(1) A church is a congregation or association of congregations which has an episcopal structure and is didactically bound by three common church confessions, functioning on the basis of statutes under the elected or appointed leadership of a board and registered as provided by law.

(2) A congregation is a voluntary association of natural persons confessing the same faith, functioning on the basis of statutes under the elected or appointed leadership of a board and registered as provided by law.

(3) An association of congregations is a voluntary association of at least three congregations confessing the same faith, functioning on the basis of statutes under the elected or appointed leadership of a board and registered as provided by law.

Art. 3 of the CCA states that:

A religious society has only partly the same characteristics as a congregation. Religious societies are voluntary associations of natural persons and the bases for their activities shall be regulated by the Non-Profit Organisations Act.

It is not hard to see that these legal definitions are problematic. They cause problems of interpretation and implementation, as well as problems concerning the practical determination of religious organisations. The interpretation of terms and phrases like "didactically bound by three common church confessions", "episcopal structure", "partly the same characteristics as a congregation" etc. are difficult for lawyers and theologians alike. For example, there has been a case in administrative practice where the Ministry of Internal Affairs refused to register the Estonian Christian Church because the name seemed to be too general and there was no mention of an episcopal structure in the statutes. After the church renamed itself the Estonian Christian Pentecostal Church and established a *pro forma* episcopal structure in its statutes, the ministry registered it.

The term "kirik" (*church, Kirche*) has been traditionally used for Christian organisations. The term "kogudus" (congregation) has been traditionally used for the congregations of a church. Before the adoption of the CCA in 1993, there had been a debate as to whether the extension of the term "kogudus" (congregation) to other faiths would be insulting for them. According to the CCA, congregation means not only the church congregation but also the so-called single congregation. The single congregation in terms of the CCA can be an association of natural persons confessing the Christian faith or any other religion or belief. It could be concluded that the CCA defines the term "congregation" in contradiction with tradition.

The 1934 Act did not try to give legal definitions of different religious organisations. It was up to each religious organisation to decide whether it wanted to be a church, religious society or association of religious societies and organise itself accordingly. The 1934 Act set out special provisions for churches. Churches were given additional rights but also restrictions, which will be discussed further. The 1925 Religious Societies and their Associations Act simply divided all religious organisations into two categories: religious societies and associations of religious societies. Under that law, churches were associations of religious societies (23). In the draft of the new CCA, one more legal definition has been added, that of "convent".

The purpose of the legal definitions of the 1993 CCA was explained as being educational. As Estonia had been a so-called atheist country for fifty years, people had forgotten the basic terms and it was necessary to educate them with the help of the law. It must be said that this is problematic. The purpose of legal definitions in the draft law is to protect the mentioned terms (church, congregation etc.). This could mean that the terms "church", "congregation", "association of congregations" and "religious society" are used in their historically and culturally developed meanings. Neither the present nor the proposed law provide sufficient protec-

(23) W. MEDER, "Ülevaade Eesti kirikuõigusest" ["Overview of Estonian Church Law"-M.K.], *Õigus*, nr 1 1938, p. 14.

tion, and some of the terms are used in contradiction to tradition. Furthermore, it can be argued that the legal definitions set forth in the 1993 CCA are in contradiction with the 1992 Constitution. The scope of the Constitutional notions "Church" and "religious society" is much broader in the Constitution than in the CCA.

6. Internal Organisation of Religious Organisations

Under the 1925 Religious Societies and their Associations Act, the internal management of churches was based on decentralisation and liberal democratic principles, but under the 1934 Churches and Religious Societies Act it was based more on the principles of authoritarianism and centralisation. The 1934 Act set out special and detailed provisions for church management. For example: the bodies of the church, the competence of those bodies and of clergy, the process of adoption and implementation of regulations, the competence of the church courts, the enforcement of court decisions, etc., are spelt out. The authority of the administration of other religious organisations was not so limited. Section 16 of the 1934 Churches and Religious Societies Act stated that the instruments of a church or association of religious societies, before being published, should be sent to the Ministry of Internal Affairs. The Ministry of Internal Affairs could suspend the enforcement of the instrument if it found that the instrument contravened the law or regulations or statutes of the church or association of religious societies. The Ministry of Internal Affairs had the right to veto the decisions of these religious organisations. Today, the entry into force of internal regulations of churches or other religious organisations no longer depends on previous approval by a state official.

Under the 1993 CCA, the internal structure and management of religious organisations is mainly left to their own sphere of autonomy. The legal definitions in § 2 of the CCA try to determine the general structure of churches, congregations and associations of congregations. Many basic requirements for democracy within the churches and congregations are mandatory: openness of membership, the existence of an elected executive, equality of members before

the law, the right to participate in elections of the executive and for official posts, the right to leave the church or congregation by notifying the church or congregation's executive beforehand. Art. 12 of the CCA sets out that the statutes of a church, congregation or association of congregations shall include: the name, the location of the board, the structure and the competence of the executive, the order of formation of the executive, the term of the authority of the executive, the status and hierarchy of the clergy, the rules for the adoption and amendment of the statutes and termination of activity, the obligatory offices, etc. The CCA sets forth particular restrictions to holders of a spiritual office, which can be viewed as an unnecessary interference into the own affairs of religious organisations. Art. 15 (1) of the CCA states that any person who has the right to vote at local government elections and who is not punished pursuant to the Criminal Code may be a member of the board of a church, congregation or association of congregations, or may be a member of the clergy. This requirement is not applied to the members of boards of religious societies registered pursuant to the Non-Profit Organisations Act. At the same time, Art. 15 (3) of the CCA states that a church, congregation or association of congregations establishes the requirements for clergymen and Art 15 (4) stipulates that in exceptional cases a church, congregation or association of congregations has the right to invite a clergyman from abroad in accordance with the Foreigners Act.

Art. 10 (2) of the CCA states that boards of churches and associations of congregations have the right to adopt instruments which regulate their activities. This provision can be viewed as a guarantee of the autonomy of religious organisations inscribed in the Consti- tution (24). Art. 10 (2) excludes the boards of congregations

(24) Autonomy in administrative law and theory is generally understood as the right to self-government and the right to issue regulations. Both of these components have to be present for autonomy to be real. A regulation is viewed as a generally binding precept issued in a definite form which governs an abstract number of cases and impersonally creates rights and duties. A regulation is therefore substantial law. The right to issue regulations means the delegation of legislation. In Estonia the regulations of autonomous subjects can be either *praeter legem* or *intra legem* regulations. (See also K. Merusk, "The Right to Issue Regulations and its Constitutional Limits in Estonia", *Juridica International. Law Review of the*

(both congregations of churches and so-called single congregations) and religious societies from the aforementioned right. On the basis of the above, the legal definitions in present Estonian law seem to be unreasonable, and unfair to congregations and religious societies. (It has to be mentioned that the exclusion of church congregations from the right to regulate their own activities may be justified within the structures of their church, but the exclusion of single congregations and religious societies is questionable). The 1993 CCA was extensively based on the 1934 Churches and Religious Societies Act. Art. 15 of the 1934 Churches and Religious Societies Act stated that the deliberative organs of churches and associations of religious societies had the right to issue regulations within their own sphere of competence as churches or associations of religious societies. That type of right was not given to single religious societies or to church congregations (25). But the 1934 Act did not try to give legal definitions of different religious organisations. It was up to each religious organisation to decide whether it wanted to be a church, religious society or association of religious societies and to organise itself accordingly.

Art. 10 of the 1993 CCA is problematic from another aspect as well. It is stated that boards of churches and associations of congregations have the right to adopt instruments which regulate their activities. A literal interpretation leaves it open whether "their activities" means activities within the sphere of autonomy of the mentioned religious organisations or any of the activities of a church or association of congregations. *Sensus verborum est anima legis.* Art. 2 (4) of the present CCA states that the main activities of churches and congregations are: confession and manifestation of their faith primarily in the form of services, religious meetings and offices. Art. 6 (1)

University of Tartu, I, 1996, p. 42). The right to issue *praeter legem* regulations is in theory restricted by the autonomy of the subject. Nevertheless, the content of the autonomy of churches (religious organisations) is debatable in Estonia. (See also M. KIVIORG, "Church Autonomy and Religious Liberty", *Juridica International. Law Review of the University of Tartu*, IV, 1999, p. 93-99; G. ROBBERS (ed.). *Church Autonomy. A Comparative Survey*. Peter Lang: Frankfurt am Main, 2001, pp. 285-301).

(25) A.T. KLIIMANN, *Kehtiv Haldusõigus* [*Current Administrative Law* - M.K.], Tartu, 1934, p. 57.

of the draft Act determines the main activities of churches, congregations, associations of congregations and convents. These main activities are: confession and manifestation of their own faith primarily in the form of services, religious meetings and offices; confessional or ecumenical moral, ethical, educational, cultural and diaconal activities, social rehabilitation and other activities outside the characteristic confessional offices or services of churches and congregations. The above-mentioned provisions can be interpreted as an attempt to identify the sphere of autonomy of religious organisations (except religious societies). The real scope of autonomy is determined together with other acts and regulations, as well as administrative and court practice.

7. CHURCHES AND CULTURE

Art. 37 of the Constitution creates the basis for the entire school system and states *inter alia* that the provision of education shall be supervised by the State. The Estonian school system contains mainly state schools. At the present moment, there are only two small private church schools (a Catholic school, and a school of the Word of Life Congregation). Thus, the main place for possible religious education is public schools. According to the law, there are provided and prescribed possibilities for organising religious education. This can be viewed as evidence of a not very strict separation of State and Church in Estonia.

According to Art. 4 of the Education Act, the study and teaching of religion in general education schools is voluntary and non-confessional. Religious education is compulsory for the school if fifteen pupils wish to be taught the subject. The principles and topics of religious education are set out in the curriculum approved by the Ministry of Education. Religious education in schools is considered as an optional subject both for pupils and for teachers. In the course, the views and contributions of various religions to the development of humanity are taught, thus providing knowledge about different religions. At primary level, the parents decide about the participation of their children in religious education lessons, at secondary level

pupils decide this independently. Religious education teachers must undergo both theological and pedagogical preparation. There is no alternative ethics course offered to pupils who do not attend religious courses. Confessional instruction is provided to children by Sunday schools and church schools operated by congregations.

The religious education curriculum defines the basic principles for religious education as following:

1. Religious education is founded on the UN Declaration of Human Rights.

2. Religious education in Estonian schools is ecumenical. (This viewpoint has strong roots in the history of Estonian religious education: it was an important factor in the reform of religious education already in the beginning of the 1920s. Religious education in schools is ecumenical, thus preventing it from becoming religious influence).

3. The aim of religious education is to provide knowledge about religion in order to help pupils in understanding the world, its culture and the role of the religious dimension in human life.

4. Religious education is important in supporting and ensuring national identity.

5. An important accent of religious education is to support the moral development of pupils.

6. Religious education is directed towards life in a pluralistic and changing world in which tolerance, an ability to live together with different people, clear personal moral values (*knowing good and evil*) and a sense of responsibility are needed.

7. Religious education can create the preconditions for personal religious choices.

8. Special attention must be paid to the problems of pupils in everyday life and to their questions.

9. Religious education lessons should have an open and confidential atmosphere (26).

(26) P. VALK, "Development of the Status of Religious Education in Estonian School. European and Local Perspectives", *Conference on Law, Religion and Democratic Society*, Estonia, University of Tartu, 1999.

The question of the cooperation between the state and churches in the development of religious education is clearly left undefined (27).

8. FINANCING OF CHURCHES

Since there is no state church in Estonia, there are no direct church taxes. The State supports the Council of Estonian Churches financially. For example, a subsidy of ca 2 million (2 043 900) EEK (250 000 DM) was allocated from the 1999 state budget (28), and a subsidy of 1 945 000 EEK was allocated from the 2000 state budget (29). The Council decides according to its own statutes which churches it admits. The members of the Council are the following: the Estonian Evangelical Lutheran Church, the Roman Catholic Church, the Estonian Christian Pentecostal Church, the Estonian Methodist Church, the Estonian Union of Evangelical Christian and Baptist Congregations, and the Estonian Congregation of St. Gregory of the Armenian Apostolic Church. The Estonian Orthodox Church applied for membership in 1993 but was rejected. The Council of Churches decides by itself upon the use of the money received. The State does not prescribe how the money must be used. The other question is whether this can be viewed as a violation of the freedom of religion of taxpayers who do not belong to these churches. Furthermore, the justification of these allocations is debatable. This definitely does not mean that the State should refrain from dropping any coin over the "wall". Taking into account the fact that sacred church buildings usually have historical, cultural and artistic value, the state intends, at least to some extent, to support

(27) "Estonia belongs to the countries where the initiative in organising religious education belongs to state officials. There is a fear that if the churches were to lose the possibility of being involved in the development of religious education, the door would be open for the state to define what is desirable or not, according to interests that are often shaped by narrow economic and pragmatic factors. It is self-evident that theologians and church representatives should be involved in religious education. Nobody demands the exclusion of historians from the teaching of history in schools!" P. Valk, ibid.

(28) RT I 1999, 3, 49.

(29) RT I 2000, 1, 1.

the churches and other religious organisations. The Government of the Republic also strives to find means to support particular projects, for instance the renovation of organs, etc. The financing of Church operated health care institutions and support for charitable events should be also welcomed.

According to Art. 20 of the CCA, churches, congregations and associations of congregations are non-profit organisations. On the basis of the Income Tax Act (30) and of Government of the Republic Regulation No. 89 of 21 March 2000, the Estonian Government has established an order regulating the list of non-taxable organisations (31). In accordance with Art. 11 (2) of the Income Tax Act, churches, congregations and associations of congregations which have been registered by the Ministry of Internal Affairs in the Estonian Registry of Churches, Congregations and Associations of Congregations are exempted from income tax. Religious societies registered by a court in the Register of Non-Profit Organisations and Foundations have to apply for registration on the list of non-taxable organisations.

9. Religious Assistance in Public Institutions

The realisation of religious freedom in prisons is regulated by Art. 5 of the CCA, which stipulates that prisons must ensure that their inmates, if they so wish, may practise their religion according to their religious beliefs, if this does not disturb the prison or the interests of the other inmates. It also stipulates that the services should be organised by a church or congregation which has obtained permission for this from the local government or authority. In accordance with the Government order, the co-ordination of the prisons chaplaincy is delegated to one of the organisations operated by the Estonian Evangelical Lutheran Church. The prison chaplains are in principle considered as civil servants. The institution of the chaplaincy is inter-denominational and ecumenical. Only people from the

(30) RT I 1993, 79, 1184.
(31) RT I 1996, 48, 946.

member churches of the Council of Estonian Churches are entitled to serve as chaplains. This does not mean that other religious organisations cannot have access to prisons at the request of prisoners. According to Art. 98 of the Code of Execution Procedure, prisoners have the right to meet with members of the clergy, and prisons must create proper conditions for the satisfaction of the religious needs of prisoners and for contacts with the clergy or authorised representatives of their confessions. Art. 171 of the Code of Enforcement Procedure is problematic, since meetings with the clergy may occur only with the permission of prosecutors, investigators, or the courts. The general rule should be that it is permitted to meet with the clergy unless investigators, prosecutors or the courts forbid it in the interest of an investigation. As Estonia is party to the European Convention on Human Rights, Convention practice allows the restriction of the rights of prisoners in prison in the interests of public safety, public order, health and morals and for the protection of the interests and rights of their fellow prisoners (32). The Code of Enforcement Procedure prohibits hindering the distribution of church or religious publications in prisons, and prisoners may subscribe, at their own expense, to religious publications from outside the prison and receive them in the prison.

Freedom of religion in the armed forces is regulated by only one provision in Art. 5 of the CCA, according to which the officer of the unit shall guarantee conscripts the opportunity to practise their religion, if they so wish. It is not clear whether, or how, this freedom is realised in practice. The chaplaincy in the armed forces is more or less regulated in the same way as the prison chaplaincy.

Art. 5 of the CCA regulates the realisation of religious freedom in medical and care institutions. According to the Act, medical and care institutions must make it possible for their residents, if they so wish, to practise their religion according to their religious beliefs, if this does not disturb the order in these institutions or the interests of the other residents.

(32) *Compatibility of Estonian Law with the Requirements of the European Convention on Human Rights*, Council of Europe, April 1997, p. 89.

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(32) *Compatibility of Estonian Law with the Requirements of the European Convention on Human Rights*, Council of Europe, April 1997, p. 89.

10. Legal Status of Holders of a Spiritual Office

Art. 15 (1) of the CCA states that a person who has the right to vote at local government elections and who is not under punishment pursuant to the Criminal Code may be a member of the board of a church, congregation or association of congregations, or may be a member of the clergy. This requirement is not applied to members of boards of religious societies registered pursuant to the Non-Profit Organisations Act. A member of the clergy can be a foreigner, if he/she has obtained permission to work and live in Estonia in accordance with the Foreigners Act. This is relevant mostly in relation with the Roman Catholic Church, the German and the Swedish congregations of the Estonian Evangelical Lutheran Church, the Ukrainian congregation, the Armenian congregation, etc.

11. Matrimonial and Family Law

Currently, no church or congregation in Estonia has the right or authorisation to register marriages carrying civil validity. The Ministry of Internal Affairs, in conjunction with the Ministry of Justice and the Council of Estonian Churches, has initiated important negotiations on the feasibility of granting such authorisation (33).

(33) The Family Law was amended in June 2001.

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THE PRINCIPLES OF STATE ECCLESIASTICAL LAW IN THE CZECH REPUBLIC

Summary: 1. *Social Preconditions.* — 2. *Historical Roots.*— 3. *Sources of Law.* — 4. *The Fundamental Features of the System.* — 5. *The Status of Churches and Religious Societies.* — 6. *The Inner Organisation of Churches and Religious Societies.* — 8. *Labour Law.* — 9. *The Financing of Churches and Religious Societies.* — 10. *The Pastoral Service in Public Institutions (Prisons, Hospitals and the Army).* — 11. *The Legal Status of the Secular and Regular Clergy.* — 12. *Family Law and Marriage Law.* — 13. *Conclusion.*

1. Social Preconditions

According to the latest statistics (from the year 1991) 10,302,215 inhabitants lived in the Czech Republic at that time. 44.8% of them declared to belong to some church or religious society (39% to the Roman Catholic Church), 39.9% declared themselves to be undenominational, and 16.2% applied their right to give no answer.

The results of the 1991 statistics were the following:

4,112,864	Undenominationals
4,021,385	Roman Catholic Church
1,665,617	No answer
203,996	Protestant Church of the Czech Brethren
178,036	Czechoslovakian Hussite Church
33,130	Silesian Lutheran Church
19,354	Eastern Orthodox Church
14,575	Jehovah's Witnesses
7,674	Church of the Seventh-Day Adventists
7,030	Greek Catholics

4,151	(Slovak) Lutheran Church in the Czech Republic
3,017	Christian Congregations
2,855	Methodist Protestant Church
2,759	Church of the Brethren (Congregationalists)
2,725	Old Catholic Church
2,544	Union of Baptists
2,269	Union of Brethren (Moravian Brethren)
1,485	Apostolic Church (Pentecostals)
1,292	Federation of the Jewish Communities in the Czech Republic
427	New Apostolic Church
365	Religious Society of Unitarians
8,182	Others (including the unknown number of members of the Church of Jesus Christ of the Latter-Day Saints)

The members of churches belong to the poorer classes of inhabitants in the Czech Republic. Richer people, especially the members of the establishment in the former totalitarian regime, haven't shown any tendency to change their mostly negative attitude towards churches, and have done nothing to support them. Any repentance or admission of collective or individual guilt is an unknown moral category for those people.

2. Historical Roots

The ancestors of the Czech people accepted Christianity after the year 800 under the influence of the Irish, Franconian (Bavarian) and Greek-Slavonic missions. The territory of the lands of the Czech (Bohemian) Crown belonged to the Western Church obedience from the beginning and then without interruption. The Czech Kingdom (the Kingdom of Bohemia) was bound in a free union with the Holy Roman Empire. The Charles University was founded in 1348 in Prague (the capital of Bohemia) as the first university in Central Europe. There had been two confessions in the Kingdom since the Hussite reformation in the 15th century: the Catholics and the Utraquists. The recatholization of the country after the Thirty Years War

was connected with the Hapsburg dynasty. The unification of the Czech lands with the Austrian possessions of the Hapsburg monarchy was the next step. The sovereign of the union appropriated *iura maiestica circa sacra*. In this way the Catholic Church lost an essential part of its autonomy.

Emperor Joseph II published his Letter of Tolerance in 1781. Approximately 2% of the inhabitants in the Czech countries professed the Helvetic or Augsburg confessions. Part of the Catholic Church's property, especially the property of monasteries and convents, was secularized. In 1848, a process of emancipation of the churches from the state began. In 1867, a new liberal constitution was adopted in the Austro-Hungarian Empire. From that time onwards, the prevailing system could be described as a coordination model establishing a system of parity between the churches in church-state relations. All the churches gained the right to be registered by the state if they fulfilled legal demands. The churches that were registered by the state had the right to teach religion in public schools and to practise religious services in the army. The salaries of priests, pastors and rabbis were financed partially by the churches and religious societies, and partially by the state when some churches were unable to finance their clergy on their own. The registered churches and religious societies were supported by the state in a fair way, according to the number of their members.

The Czechoslovakian Republic, which was founded in 1918 after the separation from the Austro-Hungarian Empire, adopted and recognized the older legislation of the monarchy. A choice between the civil and the religious forms of marriage (recognized by the state) was possible from 1919. In public schools, religious education was compulsory for children belonging to registered churches. The Constitution of 1920 proclaimed personal religious freedom. As far as public opinion is concerned, the Catholic Church was accused of having had too close relations with the Hapsburg dynasty and the dissolved Austrian monarchy. Around 20% of the Czech people voluntarily gave up their membership of the Catholic Church; approximately one half of them became undenominational, while the other half founded the Czechoslovakian Church in 1920. 1.1% of the popu-

lation converted to Protestantism, so that the share of Protestants among the Czechs increased to 4%. 0.2% of the Czech people became Eastern Orthodox. 75% of the Czech people remained henceforth in the Catholic Church.

The Evangelical (Protestant) Church of the Czech Brethren was founded by uniting two churches in December 1918, the Czech Calvinist Church and the Czech Lutheran Church. This unified church is a member of the World Alliance of Reformed Churches.

The Czechoslovakian Church developed from Catholic Modernism. It united the Catholic and Protestant aspects of worship and teaching with the Hussite tradition (which had been non-existent for a long time). This church was recognised by the state in September 1920 but it did not become a state (established) religion. This church has used the name Czechoslovakian *Hussite* Church since 1971.

A *Modus Vivendi* between the representatives of the Czechoslovakian government and the Holy See was adopted in 1927/1928. The Holy See accepted the demand of the government of the Republic to be consulted about its possible political objections before the installation of diocesan bishops.

During the Nazi occupation of 1939-1945, the Catholics in the Czech lands actively participated in the resistance against the Nazis and, being persecuted by them, they were rehabilitated in the minds of the Czech people. All the churches became popular in Czech society after World War II. Religious freedom was reestablished as before 1939, although the Communist party was very powerful and tried to increase its own power.

A radical change came after the Communist *coup d'état* in February 1948. All the spheres of public life had to accept the "scientific", i.e. Marxist, ideology. Atheism was part of this ideology. The Marxist ideology played the role of a state religion in the years 1948-1989.

Churches and religious societies were the only alternatively thinking institutions whose existence was, with many limits, tolerated. The communists adopted this attitude towards the churches thanks to the fact that religiosity was deeply established in people's souls, which meant that trying to throw all church activities into

illegality would have been very dangerous for their regime, because of the risk of losing control.

All the land property of churches (woods and fields) was taken over by the state in 1948, as this had been a basic source of their economic strength. All church schools and seminars were abolished. The education of the clergy was allowed only in three state theological faculties — the Catholic, the Protestant, and the Czechoslovakian (Hussite) — under the control of the state and with limits on the numbers of applicants.

The new law establishing the institutions of state control over the churches came into force on November 1, 1949. The next law on the same day brought a statutory but very low salary for clergy paid by the state, regardless of the will of the churches. This law also bound any religious activity of the clergy to a state permission issued for a limited territory. This state permission could be withdrawn without explanation. The Penal Code of 1950 ruled that breaking this law would be punished by imprisonment. Many ministers (most of the Catholic priests) had their state permissions withdrawn, all catholic bishops were put into prison or interned. Many priests and Christian laymen were among the ca 35,000 persons condemned for political or ideological reasons.

In April 1950 all the monasteries and priories were dissolved and the monks were interned in "centralisation camps" without any legal reason. Later they were ordered to join forced labour teams. From August 1950 convents were relocated to the borderlands and could no longer take novices, and their nuns were forced to work in factories.

A compulsory form of civil marriage was established in 1950 (first in the Czech lands). Religious education in schools was permitted on a voluntary basis, but there were attempts to ban religious lessons from school premises, and children who attended religious education classes were discriminated against.

The communist regime in Czechoslovakia did not define the relation between the state and church as separation. The legal personality of individual ecclesiastical legal entities and their ownership of remaining church property (churches, parsonages, gardens) were

recognized. Lay employees of churches, for example vergers, were usually paid with money collected during religious services.

All the churches, and especially the Catholic Church, became symbols of resistance under the communist regime. They carried some authority among all dissidents.

After "the Velvet Revolution", which followed the brutal intervention of communist police forces against the students' demonstration in Prague on November 17, 1989, the Parliament abolished crimes relating to religious activities on December 13, 1989. The mandatory state permission was abolished on January 23, 1990.

3. Sources of Law

Immediately after the first visit of the Pope in former Czechoslovakia in April 1990, diplomatic relations between Czechoslovakia and the Holy See were restored, with the opening of a nunciature and an embassy. The Czech Republic has maintained these relations to their whole former extent. The *Modus Vivendi* of the years 1927/1928 is considered obsolete by both parties because of the clause of essentially changed conditions (*clausula rebus sic stantibus*). But Czechoslovakia in the years 1990-1992 did not conclude a new agreement with the Holy See, and neither has the Czech Republic since it became independent in 1993.

In the course of a visit to the Holy See in December 1999 by representatives of the Czech Republic, led by the President of the Republic, the first steps were taken towards the conclusion of international agreements, especially on the topics that have been guaranteed by the agreements concluded by the government and the representatives of the Catholic Church in the Czech Republic.

According to article 10 of the Constitution of the Czech Republic (law No. 1/1993 Sb.) (1), the ratified and published international agreements on human rights and fundamental liberties that bind the Czech Republic are immediately binding and have precedence over laws.

(1) Sb. = Sbírka zákonu (the official Journal of Laws of the Czech Republic).

The International Covenant on Civil and Political Rights of December 19, 1966, which was ratified by the Czechoslovak Socialist Republic in November 1975 and which came into force on March 23, 1976, is one example of the agreements under article 10.

The articles of the Charter of Fundamental Rights and Liberties of 1991, especially articles 15 and 16, constitute another important part of Czech state ecclesiastical law. The Charter was integrated into the constitutional order of the Czech republic on January 1, 1993.

The basis of Czech state ecclesiastical law is created by the enactments of law No. 308/1991 Sb. about freedom of religion and the status of churches and religious societies, and by the enactments of law No. 161/1992 Sb. about the registration of churches and religious societies.

Laws No. 298/1990 Sb. and 338/1991 Sb. about the restitution of property rights to individual buildings of monasteries and convents constitute other source of contemporary Czech state ecclesiastical law.

The agreements of the Czech state authorities with the Czech Bishops' Conference and the Ecumenical Council of Churches in the Czech Republic belong to Czech state ecclesiastical law too. There are two agreements on pastoral services in prisons (1994, 1999), an agreement on pastoral services in the army (1998) and an agreement on the collaboration of churches with the public radio (1999). These agreements have no international character.

4. The Fundamental Features of the System

The Czech Republic is a state where the principle of non-identification with any religion or ideology, the principle of neutrality, and the principle of parity and autonomy of churches and religious societies have been applied.

Article 2, paragraph 1 of the Charter of Fundamental Rights and Liberties states that the Czech state is based on democratic values and must not bind itself to any ideology or religion.

According to article 15, paragraph 1 of the Charter, freedom of thought, conscience and religion is guaranteed. Everyone has the right to change his religion or to be undenominational.

According to article 16, paragraph 2 of the Charter, churches and religious societies administer their affairs independently, especially establishing their bodies and appointing their clergy separately from the state authority.

The resolute insistence on the principle of non-identification with any religion or ideology is a reaction, of course, to the former regime. The degree of identification with the Marxist atheist ideology in the Czechoslovakian state ruled by the Communist Party until 1989 was so high that the persecution against churches and believers was one of the harshest in communist countries.

The regime of state-church relations that we can call separation has never been practised on the territory of the Czech lands. Today the state applies the principle of non-identification with any church and the principle of parity and autonomy of churches, but it collaborates with them in many areas, so that one can call this a cooperation model.

5. The Status of Churches and Religious Societies

Law No. 308/1991 Sb. declares in § 4 that a church or a religious society is considered to be a voluntary union of people who share the same religion within the framework of its own structure, own bodies, and own internal provisions and ceremonies. Registration of churches and religious societies under this law is a *conditio sine qua non* for their activities as churches and religious societies to be allowed to take place on the territory of the Czech state. There is no legal distinction between the terms "churches" and "religious societies", since these two concepts mean the same thing. Law No. 308/1991 Sb. is based on the Central European tradition of verbal differentiation between churches and religious societies, although there is no difference between them in fact.

According to § 22 of law No. 308/1991 Sb. all the churches that were practising their activities under a former law or legal assent on the day of the legal coming into force of this law and that are mentioned in the appendix to this law are considered as

registered under this law. This was applied to 19 churches and religious societies.

The registration of other churches and religious societies is to be carried out by the appropriate body of the state administration - i.e. the Ministry of Culture. The proceedings and conditions for the registration are mentioned in the law. It is possible to appeal against decisions, in accordance with the principles of administrative law. If any church practises its activities in ways that contradict the law or conditions of registration, it is possible to abolish its registration. The Supreme Court of the Czech Republic is competent to review this abolition measure if it is appealed against by the church.

Two other churches were registered in the years 1993 and 1995. No registration has been repealed. At the present time there are 21 registered churches in the Czech Republic.

The condition for registration under law No. 161/1992 Sb. is 10,000 members residing on the territory of the Czech Republic (or 500 members in the case when the church requesting registration is a member of the World Council of Churches). Since 1999 a new law has been in preparation in which the number of members will be reduced and unified.

6. The Inner Organisation of Churches and Religious Societies

All registered churches and religious societies are legal entities on the ground of law No. 308/1991 Sb. The decisions on the legal personality of individual bodies, its range and the definition of who is legitimate to act as their statutory body fall within the sphere of the internal administering of individual churches and religious societies. This fact flows from § 13/1/g) of the above-mentioned law. The Ministry of Culture, i.e. a registering body, is responsible for "supervising all legal entities whose legal subjectivity is derived from the churches if they are not regulated according to another law". (§ 19/1) Examples of regulation under other laws include the supervision over church schools exercised by the Ministry of Educa-

tion, or the supervision over church hospitals exercised by the Ministry of Public Health, etc.

In fact, a distinction between theological core institutions and indirectly related institutions can be established. The latter enjoy church autonomy too, but they are also compelled to follow other conditions of secular law (concerning hospitals, schools, social institutions).

The corporations called *consociationes et fraternitates* in the Code of Canon Law of 1983 and established in order to support the aims of Christian devotion and love have legal personality and can obtain property and act independently in public affairs. Examples: the associations of third orders, ecclesiastical movements and organizations (for example *Opus Mariae* - Focolari), diocesan and parish charities, Protestant diaconates etc.

Churches can associate with each other. The Ecumenical Council of Churches in the Czech Republic is such an association.

Czech state ecclesiastical law does not concern associations that are established by believers outside the structure of churches. Examples: the Czech Christian Academy, the Church Law Society, the Society of Christians and Jews, the Academic Weeks, the YMCA, the Salvation Army or the "Orel" - Eagle (an association for physical training).

The Roman Catholic Church is constituted by two church provinces — the Bohemian and the Moravian — and by a number of religious orders and religious congregations. The establishment of a new diocese, abbey, monastery or convent does not depend on state approval. Thus, the diocese of Plzen was established in 1993. The diocese of Ostrava and Opava was established in 1996. Now there are two archdioceses and six dioceses on the territory of the Czech Republic. The exarch of the Greek Catholic Church, having his residence in Prague, is also a member of the Czech Bishops' Conference.

The Protestant Church of the Czech Brethren is constituted by fourteen seniorates including the autonomous seniorate of the Moravian Brethren (since 1999).

The Czechoslovak Hussite Church, led by a patriarch, is constituted by five dioceses.

7. Churches, Religious Societies and Culture

It is possible to divide Czech schools into three categories according to their founding bodies:

1. Schools established by the state or a municipality,
2. Schools established by a church body (dioceses, orders, parishes),
3. Schools established by a natural person or a legal entity of civil law.

The minimum requirement is to place the school under the supervision of the Ministry of Education.

Church schools are not the same as private schools. Their usual costs are fully paid by the state; their ecclesiastical founders regularly provide buildings and appoint their directors. Pupils are accepted according to their results at the entrance examinations, and not according to their religious origins. Teachers can be undenominational or be members of other churches or religious societies, although basic loyalty towards the church that founded the school is expected. This arrangement is considered suitable by the deeply secularized Czech people. Church schools have met with great popularity in Czech society (2).

All registered churches have the right to establish church schools at all levels, except universities. The Catholic Church has founded three higher theological and special schools, and the Protestant churches have founded four. These schools accept students after matriculation (A levels), their character is close to that of universities, but their students take no academic degrees. These schools educate religious education teachers, social workers, pastoral assistants and journalists.

One Protestant, one Hussite and three Catholic theological faculties are part of the public universities founded by the state. They have created their own statutes in collaboration with their churches.

(2) Believers had no access to teacher training during the totalitarian (communist) period because teachers were expected to play the role of "priests of atheism". It is interesting to see that from 1990 to this day, 88 catholic and 22 protestant church schools have been established, including a great number of secondary schools and grammar schools. The first Jewish school was founded in Prague in 1998.

Their teachers are accepted only with the consent of the churches. The chancellors of these faculties are representatives of the churches. Future clergymen, religious education teachers and lay employees of churches study in these faculties.

Private schools have the duty to follow the state curriculum and their certificates have public status. Their costs are paid by the state only partially, and the rest is paid by each school (this is drawn, for example, from school-fees). It is not excluded for private schools to hold their own specific worldviews, even religious ones. A private school can also choose its pupils according to its own discretion. In 1999, the founding of private universities became possible. It is not excluded that their founders can be church bodies.

Churches have the right to teach religion in all public schools as an optional subject. A teacher needs the permission of a recognized church. He is paid by the school. Religion is sometimes not taught because of the severe shortage of religious education teachers (3). Pupils who do not belong to the church that runs a religious education course can attend too. The churches support this practice because of ecumenical cooperation and a common need. Undenominational students can attend religious education too.

The disadvantage of this religious education system is that no alternative subject exists and therefore the course is taught on the only free half-day of the week, usually Wednesday afternoon.

Religious education is voluntary in church schools as well, but an alternative subject exists there-ethics. This model ought to be accepted also by public schools.

Private schools are completely free to provide compulsory or voluntary religious education on one or several religions, or they can totally exclude religious education from their curriculum.

The participation of churches in the broadcasting of the public Czech Radio is ruled by the 1999 agreement between the Czech Bishops' Conference, the Ecumenical Council of Churches in the Czech Republic and the Czech Radio. An editorial staff for religious

(3) Religious education in schools has a general informative character. On the other hand, religious education in the form of catechism is practised in the churches' own institutions and buildings.

programmes has been set up at the Czech Radio headquarters. The Proglas, a private radio with a Catholic priest as its director, is very popular. The Church of the Seventh-Day Adventists owns a private radio too.

The churches have not sent delegates to the control councils for television and radio broadcasting yet.

8. Labour Law

A decision of the Constitutional Court of the Czech Republic on March 26, 1997 rejected the jurisdiction of secular courts in the disputes dealing with the termination of service relationships involving clergymen, in accordance with article 16/2 of the Charter of Fundamental Rights and Liberties (the churches administer their affairs independently, especially establishing their bodies and appointing their clergy separately from the state authority).

The employment of clergy and other pastoral employees is ruled by ecclesiastical (canon) law and its duration depends on the competent church authorities, including church courts. If there is no church legal rule, it is necessary to use the state legal rules as a subsidiary source of law. The labour contracts of non-pastoral employees are ruled by secular law (the Labour Code).

9. The Financing of Churches and Religious Societies

After the fall of the communist regime, church property in the Czech lands was constituted mainly of church buildings and parish houses including their lands, some parish gardens, proceeds of collections, savings on the salaries of nuns (in the case of convents). Until 1990 the state continued to pay the salaries of clergy, partly the costs of church head offices and the repair costs of church buildings. Churches paid the salaries of sextons and other lay employees, and the everyday expenses of church buildings.

The Restitution Act gives back the property expropriated by the communist regime to its former owners, but it relates to natural persons only and not to legal entities, including churches.

It appeared necessary to give some religious houses back to religious institutions so that they could create communities, open noviciates and restore their activities. Laws No. 298/1990 Sb. and 338/1991 Sb. restored the property rights of male and female religious orders to 265 religious houses on the territory of Czechoslovakia, including 170 on the territory of the Czech Republic. In some of these buildings the orders established church schools and children(s homes, church social institutions and church hospitals.

In the case of buildings that had not been signed over to the state in the estate register, some of these were given back in an administrative or judicial way. The judicial process for the return of Saint Vitus' Cathedral and other buildings in the area of Prague Castle that had been signed over to the state in a legally dubious way in 1955 is still in progress.

Woods and agricultural land, which were part of the property of benefices, churches and religious communities, have not been given back to the Catholic Church yet. The rented flats and other estate property of the Protestant churches or the Jewish communities have not been given back either.

The question of the return of church economic property is still considered as open. Therefore, on the grounds of the blockade enactments, this property must not be transferred to other subjects. But part of this property has been transferred to municipalities, and the possibility of its return to the churches has been, in this way, excluded.

Church property today serves as a supplementary financial resource for the churches to a rather insignificant extent. The state continues to pay part of the costs of church activities, i.e. the state gives annual financial subsidies in order to pay the salaries of clergy and lay employees in church head offices and to pay for the repairs of buildings of historical value. The state has been giving this financial support directly to the head offices of churches, in the case of the Catholic Church to diocesan offices, since January 1, 1991.

This contemporary situation is considered as provisional both by the state authorities and the churches.

Church schools and religious education teachers in public

schools are paid by the state. Following the agreement of June 3, 1998, concluded between the Czech Bishops' Conference, the Ecumenical Council of Churches in the Czech Republic and the Ministry of Defence, pastoral service has been established in the army. Military chaplains are paid by the state. In the case of church hospitals and social institutions, financing is similar to that of state hospitals and social institutions.

Worship collections and gifts are an important part of the resources of all churches. These resources are exempted from tax duties. Their donors can apply for tax allowances.

10. The Pastoral Service in Public Institutions (Prisons, Hospitals and the Army)

Since 1994, churches have been able to provide pastoral service in prisons in accordance with the agreement between the Prison Service of the Czech Republic, the Ecumenical Council of Churches in the Czech Republic and the Czech Bishops' Conference. A new agreement was concluded in 1999.

The status of military chaplains is ruled by the Agreement on Cooperation between the Ministry of Defence of the Czech Republic, the Ecumenical Council of Churches in the Czech Republic and the Czech Bishops' Conference of June 3, 1998, and by the warrant of the Minister of Defence of the Czech Republic on the Establishment of Pastoral Service within the Jurisdiction of the Ministry of Defence, which has been in force since June 22, 1998. Military chaplains are officers. They are appointed on the grounds of the collective proposal of all the churches that are parties to the agreement. The ecclesiastical rank of military chaplains in the structure of their own churches is not infringed upon. The conditions for the appointment of military chaplains are stated in the agreement between the Ecumenical Council of Churches in the Czech Republic and the Czech Bishops' Conference of 1998.

Churches and religious societies have provided pastoral service in hospitals and social institutions on the grounds of agreements with the boards of directors of these institutions.

11. The Legal Status of the Secular and Regular Clergy

According to article 3 of the Charter of Fundamental Rights and Liberties, fundamental rights and liberties are guaranteed to everyone. Therefore the members of the secular and regular clergy enjoy all the civil rights. There are no limits to their property rights in Czech law, including the right to be an inheritor.

The sole privilege of clergy is stated in article 5 of law No. 308/1991 Sb. In this enactment, the state accepts the clergy's duty to keep the secret of the confessional.

Religious noviciates have the same status as students as far as social benefits and social security claims on the state are concerned.

12. Family Law and Marriage Law

The still valid Czechoslovak Family Act of 1963 was amended by law No. 234/1992 Sb., which restored the legal effects of church marriages from July 1, 1992. Today in the Czech republic, one can choose freely between the religious and civil forms of marriage. The decisions of the church courts in matrimonial nullity suits have still not been recognized by the state.

Law No. 91/1998 Sb. amended the former enactments of the Family Act, so that people who wish to marry have the duty to submit a certificate issued by the state register office, confirming that under Czech law there are no impediments to the marriage. Before, the clergymen themselves had to inquire about these matters.

As concerns children up to 15 years of age, their membership of any church or religious society depends on the will of their parents. Attendance of children at religious education lessons in schools is decided in the same way.

13. Conclusion

It is clear that the whole restitution of estate property that belonged to church legal entities is a very difficult problem, and that the property recovered by the churches will probably not be

enough to make them economically secure. Common society, as well as church members, are not satisfied with the present system of state subsidies for churches. On the one hand, this system epitomizes the churches' dependence on the state, on the other hand, undenominational people can complain that their taxes help to finance church services.

Church members still belong to the economically less secure classes of inhabitants, so it is not possible to expect that all the costs of churches will be paid by them. The solution to this problem could be an increase of tax allowances for the benefit of natural persons and legal entities that financially support churches, and the establishment of a public fund as a compensation for the debts of the state towards the churches. The interests and part-payments from this fund would constitute an additional source of income for churches (following the Hungarian model), up to its liquidation.

State support in the spheres of education, health care, charity and maintenance of church historical monuments has not been called into question. It is also considered a necessity that the state should support the repairs of churches that are devoid of historical value but are nevertheless important landmarks in Czech towns and villages. These churches are often modern buildings owned by the Catholic Church, the Protestant churches or the Czechoslovak Hussite Church.

Since April 1999, a proposal for a new law on the relation between the state and the church has been under preparation at the Ministry of Culture. But the experts seem rather to be attempting to amend law No. 308/1991 Sb., through which religious freedom and church autonomy are guaranteed. What appears to them as the only necessity is to reduce the number of members required for a church or a religious society to be registered.

Two committees collaborate with the Ministry of Culture. The first, of a political character, includes also a communist delegate. Because of this, the delegates of all the churches and of the Jewish communities refused to participate in this committee. They argued that negotiating with the representative of the Communist Party would be an absurdity of the same kind as if the Nazis had negoti-

ated about Jewish affairs after World War II. Therefore, a second committee was created, bringing together only the experts. These experts represent the Czech Bishops' Conference, the Ecumenical Council of Churches in the Czech Republic, the Federation of Jewish Communities, the universities and the Czech Academy of Sciences. The two committees work in parallel.

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THE STATE AND CHURCH RELATIONSHIP IN SLOVENIA

Summary: 1. *Sociological situation.* — 2. *Fundamental principles.* — 3. *Juridical Sources.* — 4. *The status of religious confessions.* — 5. *The status of religious confessions in particular fields.* — *a*) Education. — *b*) The media. — 6. *Church financing.* — 7. *Spiritual aid in public institutions and communities (prisons, hospitals, the army).* — 8. *Church and marriage law and family law.* — 9. *Conclusions.*

1. Sociological situation

According to the 1991 census, Slovenia has the following religious demographic pattern:

Catholics	71.36%
Orthodox	2.38%
Muslims	1.51%
Protestants	0.97%
Other religions	0.24%
Atheists	4.35%
Unanswered	19.17%

Currently, 30 religious communities (1) are registered in Slovenia, including some that are designated abroad as sects and denied registration, *e.g.* scientology.

Basic legal relations in the area of freedom of religion and belief were established by the 1991 Slovenian Constitution, yet the Act on the Legal Position of Religious Communities in the Republic of Slovenia (hereafter: the ZPPVS) regulates the legal position of

(1) The term "religious communities" means religious organizations or organized religions.

religious communities in more detail. This Act had been voted in 1976, in the then Socialist Republic of Slovenia, and is still in force despite the fact that it has proved to be deficient. First of all, the Act had come into force in a completely different constitutional system, based on the principle that everything that was not expressly allowed was prohibited. Under those circumstances it regulated all essential questions in twenty-three articles. Today the Act is not only obsolete as a result of political changes, but also inconsistent on several points with the new constitution and the new constitutional system. Furthermore, it has several noticeable deficiencies, because it neither defines religious communities nor determines the minimal criteria for their establishment (*e.g.* the minimum number of members, the act of foundation or charter with defined contents, the required representative organs, and the registration procedure). Consequently, the ZPPVS has been altered or supplemented twice: in 1986 penal provisions were added, but then in 1991, still more important changes made it possible for the first time to establish and operate denominational private schools in Slovenia.

The Bill on Religious Communities of 1996 (2) is still in the initial parliamentary debate phase. It is very short and is specifically intended to determine the criteria for the establishment of a religious community and the regulation of the registration procedure. It brings more order into the area of the status of religious communities, but at the same time it leaves out the majority of the substantial provisions that the former statute included. The penal sanctions have also been changed; prison sentences are no longer applied, and instead a mere system of fines has been introduced.

Compared to the other religious communities, the Roman Catholic Church has a special position in Slovenia. The historical development of this geographical area and the current number of Catholics support its being legitimately called the religion of the nation. In the framework of the Hapsburg Empire, which Slovenia had been a part of, Catholicism had been considered the State church for a long time. At the end of the 18th century the State had indeed become secular-

(2) Poročevalec Dřavnega zbora (Parliamentary Bulletin) No. 41/1996.

ized (under the policy known as Josephism), but the Church retained a special position in society long after (*e.g.* educational and charitable activities have almost completely remained in its hands).

After World War 2, in the Socialist Federative Republic of Yugoslavia, the Church was heavily persecuted by the State, and relations between them were not improved until the reestablishment of diplomatic relations between the Holy See and Yugoslavia in 1966. In the 1991 census, no less than 71% of the inhabitants of Slovenia declared themselves Catholics, and scientific research on public opinion shows that this share has been growing year by year (*e.g.* in 1994: 76.2%) (3). Undoubtedly, the Roman Catholic Church is the best organized and the most active religious community in Slovenia, particularly in the area of humanitarian activities (Karitas-charity) and education (four secondary schools).

Undoubtedly, compared with other religious communities, the Roman Catholic Church has a *de facto* special position. This is proved by both the historical development of the area and the data on the number of members it has today: in the 1991 census no less than 71% of the population declared themselves Catholics, so that the Roman Catholic Church can legitimately be called the religion of the region. In the framework of the Austro-Hungarian Empire, to which Slovenia also had belonged, it had long been considered the State religion. In addition, it is the best organized and the most active religious community in Slovenia, particularly in the field of humanitarian activities (Karitas) and education (four secondary schools).

However, compared with other religious communities, the Catholic Church is not entitled to special benefits. The exceptions to this are: (*a*) the diplomas of the Catholic secondary schools and the Theological College (the only theological college in Slovenia) are considered to be public documents (Art. 22 a of the ZPPVS), as well as (*b*) the archives of the Roman Catholic Church, which must be selected from the documentary material of the Church according to its own rules. The Minister determines in agreement with the

(3) Source: "Religion, Church, State, Politics: an excerpt from longitudinal research on Slovenian public opinion", in the collection of papers: *Religion in the Schools. Why?*, Association of Social Democrats, Ljubljana, November 1994, p. 51ff.

Slovenian Bishop's Conference the necessary conditions for carrying out archival activities and the funds agreed upon for performing the archival activities of the Church (Art. 37 of the Archival Material and Archives Act). Negotiations have begun with the signing of an international agreement between the State of the Republic of Slovenia (hereafter the RS) and the Holy See, which is intended to regulate the special status of this church in the RS.

2. FUNDAMENTAL PRINCIPLES

In the Slovenian legal system, freedom of conscience and belief is provided for under Art. 41 of the Constitution, entitled "freedom of conscience". This provision protects the freedom of self-definition broadly, for it does not refer only to religious beliefs but also to moral, philosophical and other worldviews (views of life). The article includes three provisions: the assurance of freedom of conscience, or the positive entitlement (Para. 1), the negative entitlement (Para. 2), and the right of parents concerning their children's upbringing in the area of freedom of conscience (Para. 3).

As a special aspect of freedom of conscience, the Constitution provides the right for parents to give their children a moral and religious upbringing in accordance with their beliefs. The religious and moral guidance given to a child must be appropriate to his/her age and maturity, and be consistent with the child's free conscience, and with his/her religious and other beliefs or convictions (Art. 41, Para. 3 of the Constitution). The Act only provides that in order to attend religious lessons, beside his/her own consent, a minor (a person under 18 years of age) also needs to obtain the consent of his/her parents or guardian. The bill, however, lowers this limit to 15 years of age.

The right of conscientious objection is also protected by the Constitution. This right is permitted in such circumstances as are determined by statute, to the extent that the rights and freedoms of others are not affected (Art. 46 of the Constitution). More precisely, in the area of defense, citizens who, because of their religious, philosophical or humanitarian beliefs, are not willing to perform military

duty, are assured the opportunity of participating in the defense of the State in some other manner (Art. 123, Para. 2 of the Constitution). One of the motives that must be considered in a case of conscientious objection is religious belief. The manner of claiming the right to conscientious objection is prescribed under the Military Service Act, which came into force in 1991, that is before the Constitution, to which it did not entirely conform. Thus, in 1995 the Constitutional Court of the RS, in case No. U-I-48/94, decided that the Act was not consistent with the Constitution insofar as it made it possible to claim the right to conscientious objection only at the time of conscription, and not also later. The right to conscientious objection is held by anyone who is under the obligation of performing military duties until they are required to participate in the defense of the country: recruits, soldiers during their military service, and commissioned soldiers. The right of conscientious objection is a permanent right, which can be limited only by the rights of others, and in cases determined by the Constitution; by statute it is only possible to determine the way in which it is implemented. Following the Constitutional Court decision, the statute was appropriately amended.

Today conscientious objection is allowed only in two areas: in the area of the State's defense and concerning medical operations. Doctors may refuse to operate on patients (except in cases of emergency) if the operation is contrary to their conscience and the international rules of medical ethics. They have first to inform the respective medical institution of their objection, which must respect their decision and at the same time ensure that its patients can continue to exercise their rights in the area of health care (according to the Health Services Act).

According to the explicit provisions of the Constitution (Art. 16, Para. 2), freedom of conscience is one of the seven constitutional rights and freedoms which can never be temporarily suspended; other constitutional rights may be temporarily suspended or restricted during a state of war or emergency for the duration of such a state and to the extent required by the same, but without any kind of discrimination.

It is also necessary to mention the two constitutional provi-

sions that refer to the status of the individual concerning freedom of religion and belief:

a) it is prohibited to incite religious discrimination and inflame religious hatred and intolerance (Art. 63 of the Constitution); this provision is also included in the ZPPVS, which states that it is prohibited to incite or inflame religious intolerance, hatred and disunion;

b) discrimination on the basis of religion or other beliefs is prohibited, as a reflection of the principle of equality before the law, (Art. 14, Para. 2 of the Constitution). Violating the principle of equality or the prohibition against discrimination in the area of freedom of religion is sanctioned as a crime against human rights and freedoms by the Penal Code of the RS (4). This principle is also detailed by the ZPPVS in the following provisions:

— the provision that all religious communities have an equal legal position,

— the provision which prohibits restricting the constitutional and statutory rights of citizens due to their religious beliefs, affiliation with some religious community, participation in religious observances, or due to a different expression of religious beliefs and religious feelings,

— the provision that religious communities, and their representatives and members, cannot enjoy special benefits, privileges, or special protection,

— the provision that affiliation with some religious community or the profession of some religion do not excuse anyone from their general civil, military and other duties, which citizens must fulfill according to the Constitution, statute, and other regulations.

On the basis of the Constitution (Art. 8), ratified and published international agreements are to be applied directly in Slovenia. In the

(4) Art. 141 of the Penal Code of the RS provides that any individual who, because of a difference in religious beliefs, deprives another individual of any human right and fundamental freedom recognized by the international community or determined by the Constitution and statute, or who restricts such a right or freedom, or who grants someone some special right or benefit on the basis of discrimination, violates the principle of equality. A fine or imprisonment up to one year is prescribed for such an offense. If such an offense is committed by an official abusing his/her official position or rights thereof, imprisonment up to three years is prescribed.

area of freedom of religion and belief the following are especially relevant: Art. 9 of the European Convention on Human Rights (5), Art. 18 of the United Nations Universal Declaration of Human Rights (6), and Art. 18, Paras. 1 and 2 of the International Covenant on Civil and Political Rights (7), the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (proclaimed on 25 November 1981 by Resolution No. 36/55), and the Resolution of the European Conference on Security and Cooperation in Europe (the Final Document of the Vienna Conference dated 19 January 1989).

The applicable Act on the Legal Position of Religious Communities in the RS provides that the profession of religion is a person's private matter. This is a relict from the past communist social system, which transferred religion from the public sphere to a completely private sphere. Under the present Constitution, the

(5) Art. 9, Para. 1 of the European Convention on Human Rights grants everyone the right to freedom of thought, conscience and religion, which includes the freedom to change their religion or belief and freedom, either alone or in community with others and in public or private, to manifest their religion or beliefs, in worship, teaching, practice and observance; Para. 2 of this Convention, however, provides limitations of the freedom to manifest religion or belief but only in cases prescribed by statute, and if necessary in a democratic society in the interests of public safety, health or morals, or for the protection of the rights and freedoms of others.

(6) Art. 18 of the United Nations Universal Declaration of Human Rights provides that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change their religion or belief, and freedom, either alone or in community with others and in public or private, to manifest their religion or belief in teaching, practice, worship and observance; this Declaration does not mention any limitations to this right.

(7) Art. 18 of the International Covenant on Civil and Political Rights:

1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of their choice, and the freedom, either individually or in community with others and in public or private, to manifest their religion or beliefs in worship, observance, practice and teaching.

2) No one shall be subject to coercion which would impair their freedom to have or to adopt a religion or belief of their choice.

3) The freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4) The countries party to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

profession of religions and other beliefs is also free in public life. The bill on religious communities leaves out the provision on the private nature of religion.

Freedom of conscience is not just an individual right, it also has a collective perspective. This means that freedom of conscience is an individual right held by the members of a religious community. It is a special reflection of the constitutional right to freely manifest one's conscience or profess a religion or other belief in public (Art. 41 of the Constitution), in connection with the rights of peaceful assembly, public assembly and free association with others (Art. 42 of the Constitution).

The RS Constitution, in its general provisions (Art. 7), devotes a special article to the regulation of relations between the State and religious communities. The position of this article shows that it concerns one of the basic legal and political principles of State regulation. It is developed in further provisions of the Constitution, statutes and executive regulations. The legal position of religious communities is based on the following fundamental guidelines: the principles of the separation of the State and religious communities, and of equality of religious communities and their free activity (within the legal order) (8) (9).

Concerning these issues, there is a special document of the Joint Commission of the Roman Catholic Church and the Government of the Republic of Slovenia, dated 1994 (the Constitutional Provision on the Separation of the State and Religious Communities as the Starting-Point for the Work of the Joint Commission), which establishes inter alia that: "The democratic State of Slovenia does not take sides with religiosity or non-religiosity as such, but respects the right of citizens to the free, personal and collective, ideological or practical, profession of their religion or their unreligious persuasion. Thus, it understands that citizens have different religious or

(8) Art. 7 of the RS Constitution: "The State and religious communities are separate. Religious communities enjoy equal rights and freedom of activity".

(9) Similar provisions were included already in the SRS Constitution of 1974, which emphasized the separation of religious communities from the State (Art. 229).

non-religious persuasions, and that it is responsible to respect the freedom of all".

The Constitutional Court has not yet dealt extensively with this question. However, it has pointed to one view of the principle of the separation of the State and religious communities in decision No. U-I-25/95 dated 4 March 1993 (10), in which it reviewed the constitutionality of the provision of the Denationalization Act (hereafter the Zden) that had restricted the return of nationalized property to natural persons. The decision stated: "In connection with the assertions of the petitioner, Forestry Nazarje, that the Church as a foreign legal entity cannot be a denationalization claimant for the return of lands, the Constitutional Court holds that there are no constitutional barriers to returning the nationalized property of churches and other religious communities, their institutions or orders, that were operating in the Republic of Slovenia at the time of the coming into force of this statute. The State and religious communities are separate (Art. 7 of the Constitution). It is vital for the system of separation that church organizations and institutions are bound by State law and also depend, concerning their status as legal entities, upon State regulations. These subjects were at the time of the nationalization of their property, as well as during the entire period until the adoption of the Zden, treated as domestic legal entities, and are as such also governed by positive law (Act on the Legal Position of Religious Communities in the Republic of Slovenia, Official Gazette SRS, Nos. 15/96 and 42/86, and Official Gazette RS, No. 22/91)".

The RS Constitution, under Art. 7, explicitly provides that religious communities are equal; thus it is not necessary to derive equality from the general principle of equality and the prohibition of discrimination on the basis of religious belief. The principle of equality does not mean absolute equality; it is to be understood relatively, that to equal facts equal legal consequences apply, and that to essentially different facts different legal consequences apply. Absolute equality itself would entail the unequal treatment of religious communities. There is no (constitutional) case-law on the in-

(10) Decisions and Rulings of the Constitutional Court II, 23.

terpretation of this constitutional provision yet. In theory, the views on its contents differ.

Art. 63 of the Constitution, which declares unconstitutional any incitement to religious inequality and the inflammation of religious hatred and intolerance, is intended to preserve religious peace in the State. The provision is also important as a limitation imposed on certain constitutional rights, *i.e.* freedom of expression (Art. 39), freedom of conscience (Art. 41, Para. 1) and the right to assembly and association (Art. 42), if there happens to be an intention that is unconstitutional according to the said provision of the Constitution. The statute practically assumes the constitutional provision, prescribes that it is prohibited to incite and inflame religious hatred or disunion (Art. 5, Para. 2), and for such an offense prescribes imprisonment extending to 30 days or a fine, if such a violation does not already constitute a criminal offense (Art. 21*a*, Para. 1). This provision is materialized in the Film Fund Act (Art. 20, Para. 3): the Ministry of Culture does not issue a permit for shooting a film in the RS, if the contents of the film are likely to inflame religious intolerance.

Being a reflection of the principle of equality, the Slovenian legal system (the Constitution, statutes and executive regulations) does not use two terms (*i.e.* church and religious community), but only the general concept of religious community. The term "church" is used in established phrases (as for example the separation of Church and State), particularly in public discussions.

The Constitution in Art. 7 only mentions the free activity of religious communities, and not their free establishment. The freedom to establish religious communities is derived from the general freedom of association (Art. 42 of the Constitution). The system of registering religious communities is established, which means that in the registration process the State only examines whether the data in an application do not violate the compulsory regulations applying in the RS.

There is no active protection or promotion of "Christian values" in the RS, since the State is based on the principle of "laïcité" and religious neutrality. Also, deriving from neutrality and "laïcité"

founded on the principle of the separation of the State and religious communities, the State holds that religious symbols in public institutions would be in principle controversial. However, to a certain extent they are tolerated, insofar as religious and general cultural values or symbols overlap (*e.g.* the Christmas tree does not only have a religious significance). Thus far, these issues have not been reviewed by the Court.

3. Juridical Sources

Beside the already mentioned constitutional provisions, the Act on the Legal Position of Religious Communities in the Republic of Slovenia (the ZPPVS) provides a very detailed regulation of the legal position of religious communities. The Act was already adopted in 1976, in the then Socialist Republic of Slovenia, and still applies today, although its deficiencies are more and more obvious. For the circumstances of the time, it regulated all important questions in twenty-two articles. Nowadays, however, it is not only obsolete as a result of social progress, but it is also, on a few points, inconsistent with the new Constitution and the new constitutional system. Besides, it is deficient in many respects, since it neither defines religious communities nor determines minimal criteria for their establishment (*e.g.* the minimum number of members, an act on establishment or a charter with determined contents, representative organs, and a procedure for registration). Later, the ZPPVS was amended twice: in 1986 penal provisions were included in it, and in 1991 important amendments were adopted which made possible the establishment and operation of private religious schools for the first time in Slovenia.

In short, the ZPPVS ensures the freedom to profess one's religion, which is defined as an individual's private matter, ensures the freedom to join religious communities and to participate in their activities, and prohibits individual discrimination on the basis of one's religious beliefs. Furthermore, it establishes the freedom to found religious communities, all of which have an equal position, are separated from the State, and are free to attend to their religious

matters within the framework of the legal system. Religious communities are legal entities under civil law, and obtain legal status through registration by the Office of the Republic of Slovenia for Religious Communities. The statute contains also a series of other provisions that refer to the religious press, the performance of services, education in the sense of establishing religious schools and especially religious lessons, the pastoral activities of religious communities, the financing and other property rights of religious communities; it also contains provisions prescribing criminal sanctions for violations.

The legal position of religious communities in the RS is also directly co-determined by a series of statutes from different legal fields. In their provisions, these statutes explicitly mention religious communities and protect freedom of religious belief, *e.g.* some of these statutes protect certain religious values (The Media Act, The Film Fund Act, The Penal Code, The Military Service Act, The Health Activities Act); some protect the confidential relation between an individual and his/her confessor (The Criminal Procedure Act, The Civil Procedure Act, The General Administrative Procedure Act); some enable the implementation of freedom of religion in various areas (The Public Meetings and Performances Act, The Act on Graveyard and Burial Activities and on the Arrangement of Graveyards); some make possible and restrict the participation of religious communities in certain activities and public life (The Act on the Organization and Financing of Child Rearing and Education, The Radio-Television of Slovenia Act, The Election Campaign Act, The Political Parties Act, The Institutes Act); some determine the special tax status of religious communities or priests (The Tax on the Profits of Legal Entities, The Sales Tax Act, The Building Lands Act, The Foreign Trade Act, The Income Tax Act) and a special system for priests' insurance (The Social Protection Act, The Retirement Pension and Disability Insurance Act); and some regulate the return of property in denationalization proceedings including to religious communities (The Denationalization Act).

Also relevant are all those general legal acts which apply to generic legal entities or legal entities under civil law.

The Slovenian legal system has no special statutes regulating

individual churches or religious communities. However, negotiations have been opened with the Roman Catholic Church on the possible signing of an international agreement or on more partial agreements with the Holy See. The Roman Catholic Church has for a long time tried to sign such an agreement, but the Slovenian State has so far been reluctant to sign.

When the new Bill on Religious Communities was being created, religious communities were invited to participate in its preparation, but their actual influence on its contents was negligible. Therefore, the Roman Catholic Church ceased to participate in preparing the new Bill on Religious Communities. This bill being quite indefinite, it is primarily intended to determine the criteria for the establishment of religious communities and the regulations of the registration procedure. It also contains short provisions on the public and non-profit characteristics of the operation of religious communities, the attendance of children at religious lessons, the registration of religious buildings and services performed outside the same, and the financing and cessation of religious communities. It makes violations of public order punishable by fines and regulates the harmonization of already registered religious communities with the new statute.

The Slovenian legal system does not distinguish between sects and religious communities but only uses another name. Owing to the negative connotations of the concept of sect today, it tries to avoid this concept, thereby striving to introduce equality between religious communities. Because of the lack of clear criteria (at least the lack of a closer definition) to determine the nature of a religious community, no religious or parareligious community that has shown at least some extent of religious activity has been refused registration or has been somehow designated as unwanted. Any kind of religious activity would be prosecuted only if it perpetrated a criminal offense, and thereby threatened public order, peace or public safety. Hitherto, there has been no such case in the RS.

The right to peaceful assembly and free association (Art. 42 of the Constitution) is constitutionally protected, which provides the opportunity to exercise freedom of conscience and religious belief as an individual right. Freedom of association implies both the pos-

itive entitlement (the opportunity of subjects to associate with others and thus establish religious communities) and the negative entitlement (the opportunity of subjects not to enter into any association and to refuse to participate in any).

Religious ceremonies may be practised exclusively in sacred buildings, and outside only during burials in cemeteries; however, the latter right is subjected to a potential suspension by a competent state authority in order to protect public health or order. Any ceremony outside sacred buildings always requires the permission of the Minister of Interior Affairs of Slovenia; however, if no answer is given to a request, this is considered as the granting of a permission.

Slovenian legislation does not mention explicitly the right to observe and celebrate church holidays. However, this right is embraced by the freedom to privately and publicly profess one's religion. In fact, in Slovenia certain church holidays are declared National holidays: Catholic holidays on 25 December (Christmas), Easter Monday, Whitsuntide, and 15 August (Mary's Assumption), and a Protestant holiday on 31 October (The Day of the Reformation).

On account of the protection of individual religious freedom and the protection of confidential relations between individuals and religious confessors, the latter are in criminal, civil (litigious and non-litigious) and administrative procedures treated as so-called privileged witnesses. They are exempted from the duty to testify on what they heard when acting as the defendant's or the party's confessor. It is left to religious confessors to decide for themselves whether to testify or not, but if they testify they must tell the truth. Religious confessors are exempted from the general duty to report criminal offenses or their perpetrators.

The crime of the unauthorized betrayal of a business secret may be committed also by priests, if they unauthorizedly betray a secret that they heard while carrying out their profession, unless they do this for the general good or the good of someone else, this being greater than the good of keeping this secret. It is considered that they must still keep such information confidential after they have ceased to perform their profession. Prosecution in such cases is instituted upon a private action (Art. 153 of the Penal Code of the RS).

Discrimination on the basis of religious belief is prohibited by the Constitution: in Art. 14 it contains a general prohibition of discrimination concerning human rights, and among the fundamental freedoms and other personal circumstances listed it also mentions discrimination on the basis of religion; in Art. 16 of the Constitution such discrimination is prohibited in the case of the permissible temporary suspension of rights; under Art. 63 any incitement to religious discrimination is prohibited. More concrete provisions are contained in the Act on the Legal Position of Religious Communities. Furthermore, discrimination is also defined as a criminal offense under Art. 141 of the Penal Code of the RS.

The Health Activities Act provides that doctors have the right to refuse to operate if this is contrary to their conscience and the international rules of medical ethics, unless there is an emergency. However, a doctor is obliged to inform the employer about the refusal. In Slovenia this question has been topical in particular concerning the artificial termination of pregnancy, as well as euthanasia.

4. THE STATUS OF RELIGIOUS CONFESSIONS

The Constitution of the RS in its general provisions (Art. 7) devotes a special article to the regulation of relations between the State and religious communities. This article explicitly declares that the State and religious communities are separate, that they enjoy equal rights, and that they are guaranteed freedom of activity. In particular, this ensures the freedom of establishment and performance of ceremonies and religious practices (worship of God, prayers, sacrifices, sacraments, the celebration of religious holidays, the proclamation of a religion, etc.). The State must not interfere with the autonomy of the internal matters of religious communities. In the sense of realizing the basic human right of freedom of conscience and the right to free association, citizens are free to establish religious communities, with the limits of their free activity dependent on the consistency of their activities with the legal order, particularly with constitutional and statutory provisions and morals.

Concerning the question of which fields the State may not

interfere with, due to their falling under the autonomous regulation of religious communities or their so-called internal affairs, neither Slovenian legislation nor case-law provide any answers. In theoretical works, there are views which designate as unallowed those activities of religious communities which would be immoral or constitute criminal offenses (*e.g.* the public ritual killing of animals, temple prostitution, ritual murders, bodily harm, the deprivation of freedom in cases of exorcism), violations of the constitutional rights of their followers (violations of their dignity, ownership, the right to petition or to file legal remedies, etc.), or the incitement to civil disobedience violating regulations which are obligatory for all citizens (the non-payment of taxes for non-religious purposes, compulsory vaccination, etc.). Religious communities are not allowed to abolish constitutional limitations (*e.g.* by practicing polygamy) for their members, and they are not allowed to interfere with the rights of other persons or non-members, *i.e.* the followers of other religions or atheists (11).

In determining the limits of their free activity, the Act on the Legal Position of Religious Communities (the ZPPVS) is slightly more specific in prescribing that the activity of religious communities must be consistent with the Constitution, statutes and other regulations. However, the question of what exactly these "other regulations" are is especially disputable because constitutionally protected rights are exercised directly on the basis of the Constitution (Art. 15, Para. 1 of the Constitution), yet the rights and duties of citizens and other persons (also legal entities) may be regulated only by statute (Art. 15, Para. 2 of the Constitution). With regard to the fact that the ZPPVS is a lower act in the hierarchy than the Constitution, and that this act came into existence some fifteen years before the Constitution in a completely different historical and legal setting, it is possible to conclude that beside the constitutional and statutory limitations on the free activity of religious communities, other limitations could not have been adopted. Moreover, the

(11) J. ŠINKOVEC, *Freedom of Conscience and the "Laïcité" of the State*, Pravnik, Ljubljana, Vol. 51 (1996), 1.-3., p. 9.

ZPPVS established the limits of free activity by prohibiting the abuse of religion, services, religious education, religious press, ceremonies or religious activity for political purposes (the addition "political purposes" being a relict of the previous system, and which could today be abandoned because any abuse of rights or their exercise contrary to the purpose for which they were granted is inadmissible). The abuse of religion or religious activity is an offense for which imprisonment extending to 30 days or a fine are prescribed; furthermore it could also be a criminal offense under the Penal Code (Art. 21*a*, Para. 1).

Following the principle of the free activity of religious communities, the ZPPVS also prohibits the obstruction of religious meetings, of religious education, of observances or other professions of religious belief and religious feelings (Art. 5, Para. 3), and for offenses against this provision it prescribes imprisonment extending to 30 days or a fine (Art. 21*a*, Para. 2).

In order to acquire legal standing, in Slovenia a system for registering religious communities exists, which provides every religious community with an opportunity to acquire the status of a private law entity without the State examining the contents of its religion, or even judging its merits. Thus, the establishment of religious communities is free and uncomplicated, if it is not contrary to the State legal system. Religious communities must register with the Office of the Government of the RS for Religious Communities (hereafter also: the Office). On the basis of the applications received, the Office registers religious communities, thereby granting them, according to the explicit provision of the ZPPVS, the status of legal entities under private law.

A similar system has also been created for their organizational units, which have, according to the ZPPVS, equal legal entity status. The Act (Art. 7) is indefinite, for it provides that religious communities *or their corresponding organs* are legal entities under civil law. From the point of view of case-law, their corresponding organs or, more correctly, their institutions, may also obtain legal subjectivity insofar as they are not organized in some other existing legal form (*e.g.* as an institute under the Institutes Act, as a society under the

Societies Act, or a company, pursuant to the Companies Act, etc.). Currently the Office of the Republic of Slovenia for Religious Communities issues certificates conferring legal status to representative constituent parts of religious communities on the basis of a certificate issued by the competent organ according to internal Religious Community law. Thus, for example, parishes too may be registered as independent legal entities, if this is approved by the competent Church organ.

On the basis of the Decree on the Introduction and Use of the Standard Classification of Activities, independent legal entities (such as educational or charitable institutes) cannot be registered as constituent parts of religious communities and operate externally at the same time (these independent entities will therefore have to register as, for example, private institutes), because under the decree educational and charitable activities must be separated from religious activities. An exception to this is Karitas (*i.e.* a charitable organization of the Catholic Church), which had already been registered before the Decree came into force.

In two cases the Office of the Republic of Slovenia for Religious Communities refused to recognize legal status. In the first one a certain religious community wanted to obtain legal status so that it could carry out religious instructional, educational and research activities. The Office refused the request of the religious community to be given a certificate granting legal status to its organ. The refusal was based on the already mentioned Decree, according to which the activities of religious communities include: "...activities of religious and similar organizations and activities of monasteries...", but not the educational activities of such organizations. This does not mean that a religious community is prohibited to teach its religion, for example in the form of religious lessons. It does mean, however, that an organ of a religious community whose main activity is educational activity cannot have a legal status that derives from the legal status of the religious community. To perform the activities of instruction and education, science, culture, sport, health care, social security and other activities, if these remain non-profitable, domestic legal entities and natural persons may establish an institute

on the basis of the Institutes Act. Furthermore, in the second case, the Office refused to issue a certificate of legal status to a students' theological seminary through the similar reasoning that, according to the Decree, instruction and education performed in the dormitories of such an organization are considered as educational activities.

One of the greatest deficiencies of the present regulation in Slovenia is the non-existence of any statutory criteria or conditions for the establishment of religious communities. This prevents the Office from refusing to register certain groups of persons who wish to be registered as religious communities, although it is obvious that their activity bears no relation to religion. The Office bridges this gap in the law in a pragmatic, yet concerning religious communities, benevolent manner. It informs every applicant about the assumption that every religious community as a legal entity under civil law is deemed to have a special legal framework which determines its purpose, means, manner of operation and organizational structure. The said legal framework should contain a charter or rules, which must define the name and the registered office of the religious community, its "director", the intent and manner of its operation, its financing, its organizational structure and the contents of its beliefs. All these data must not contradict the compulsory regulations applying in the RS.

Another great deficiency of the existing regulation is that the concept of "registration" of religious communities is vague. The Office, as a representative of the Government of the Republic of Slovenia in a specified area, should conduct the procedure of registration as an administrative procedure, and issue an administrative decision against which an appeal in an administrative procedure as well as the judicial review of administrative decisions are provided. At present, that is not so. The Office does not issue (substantial) decisions, but only certificates of registration, whose legal nature is questionable. On the basis of the literal interpretation of the statute, one could infer that the task of the Office is merely formal, and that it is obliged to enter into the register of religious communities every single more or less established religious community.

Registered religious communities are not under any special

supervision of the State. However, being legal entities under private law, they are subjected to general supervision, for their activities must conform to the Constitution, statutes and other regulations (*e.g.* the registration of religious communities is intended to protect third parties; like other legal entities, they must also carry out financial transactions through the Agency for Payment Transactions).

The internal law of religious communities is, as a rule, not relevant; in the case of a gap in the law, the State respects it only factually, with the registration of their constitutive parts, organs or institutions. The Office of the Republic of Slovenia for Religious Communities issues certificates of legal status to the corresponding individual constitutive parts (organs or their institutions) of a religious community, if the competent organ of the religious community has issued a certificate stating that a certain organ or institution has such a status according to the internal law of the community. (Thus, *e.g.*, parishes too may be registered as independent legal entities). An exception is the provision on the archival materials of the Roman Catholic Church, for these materials are selected pursuant to the Church's internal regulations.

There is no case-law yet on the resolution of disputes inside religious communities. The theory views such a dispute as a civil-law dispute between two civil-law subjects (a member/part of the religious community against the religious community), and not as an administrative issue. The competence of the internal organs of a religious community is regulated by its internal rules; the State does not interfere with these relations.

5. The status of religious confessions in particular fields

a) *Education*

On the territory of present day Slovenia, the establishment of private schools was prohibited first in 1929, in the then Kingdom of Yugoslavia. In 1945 in Yugoslavia, the operation of any kind of private schools (which were mainly nationalized) was ultimately prohibited, and this state of affairs was preserved until 1991. Religious communities could only establish (under Art. 229 of the SRS Constitution and Art. 10 of the ZPPVS) religious schools to educate priests, whose diplomas were not publicly recognized. After World War 2, religious communities were forbidden to engage in so-called activities of a general or social significance, which included education, until 1991. In May 1991, the amended ZPPVS abolished these prohibitions and even granted public recognition to the three then existing religious secondary schools in Slovenia, and to diplomas issued by the Theological College. Also in 1991, the Institutes Act was adopted, which enabled the establishment of educational organizations.

Concerning the educational system, the RS Constitution is very concise. The basic constitutional provision in this area is Art. 57, which guarantees freedom of education, and prescribes compulsory elementary education financed from public funds. Para. 3 of this article, which provides that the State should give all citizens the opportunity to obtain a proper education, is rather a programmatic provision. The Constitution also provides for the autonomy of public universities and other public junior colleges, but it leaves the regulation of the manner of their financing to statute (Art. 58). It does not explicitly provide for religious schools, but, deriving from the principle of freedom of education, they seem to be permitted.

The basic statute in the area of education, *i.e.* the Act on the Organization and Financing of Child Rearing and Education (hereafter: the ZOFVI), introduces the separation of public and private educational institutions. Private institutions may also carry out educational programs certified as public, and their diplomas are thus recognized as public documents, if they fulfill, in the same manner as public schools, the statutory conditions concerning (particularly the training of) their employees, their premises and their equipment. Public kindergartens and elementary schools are established by local communities (municipalities), whereas secondary schools are founded by the State, which also finances them. In agreement with the State, general secondary schools may be established also by urban municipalities. Beside the ZOFVI, the operation of particular educational organizations is precisely regulated also by statutes pertaining to particular fields: the Kindergartens Act, the Elementary Schools Act, the General Secondary Schools Act, the Professional

Education Act, the Education of Adults Act, the Institutes Act, and those statutes which regulate the rights of children and minors with special needs and the rights of the Italian and Hungarian national communities.

Public schools (and kindergartens) must be neutral. The ZOFVI, originating from the strictly interpreted constitutional provision of the separation of State and religious communities, in a special chapter entitled "the Autonomy of the School Area", explicitly prohibits religious activities in public kindergartens and schools, and even in those kindergartens and schools which have been granted licenses. These prohibited religious activities comprise:

— lessons in religion with the aim of educating children in a particular religion,

— lessons where religious communities decide on their contents, textbooks, the training of teachers and the suitability of a particular teacher for teaching, and finally

— the organization of religious observances.

Exceptionally, upon the headmaster's proposal, the competent Minister may allow religious lessons on the premises of some kindergartens and schools, outside their curriculum and regular operation, if in the local community no appropriate premises are available for such activities. In practice, it is established that such a case is at issue when no premises whatsoever are available in the local community, or when they exist but are in a very bad condition so that they could be a threat to the health and security of people, or if these premises are more than four kilometers away from the kindergarten or the school, thus causing problems for organizing transport, or if the premises, although less than four kilometers away from the kindergarten or the school, can only be reached by a route presenting a threat to the children's safety (12).

Among the objects of child rearing and education, the ZOFVI also lists autonomy, which is particularly stressed in relation with the extracurricular "types and varieties of knowledge and persua-

(12) Act on the Organization and Financing of Upbringing and Education with the commentary of Ksenija Mihovar Globokar and Stane Čehovin, Gospodarski vestnik, Ljubljana, 1997, p. 126.

sion", and by ensuring the optimal development of individuals irrespective of their religious beliefs. Thereby the neutrality or autonomy of schools towards any religious belief, as well as principled tolerance and the prohibition of discrimination, are expressed.

The Constitution does not regulate religious lessons; however, statute (the ZOFVI) explicitly prohibits religious lessons intended to instruct children to follow a particular religion, in public schools and kindergartens and the schools and kindergartens which have been granted licenses. The Elementary School Act is the only act which includes the provision that schools must provide in the framework of their optional courses also non-religious lessons on religions and ethics (Art. 17, Para. 2). All religious communities have the opportunity to organize religious lessons on their premises whenever they wish, but this is not relevant for the school or the State. This issue really concerns the pupils' freedom of choice. Regarding religious lessons, the ZPPVS determines that they may be held on the premises designated for religious observances and other premises where the religious community permanently carries out its religious activities, and that for a minor to attend these lessons his/her consent and the consent of his/her parents or guardian is necessary.

Currently, negotiations between the Slovenian State and the Roman Catholic Church are proceeding, also concerning the question of religious lessons in public schools. According to the existing legislation, any lessons where religious communities decide on their contents, textbooks, the training of teachers and the suitability of a particular teacher for teaching, are prohibited in public schools and in the schools that have been granted licenses, which means that the Roman Catholic Church will not be allowed to autonomously design the program of this course or nominate the teachers. Since the applicable legislation prohibits religious lessons, if a compromise is reached with regard to religious lessons the legislation will have to be amended. The questions that still remain open are, *e.g.*, whether these lessons will be religious lessons in the Catholic religion or non-religious lessons on religions (and ethics), whether they will be optional or mandatory, how they will be included in the schedule of courses (and when), who will teach them (priests, lay theologians,

philosophers or sociologists). The question of the (in)admissibility of religious activities in public kindergartens and schools, and in the licensed schools or kindergartens, is at present especially being considered by the Constitutional Court, which however has not yet reached a decision in this case.

Religious lessons in public schools are prohibited. In private (religious) schools, they may be, and actually are, a mandatory course.

Religious observances, including prayer meetings, are prohibited by statute in public schools and kindergartens and in licensed schools and kindergartens. Exceptionally, this prohibition is not imposed on those licensed private schools that were granted licenses before the coming into force of this statute; among them are three Catholic general secondary schools. In these schools, prayers are permitted but are not mandatory.

The crucifix or the cross (there is no distinction made) in schools as a symbol is neither explicitly prohibited nor allowed by legislation, but in light of the principle of the separation of the State and religious communities, practice considers these symbols as prohibited. However, there is no evidence that any public school has ever tried to hang a cross or a crucifix. The Constitutional Court has not yet adjudicated on such a case.

Symbols worshiping God worn by pupils are permitted, and schools do not control this. Thus far, there has been no case in which the school has prohibited students to wear or display symbols worshiping God, or restricted this right in any other manner. The Constitutional Court has not yet adjudicated on such a case.

The legal order does not envisage any difference concerning private religious kindergartens and schools compared to other private kindergartens and schools; the ZOFVI, for example, only regulates private schools in general and does not mention religious schools. Religious communities may establish kindergartens and schools under the same conditions as other private-law subjects.

In fact, the transitional provision of the ZOFVI concerning licensing, which introduces an exception to the financing of those private schools that were granted licenses already before the coming into force of this statute (*i.e.* still under the Act on the Organization and

Financing of Child Rearing and Education of 1991), applies particularly or exclusively only to religious licensed private schools, because no other private schools had existed in Slovenia before the new statute was adopted. For these licensed schools, it still follows that they are financed under the license which ensures them, as a rule, 100% public financing. Such a license is terminated by the mere enforcement of statute, if the founders do not adjust the programs of instruction and education to the statute. Without such a transitional provision, the thus far existing licensees (in fact, this matter concerns three Catholic general secondary schools: the Bishop's Classical General Secondary School in Ljubljana, the Secondary Religious School in Vipava and the Secondary Religious School in Želimlje) would either have to switch to the system of financing according to Art. 86 of the ZOFVI (*i.e.* to 85% public funding), or entirely assume public educational programs, in order to preserve their licenses. In the latter case, a problem would arise because, as licensees, they would need to respect the prescribed autonomy of schools, which would prevent them from carrying out their religious activities.

At the Constitutional Court, a few petitions have already been filed to commence proceedings for reviewing the constitutionality of the statutory regulation which prohibits religious activities in the licensed kindergartens and schools (*i.e.* the (un)constitutionality of the so-called autonomy of the school area). The problem is even greater when it comes to the potential establishment of new religious schools which apply for licenses. The prohibition of any kind of religious activity in the schools and kindergartens with licenses means that religious communities cannot be granted licenses for their educational institutions established after the coming into force of the new ZOFVI (*i.e.* after March 15, 1996); this applies also to the Bishops' General Secondary School in Maribor, which began to operate in September 1997, and is currently the only private general secondary school without a license.

The ZPPVS of 1991 gave a special legal position to religious schools. It provided that the certificates and diplomas of religious schools should be considered as public documents under the conditions determined by statute. In addition, it explicitly granted public

recognition to the diplomas of the Secondary Religious School in Vipava, and the Secondary Religious School in Želimlje, and to the diplomas of the Theological College. When the new ZOFVI came into force, the previous provision became obsolete, because now any private school program, provided that it fulfills the statutory conditions, may be granted public recognition, and thereby also the public recognition of its diplomas. It is expected that the potential agreement of the State and the Holy See will include also special provisions concerning Catholic private schools (and kindergartens).

The establishment of private schools is free. This means that on the basis of the Act, on establishing an educational organization it is necessary to enter it into the court register or any other appropriate register (13). Private schools are free to adopt their educational programs, except if they wish to carry out public programs. In this case, they must obtain approval from the RS Government, or from its competent professional council, confirming that their educational program meets the same educational standards as the public educational program.

The founders may be domestic or foreign legal entities; however, elementary schools may be established only by domestic natural persons or legal entities.

The State supervises issues of status concerning the registration of schools. It also supervises their educational programs only when schools wish to carry out public programs, that is when they want their diplomas to be recognized as public documents. It does not, however, control the internal organization of private schools, except when it grants licenses — in this case the statutory provisions apply ex lege to licensees. If the State, on the basis of a public call for tenders, makes license contracts with private educational institutions for operating public services, all the provisions of the ZOFVI regu-

(13) Elementary schools and secondary schools may be established only in the form of an educational institution, or as its organization, thus their establishment must comply with the Institutes Act. However, all other schools may be organized as educational institutions, business companies, or as an organization of an institution, business company or other legal entity (*e.g.* societies, institutions, political parties, chambers, trade unions), therefore their establishment must follow the Institutes Act, the Companies Act or other relevant statutes (Art. 7 of the ZOFVI).

lating public kindergartens and schools apply to the licensees; these provisions particularly concern the equal rights and obligations of pupils and their parents, the same standards in implementing the programs as in public schools, internal organization, and the financing of programs and training conditions for professional employees.

Financial supervision is two-sided: the expenditure of public funds spent in private schools is supervised by the Court of Auditors of the RS (especially the lawfulness, purposefulness, efficiency and effectiveness of such expenditure), whereas the purposefulness of funds and particularly the organization and implementation of public programs according to statute are supervised by the school inspectorate (the Inspectorate of the RS for Education and Sport).

Private schools are free to enroll pupils and to determine the admission criteria. Following the thus far existing data, only one out of the four present private (Catholic) general secondary schools requires for admission a baptismal certificate with the notice of sacraments and a priest's confirmation in writing for a particular candidate. Others do not mention admission conditions for the followers of other religions or for atheists, yet the pupils must adjust themselves to the manner of work, orientation and programs of these schools, including religious lessons as a mandatory course. The school reports issued by the present religious private schools (general secondary schools) are recognized as public documents.

Private educational institutions may be financed in two ways: they are either granted licenses or financed directly under statute. To grant a license means in fact to include the private school or kindergarten concerned in the public network, and consequently to equally apply all the conditions that apply to public schools or kindergartens — they must carry out the same educational program and fulfill all the other conditions (by regulating fairly the rights and obligations of pupils and their parents, maintaining the same quality in implementing programs, having the same internal organization and providing the same financing of programs and training conditions for professional employees as in the public sector).

According to the statute itself, private kindergartens, private elementary and music schools and private general secondary schools

(but not professional schools) that carry out public programs but are not licensees, have the right to public funds to the extent of 85% of the funds that the State or local community spend for salaries and material costs per pupil in public schools, if they comply with the statutory conditions (14). The only condition is that the existence of the public elementary school in the same area should not be threatened. In the transitional period of three years from the coming into force of the statute (until March 15, 1999), such schools even had the right to receive 100% of public funds, so that the founding of private schools might be stimulated.

Both ways mentioned also enable the financing of religious private schools. Indirect financing is, however, not regulated in the Slovenian legal system.

The State has established the school inspectorate to supervise the contents of the programs of those schools which carry out public programs. It has already begun supervising the first phase so that it can grant public recognition to educational programs if the competent profession council of the RS Government determines that these programs meet the same standards as public educational programs. The criteria for this supervision are not determined by statute.

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(14) For schools, the following conditions are prescribed by Art. 86 of the ZOFVI:

— that they carry out educational programs from the first up to the final year of the school,

— that they provide or register at least two classes of the first year, or that the music school organizes in its educational music program lessons in three orchestral instruments and register at least 35 students,

— that they employ or in some other manner provide teachers or tutors necessary to implement the public program in accordance with statute and other regulations.

The right of private schools to public funds also carries some restrictions concerning the setting of tuition fees (for pupils who do not exceed the resources ceiling for obtaining State scholarships, the fees may amount to a maximum of 15% of the funds granted by the State to public schools per pupil) and the salaries of professional employees (which must not exceed the salaries of professional employees in public schools). The expenditure of public funds in private schools is supervised by the Court of Auditors of the RS, while the purposefulness of the expenditure of funds, and particularly the organization and implementation of public programs according to statute, are supervised by the school inspectorate (the Inspectorate of the RS for Education and Sport).

Concerning kindergartens, the salaries of educators must not exceed the salaries of educators in public kindergartens (Art. 23 of the Kindergartens Act).

The conditions prescribed for professional employees of schools must also be complied with by the professional employees in those private schools which carry out public programs.

If teachers comply with the statutory conditions (particularly concerning their training), private schools are free to choose their own teaching staff. Thus far, in Slovenia there has been no case implying the possibility of terminating an employment contract because of the nature of the school.

b) *The media*

The Media Act, which regulates the manner of realizing the freedom of public information and the rights and duties of the media and journalists, explicitly excludes from its definition of "the media" the bulletins, periodicals and other forms of publishing information intended exclusively for internal use in church organizations. A religious community can be the publisher of a public magazine, if this is related to its activities. Exceptions to this are radio and television programs. Concerning religious observances, there is no so-called right to short reports, that is the right of radio-television organizations to briefly (up to one minute and a half) report on important performances and events which are accessible to the public and are of general interest. This means that a special permission from the religious community concerned is necessary for such a report. Religious broadcasting must not be interrupted by advertisements.

The Radio-Television of Slovenia Act prohibits religious propaganda in the programs of RTV Slovenia. In creating and preparing programs, RTV Slovenia must respect the principles of diversity of opinions and worldviews and of religious pluralism. Religious communities directly appoint one delegate (out of twenty-five) to the Council of RTV Slovenia, which is the managing organ of the public institute RTV Slovenia. RTV Slovenia has already dedicated a few hours of its programming to religious topics and has broadcast programs with the religious contents of various denominations.

If the contents of a particular film are likely to incite to intolerance, the Minister of Culture must not issue a permit for shooting such a film in Slovenia.

6. CHURCH FINANCING

The financing of religious communities by the State or by local communities may be direct, *i.e.* by granting financial means, or indirect, *i.e.* by providing exemptions from taxes. Direct financing may be directed towards a completely defined purpose, meaning that the religious community alone disposes of such funds; however, upon request it must report to the State or municipal organ about the use of such purposefully assigned funds. The State, in fact, earmarks very little money for religious communities: in 1996, for example, the Office of the RS for Religious Communities received two million tolars intended as aid for religious communities. The money was distributed among religious communities in proportion to the registered projects following the internal criteria of the Office (for activities of general cultural significance, *e.g.* for publishing, exhibitions, performances, etc.). A greater amount of aid is provided in the form of social transfers for the health and pension insurance of priests who have been paid by the State since 1991: in July 1997 this amounted to 16.24 million tolars. Funds earmarked by the State can be directed towards (co-)financing the restoration of sacred objects (*i.e.* buildings) which form part of the national cultural heritage, yet what is really involved here is not the financing of activities of religious communities as such, but the preservation of the objects of the country's cultural heritage, whose proper condition is also (or particularly) in the interest of the State.

Indirect financing is represented by certain exemptions and reliefs in fiscal matters. For instance, religious communities are exempted from paying income tax. Practice does not interpret clearly this ruling of statute, in that while religious communities (as well as *e.g.* societies) as a rule do not pay taxes, for it is assumed that they have been established with non-profit intention, they must nevertheless pay taxes for every profitable activity, *e.g.* for publishing and selling books. They are also exempted from taxes on gifts received from natural persons and legal entities. Additionally, the basis for the income tax of natural persons is reduced (by 3% at most) for voluntary contributions in money and gifts in kind; furthermore, the contributions of legal entities to religious communities are calculated

as being part of their outgoings, thereby their taxable base is accordingly reduced (their taxable base is determined by their profit, which is the difference between their income and their outgoings).

Religious communities are exempted from paying the sales tax on their products for the protection of children and elderly and handicapped people, and from paying the sales tax on their religious services. Karitas is by statute one of the mentioned organizations which pays neither the sales tax on products obtained freely and used for the purpose for which it was established (*i.e.* for charitable activities), nor taxes on the purchase of products it distributes freely or sells within the framework of its activities (it may sell only badges, stamps and other graphic products which have its own symbol imprinted on them and whose contents are limited to its own activity). Exemptions from the sales tax do not cover automobiles, liquor, oil derivatives, tobacco products, noble metals, precious stones, scented and cosmetic products, hand-made carpets, reptile-skin and genuine leather items, and pornography. Religious communities are also exempted from paying taxes on buildings used for their religious activities (according to the Act on the Land Designated for Construction). Furthermore, they are exempted from customs for sending and receiving goods and operating services with religious and other non-profit purposes.

Priests, like all other citizens, are expected to file their tax reports. However, they may, like other persons with the status of independent professionals, request that their profit should be determined by deducting 40%, as outgoings, from their income.

In the area of property law, religious communities are, like all legal subjects in the State, equally ensured the constitutionally protected right to private property and inheritance (Art. 33 of the Constitution), for which purpose statute determines the manner of acquiring and enjoying property, so that the economic, social and environmental functions of such property are ensured, as well as the manner and conditions of inheritance (Art. 67 of the Constitution).The ZPPVS (because of the different constitutional starting-point at the time of its formulation) specifically defined that religious communities were allowed to own buildings and other real

estate within the limits determined by the Constitution and statutes. Nowadays, this provision is obsolete. In general, as regards participation in legal transactions and fiscal matters, everything that applies to legal entities under private law also applies to religious communities, especially the fact that they may participate in legal transactions independently in the framework of their activities, with all rights and obligations, on their own behalf.

The ZPPVS states that religious communities in Slovenia may independently dispose of the funds which they gain from income from their own property, from awards and contributions of believers for observances performed and services offered to them, and from gifts, legacies and bequests of natural persons and legal entities. There is no church tax in Slovenia. According to an explicit provision of statute, the contributions of believers are voluntary and are allowed to be collected on the premises intended for observances and the other premises of religious communities. However, outside these premises collections are allowed only with a permit issued by the competent State organ (*i.e.* the competent administrative unit of the Ministry of the Interior). For religious observances carried out at the request of individuals, priests may accept remuneration in money or in other typical forms (*e.g.* produce, etc.).

The property rights of religious communities also changed with the introduction of denationalization. The Roman Catholic Church is one of the biggest claimants to nationalized property. According to the Denationalization Act (the ZDen) adopted in 1991, property nationalized by regulations on agrarian reform, nationalization and confiscation, and by other regulations and in manners determined by the statute itself, is to be returned as a rule in kind, but if this is not possible in the form of compensation (*i.e.* as substitute property, securities or money). Among claimants to the return of property, the ZDen explicitly includes the churches and religious communities, with their institutes or orders, that were operating in the territory of the Republic of Slovenia at the time of the statute's coming into force. Legal succession is considered as pursuant to the autonomous laws of religious communities.

The process of denationalization is not proceeding without

complications. The Constitutional Court has frequently had to decide on the constitutionality of provisions of statute. Three decisions also partially interfere with the area of religious communities. In the first (decision No. U-25/92 dated 4 March 1993) (15), which refers to the legal status of religious communities, their institutions and orders, the Constitutional Court has established that the legal status of a church organization or institution is to be evaluated according to State regulations, and that these subjects be treated as domestic legal entities at the time of the nationalization of their property as well as during the entire period until the adoption of the ZDen, and they are defined as such also by positive law (the ZPPVS).

In the second case (decision No. U-I-107/96 dated 5 December 1996) (16), the Constitutional Court abrogated a statute which had introduced a temporary suspension of the return of property for three years in all the cases where the return of more than 200 ha of farmland and forests was requested by an individual claimant. The Court established that there were no justified grounds to temporarily suspend the implementation of the ZDen. It made this statement in the reasoning that the challenged bill had first of all only envisaged a temporary suspension concerning the return of property to the Church, other religious communities or orders (with the exception of sacred objects) until the adoption of a new statute on religious communities. Thereby the legislature was allegedly given time to examine whether the Church was justified in claiming ownership on the basis of acts of the Kingdom of Yugoslavia. Also, the Constitutional Court emphasized that the Church and religious communities, as denationalization claimants, in view of their role as universally beneficent institutions and considering their position in the Slovenian legal system, should not be equated with the large estates of feudal origin or with property relations originating from historically proved feudal relations.

In the third case (decision No. U-I-121/97 dated 23 May 1997) (17), the Constitutional Court adjudicated on the constitution-

(15) Decisions and Rulings of the Constitutional Court II, 23.
(16) Decisions and Rulings of the Constitutional Court V, 174.
(17) Decisions and Rulings of the Constitutional Court VI, 69.

ality of a question contained in a request for calling a preliminary referendum on amendments to the Denationalization Act. It decided that the question, which read as follows: "Are you in favor of the solution that the National Assembly of the Republic of Slovenia should regulate by the Act on Amendments to the Denationalization Act that the land, forests and other property of feudal origin may not be returned?", was not unconstitutional insofar as it referred to the cases in which denationalization claimants were churches and other religious communities, their institutions and orders. It grounded its conclusion on the special position of religious institutions as denationalization claimants on the arguments: (1) that the ZDen explicitly recognized their right to the return of property on the condition that they were acting in the RS at the time of its coming into force, (2) that religious communities are domestic legal entities who act within the framework of the legal system of the RS, and (3) that for this reason they cannot be equated with the private owners of the large estates of feudal origin, who — particularly if they now live abroad — cannot be granted recognition of a special position from the viewpoint of the State and of public interest, unlike religious communities.

7. Spiritual aid in public institutions and communities (prisons, hospitals, the army)

The right of national servicemen to uninterruptedly profess their religion during military service has been introduced anew in the Slovenian legal system (Art. 1 of the Act on Amendments to the Military Service Act). National servicemen may attend religious observances in their spare time, when they are not carrying out duties related to military service, for such duties do not allow them to leave their headquarters, units or institutions.

Military authorities must publish a list of religious buildings (churches) in the area together with their schedules of services, inform recruits who wish to know about this, and allow servicemen to attend services outside military bases in their spare time. In addition, the military authorities must allow religious literature and periodicals to be brought on military premises. In agreement with the representatives of religious communities, they must allow spare time discussions or lectures with religious content for recruits who are interested in these, in such a way that work is not interrupted, and they must also provide places for such events to take place. The authorities must ensure the representatives of religious communities equal opportunities and equal possibilities of acceding to the area and premises of military bases, as this applies to civil persons (Instructions on the Realization of the Rights of Servicemen to Profess Religion during their Military Service).

In practice, it is left to the military authorities to decide on whether and how to enable priests to visit military bases. Religious communities have not yet organized the direct provision of religious services in barracks; however, soldiers are allowed to attend services on Sundays. Who will pay the priests performing this service is a current question and also a subject of the present negotiations of the joint commission of the State and the leaders of the Roman Catholic Church.

Persons staying in hospitals, retirement and similar homes who cannot attend services outside these institutions for health or other reasons, may be visited on their or their relatives' request by clergy. Clergy may also perform services in such institutions, and administer sacraments, but they must respect house regulations and must not interrupt persons who have not requested the visit of the clergy and their services (Art. 16 of the ZPPVS). The question is whether the expression "similar institutions" also includes prisons, houses of correction and the closed wards of psychiatric hospitals, in which persons are placed involuntarily.

Visiting patients is in fact not problematic and is already an established practice; but visiting prisoners is possible only if they express such a wish. The Criminal Punishment Enforcement Act does not contain any concrete provision on this.

8. Church and marriage law and family law

The State holds that religious communities cannot be granted any public authority in a secular State. Accordingly, they do not

have such authority in the area of marriage either. They may only marry or divorce couples according to their internal law, and this does not have any civil-law consequences; *i.e.* from the viewpoint of the State these acts are not relevant, and therefore State control is not necessary.

All registers concerning legal status are kept by the State. The archival material of the Roman Catholic Church (historical documents, *e.g.* records of births, deaths, marriages) must be selected from the documentary materials of the Church according to its own regulations. However, the Minister of Culture, in agreement with the Slovenian Bishops' Conference, determines the special conditions for carrying out archival activities and determines the means for carrying out the archival activities of the Church (Art. 37 of the Act on Archival Materials and Archives).

Religious marriage, *i.e.* a marriage entered into before the organs of a religious community, as well as divorce, do not entail any consequences under civil law. The ZPPVS provides that the religious rite of marriage may be performed only after the marriage has been previously performed before the competent State organ.

A special issue is how and to what extent children can enjoy or realize freedom of conscience. The Constitution (Art. 41, Para. 3) explicitly mentions the right of parents to give their children a moral and religious upbringing in accordance with their beliefs, provided that the religious and moral guidance given to a child is appropriate to his/her age and maturity, and is consistent with the child's free conscience and religious and other beliefs or convictions. The Constitution gives priority to the rights of parents to decide on the religious upbringing of their children, although the Constitution also mentions the child's free religious conviction. The right to freedom of thought, conscience and religious belief is ensured to everyone, also to children, except that children enjoy human rights and basic freedoms consistent with their age and level of maturity (Art. 56 of the Constitution). Only this criterion may be the basis for possible limitations. The Marriage and Family Relations Act does not contain any provisions on the question of when the right of parents to decide on the religious upbringing of their children ceases, or when children

come of age concerning religious matters. The ZPPVS states that religious maturity is reached at the age of eighteen, which also holds for general maturity. In addition to a minor's consent, the consent of his/her guardian is also needed to attend religious lessons (Art. 14, Para. 2). That this regulation is not appropriate is tacitly recognized by the Bill on Religious Communities, which determines the age of fifteen as the age when children may decide by themselves on the exercise of their own right to free religious belief, *i.e.* when in order to attend religious lessons the preliminary written consent of parents or guardians is no longer needed (Art. 3). This is consistent with the personal nature of this right and the provisions of Slovenian legislation in other legal areas (*e.g.* at the age of fifteen children acquire a limited contractual capacity, they are no longer obliged to attend school, they can independently enter into employment, they may independently become members of an association and may independently hold office in the organs of a society (18), and they acquire the right to medical consultation without the consent of their parents).

The constitutional provision on the separation of the State and religious communities, as the starting point for the work of the Joint Commission of the Roman Catholic Church and the Government of

(18) In decision No. U-I-391/96 dated 11 June 1998 (Official Gazette of the RS, No. 49/98), the Constitutional Court decided that the statutory provision which requires that a child's (*i.e.* a minor under the age of fifteen) legal representative should sign the membership agreement when joining an association, was inconsistent with the constitutional freedom of association. The Convention on the Rights of Children in Art. 15 provides that when exercising the rights of a child to freedom of association, no restrictions may be placed other than those imposed in conformity with the law and which are necessary in a democratic society, inter alia, in the interest of the protection of the rights of parents in relation to their children. The prescribed manner for a child to join an association, in which (instead of the child) "his/her legal representative signs the membership agreement", does not take into account the fact that the desire to join must first be expressed by the child alone, and that the child's legal representative should only subsequently, after the child has joined, give his/her consent in an appropriate manner. As the statute requires the consent of the child's legal representative expressed in an appropriate manner, the challenged statutory provision was found by the Constitutional Court to be an excessive interference with the child's constitutionally and conventionally ensured freedom of association. In the same decision, because of the inconsistency with freedom of association, the Court abrogated the statutory provision according to which a minor under the age of fifteen is represented by his/her legal representative also in the organs of an association.

the Republic of Slovenia, reads, inter alia, as follows: "The Republic of Slovenia is bound by its Constitution to respect all human rights. These rights specifically include the right to religious freedom and the right of parents to decide on the religious upbringing of their children. All children have the right to have access to the kind of upbringing and education concerning religion or belief that their parents wish, and they cannot be forced to attend religious or similar lessons contrary to the wishes of their parents, given that the child's welfare is what is most important. The Republic of Slovenia will regulate its relation to religious citizens and religious communities in accordance with international agreements on human rights, and other democratic countries".

The problem of how a child can realize his/her own right to freedom of religious belief when this is in conflict with the right of parents to decide on the religious upbringing of their children is not solved by Slovenian legislation. There are no efficient means for enforcing the rights of the child: in particular, it is not clear who represents the child in the case of a dispute with the parents, for the child has only legal, and not procedural, capacity; the child can be a party to proceedings but cannot independently and efficiently participate in procedural activities. What is also applicable here is the UN Convention on the Rights of the Child, which, under Art. 14, ensures the rights of the child to freedom of thought, conscience and religious belief, and the rights and duties of parents to direct their children in realizing this right in the manner appropriate to their developmental needs. However, this right does not enable children to independently commence proceedings in order to protect their rights.

9. Conclusions

1. In Slovenia the "Law on Religious Communities in the Republic of Slovenia" (ZPPVS) is in force. Having been adopted in the year 1976, it is not in accordance with the new democratic Constitution (1991). A draft on a new law was filed in the parliamentary procedure in 1996 after long negotiations, but it has still not been discussed there, despite the uncertainties about the old law.

2. During the last few years negotiations with the Holy See have taken place, but the Government of the Republic of Slovenia has not yet concluded them, due to strong resistance from certain influential political organizations.

3. In the military service and in hospitals there are no religious trustees, but in the hospitals patients have at least a real possibility of requesting a visit by a priest. This is also possible in prisons, but priests have no additional rights compared to other visitors.

4. In the school system, there are only a few private religious kindergartens, no private religious primary schools, and four Catholic secondary schools supported by the state with financial aid. The only Theological Faculty (which is Catholic) is part of the State University in Ljubljana.

5. The process of denationalization (property restitution), through which the Catholic Church also should get back its former property, has been lasting far too long despite several warnings by the Constitutional Court of the Republic of Slovenia.

6. Concerning the media: legally all the possibilities of pluralism are ensured (the freedom of press is guaranteed by the Constitution), but in fact the new media do not have enough finances to develop and do not get any state support. At the same time, the old media have not changed much (neither personally nor politically), although they are no longer financed by the State. The Board of the national TV and radio has no representatives from the Catholic Church, despite the fact that there should be representatives from all important civil groups.

7. The Catholic Church is still considered as a former internal/domestic enemy and not as a partner. There are still strong tendencies to exclude religious people from public life.

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THE LEGAL STATUS OF RELIGIONS IN THE REPUBLIC OF CYPRUS

SUMMARY: 1. *Prolegomena.* — 2. *Relations Between the Religions and the State.* — 3. *Religious Freedom.* — 4. *The Autocephalous Orthodox Church.* — *A*) Historical Introduction. — *B*) Sources Of Law. — *C*) The Administrative Organization. — *D*) The Financial Organization. — *E*) The Legal Status of Clergymen and Laypersons. — *F*) The Church and Marriage and Divorce Law. — *G*) Religious Education.

1. PROLEGOMENA

On August 16, 1960, the Republic of Cyprus came into being. This put an end to the long-standing subjugation of the Cypriot people to powers that were completely foreign to it, both ethnically and religiously. This subjugation had begun in 1191, when the crusaders of Richard, the King of England, took over the island. In the latest census (1973), the population of Cyprus reached 631,778 inhabitants. Out of these, 498,511 (78.9%) were Greeks, 116,000 (18.4%) were Turks, and 17,267 (2.7%) belonged to other ethnic or religious groups, such as the Armenians, the British, the Maronites and the Roman Catholics.

One of the effects of the occupation of the northern part of the island by the Turkish troops in July 1974 was that the Greeks and the other Christians of the region became refugees, having fled to the southern part of the island. Also, during that same year and in 1975, the Turks of the southern part of the island were relocated to the north.

Despite my efforts, I was not able to come across information about the status of the Islamic creed in the occupied part of the

island. Thus, my report refers to what applies in the territory controlled by the Republic of Cyprus.

2. Relations Between the Religions and the State

During the period of British occupation, as well as during that of Ottoman rule, the Orthodox Church had a twofold character. It constituted the ministering religious organization of the Orthodox Christians of the island and at the same time the nation-leading political coalition of the Greeks under foreign sovereignty. Its pre-existing Charter (1914), drafted and put into effect by the Church itself and without the intervention of the British authorities, established the Autocephalous Church of Cyprus as a legal entity (art. 94), not further determining its nature. If it had been considered as a legal entity under public law, it would have had to be subjected to some sort of control on the part of the state; yet this was carefully avoided both by the Church and by the British authorities. The Church considered itself to be a legal entity under private law. What lends further support to this view is the fact that the Charter was never vested with state authority. However, in parallel, those acts of the Church that were of a legislative and administrative nature, the decisions issued by ecclesiastical courts on any subject (including Family law disputes), and only marriages celebrated through a church ceremony, were recognized by the state administration and justice. In other words, it was obvious at first glance that the state did not treat the acts of the Church merely as the acts of a legal entity under private law. It was thus maintained that the aforementioned competencies of the Church were tacitly recognized as law by the British authority (1). I disagree with this opinion. Great Britain, having acquired the rights of possession and administration of Cyprus by way of the Treaty of Alliance of 1878 with the Ottoman empire (while the Sultan maintained limited ownership on the island and the Cypriots remained Ottoman subjects), was requested

(1) According to C. Chrysostomidis, 131. (For the full references of the footnotes given in abbreviated form, see Sources-Bibliography at the end of the chapter).

to preserve the existing state of things, which included the competencies granted by the Hatt-i-Humayun (1856), which were spiritual advantages and exemptions towards the Churches and religious authorities in general (2). The same situation in favor of the various religions remained in effect even after the annexation of Cyprus by Great Britain in 1914, the recognition on the part of Turkey of this annexation by way of the Treaty of Lausanne (1923) and the proclamation of the island as a Crown Colony in 1925 (3).

This status of the Orthodox Church, as well as that of the other Churches and religions in general, was confirmed by the Law passed in 1935 regarding the Administration of Justice, which by way of its art. 50, § 1 explicitly excluded from the jurisdiction of state courts "any marital disputes of members of the Greek Orthodox Church, whenever the marriage was celebrated in accordance with ceremony...[and] any other case, which according to the principles of the Ottoman Law that was formerly in force in Cyprus was subject to the jurisdiction of an ecclesiastical court of the religious community of the litigants." Concurrently, paragraphs 2-3 of the same article stipulated that none of the provisions of the particular law should be construed "as abolishing the jurisdiction vested in ecclesiastical courts on marital disputes of members of the Greek Orthodox Church [or] as abolishing the principle of the pre-existing Ottoman Law in Cyprus according to which matters of family law are settled by the law of the religious community to which the litigants belong (4)". These provisions of art. 2 were repeated in the subsequent laws amending the aforementioned law and were in force on August 16, 1960, the date of the declaration of the island's independence and of the coming into effect of the Constitution of the Cypriot Republic.

With the formation of the Cypriot Republic, the status of both

(2) See Ach. Emilianidis, "Private International Law", 90; Cr. Tornaritis, "The Relations", 111. As concerns the implementation of the statutes of the Hatt-I-Humayun in Cyprus, see the decision of the Privy Council on the case of Parapano v. Happaz, (1894) 2 *C.L.R.* 71-76; see Cr. Tornaritis, "The Legal Position of the Armenian Religious Group", in the collection of his studies: *Constitutional and Legal Problems*, 85ff.

(3) See Ch. Papastathis, *On the Administrative Organization*, 29.

(4) Cr. Tornaritis, "The Relations", 11; cf. Tano v. Tano, (1910) 9 *C.L.R.* 94.

the Orthodox Church and the other Churches and religions significantly improved, since their abovementioned competencies were safeguarded by explicit constitutional mandates that were primarily binding on the state as concerns its rights and powers over religious organizations. More particularly: under art. 110, § 1 of the Constitution, the Autocephalous Orthodox Church maintains and continues to have the exclusive right of regulating and administering its own internal affairs and its property in accordance with the Holy Canons and with its Charter that is in force for the time being, while the Greek Communal Chamber shall not act inconsistently with such rights of the Orthodox Church. Furthermore, under art. 111, § 1, any matter of its Christian followers pertaining to marriage, divorce, the validity of marriage, the separation from bed and board, the cohabitation of the spouses and family relations in general, is governed by "the ecclesiastical law of the Greek Orthodox Church." The Greek Communal Chamber does not have the authority to make decisions that contradict the provisions of this law, whereas the execution of the decisions issued by ecclesiastical courts is carried out by the public authorities of the Republic (art. 90, § 5 in conjunction with art. 111, § 2).

Art. 110, § 2 recognizes the principles and the laws of vakfs (religious entities) in a manner favorable to the Muslim religion, and stipulates 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 or any other Moslem religious institutions, shall be governed solely by and under the Laws and Principles of Vakfs (ahkâmül 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."

All the aforementioned rights of the Orthodox Church are also granted to the other "religious groups" found in Cyprus, for which the provisions of art. 2, § 3 of the Constitution apply, and which are the Armenians, the Maronites and the Roman Catholics. Similarly, under art. 23, § 9 of the Constitution, no deprivation, restriction or similar

limitation may be imposed on the immovable or movable property owned by any See, monastery, church or 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, which in the case of the Orthodox Church, "shall be determined on the basis of its Statutory Charter (5)".

According to the statute of § 10, the same right is accorded to all Muslim religious institutions, whereby the Turkish Communal Chamber manifests the aforementioned consent, in congruence with the principles and the laws of the vakfs.

From the constitutional provisions that we have mentioned, it becomes obvious that no single religion or creed is established as the official religion. A consequence of this is that: 1) there is no prevailing religion or religion of the state, and 2) the state is not confessional. Thus, when assuming their duties, state officials are not sworn in, but affirm their faith to, and respect for, the Constitution and the laws made thereunder, the preservation of the independence and the territorial integrity of the Republic of Cyprus, pursuant to arts. 42, §1, 59, §4, 69 and 100 of the Constitution.

Therefore, under the framework of the current Constitution, all the religions and Christian creeds in Cyprus: 1) deal restrictively with their own affairs, without in any way interfering in the affairs of the state, 2) the state has recognized broad discretionary powers in their favor and does not have the right to intervene in their internal affairs, and 3) whenever matters of common interest arise, state and religious corporations debate on equal terms. Accordingly, the provisions of the Constitution abolished the system of the moderate separation in the relations between state and religions that prevailed under English rule, introducing instead a system of coordination between the Cypriot Republic and all other religions and Christian creeds (6).

This system is in effect, although the Orthodox Christian and the Islamic religion constitute the criteria of the inter-communal

(5) According to Cr. TORNARITIS, "The Relations", 14.
(6) Ch. PAPASTATHIS, *On the Administrative Organization*, 34.

character of the Cypriot Republic, and as a consequence hold a peculiar legal status. Under the provision of article 2, § 1 of the Constitution, the people who belong to the Greek Orthodox Church constitute the members of the Greek Community. Under art. 2, § 3, the members of religious groups (such as the Armenians, the Maronites, and the Roman Catholics) may choose to belong either to the Greek or to the Turkish Community. A provision similar to the one referring to the Orthodox is established by art. 2, § 2 of the Constitution for the Muslim citizens of the Cypriot Republic that are required to constitute the members of the Turkish Community, without this signifying the recognition of a special status in favor of the Muslim religion relative to the other religions.

Nevertheless, the Constitution does not recognize any single religion as the official religion of the Cypriot Republic.

3. Religious Freedom

1. August 16, 1960 was the date on which the conceded Constitution of the Cypriot Republic came into operation.

Article 18 of this Constitution, relating to the protection of intellectual activity, safeguards the right of religious freedom, including the freedom of religious conscience and freedom of worship. Under the mandate of § 1 of this article, "every person has the right to freedom of thought, conscience and religion". The parallel use of the terms "conscience", "religion" and "every person" denotes that any person, either a believer or an atheist, a citizen or a non-citizen of the Cypriot Republic, is protected. It is then stipulated that "all religions whose doctrines or rites are not secret are free." By virtue of § 3, "all religions are equal before the law", and more particularly, "without prejudice to the competence of the Communal Chambers under this Constitution, no legislative, executive or administrative act of the Republic shall discriminate against any religious institution or religion", while at the same time certain religious manifestations are protected by penal law. The criminal offenses that are characterized as religion-related in the Cypriot Penal Code are: the defamation of religions (art. 138), the disturbance of

religious assemblies (art. 139), the unlawful trespassing into burial places (art. 140), the affront to religious sentiments by word or act (art. 141) and criminal libel (the circulation of publications that are defamatory and injurious to religion) (art. 142).

Par. 4 of art. 18 enumerates and guarantees the more particular manifestation of an individual's religious freedom, that is, of an individual's right to freely profess, manifest and change his or her religious beliefs, stipulating that "every person is free and has the right to profess his faith and to manifest his religion or belief, in worship, teaching, practice or observance, either individually or collectively, in private or in public, and to change his religion or belief (7)." Particularly in what regards change of belief, § 5 prohibits "the use of physical or moral compulsion for the purpose of making a person change or of preventing him/her from changing his religion." Here the term "physical or moral compulsion" includes illicit proselytism, whose exercise is prohibited for any individual, in favor of or against any religion; however, this constitutional prohibition has not yet been supplemented by law. Par. 6 restricts the exercise of the right to religious freedom to reasons exclusively pertaining to the interests: *a*) of the security of the Republic, *b*) of constitutional order, *c*) of public safety, *d*) of public order, *e*) of public health, *f*) of public morals, and *g*) of the protection of the rights and liberties guaranteed to every person by this Constitution. The next paragraph states that "until a person attains the age of sixteen, the decision concerning the religion to be professed by him/her shall be taken by the person having the lawful guardianship of such a person", and finally, by virtue of § 8, "no person shall be compelled to pay any tax or duty the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own."

Two other constitutional provisions, those of articles 10, § 3*b* and 28, § 2 are indirectly related to religious freedom. The first of these does not deal with "forced or compulsory labor" (which no one shall be required to perform under art. 10, § 2), but states that

(7) Cr. Tornaritis, *Promotion and Protection*, 6.

"any service of military character if imposed or, in the case of conscientious objectors, subject to their recognition by a law, shall be replaced by another service exacted instead of compulsory military service." This constitutional statute, implementing art. 4, § 3, sect. b! of the Treaty of Rome (the European Convention on the Protection of Human Rights, which was ratified in Cyprus by Law 39/1962), empowers the legislative branch to relieve of their compulsory military service those who object to it for reasons of conscience, and to order them to provide services of another nature. Art. 28, § 2 ordains, according to art. 14 of the Treaty of Rome, that every person shall enjoy all the rights and liberties provided for in the Constitution without any direct or indirect discrimination against any person "on the ground of his/her community, race, religion, language, sex, political or other convictions, national or social descent, birth, color, wealth, social class, or any ground whatsoever, unless there is express provision to the contrary in this Constitution."

2. The Constitution did not create a new internal legal regime for the various religions in Cyprus. Religions and creeds enjoy the constitutional guarantees of articles 18 and 110. Concurrently, the Constitution (article 111) maintains in effect the provisions of Ottoman law, — especially of the Hatt-i-Humayun —, with regard to the implementation of the religious law of each religious community and religious group on: *a*) institutions of family law, and *b*) adjudication of the relevant disputes by the appropriate religious tribunals. This jurisdiction of the respective creeds is "subject to the provisions of this Constitution..." Consequently, provisions of religious law that are inconsistent with the Constitution are not implemented.

A religious group in the constitutional sense 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, and whose number, on the date of the coming into operation of the Constitution (August 16, 1960), exceeded one thousand, out of whom at least five hundred became on that date citizens of the Republic (Const., article 2, § 3*d*). The religious groups are the Armenians, the Maronites and the Roman Catholics, (according to Appendix E of the Draft Treaty of Establishment between the United Kingdom, Greece, Turkey and the Republic of Cyprus). These groups opted to belong to the Greek Community. The Jews (who are very few) and the Orthodox Christians who follow the Old Calendar enjoy religious freedom, but are not "religious groups" under the sense of the Constitution. Religious groups are governed by the provisions of article 110, § 3 of the Constitution: under these, any right with regard to religious matters already possessed by the Church of a religious group in accordance with the law of the Colony of Cyprus in force immediately before the date of the coming into operation of the Constitution continues to be possessed by the said Church.

In 1985, the Armenians reached 2,250 individuals. Since 1974, all of them have resided in the territory controlled by the Republic of Cyprus. They comprise the diocese of Cyprus, which belongs to the Armenian Patriarchate of Cilicia, whose seat is today in Beirut in Lebanon. The Armenians, as well as the Maronites and the Roman Catholics, -in addition to the right of electing and being elected in parliamentary elections-, also elect, as members of their religious group, one member of Parliament that represents their group and is in charge of all matters which concern the group, but does not have the right to vote. The creed of the Maronites appeared around the 7th century in Lebanon, with the monastery of Saint Maron as their center. Their doctrine is monothelitic. Today the Maronites comprise approximately 5,000 people. The Republic of Cyprus set up a concordat with the Holy See in 1963.

4. The Autocephalous Orthodox Church

A) *Historical Introduction*

"But there were some of them, men of Cyprus...", as is mentioned in the Acts of the Apostles (11,20) in reference to those who fled from Jerusalem after the stoning of the protomartyr Stephen and preached the holy word "as far as Phoenicia and Cyprus and Antioch." (11,19). The foundation of the Church of Cyprus took place a little later, around the year 45, when the Apostle Paul and his fol-

lower from Cyprus Apostle Barnabas, who became the island's first bishop, arrived on the island and began their work.

The Church of Cyprus is accordingly apostolic. The Church of Cyprus is also autocephalous. Its autocephalous regime was recognized by a resolution of the Third Ecumenical Council of Ephesus (431), which became its eighth Canon. It was established by decree of the Byzantine emperor Zeno, following the concurrent opinion submitted to him by the Synod of the Church of Constantinople, which had taken care of looking into the matter because of a claim posed by the Church of Antioch to exercise sovereign rights over the island. It was re-affirmed by Canon 39 of the Ecumenical Council of Trullo (692). Since then, and despite the constant tribulations of the Cypriot Church, its autocephalous regime has remained intact in the midst of the continuous ordeals and political-institutional changes of the island, and having been established by decisions of various Ecumenical Councils it will be preserved according to the stipulations of Canon law (8).

For a long time, the Church of Cyprus occupied the fifth place in the ranking order of Autocephalous Orthodox Churches. Then it fell into sixth place after the elevation of the Seat "of the most reverent and Orthodox city of Moscow" to the status of a Patriarchate in the year 1593. Under prevailing ecclesiastical practice, the Church of Cyprus is today ranked in tenth place, for the reason that the Heads of the younger Churches of Serbia, Romania, Bulgaria and Georgia have been promoted to the rank of Patriarchates.

B) *Sources Of Law*

1. A basic legal source for religions in general in each country is, as we all know, the Constitution. The Constitution of Cyprus

(8) See I. PAPAIOANNOU, "The Autocephality of the Church of Cyprus", [in Greek], *Orthodoxia* 23 (Istanbul 1948), 69ff; P. PANAYOTAKOS, "The Autocephality of the Most Holy Apostolic Church of Cyprus", [in Greek], *Archeion Ecclesiasticon kai Canonicon Dikaeou* 12 (1957), 65, 73; 14 (1959), 13-21; Barnabas TZORTZATOS, *The Autocephality of the Church of Cyprus*, [in Greek], Athens 1976; G. KONIDARIS, *The Autocephality of the Church of Cyprus*, [in Greek], Athens 1976; An. MITSIDIS, *The Autocephality of the Church of Cyprus*, [in Greek], Athens 1976.

contains many articles with statutes and references to religions. This is due to the inter-communal (Greek-Turkish) structure of the Cypriot Republic. As we have seen, this inter-communal structure is also grounded on the religion of its citizens. But indicatively, the main articles of the Constitution that refer to religion are the following: article 18 on religious freedom; article 23, §§ 9-10 on the prohibition of any limitation or deprivation of the property rights held by the Christian and Muslim corporations and institutions without the consent of the appropriate ecclesiastical authority or the Turkish Communal Chamber respectively; article 87, § 1*a*!, which bestows on both Communal Chambers legislative power with regard to all religious matters of the two Communities respectively. Article 110 safeguards the internal administration and secures the property of all creeds, while article 111, § 1 sets apart family law disputes, which are adjudicated in accordance with religious law and by the tribunals of the respective religion or religious group.

2. The provisions of articles 18 and 110 of the Constitution guarantee the self-administration of religions and creeds. In particular, they recognize the religious laws that govern the internal affairs of religions and creeds.

Each autocephalous Orthodox Church is connected with the other Orthodox Churches by means of spiritual unity (or simply unity). 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), such as, e.g. the synodal system of administration (9). Article 110, § 1, in establishing the right of the Church to regulate and administer its own internal affairs and property, stipulates that this right shall be exercised "in accordance with the Holy Canons and its Charter in force for the time being...".

Here two other problems arise:

1. How to resolve the possible clash between the statutes of articles 87, § 1*a*! of the Constitution ("the Communal Chambers

(9) See Ch. PAPASTATHIS, "Unity Among the Orthodox Churches. From the Theological Approach to the Historical Realities", *Louvain Studies* 25 (2000), 143ff.

shall, in relation to their respective Community, have competence to exercise...legislative power solely with regard to... (a) all religious matters...") with the right of self-administration of article 110, § 1.

2. Which are the Holy Canons whose force is imposed by article 110, § 1 of the Constitution?

As concerns the first question, the solution is provided by article 110, § 1 itself. It stipulates that "the Greek Communal Chamber shall not act inconsistently with the said right" (= the Church administering of its own internal affairs and property). As regards the second question, the force of those Holy Canons that relate to Church doctrine is granted by article 18, § 4; while the effect of the Holy Canons referring to the administration of the Church's internal affairs and property is imposed by article 110, § 1.

In addition to the force of the Holy Canons, the Constitution also makes reference to the Charter of the Church. With the establishment of Charters, various Orthodox Churches attempt to combine the force of the Holy Canons of the first seven Ecumenical Councils and the other Synods (until the year 787) with the satisfaction of present-day needs. The first Charter of the Church of Cyprus was drafted in 1914. That is when it came into effect. Almost at the same time, the Church enacted other nomocanonical texts; the "Procedure of Ecclesiastical Courts" (1917), the "Special Ordinance on Parish Management" (1917) and the "Special Ordinance on Parish Priests and other Attendants of the Church" (1918). A new Charter was issued in 1929, but was never put into effect. Thus, the Charter of 1914 continued to be in force until December 31, 1979. Already in November 1979, the Holy Synod issued a circular, making known the drafting and enactment of a new Charter. In this Charter were integrated, by way of amendments, the Special Charters on procedure, management and parish priests. The new Charter came into operation on January 1, 1980.

The Charter contains 355 articles, separated into nine chapters. Its main characteristics are: 1. The reinforcement of the synodal system of Church administration, 2. The substantial participation of laypersons in ecclesiastical administration and in the election of metropolitans and of the archbishop, 3. The equality of men and

women with regard to the administration of the ecclesiastical corporation and electoral assemblies, -but not fully in matters of family law, 4. The financial remuneration of clergymen and other persons attending to the Church, and 5. The detailed audit of financial management (10).

The question that arises here is whether the Church of Cyprus has the right to draft and enact a new Charter. In other words, whether it possesses its own legislative power.

There is no problem from the aspect of canon law. The Church is entitled to legislate freely, subject to the inviolable condition that its new statutes do not contravene the Holy Scriptures, the Holy Tradition and those Holy Canons that are accepted by all the Orthodox Churches. The same holds from the point of view of the Constitution, which stipulates in article 110, § 1 that the Church "shall continue to have the exclusive right of regulating and administering ... in accordance with the Holy Canons and its Charter in force for the time being, and the Greek Communal Chamber shall not act inconsistently with the said right". Both the exclusive right and the deprivation of the Greek Communal Chamber (today the Parliament of Representatives) of such powers, and at the same time the provisions of articles 110, § 3 and 111, § 1 of the Constitution, recognize that the Church of Cyprus, — as well as the other Churches (article 110, § 3) — has legislative power with regard to matters concerning its internal administration and property.

C) *The Administrative Organization*

1. The pre-existing Charter established the Church of Cyprus as a legal entity (art. 94). The current Charter contains a similar provision only for particular ecclesiastical corporations: metropolises (art. 153), parish churches (art. 80, § 3 and 160), monasteries (art. 184), collective bodies of administration of Church property (art. 210) and for a number of Church-run charitable foundations (art. 190); but not for the Church *per se* (as a distinct entity). Despite

(10) Ham. ALIVISATOS, "Die Kirchenordnung"; Ch. PAPASTATHIS, "The New Statutory Charter".

the absence of a similar provision, I contend that the Church remains a legal entity. The pre-existing Charter maintained its force twenty years after the coming into operation of the Constitution, and the institutional status of all religions and creeds, as well as of the Charter of the Orthodox Church, are determined by art. 110, § 1 of the Constitution. In other words, indirectly, the Constitution recognizes the character of the Church as a legal entity. In fact, although under English rule it was considered a legal entity under private law, today it should properly be viewed as a legal entity under public law, precisely because the Constitution confers upon it powers that appertain to the State.

2. The bodies of administration of the Church are divided into central and peripheral bodies. The central organs are: 1. the Holy Synod, and 2. the archbishop.

2.1. As in every Orthodox Church, in the Cypriot Church the congregation (clergy, monks, laypersons) constitutes the highest authority (Ch. 5). This authority is exercised by the Holy Synod. The other source of authority is constituted by the acting archbishop and the acting metropolitans. Moreover, participants to the Synod include bishops, — if there are any —, who do not have administrative duties but assist the archbishop with his work. If a prelate has been sentenced to a canonical penalty (with the exception of a reprimand), and for as long as his sentence lasts, he is not entitled to participate in the sessions of the Holy Synod. The archbishop is its chairman. If he is impeded from appearing or if the see is vacant, the first ranking metropolitan, that of Paphos, assumes the chairmanship. The sees of Kition, Kyrenia, Limassol and Morphou follow. The Holy Synod is in quorum when one half of its members are present. If some of its members refuse to participate, then one or two prelates are called upon from the Patriarchates of the East or from the Church of Greece. Its Chairman convokes the Synod regularly three times a year. It is convened for special sessions when the chairman deems it necessary or when two of its members make such a request. Its decisions are made with an absolute majority of all those present. An increased majority of of its members is required for revising provisions of the Charter. The Holy Synod supervises

clergymen and the overall ecclesiastical corporation and exercises administrative power in its broad sense. The latter is divided into legislative, judicial, and administrative power *stricto sensu*.

Furthermore, the Holy Synod has the "presumption of jurisdiction" (Ch. 18), that is, it has jurisdiction over any matter that does not fall under the jurisdiction of another body. Also, it is the highest court for the canonical offenses of clergymen, monks and laypersons. When it is called upon to try a prelate, charged with an offense which under canon law is punishable with unfrocking, then the Synod assembles as a Superior Court. Namely, this court is comprised of members of the Synod and prelates from other Churches, so that they are thirteen in number, including the chairman, in accordance with canon 12 of the Synod of Carthago.

2.2. The archbishop is a central organ of the administration — and at the same time a peripheral organ as a bishop in the archdiocese (Nicosia). He presides over the Holy Synod, represents the Church before the Republic, other states and Churches, he supervises the "royal" monasteries of Cyprus, and so on. According to the privilege granted to him by the Byzantine emperor Zeno in the fifth century, the archbishop of Cyprus signs in cinnabar (red ink), is clad in imperial purple, and holds an imperial scepter.

3. The peripheral organs of the administration are: 1. the archdiocese and the metropolises, 2. the parishes, and 3. the monasteries.

3.1. In addition to the archdiocese, whose prelate is the archbishop (seated in Nicosia), there are five metropolises, each administered by a metropolitan (Paphos, Kition, seated in Larnaca, Kyrenia, Limassol and Morphou). The metropolitan holds the hieratic rank of a bishop. He exercises administrative authority in the broad sense within his region, that is, authority that is administrative in the strict sense, judicial and legislative; he controls and supervises the administration and management of the parishes and the monasteries of his province, and is generally charged with all the competencies conferred by the Holy Canons and the Charter.

The archbishop and the metropolitans are permanent in their region. They lose this capacity if they resign or if they are discharged on account of an illness or a conviction for a canonical

offense. The dismissed prelates do not exercise administration, but maintain their prelateship intact.

3.2. A parish is a particular region, whose Orthodox inhabitants serve their religious needs in a specific church. The Orthodox inhabitants of a parish are rendered parish members upon completing residence of one year in that region (Charter 81, § 11). In order to establish a new parish, the requirement is the presence of 2,500 inhabitants in cities and 1,500 in towns and villages. However, any special conditions of the region are taken into consideration, when the number of the faithful is smaller. The head of the parish is the parish priest. He must be a married clergyman; an unmarried clergyman is appointed exceptionally. The staff of the churches is also comprised of preachers, cantors and sacristans.

3.3. Monasteries constitute the centers of monastic life. From an administrative viewpoint, they are divided into royal monasteries, parochial monasteries and monasteries of the see. The royal monasteries enjoy full autonomy in their internal administration and management. They are spiritually (but not administratively) subject to the archbishop. Parochial monasteries enjoy self-administration. Spiritually, they belong to the local metropolitan. The monasteries that have closed down are called monasteries of the see. By ownership, they belong to the local metropolis. The organs of administration of the monasteries are the abbot, the abbot council and the brotherhood of the monks.

D) *The Financial Organization*

The Republic of Cyprus does not provide funding to creeds, nor does it impose any special religious tax. Each creed administers its own property without any state intervention. The Orthodox Church has set up central and peripheral organs for the administration of its property.

1. The central organs are the following: *a*) the Central Ecclesiastical Fund, *b*) the Audit Department, and *c*) the Ecclesiastical Financial Board. All of these are seated in Nicosia.

a) The Central Ecclesiastical Fund is supervised by the Holy Synod. Its resources are comprised of percentages of the total resources of the metropolises and the monasteries. It subsidizes the various ecclesiastical legal persons when their own finances do not suffice and covers the main ecclesiastical activities, such as the publication of the review "*Apostolos Varnavas*", the operation of the hieratic school, and the Cypriot participation in inter-ecclesiastical and inter-religious events.

b) The Audit Department inspects the management of the archdiocese, the metropolises and the royal monasteries. It is staffed by laypersons.

c) The Ecclesiastical Financial Board drafts recommendations with regard to the best possible use of Church property. Its recommendations are not binding, unless they are adopted by the Holy Synod. It is made up of ten members, all of whom are laymen, who serve a four-year term.

2. The peripheral organs of administration of ecclesiastical property are: *a*) The See Committee, *b*) the See Fund, *c*) The Fund for the Wages of the Clergy, *d*) the Parochial Committee, *e*) the Abbot Council, and *f*) Philanthropic and charitable ecclesiastical foundations in general.

a) The See Committee is based in each particular metropolis. Its chairman is the metropolitan and there are eight other members: four clergymen and four laymen. The lay members are elected by the body of church wardens (who are laymen too). They are charged with the study, supervision and management of the finances of each diocese.

b) The fiscal management of the finances of each metropolis is assigned to the See Fund, which operates under the orders of the See Committee.

c) The Fund for the Wages of the Clergy pays special allowances to clergymen, in addition to the revenues that they have from their parish. Thus, their overall income is levelled and equalized.

d) The Parochial Committee manages the finances of the parish. It is chaired by the parish priest and comprises two to four other members from among the laity, who are elected every four years by the parishioners.

e) The Abbot Council manages the property of the monastery.

f) Each metropolis may establish philanthropic and more gen-

erally charitable foundations, such as orphanages, old-age homes, etc. They are administered by a council appointed by the metropolitan, who is also its chairman. Foundations that have been instituted by virtue of a last will and testament and placed under the Church, and operate according to the conditions of the testator.

E) *The Legal Status of Clergymen and Laypersons*

1. The capacity of Orthodox Christian is acquired by christening and unction, which in the Eastern Church are celebrated simultaneously. The Charter (art. 2) recognizes as members of the Congregation: 1. All the Orthodox people permanently residing in the island, that is, regardless of citizenship, sex, age, etc., and 2. All persons of Cypriot origin who were baptized in Cyprus and live abroad. This latter provision is an innovation. This is because normally in the Orthodox Church "ecclesiastical citizenship" is determined by the autocephalous Church of the territory where the particular believer is located. In particular, the greater Diaspora (the Americas, Australia, Southeast Asia, Western, Central and Northern Europe) is subject to the Ecumenical Patriarchate of Constantinople, seated in Istanbul, at least according to the views of the Greek-speaking Orthodox Churches (the Ecumenical Patriarchate, the Patriarchates of Alexandria and Jerusalem, and the Archdioceses of Cyprus and Greece). However, the Church of Cyprus has not established its own parishes abroad. The Cypriots who live abroad continue to be ministered to by the Ecumenical Patriarchate.

The forfeiture of the capacity of Orthodox Christian comes with death (primarily), excommunication or voluntary secession from the Church.

2. As in every other Orthodox Church, the members of the Cypriot Church are divided into clergy, monks and laypersons.

2.1. Clergymen are further divided into deacons, presbyters, and bishops. They hold the ceremonial, administrative and teaching authority. The ordination of a deacon or a presbyter is performed by at least one bishop; the ordination of a bishop is performed by the archbishop or, by order of the latter, by the first-in-rank metropolitan (Charter 63, § 5). If the seat of a metropolitan is vacant, the

archbishop acts as vicar of the seat. The archbishop and the metropolitans are elected by an Electoral Assembly composed of clergymen, monks and laymen (Charter 62-63). A candidate to the post of prelate is expected to be unmarried, to have completed his thirtieth year of age, to be a graduate of a school of Theology, to be distinguished for his integrity and piety, and to have completed an ecclesiastical service of at least five years as a clergyman (Charter 71).

The capacity of clergyman is forfeited when a clergyman is unfrocked. The penalty of unfrocking is imposed by the Holy Synod convening as a tribunal (art. 22, *B*,*a*!); on prelates it is imposed by an extraordinary synodal court or by a superior synodal court. Prelates from other Churches also participate in the latter. The capacity of clergyman is retrieved when pardon has been granted, by the same court that had issued the conviction.

The law of the Republic of Cyprus does not contain any provisions referring to the potential special legal treatment of the Orthodox clergy. The Statutory Charter is limited to their impediment to marry (art. 220, § 2,*d*) and to the establishment of a provision concerning the succession of prelates and unmarried clergymen (articles 74 and 79). Under canon law, clergymen are prohibited from practicing certain professions entailing profitable activities, which are inconsistent with their function, and from the assumption of state offices and more generally of secular concerns. As for the succession of deceased clergymen, those who are married are governed by the rules of succession contained in the statutes of Civil Law, while the succession of unmarried deacons and presbyters is governed by the stipulations of the Statutory Charter concerning the succession of prelates, but only if they possess (or possessed at some point) the capacity of employee of a metropolis, regardless of whether they were still in office or not at the time of their death (Charter 79). This is so because they happen to be members of the Brotherhood of the Diocese, which is granted the same status as a monastery (Charter 78).

2.2. The capacity of monk is acquired by tonsure. The minimum age limit for tonsure is eighteen. The candidate must have completed a three-year term as a novice. Tonsure is performed by a bishop or a presbyter, following the permission of the local

bishop, otherwise it is null and void. Hiero-monks and hiero-deacons who have undergone tonsure to become presbyters and deacons respectively, also belong to the order of monks. The law of the Republic of Cyprus does not contain any statutes on the legal status of either clergymen or monks. The Charter of the Church limits itself (art. 220, § 2*d*) to the impediment of contracting marriage, as well as to the prohibition of exercising property rights on real estate. As for everything else, the provisions of canon law apply. The supplementary sources here are the internal regulations of monasteries.

Laypersons participate in all aspects of the work done by the Church. Their distinction from clergymen and monks lies in the degree of their diaconate for the sake of the Church. The participation of the laity in the Church of Cyprus is the strongest in the entire Orthodox world, both as concerns the extent of its competencies and its elevation to the status of an organ of Church administration. Laypersons who participate (1) in most of the central and peripheral organs of administration of the Church, as well as in the management of its property, and (2) in the Electoral Assembly, which votes for the archbishop and the metropolitans of the island, are not appointed. They are elected by secret and universal ballot by the Congregation of the Church, and in fact without any discrimination between men and women.

2.3. Laypersons participate in: 1) the election of the archbishop and the metropolitans, 2) the central organs of the administration and church property, 3) the peripheral organs, 4) the ecclesiastical courts of family law, 5) the administration of philanthropic and other charitable ecclesiastical foundations.

When the archbishop's See falls vacant, the elections for the appointment of a new Head, from the aspect of the laity's participation, proceed as follows: first of all, all the Orthodox Christians of the island aged eighteen and over and regardless of sex, elect by parishes or communities and by secret ballot a total of one thousand four hundred Special Delegates. Then the latter elect, by secret ballot, one hundred General Delegates, of which thirty-four are clergymen and sixty-six are laypersons. The General Delegates participate in the Electoral Assembly, together with its *ex officio* members, that

is, the members of the Holy Synod, the former Prelates, the Abbots of the Monasteries and five office-holding clergymen. Thus, the members of the Assembly elected by the congregation of the Church constitute a body that is approximately four times the size of the body composed of *ex officio* members. The same participation of the laity holds for the election of the Metropolitans, where the flock of the vacant diocese elects, in accordance with the aforementioned procedure, two hundred Special Delegates, who then elect three hundred and three laypersons as General Delegates, while at the same time the priests of the same diocese vote to elect seventeen clergymen, also to be appointed as General Delegates.

F) *The Church and Marriage and Divorce Law*

Article 111 of the Constitution refers to the courts of the Christian creeds. Only the Orthodox Church and the Armenian Church have ecclesiastical courts in Cyprus. The Maronites appeal to their own religious tribunals, based in Lebanon.

Marital disputes between Orthodox people who had celebrated religious marriage used to fall under the jurisdiction of the courts of the Orthodox Church. When both of the spouses-to-be were Orthodox, it was not possible for them to have a civil marriage in Cyprus. If, however, they had performed a civil marriage abroad, Cypriot law recognized it by virtue of the principle of *lex loci celebrationis*. Furthermore, during the period of English occupation, mixed marriages (between an Orthodox person and a Christian of another creed) had to be contracted in accordance with the civil form of marriage. Any disputes that arose within a civil marriage were not subject to the jurisdiction of the ecclesiastical tribunal, but of the Supreme Court of Cyprus.

After the coming into effect of the Constitution, civil marriage was recognized as valid, but there was no authority to solemnize it in Cyprus. Thus, any Orthodox people who wished to have a civil marriage had to go abroad. In 1977, the Supreme Court, adjudicating on a divorce suit between E. Metaxa and M. Mita, held that a civil marriage between Orthodox people is null to begin with, wherever it has been celebrated. And this was because article 111 of the

Constitution stipulates that "any matter relating to... marriage, divorce, nullity of marriage... of members of the Greek Orthodox Church or of a religious group [=article 2, §. 3]... be governed by the law of the Greek-Orthodox Church or the law of the Church of the concerned religious group...". Therefore, the only form of marriage that was appropriate for the Orthodox, the Armenians, the Maronites and the Roman Catholics was the religious form. Civil marriage was declared invalid and void *ab initio*. The same case-law was repeated in the divorce cases of Neophytou v. Neophytou (1979) and Platritis v. Platritis (1980).

The new Charter of the Church makes detailed references to the institutions of family law that come under the jurisdiction of ecclesiastical courts (arts. 217-235), as well as to the organization and operation of the latter (arts. 236-355).

It became obvious beyond doubt that the monopolization of fundamental institutions of family law, — such as marriage and divorce —, on the part of canon law and the ecclesiastical courts, hindered the adjustment of all matters relating to these personal institutions to contemporary legal principles, to new social perceptions and to the commitments of the Republic towards international conventions.

For this reason, the Parliament proceeded with a First Amendment to the Constitution in 1989. Divorces thereafter came under the jurisdiction of three-member state courts of family law, presided over by a clergyman and with laypersons acting as their two other judges. The decisions of these courts can be appealed against before the Supreme Court of the Republic. If the Church does not appoint a presiding judge, then he is appointed by the Supreme Court, and this has been the practice until today (11). Moreover, to the grounds for divorce mentioned in the Charter, the Amendment added the grounds of irretrievable breakdown rendering the marital relationship intolerable for the plaintiff. The promulgation of a relevant law for religious groups was further provided for.

A year later, Law 21/1990 on civil marriage, establishing a

(11) R. Gavrhilidis, "Historical Evolution" [in Greek], 53.

dual regime relative to religious marriage, was promulgated, followed by Law 23/1990 on family courts and Law 87/1994 on the family courts of religious groups. Thus, the marriage and divorce law of the Republic of Cyprus is today on the same level of modernization as in other European countries.

In 1983, the Church of Cyprus took an extremely important initiative for the premarital regulation of the health of future spouses, something that nearly all Churches in other countries disapprove of. In Cyprus, several incidents of sickle-cell anemia are reported each year. The Holy Synod, in its regular session of February 15-17, 1983 decided that among the documents that the spouses-to-be are required to submit to the Church for the issuing of a license for the solemnization of a religious wedding ceremony, there should also be a certificate from a state-appointed doctor proving that they had been examined for sickle-cell anemia. Even when the test shows that the disease is present, the marriage can still be celebrated. The test aims exclusively at assisting the prospective spouses in making grave decisions concerning the family that they will create. Subsequently, the Holy Synod made known and analyzed its decision in a circular it issued (12). The decision came into effect on June 1, 1983. It has had very satisfactory results up until now, since the cases of sickle-cell anemia have substantially decreased (13).

G) *Religious Education*

Religious lessons given in public primary and secondary schools follow the doctrine of the Eastern Orthodox Church. Attendance is compulsory for Orthodox pupils. 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.

(12) See *Apostolos Varnavas* 44 (1983), 63-64.

(13) See R.H. Hoedemaekers, *Normative Determination of Genetic Scientific and Testing. An Examination of Values, Concepts and Processes Influencing the Moral Debate*, Nijmegen 1998, 161-176; R.H. Hoedmaekers-H. ten Have, "Geneticisation: The Cyprus Paradigm", *The Journal of Medicine and Philosophy*, 1998, 23/3, 274-287.

At the same time, the Orthodox Church, as well as the other Christian creeds, operate Sunday schools.

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 the Orthodox Theological Academy enjoys the status of a University college. Under the supervision of the Holy Synod of the Church of Cyprus, the hieratic school "Apostolos Varnavas" is in operation near Nicosia, as a dependence of the Monastery of Kykkos.

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THE LEGAL STATUS OF CHURCH AND RELIGION IN THE REPUBLIC OF BULGARIA

The dynamic social, political and historical processes in the Bulgarian lands reveal a prevalence of Eastern Orthodox Christianity among a substantial part of the Bulgarian population, as well as its crucial role for Bulgarian national identity, for the historical and cultural heritage of the country, and for its movements for national independence. Nevertheless, other religions emerged too and have been maintained among some compact groups of the Bulgarian people. Nowadays, past history still has an influence on social developments and legislative trends. The legislative process has not yet reached an acceptable solution for the achievement of equality before the law.

I. HISTORICAL ANALYSIS

At its dawn, the Bulgarian State united various multi-religious and culturally divergent ethnic groups that inhabited the northern

part of the Balkan Peninsula (1). In 865, Eastern Orthodox Christianity was officially imposed in the Bulgarian lands. That year was a landmark in a continuous process of self-determination on the international plane and marked the beginning of a state policy aiming at the christianisation of the Bulgarian people. The adoption of Christianity was a political choice, with a socially and ethnically unifying purpose, which reinforced the recognition of the state in Europe. On 4 March 870, at a Great Church Council in Constantinople, the Bulgarian Orthodox Church was set up under the jurisdiction of the Constantinople Church. The new religion was a forerunner of a cultural strategy of the state, placed under the motto "Church, Literacy and Culture". For centuries Bulgarian culture was developed through the Bulgarian Orthodox Church.

After a victory over Byzantium, Tsar (2) Simeon proclaimed the autonomy and independence of the Bulgarian Church in 917. The official recognition of this Law was approved by the Constantinople patriarchate 10 years later during the reign of Simeon's son, Tsar Peter. Institutionally, from the Xth century the Bulgarian Orthodox Church enjoyed the status of a local patriarchate. This lasted until 1416, when the Church was dismantled following the conquest of Bulgaria by the Ottoman Empire in 1396. The Church lost its autonomy, as it was transformed into a diocese of the Constantinople patriarchate. The Orthodox Church's functions were reduced to those normally attributed to a cultural institution. The Church lost its autonomy several times in Bulgarian history (3); however, it never lost its presence as the religion and faith of the majority of the Bulgarian people.

(1) When the Bulgarian State was formed in 681 AD, it comprised three ethnic and demographic components: the Protobulgarians, the Slavs and the Thracians. The religion of the Protobulgarians was purely monotheistic, while most of the Slavs were henotheistic. The Thracians also followed a variety of ancient religious beliefs and rites.

(2) *Tsar* is a mediaeval title of the head of state corresponding to *King*.

(3) The Bulgarian Orthodox Church has enjoyed the status of a "local patriarchate" since the Xth century, except for the following periods: 1018-1235, when Bulgaria was conquered by the Byzantines and the Church was reestablished as the Ochrid patriarchate in the western part of the territory of the ex-state; and 1204-1235, when *unia* with the Church of Rome prevailed.

A process aiming at achieving the establishment of an independent Christian Orthodox Bulgarian Church developed in the XIXth century (4). It culminated with the publication of a special decree (ferman) by the Sultan of the Ottoman Empire on 28 February 1870, setting up the Bulgarian Exarchate. This event is very important in Bulgarian national history, for it is on the basis of the boundaries of the Bulgarian Church that the frontiers of Bulgaria were determined, when the independence of the Bulgarian state was reestablished by the Treaty of San Stephano on 3 March 1878. Furthermore in the period leading up to 6 September 1885, and even up to 1915, the Bulgarian Exarchate acted as the unifying focus among the Bulgarians, in all the lands that had been part of the territory of the Bulgarian State during certain periods in history.

The historical importance of the Orthodox Church in the XXth century, particularly after the death of patriarch Joseph in 1915, is still the subject of debates among historians and theologians. The position of the Church in society was significantly restricted at the end of the 1940's. Following the entering into force of the 1947 Constitution, and especially the passing of the Law on Denominations of 1949, the model of separation between the Church and the State and a state policy aiming at building an atheistic society took precedence and lowered the esteem that the Orthodox Church had enjoyed up to that time.

II. Sociological Dimensions of Religion

Human beings reveal variable characteristics on the internal individual level and in society. Social groups, and religious groups in particular, bear their own specific characteristics. In the context of social dynamics, however, they appear to become different and to modify themselves. That is why the social dimensions of religion

(4) There is a process of cultural uplifting in the Middle Ages called in Bulgarian historical science the "National Renaissance". The first token of the process occurred in 1762 when the monk Paisij wrote a book entitled "Slav-Bulgarian History". Up to then it was mostly the educational and preaching activities of monasteries that supported the idea of a Bulgarian cultural identity.

will not be presented here only as statistics, but also through a review of the ways and the periods in which various religions and religious groups appeared in Bulgaria.

Historically, along with the development of the Orthodox Church, there was the emergence of so-called heretical (5) movements in the Middle Ages. The most influential and unique among the various religious movements streaming from the established religion in Bulgaria were the *bogomils* (6). After the conquest of the Bulgarian lands by the Ottoman Turks in 1396, there was a gradual ethnic and religious rise in numbers of the followers of the Muslim religion. During the centuries of Turkish rule, there were many instances of forceful imposition of the Muslim religion on the Bulgarian population. As a result, in some areas particularly in the south a population of so-called Bulgarian Muslims (*pomaks*, *Bulgarian Mohammedans*) was formed as compact social groups, who still exist nowadays. During the XVIth and XVIIth centuries, Catholicism spread in some areas. The Catholics formed compact groups in the surroundings of the town of Plovdiv and in the central north lands of present day Bulgaria. In the period of the XVth-XVIth centuries a number of Jews settled in Bulgarian lands, coming mostly from Spain (7). Under the first 1879 Bulgarian Constitution (*Turnovo Constitution*), Eastern Orthodox Christianity was proclaimed as the "dominant" religion (8). Islam, Judaism and Armeno-Gregorianism were also declared as officially recognised. The statistics on the population for the period 1887-1945 reveal a rise from 77% to 85.2% of the proportion of Christians, and a decrease from 21.5% to 13.3% of the followers of Islam. The other forms of Christianity

(5) The term "heretical" has never been given a recognized definition in theology. This term is used here as a tribute to precision. It designates religious movements in the Christian religion which deviated from its dogma and were persistently suppressed by the Church, sometimes with the support of the state authorities.

(6) The religious doctrine of the *bogomils* was developed on dualistic fundamentals. Marxist historiography cherished it as a significant achievement and even as a pre-reformation phenomenon. There is now a trend back towards the traditional view, according to which the movement had more destructive social effects than progressive implications for society.

(7) *See* "Bulgaria XXth Century Almanac", professor Christo Matanov, p. 399-403, published by "Trud" Publishing House, 1999.

(8) Article 36 of the Turnovo Constitution.

enjoyed a small increase of their congregations, from 0% to 0.1%. Statistical surveys during the period when the Republic of Bulgaria formed a part of the Eastern block did not contain questions concerning faith and religion.

According to the official census statistics of 1992, the proportion of Orthodox Bulgarians was the same as in 1945, the Muslims reached 8%, and the Protestants and Catholics, having made some progress through conversions, represented 4% of the Bulgarian population. Nearly 3% of Bulgarian citizens defined themselves as atheists. The results of sociological surveys that were held for the period 1992-1999, and especially those analysing religious belief among young people, reveal an increase in the influence of the Orthodox Church (9). At present nearly 7 million Bulgarian citizens, who are exclusively ethnic Bulgarians, identify themselves as Orthodox Christians. The Catholics in Bulgaria number approximately 54,000. There are three catholic eparchies and the chief governing authority is the catholic exarch. There is also a group of Bulgarian Uniats who, while recognising the authority of the Vatican, still follow the Orthodox pattern of worship. The confession of the Armeno-Gregorians has approximately 20,000 followers.

Sociologically, the most significant non-Christian religion in Bulgaria at present is Islam. Muslims constitute about 10% of Bulgarian citizens. Only 2% of these Bulgarian Muslims are ethnic Bulgarians. Most of the Muslims in Bulgaria are *Sunni*, but there are some *Shia* and some *Alevi* (*cazalbashi*) Muslims too. Approximately 2600 Bulgarians belong to the Jewish community. There is also a specific religious movement founded in the 1920's, called the *White Brotherhood* or the *Dunovists* (after the name of the founder Peter Dunov), which grew after 1990. Only 1% of the citizens have been converted to new religious movements.

Beside the prevailing social influence of the Orthodox Church, the analysis of a number of sociological surveys may lead to the conclusion that the Orthodox religion has not significantly succeeded

(9) The author is thankful to Mr. Dejan NIKOLCHEV for the overview and analysis of a number of the sociological surveys provided here.

in its consolidating function in society. The sociological surveys of 1996 revealed that 12% of the population considered themselves as very religious, 43% as decent believers, and 45% as not inclined to religion. The first group consisted mostly of elderly people over 60 years of age. On the other hand affection for religion appeared stronger among people with a low level of education. Moreover, 32% of the people surveyed declared that they practised only on great religious festivals, and 66% declared that they never attended religious services, or only rarely or by accident (10). This is mostly a consequence of the communist years, when atheism was an official policy of the state.

During the years following the first steps towards building a democratic society, a schism occurred within the Orthodox Church. In May 1992 a group of high-ranking clergymen proclaimed themselves as a Synod and initiated an Assembly for the election of a patriarch. For more than six years two parallel Synods existed in Bulgaria. But the newly emerging one failed to present valid proof of both the legitimacy and the legality of its existence, and the Assembly of all the Orthodox Patriarchs held in Sofia in September 1998 did not approve its activities. This schism in the Bulgarian Orthodox Church called for a reconsideration of the relations between the Church and the State. The phenomenon revealed troublesome and morbid thoughts about religious attitudes, the ability of state institutions to take relevant steps in time, and finally respect for religious institutions as an aspect of the collective exercise of freedom of religion and as a cultural phenomenon. Despite the existence and even the growth in numbers of the followers of non-Orthodox religions and religious movements, the Orthodox Church is still considered as a consolidating factor in society. The latest sociological surveys have revealed that about 85% of the population identify themselves as Orthodox Christians. Surveys conducted by the Ministry of Education have shown that about 57% of young people belong to Orthodox Christianity; 45% of young people explain their

(10) *See* "Bulgaria XXth Century Almanac", professor Christo Matanov, p. 399-403, published by "Trud" Publishing House, 1999.

personal attitude towards religion by the fact that the Orthodox religion plays a role in the preservation of Bulgarian traditions and by the fact that religion stimulates justice as a personal value.

Finally it should be noted that an official survey will be held from 8 to 14 March 2001. Article 5, Section 1 of the Law on the Official Census of the Population, the Civil Construction Fund and the Agricultural Farms in the Republic of Bulgaria in 2001, which came into force on 28 February 2000, states that religion (item 13 of the provision) shall constitute an element of the personal data to be collected. The results of this survey will bring new specific data concerning the social aspects of religion.

III. Sources of Law

1. *Constitutional foundations*

The constitutional foundations of the legal status of religions and denominations cover the relations between religion and the state, as well as freedom of thought, conscience and religion as a fundamental human right. The former is regulated under Article 13 in Chapter I entitled "Fundamental principles" and the latter under Article .37 in Chapter II entitled "Fundamental Rights and Obligations of Citizens" of the 1991 Constitution of the Republic of Bulgaria (11). The Constitution also recognises equality before the law and prohibits any kind of discrimination, and explicitly discrimination on religious grounds (Article 6). Freedom of assembly is also recognised (Article 44).

According to Article 13, Section 1, denominations shall be free. Pursuant to Section 2, religious institutions shall be separate from the State. Section 2 of Article 13 provides that Eastern Orthodox Christianity shall be considered the traditional religion in the Republic of Bulgaria. According to Section 4 of Article 13, no religious community, religious institution or religious belief shall be used for political aims.

(11) Constitution of the Republic of Bulgaria, voted by the Grand National Assembly on 12 July 1991.

Article 37 provides for the constitutional fundamentals of freedom of thought, conscience and religion. The provision is similar but not identical to the one under Article 9 of the European Convention on Human Rights and Fundamental Freedoms (12). Section 1 of the Article recognises the right to freedom of thought, conscience and religion, and Section 2 provides for the admissible limitations to that right. Freedom of religion is an inalienable right according to the 1991 Bulgarian Constitution. It is among the rights enumerated under Section 3 of Article 57 of the Constitution, which cannot be withdrawn even under circumstances of war, martial law or state of emergency. The Constitution explicitly prohibits the failure to perform the obligations imposed by law on the grounds of religion or other beliefs (Article 59(2)). This constitutional provision was interpreted by the former Supreme Court as a ground for a *de facto* refusal to recognise the right to conscientious objection. In Decision N. 46 of 2 February 1997 on criminal case N. 546/96 of Department II of the Supreme Court, the former Supreme Court ruled that religious convictions cannot be a ground for a refusal to perform one's military duties. The practice of the courts was changed accordingly. However, following a friendly settlement reached during proceedings before the European Court of Human Rights upon a complaint by the Jehovah's Witnesses, an alternative form of military service was set up and conscientious objection received legal grounds.

2. *International treaties*

By virtue of Article 5, Section 4 of the 1991 Constitution, international treaties that have been ratified under a constitutionally established procedure, promulgated and come into force with respect to the Republic of Bulgaria, shall constitute a part of domestic law. They shall take precedence over conflicting provisions found in domestic law. Bulgaria has ratified both the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms. Thus, Article 18 of the Covenant and Article 9 of the Convention form part of the applicable law in force.

(12) Ratified by the Republic of Bulgaria on 7 September 1992.

3. *Legislation*

The relevant legal regulations in force in Bulgaria do not form a systematic body and for the most part they do not comply with the Constitution. This non-compliance led to rulings by the Constitutional Court of the Republic of Bulgaria concerning a number of provisions of the Law on Denominations. The status of denominations is codified under the Law on Denominations, which came into force on 4 March 1949 (13). This law was passed on the grounds of Article 78, Section 3 of the 1947 Constitution then in force (14). It provided for the adoption of a special law on the legal status of various denominations, including matters concerning the financing of their maintenance and their right to internal self-regulation and self-governance. The law was passed following the establishment of the communist regime on 9 September 1944 at the dawn of the Cold War, and it favours principles which are repugnant to today's moral values and political and legislative priorities. The records of the National Assembly contain parliamentary debates that reveal the fundamental prerogatives for the regulation of the religious communities of that time (15). Despite the initially proclaimed principles, the law permits by-law intrusions in the internal regulation of the activities of religious denominations. Generally it aims at restricting the interaction between domestic and foreign denominations and favours a restrictive state policy and statutory over-regulation. These restrictions were aimed in particular at slowing down the spread of Catholicism and Protestantism, in particular as these two confessions came from the Western part of Europe. The parliamentary debates preceding the passing of the law reflected a negative attitude towards religious matters.

(13) The Law on Denominations was promulgated under State Gazette N. 48 of 1° March 1949, amended in State Gazette N. 54 of 1949, Announcement N. 1 and 13 of 1951 (Announcement was the substitute name of the official state gazette for a certain period), and State Gazette N 15 of 1991.

(14) The Constitution of the People's Republic of Bulgaria, voted by the Grand National Assembly on 4 December 1947.

(15) See Stenographic Reports, Grand National Assembly BHC III PC, 93, 23/III1949, c. 71.

The Criminal Code, in Part. II of Chapter III entitled "Crimes against the Rights of Citizens", regulates the sanctions for the infringement of certain aspects of constitutional rights regarding freedom of religion and the status of religious denominations. Article 164 prohibits any expression of hatred on religious grounds and any attempt to arouse such hatred in other people. Article 165 provides for the prohibition of forceful or threatening hindrances to freedom of religion and religious services when the latter comply with the law. Article 165(2) prohibits forceful or threatening coercion to participate in religious worship or liturgies. Under Article 165(3) any group coercion or use of force against citizens or their property because of religious convictions shall be considered a crime. Article 166 prohibits the formation of political parties based on religion, or any use of church or religion for propaganda against the state authorities and their activities.

In addition, relevant provisions can be found in other laws with different aims and subject matters, such as tax laws, the law on military service, the law on the application of penalties, and others.

IV. Fundamental Principles

The political and social context, which prompted the search for a compromise, underlies the wording of the rules that establish those principles. Despite conceptual controversies, however, the constitutional provisions stipulate fundamental principles forming the legal framework which future laws must comply with. Those principles are religious pluralism, separation between church and state, no political involvement, and the recognition of Eastern Orthodox Christianity as the traditional religion in the Republic of Bulgaria.

1. *Religious pluralism*

Article 13, Section 1 of the Constitution provides that religious groups shall be free (16). The principle provides a framework for

(16) The wording of the provision incorporates a term, "veroizpovedanie", whose morphological structure unites the roots of the nouns "faith" and "profession". Under the *obiter dictum* of Decision N. 2 of 18 February 1998 (constitutional case N. 15 of 1997, *obiter dictum*, item 16, *d*), promulgated in State Gazette N. 22 of 1998) the Constitutional Court held the view that semantically the word covers both religion as creed and the personal component of religious systems in the sense of communities.

the relation between religions and the state. It refers to religious communities as a form of practising the freedom of association on religious grounds. Religious pluralism is an institutional guarantee of the freedom of religion and the freedom of association. In para. 62 of the judgement *Hasan and Chaush v. Bulgaria* of 26 October 2000 (application no. 30985/96) the European Court of Human Rights ruled: "Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society..." Furthermore, religious communities shall enjoy the tolerance of society and individuals, and shall enjoy all the variety of forms that are admissible to exist in civil society and in a state ruled by law. Religious communities should be allowed to exist and to be autonomous as regards their creed and internal organisation in so far as nothing in their proselytism or activities is contrary to the Constitution or the law in force.

2. *Separation between Church and State*

This principle is recognised under Article 13(2) of the Constitution. It provides for the separation between the Church and the State. Its essence is elucidated under the ruling of Decision N. 5 of 1992 of the Constitutional Court (17). According to the decision of the Constitutional Court: "Religious communities and institutions shall be separated from the State. State interference and state administering of the internal organisational life of religious communities and institutions as well as of their public manifestations shall be inadmissible, save those performed on the grounds of Article 13, Section 4 and Article 37, Section 2 of the Constitution" (18).

The separation between religious institutions and the state as

(17) Decision N. 2 of 11 June 1992, constitutional case N. 11/92 promulgated in State Gazette N. 49 of 16 June 1992.

(18) Ibid.

recognised under Article 13(2) is fundamental. In addition to religious pluralism, it could be concluded that the Constitution promotes the principle of the secular state. However, this concept is not explicitly provided for under the Constitution or under the Law on Denominations. This interpretation is provided by the Constitutional Court and underlies its ruling of Decision N 2 of 1998 (19). Therein, the fundamentals of that principle were found in supreme constitutional values such as humanism, tolerance and respect for human dignity as stipulated under the Preamble of the Constitution.

Furthermore, the constitutional recognition of the traditional character of the Bulgarian Orthodox Church, the religious criteria for determining a number of official and non-official holidays, the subsidies granted by the state, and other legislative and conventional modes of interaction between the state and religion all taken together prove that the very term "separation" does not reflect the idea of the relation between religion and the state that the framers of the Constitution meant to introduce.

3. *Eastern Orthodox Christianity as "the traditional religion in the Republic of Bulgaria"*

The provision of Article 13(3) of the Constitution recognises Eastern Orthodox Christianity as the traditional religion in the Republic of Bulgaria. This statement, however, does not imply a dominant or privileged position for the Orthodox Church. By virtue of a decision of the Constitutional Court, the Constitution only recognises its "cultural and historical role and merit for the Bulgarian State as well as its contemporary significance for the nation as reflected mostly in the system of official holidays" (20).

4. *No political involvement*

Article 13(4) stipulates that none of the religious communities, religious institutions or religious convictions shall be used for political ends. According to the Constitutional Court, this ban is derived from the mutual relation between religious faith and human dignity. Using religion for political ends constitutes an absolute infringement on equality of rights and dignity, because political ends are always aimed at establishing relations of public power among people (21). The autonomy of religious institutions shall be safeguarded by a constitutional guarantee. Religious communities and religious institutions shall therefore be only concerned with the performance of fundamental rights.

(19) Ibid 1.
(20) Ibid.

V. Status of Religious Denominations

Religious denominations are legal persons under the current legislation. This status, however, can be obtained only upon compliance with the requirements of the law in force. The legislation provides for the registration of religious communities by the Directorate on Denominations at the Council of Ministers under Article 6 of the Law on Denominations. In addition, Article 16 of the Law on Denominations makes it compulsory for the central governing bodies of denominations to register at the Directorate (22). At present there are 30 officially registered denominations. These are: the Armenian Apostolic Church, the Association "Free Evangelical Caucuses", the Baha'i Community, the Bulgarian Church of God, the Bulgarian Evangelical Church "Good News", the Bulgarian Orthodox Church, the Catholic Church of Bulgaria, the Christian Church "Zion", the Christian Church "God's Might", the Christian Evangelical Church "Shalom", the Church of Jesus Christ of the Latter-Day Saints, the Church of the Seventh-Day Adventists-reform Movement, canonically related to the General Conference of the International Reform Movement, the Church of the Seventh-Day Adventists-Reform Movement, canonically related to the general Conference of the

(21) Ibid.
(22) The powers of the Directorate on Denominations are stipulated under Article 107 of the Structural Regulations of the Council of Ministers and its Administration, issued by Regulation of the Council of Ministers N. 209 of 25 November 1999, promulgated in State Gazette N. 103 of 1999.

Seventh-Day Adventists-reform Movement, the Evangelical Church "Burning Faith", the Evangelical Methodist Episcopal Church, the Israelite Denomination of Bulgaria, the Jehovah's Witnesses of Bulgaria, the Krishna Consciousness Society, the Lutheran Church of Bulgaria, the Muslim Denomination of Bulgaria, the New Apostolic Church of Bulgaria, the Open Biblical Brotherhood, the Spiritual Christian Society "Redemptive Church of Christ", the Union of the Bulgarian Pentecostal Churches of Bulgaria, the Union of the Churches of the Seventh-Day Adventists, the Union of the Evangelical Baptist Churches of Bulgaria, the Union of the Evangelical Congregational Churches, the United Churches of God, the White Brotherhood Society.

Before the coming into force of the new law on non-governmental organisations, there was a different regime for non-governmental organisations that had religious or religiously oriented educational functions (23). According to Article 133*a* of the Law on Persons and the Family, they were registered by a court decision preceded by a confirmation from the Council of Ministers. After the coming into force of the new Law on Non-Profit Legal Persons (24), this legal regime ceased to exist. It is now up to the legislator to provide for special regulation by law (25).

By virtue of Article 6 of the Law on Denominations, the Council of Ministers or a duly authorised body shall constitute a denomination as a legal person following the confirmation of its Articles of Association by the Deputy President of the Council of Ministers. The Directorate on Denominations is further empowered by a by-law with the respective delegated competence. Unfortunately there is no regulation providing possibilities of appeal concerning the decisions of the Directorate on Denominations. Although being individual administrative decisions, they are not included

(23) Thus under Decision N. f 46 of 5 April 1994 on firm case N. 12/93, ruled by Department V of the Supreme Court. By the amendment of the Act on Persons and the Family, the legislator intended to prevent any decision *praeter legem* concerning the registration of associations who performed activities that are distinctive of denominations.

(24) Law on Non-Profit Legal Persons, promulgated in State Gazette N. 81 of 2000.

(25) Para. 2 of the Transitional Provisions of the Law on Non-Profit Legal Persons, promulgated in State Gazette N. 81 of 2000.

among the decisions subject to judicial review if appealed against within the scope of the codified Law on Administrative Proceedings. For the time being, until a new Law on Denominations is passed the procedure under the Law on Administrative Proceedings should apply by analogy. The procedure for the registration of denominations under the Law on Denominations does not provide sustainable procedural guarantees for the rights of the interested parties as provided under the Law on Administrative Proceedings. As a result, the Decisions of the Directorate on Denominations are issued without the participation of the applicant. The draft statutes of the denominations are examined and the executive decisions are issued at the free discretion of the authorities. The former Supreme Court refused to consider the grounds for the limitations of freedom of religion under Article 37(2) of the Constitution, leaving this to the free discretion of the Council of Ministers (26). The free discretion of the executive upon imposing limitation on freedom of religion and freedom of association is *a fortiori* exercised in proceedings under Article 6 of the Law on Denominations. Such administrative discretion is repugnant to the principle of a state ruled by law.

If the registration procedure is maintained, compliance with the constitutional principles will be guaranteed only by introducing an application for registration before a court. It is not the executive authorities but the courts that provide for impartial proceedings with procedural guarantees for the rights of the interested parties. The last three drafts of the Law on Denominations that were proposed to the latest legislature of the Bulgarian National Assembly reflect the controversial issue of the registration of denominations. Registration before the courts is set forth in one of the legislative bills by a reference to the general regulation of non-governmental organisations. A second bill also provides that power to grant registration shall be vested in the Council of Ministers. A third bill provides for the granting of the status of religious institution by the Council of Ministers. The consolidated draft made by the Parliamen-

(26) Decision N. 633 of 7 March 1995, civil case N. 734/94, five-member panel of the Supreme Court.

tary Commission on Human Rights and the Denominations also accepted court registration. However, the procedure proposed involves a statement of opinion by the Directorate on Denominations at the Council of Ministers. The new law on denominations was not passed before the dissolution of the latest legislature of the National Assembly. The legislative procedure will have to be initiated again when a new National Assembly is set up after the parliamentary elections on 17 June 2001.

The denominations that are duly registered shall enjoy the rights concerned with their autonomy as well as those rights related to their manifestation in public that do not contravene the law in force, public order and *boni mores* (Article 5 of the Law on Denominations). In particular, denominations shall be free to obey their canons, dogmas and the provisions incorporated under their Articles of Association. They shall be allowed to build temples and to hold religious services in public therein. The law refers to the general provisions on manifestations and assemblies as regards public religious processions and religious services held in the open. By virtue of article 7, Section 2 of the law, those activities must comply with general laws and administrative orders. In particular, this means the provisions under the Law on Meetings, Assemblies and Manifestations. The Municipal Council, as a body of local government, or alternatively the respective mayor, may prohibit a public procession or a religious service held in the open. If they decide to prohibit an event of this kind, the authorities must rule on expressly stipulated grounds among those under Article 12, Section 2 of the Law on Meetings, Assemblies and Manifestations.

Its name, and the address of its governing body, shall identify a denomination. The chief governing bodies of denominations shall be registered at the Directorate on Denominations (Article 16 of the Law on Denominations). The representative executive bodies shall be those authorised under the Articles of Association.

The valid existence of a denomination may be terminated on the publication of a motivated decision by the Council of Ministers on the grounds of an infringement of laws, public order or *boni mores* (Article 6(2) of the Law on Denominations). The coming into effect of the decision shall result in the termination of the existence of the denomination as a legal entity.

VI. Internal Organisation of Churches and Religions

The institutional structure and internal hierarchy of clergy is a substantial component of the principle of the autonomy of denominations. These are mostly regulated under the Articles of Association of religious denominations and the canon regulations of each denomination. Each confession, however, must register its Governing Body, and that body bears liability before the state for any infringement of the law in force. The approval of the governing and representative bodies of denominations constitutes a prerequisite for their Articles of Association to be submitted before the Directorate on Denominations. The setting up of disciplinary bodies vested with sanctioning powers is treated as a right of denominations under the Law on Denominations. Church courts are established under the statutes of the Orthodox Church and of the Muslim denomination.

Religions are allowed to set up local structures. The respective local authorities must register the governing bodies of these structures. Those local authorities can be either elected for that purpose by the Municipal Council, or can be the respective Municipal Council itself. According to article 16 of the Law on Denominations, the Municipal Council must record not only the bodies themselves, but also the names of their members.

VII. Churches, Religions and Culture (Education and the Media)

Religious emotion is one of the deepest that mankind has ever experienced. That impulse has always endowed human beings with the feeling of being in touch with the sacred and with this most valued dimension, eternity. Religion has always precipitated other regulators in social life and provided various societies with everlasting values. Religious values have been constantly transformed into

social and legal reasoning. Nowadays modern societies treasure the civilising and integrating role of religion.

Being in search for the optimal position for religion and religious institutions in Bulgarian society, the legislator is exploring legal solutions. The priority, when reforming the law in force, has been to avoid building a wall of separation, and to maintain religious tolerance. Anti-discrimination provisions are incorporated in all the laws on education, culture and the media. In addition, I will make here a brief reference to the regulations relevant to the position of religions and Churches concerning education and the media.

1. *Education*

The legislation in force is based on secular education as a general principle. This principle applies to both primary and secondary education by virtue of Article 4 of the Law on Public Education (27). In compliance with constitutional rights to education, however, the legislation does not prohibit receiving religious education within the educational system. In the 1998/1999 school year, optional religious education was introduced. The purpose of the legislation is to guarantee both the right to education and religious tolerance, the latter being considered as one of the highest constitutional values, following the wording of the Preamble of the Constitution. The optional subject of religion is not taken into account when giving degrees in general schools.

Higher education determines itself its relations with theological education. This relation varies according to the decisions adopted by academic bodies within the sphere of academic autonomy, which is a major principle to be applied in the system of higher education. The principle of academic autonomy, however, cannot override the binding requirements of the Law on Higher Education. According to the law, universities may set up canon faculties. Such a faculty exists in Sofia University. It is a theological faculty, and applicants are required to produce a baptism certificate from the Orthodox

(27) Law on Public Education, promulgated in State Gazette N. 86 of 18 October 1991, latest amendment in State gazette N. 68 of 30 July 1999.

Church. Outside the decisions of the competent academic bodies, the establishment of religious institutions within a higher school shall constitute an infringement on academic autonomy, under Article 22, paragraph 3 of the Law on Higher Education.

However, a Church or religious group is permitted to set up its own theological schools, at secondary or higher levels, once it has been officially registered under the Law on Denominations. Those schools shall provide education for future clergymen and shall enjoy the support and contribution of the Directorate on Denominations at the Council of Ministers. Thus the Muslim religion has set up secondary and higher educational institutions. Such schools shall provide education of the same level of qualification as general secondary and higher schools. Being educated in a theological school generally presupposes involvement in a certain religion. Therefore the relevant regulation constitutes not only an aspect of the relation between the Churches and Education, but also the institutional guarantee of an explicitly recognised right under the Law on Denominations.

2. *The media*

Law bearing on the media has only recently been developed in the Republic of Bulgaria, especially in the sphere of telecommunications. The new Law on Radio and Television has introduced modern regulations, which provide for a share for Churches and religions in this particular field of cultural exchanges. Because of the absence of special regulations on the press, the following paragraph will concentrate on the mutual relation between religions and churches on the one hand, and radio and television on the other.

Concerning the new Law on Radio and Television of 1998, two aspects can be referred to. Firstly, the setting up of a radio or television service within a building owned by a denomination as a legal person, as well as any other use of radio and television by registered denominations only for their purposes as legal persons, shall not be subjected to the licence regime that exists under the law. Therefore no legal restrictions shall apply. Secondly, churches and religions are allowed to be involved in the media coverage of licensed social or commercial radio-television operators. The Ortho-

dox Church or any other duly registered denomination shall be granted a share of media time to address appeals to the public. The relevant provision (Article 53 of the Law on Radio and Television) is binding only for the Bulgarian National Radio and the Bulgarian National Television. Those institutions shall issue relevant provisions under their own rules of procedure.

Any religion may be granted coverage in radio and television programmes according to the law. Religious programmes, however, may be promoted only for the purpose of achieving a broader and a more profound outlook on both the national and the world cultural heritage. Likewise, religion in the media may only promote religious tolerance. Whenever a religious programme inflames discrimination or hatred in the name of religion, the radio-television operator shall be bound to dismiss it by virtue of Article 17 of the Law. This non-discrimination clause applies to advertisements as well. Any advertisement that is discriminating on religious grounds shall be prohibited.

The access of the churches to the public through the media is subject therefore to certain limitations as stipulated by law. Those limitations cover both the programming and the financing of television programmes. Thus, by virtue of Article 90, Section 1 of the Law on Radio and Television, religious organisations are not allowed to sponsor programmes.

It is the task of the judiciary and of the competent executive bodies to take into consideration the efficiency of the regulation in force. Despite any future debates on the grounds of *boni mores*, public order and constitutional principles and values, any further restrictive measures imposed by by-laws, on whatever grounds, should be considered as repugnant to fundamental constitutional principles and to fundamental human rights.

VIII. Labour Law concerning Churches and Religions

Legal personality, obtained upon registering at the Directorate of Denominations, is of key importance for the establishment of legal labour relationships within denominations. In the legal regulations on denominations there are no special provisions concerning labour in religious organisations. Therefore the general provisions of the law shall apply respectively.

Before being incorporated, a religious group is not considered as a legal person. The general provisions under the Law on Contracts and Obligations shall therefore apply. Following incorporation, however, the structure of relationships takes on various new aspects. When a denomination has been granted legal personality, it may become an employer as a party to a contract of employment. Despite the provision of §1 of the Additional Provisions of the Labour Code that allows non-personalised entities to be parties to contracts of employment, the current trend in Bulgarian labour law is to consider such an understanding as rebuttable and legally inconsistent. The existence of legal personality shall not derogate the principle of freedom of contract. However, once a contract of employment, to which a denomination is a party, has been concluded, the labour law provisions shall apply.

Despite the absence of any special statutes on labour relations in religious organisations and denominations, a certain, though limited, number of provisions exist. Firstly, the non-discrimination clause shall apply to every contract of employment. Furthermore, there are special grounds for the termination of contracts to which clergymen or persons performing work or service in a religious institution are party. By virtue of Article 12 of the Law on Denominations, clergymen (as well as any other persons employed in religious institutions) who infringe laws, public order or *bona fides*, or who work contrary to the democratic regulations of the state, shall be dismissed or temporarily suspended from work on a proposal of the Director on Denominations. The person in fault shall be sanctioned by the governing body of the confession or by the administrative authorities. In my understanding, this provision shall be applied both to contracts of employment and to civil contracts. In addition, the provision in its broad wording may have been deliberately applied in the past in order to support the implementation of government decisions, even those violating fundamental human rights. The Labour Code provisions also regulate the disciplinary liability of

clergymen and other persons employed generally. On an institutional level, however, disciplinary liability implies a further implementation of the autonomy of denominations. Denominations are indeed allowed to form disciplinary bodies according to their internal regulations. Disciplinary sanctions, however, shall be considered invalid if they are proved to be repugnant to the laws in force, public order or *boni mores*.

Finally, the only direct implication on labour law on the part of religion as a social regulator is the system of official holidays. In this respect, the influence of the Orthodox religion as the traditional religion in the Republic of Bulgaria was sustained by the Constitutional Court in the *obiter dictum* of Decision N. 2 of 1998. In conformity with the constitutional principle of religious tolerance and with the principle of freedom of religion, other denominations also enjoy official recognition of their holidays. Annually the Council of Ministers passes regulations that stipulate the official holidays for the denominations that have been officially registered.

IX. Financing of Churches

The following paragraphs provide an overview of the sources and distribution of finances for the functioning of denominations that have been incorporated under the official register at the Directorate on Denominations. Due to their specific characteristics, denominations are subject to a specific financial legal regime. For the time being, this regime covers a number of provisions that are scattered under a number of laws with different subject matters. The Transitional Provisions (para. 2) of the newly passed Law on Non-Governmental Organisations also refers to a special legal regime that will accordingly cover the issues concerning the financing of non-governmental organisations set up for religious purposes. The future legislation on denominations may include the financial aspects of each or both of these entities, under a new Law on Denominations, or it may keep the present system under which they are included in the legislation concerning property and financing.

By virtue of Article 13 of the Law on Denominations, denominations shall collect income and shall perform expenses under budgets in accordance with their Articles of Association. The requirement to draw up budgets shall be interpreted in relation with the control exercised by the state administration on the financial activities of denominations, according to Section 3 of the same Article. The budgets shall be drawn by the denominations themselves and shall then be submitted to the Directorate on Denominations, but only for information purposes. The Directorate shall not be involved in the drafting of the budgets of denominations. The state may also give subsidies to denominations. Such subsidies have been granted to the Eastern Orthodox Church as well as to the Muslim Religion.

Donations and bequests can constitute further sources of financing. Donations in favour of denominations shall be exempted from taxation up to 5% of the financial result of the donor preceding tax reorganisation, if those donations are drawn from capital reserves. Donations and material support from foreign sources, however, shall be subject to permission from the Directorate on Denominations.

By virtue of Article 4 of the Corporate Taxation Law, denominational organisations shall be taxed only for income and profit obtained by trade contracts explicitly provided for under the Law on Commerce, including leases of movables and immovables. This rule on the certainty of the objects of taxation excludes sources of financing pertaining to the specific functions of denominations, and brings the tax regulations concerning denominations closer to the legal regime applicable to non-governmental organisations set up for the benefit of the public.

Land and immovable property are a substantial source of income for religious denominations. Under the communist regime most of this property was confiscated by the state. After the democratic changes it became subject to restitution by virtue of explicit legal provisions. These are Article 3(2) of the Law on the Restitution of Nationalised Immovable Property (28) and Articles 1 and 2 of the Law on the Restitution of Movable and Immovable Property

(28) Law on the Restitution of Nationalised Immovable Property, promulgated in State Gazette N. 15 of 21 February 1992, latest amendment in State Gazette N. 9 of 1 February 2000.

Belonging to the Catholic Church and Confiscated in 1953. As the Supreme Administrative Court ruled in its Decision 4431/2000 of 24 February 2000, the latter law is *lex specialis* as to the former.

Unlike the sources of financing, the distribution of the received funds is not explicitly regulated under the law in force. In practice the largest denominations provide for the directing of funds towards various activities under their Articles of Association, thus implementing the principle of financial transparency in their relations with the non-religious bodies or persons involved in the process.

The financing of churches, and the respective implications of the law on property, are neither systematised nor exhaustively regulated. This legal situation underlies some of the most significant public tensions that have arisen. Although it will not be disclosed completely to the public, the financial aspect of the status of religions will require more and more precise and systematic legal regulations. A new legislative approach of this kind would significantly contribute to the achievement of a modern legal set of regulations on religious matters in relation with property interests and financial efficiency, to the benefit of the religious organisations themselves and of society.

X. Spiritual Assistance in Public Institutions

During the years of transition, setting up elaborate regulations on religious assistance in public institutions, such as the army and the prisons, was not a matter of legislative priority. It was not until 1998 that amendments on this subject were introduced. At present, although existent, the provisions on religious assistance in public institutions form a thin body of legal statutes. They are incorporated only under the Law on the Application of Penalties and the Law on Defence and the Armed Forces in the Republic of Bulgaria. Positive regulations can be found only under the first law mentioned. The depoliticization of the army after 1989 was a gradual process that instigated further steps towards achieving the complete neutrality of the army and of its conscripts and professionals. By virtue of Article 196 of the Law on Defence and the Armed Forces in the Republic

of Bulgaria, religious services can be performed only outside the sites where armed forces are positioned. Persons whose religious convictions are incompatible with normal military service are allowed to apply for an alternative military service under a special legal regulation.

Unlike in the armed forces, spiritual assistance in prisons is allowed easily. By virtue of Article 70*a* of the Law on the Application of Penalties, imprisoned people shall be provided with the possibility of satisfying their religious needs by participating in religious services or by performing religious practices. The access of clergymen to prisons shall be ensured (Article 70*b*). Only clergymen of the traditional religion, however, may be employed in prisons. This set of provisions is in conformity with the ones that concern educational work in prisons. The underlying reason is mostly concerned with achieving the purposes of punishment. The admission of religion in prisons seems to have been introduced as a token to prove that punishment is being made more humane, rather than as a guarantee for the freedom of religion. Nevertheless, though not in purpose, at least in effect this measure is a certain guarantee for the freedom of religion.

XI. Legal Status of Clergymen and of Members of Religious Congregations

The legal status of clergymen and of members of religious congregations comprehends the general legal status of natural persons modified under the special provisions and other rights and obligations ensuing from their involvement in religious activities. The practice of the courts sustains the understanding that religious conviction or an occupational position related to religion shall not be considered as a ground for relief from other obligations under the law in force.

Both for clergymen and the members of congregations, the non-discrimination rule shall apply. This is both a consequence of the constitutional principle of equal treatment and a legal rule implemented under Article 4 of the Law on Denominations.

1. *Clergymen*

Special provisions relevant for clergymen impose further rights and obligations. More restrictive rules are set forth in the Law on Denominations, especially when relations with denominations abroad are involved. Thus by virtue of Article 9, Section 2 of the law, clergymen belonging to denominations that maintain canon relations with foreign institutions may take office only after confirmation from the Directorate on Denominations. The law imperatively demands Bulgarian citizenship as a prerequisite for entry into office. This requirement does not apply for clergymen working under civil contracts. Other obligations as well as rights may only arise under the Articles of Association and other instruments regulating the internal regulation of denominations. As for matters where no explicit regulation exists, the general legal rules shall apply accordingly.

2. *Congregations*

Congregations do not have a special status under Bulgarian law currently in force. Moreover, under the *obiter dictum* of Decision N. 2 of 1998, the Constitutional Court has taken the stand that freedom of religion, as a constitutional right, does not cover collective rights. Therefore the organised forms of the manifestation of freedom of religion shall be subject solely to the general rules of law. No other particular rules shall apply.

XII. Church and Family Law

The competence of the Churches in family law matters, especially as regards the regulation of marriage, has gradually become a subject for public debate. However, it is not regulated in detail under the Family Code now in force. The code provides no legal statutes except for the recognition of the right to religious marriage. Furthermore, only civil marriage is considered to be legally valid. Religious marriage may be performed only after civil marriage. Recently a legislative initiative was taken in favour of a new Family Code. The draft introduced an official recognition of religious marriage. However, in April 2000 it was rejected by the Parliament. The matter of religion in family relations and its legal regulation is thus left to legislative initiatives during the next legislature of the National Assembly.

Relationships under family law regulations cover both moral and legal aspects. Religion, however, is considered by the legislator and the courts to be a separate social regulator. Therefore the established practice of the courts takes the stand that religious beliefs cannot constitute a fault in marriage in so far as freedom of religion is an individual right. The boundary to that rule can only be those manifestations of religious belief within the family that are subversive for the marriage relationship, for example a sectarian attitude. Thus, under Decision N. 2502 of 1972, the Supreme Court considered that the participation of a spouse in a religious sect and its activities, if this has implications on the upbringing of the children, shall be considered repugnant to the values and purposes imposed by the Family Code on marriage and the family in Bulgarian society. It should be noticed, however, that those interpretations might reasonably be expected to change. The Family Code was passed before the coming into force of the Constitution of 1992. Due to the moral elements in family relationships, its provisions were interpreted according to the materialistic ideology of the time.

Conclusion

The legal regulation of the relations between Churches, Religion and the State reveals a controversial juridical reality in which constitutional principles hardly manage to find their legislative counterparts. Ten years after the beginning of the democratic process in Bulgaria, the Law on Denominations has not yet found an adequate substitute.

Regretfully, after the collapse of the ideology that had constituted at one and the same time a social creed, a moral code and a basis for state policy, the churches and religion did not manage to contribute to the integration of society as regards the promotion of humanistic and social values. The dynamic developments in the

modern world can refuse to consider canon provisions, details of church liturgy and the particular problems of congregations as priorities in the social debate. The religious freedom of the individual, however, is essential. An adequate legal framework on Church and religion must be considered as an institutional guarantee for freedom of religious association as a particular aspect of the fundamental right to religious freedom.

However, the hope remains that the legislator will soon establish an adequate regulation of religion and religious institutions that will contribute to the implementation of the principles of the constitution and will respond to social needs and common values.

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RELIGION IN TURKEY

SUMMARY: I. *Sociological and demographic situation.* — *A*) Muslims in Turkey. — *B*) Non-Muslims in Turkey. — II. *Historical background.* — III. *Legal status.* — *A*) In general. — *B*) Status of religious confessions (confraternities, denominations and sects). — *C*) The situation today. — *D*) Various problems. — 1) Financial aspects. — 2) Internal structure of religious activities. — 3) Religion and culture. — 4) Religious assistance in public institutions (prisons, hospitals, the army). — 5) Marriages. — IV. *Conclusion.*

Turkey is a secular state. Among the Muslim countries, Senegal and Turkey are the only states where secularism is prescribed in the Constitution.

Secularism is one of the most important principles of the Republic of Turkey. Beginning from the first republican Constitution of 1924 to the most liberal and democratic Constitution of 1961 and finally to the Constitution of 1982, which is an authoritarian one, secularism has always taken an important place in Turkish legislation.

But in a country where the majority is Muslim, secular legislation presents some problems in social life. For some people, the general principles of the Muslim religion are not compatible with western philosophy. Not only fundamentalist Muslims but also some intellectuals affirm that the idea of democracy and secularism is unfamiliar to the Islamic dogmas.

It is a fact that some Islamic traditions and interpretations are in conflict with the idea of the modern state. But philosophically, sociologically and theologically Islam has many aspects. I think that the rationalist interpretations of this faith could easily accept progress.

Turkey, regarding its historical, sociological and jurisprudential situation, is not a classical traditional Muslim country. The social

and cultural situation of Turkey has established a synthesis between Islam and Western political culture.

Before explaining today's legislative situation in Turkey, I would like to talk about sociological, demographic and historical aspects of religion in Anatolia.

I. Sociological and demographic situation

A) *Muslims in Turkey*

Today, the population of Turkey is about 62-65 million. It is known that 99% of Anatolians are Muslims.

Are these Muslims all Sunnites? Obviously not. In the East, towards the Iranian border, for example in some villages of Kars, the fervent Shiites, who are faithful to the genealogical line of Ali, the cousin of Mohammed, practice their faith. They believe that this genealogical line was inherited from Mohammed and that through his daughter Fatima, the wife of Ali, a divine light is still being transmitted through his successors. An important community of Turkish Shiites live in Istanbul. The total number of the Turkish Shiites is estimated to be around 300,000.

But around 12-15 million people, which amounts to 20-25% of the Anatolian population, claim to be faithful to the genealogical line of Ali (Ahl-i Beyt) without accepting the traditions and rites of the Shiites. They call themselves the "Alevi-Alawis". They do not fast during Ramadan, but only 12 days in the month of Mouharrem; they do not go on pilgrimage to Mecca, nor do they say the daily prayer five times. The Alawi women do not wear a veil. Including the poorest who have not had the opportunity to receive a good education, the Alawis are quite enlightened. They have always taken part in progressive activities, some of them even being communists.

The only common denominator between the Alawis and the Shiites is their love for Ali and their respect for his genealogical line. But in the XVIth Century, the Anatolian Alawis supported an Iranian-Turkish political leader, Shah Ismail, who possessed the characteristics of a humanist poet, therefore not at all those of a cruel chief.

Despite a certain analogy, the social psychology, the customs, the traditions and the moral rules of the Anatolian Alawis also display differences with those of the Alawis of the South-East countries. On the other hand, an important parallelism can be noticed between the Bektachi confraternity of the Balkan countries and that of Turkey. Moreover, some people consider the Bektachis as the elite of the Alawis.

B) *Non-Muslims in Turkey*

1) Demographic Situation of non-Muslims:

The numbers of non-Muslims in Turkey are as follows:

50,000 Armenian Orthodox Christians
25,000 Jews
15,000 - 20,000 Syrian Orthodox Christians (Syriacs)
5,000 - 7,000 Yezidis
2,000 - 3,000 Greek Orthodox Christians
Some Nestorian Christians.

Most non-Muslims live in Istanbul and the rest in other big cities. An important population of Syriacs lives in South-East Anatolia, but because of the Kurdish problem in that area, they have to leave their towns.

2) General Problems of non-Muslims:

Religious minorities established under the Lausanne Treaty in 1923, and their affiliated churches, monasteries and religious schools, are regulated by a separate government agency: The Office of Foundations (Vakıflar Genel Müdürlügü). The "Vakıflar", as an institution, must approve the operation of churches, monasteries, synagogues, schools, hospitals and orphanages.

According to the Lausanne Treaty, religious minorities cannot acquire additional property for churches, or religious places, beyond those acquired before the establishment of the Republic. If they fail to maintain existing properties, these may be returned to the Office of Foundations (the Vakıflar). As the Christian population is decreasing, the risk of losing their religious property has become a very serious problem. They have the right to obtain more property if there is a community need, but such a need has not been noticed until now.

The restoration and construction of religious buildings and monuments considered to be ancient is possible with permission from the Regional Board for the Protection of Cultural and National Wealth. The pressure of the Government on that organization has a conjectural aspect. The Greek Orthodox Patriarchate, who had not managed to obtain permission for the restoration of the buildings in Phanar for more than 30 years, obtained it finally when Turgut Özal elected as president of the Republic. Nowadays, Christian minorities obtain without any complicated bureaucratic obstacles the authorizations for the restorations or renovations of their buildings.

The government authorities do not interfere with the publication of religious literature. Legally, propaganda by other religions is not prohibited, but missionary activities are not well accepted by the conservative Muslims or even by the State. As an example, in the towns damaged by the earthquake in 1999, the humanitarian aid brought by Christian missionaries was criticized by the media and by some government officials. Nor do they appreciate the aid coming from Muslim denominations, under the pretext of the danger of the spread of fundamentalism.

Christians living in the eastern part of the country used to have some difficulties to teach their languages, especially the Syriac Christians. Finally, in October 1997 the Syriac Christians received the authorization to open classes in their Aramaic language in the monasteries of Deyrul Umur and Deyrulzefaran in South-East Anatolia. In Istanbul, where the majority of the Christian minorities live, the churches have normally not met such a problem.

3) The Ecumenical Patriarchate:

In the Christian World, according to tradition, the Patriarch of Phanar in Istanbul is considered as "Primus inter Pares" among the five Patriarchs (Alexandria, Jerusalem, Antioch, Constantinople and Rome). This situation has been questioned by the Catholics and some other churches since the Middle Ages, but has been widely accepted by the Orthodox. Being "Primus inter Pares" is also expressed by the word "ecumenical", which means universal.

Such a status is not accepted by the Turkish government. This is quite difficult to understand, because the problem should have no

significance for a State where the vast majority of the population is Muslim.

Thus, the authorities monitor the activities of the Eastern Orthodox Church of Phanar. They think that Phanar has always had the ambition of recreating the Byzantine Empire. That is the reason why they are buying some buildings in this section of the city, Phanar.

As a matter of fact the philosophy of the "Megali Idea" has always been present in the heads of some Greek Orthodox religious leaders. The utopia of the Byzantine Empire is still widespread among some Greek people. But this fact may not be the logical reason for the limitation of human rights in Turkey.

Like the other Christian communities, the Greek Orthodox Church of Phanar has the problem of the education of priests. The seminary of the Greek Orthodox School on the Island of Halki (Heybeliada) was closed in 1971 when the State nationalized all the private institutions of higher education. Under current restrictions, religious commmunities remain unable to train new clergy for eventual leadership.

But since the visit of President Clinton in November 1999 and the acceptance of Turkey as a candidate to become a member to the European Community (December 1999), the government has taken new dispositions. A department of Christian Theology at the Faculty of Theology of the University of Istanbul has been opened recently. But I must remark that measures of this kind are not satisfactory for the Christian communities, because it is impossible to educate Christian clergy in a Muslim Theology School.

4) New approaches:

Nowadays, the Turkish State has started to open a new friendly approach to dialogue with the non-Muslim population.

For the first time in the history of Republic, President Süleyman Demirel sent Christmas greetings to the Christian population on 24 December 1999.

The Presidency of Religious Affairs also planned some activities for the celebration of the 2000th anniversary of the birth of Jesus Christ. It also established a Department for Inter-religious Dialogue in November 1998. When the Presidency of Religious Affairs orga-

nized the Second Council of Religion, in the Section on Inter-religious Dialogue the leaders of different religions gave speeches. The Greek Patriarch Bartholomeos II and Cardinal Arinze of the Vatican were among the speakers. Whereas we had received many protests, when we had proposed dialogue with the other religions at the First Council of Religion in 1993. According to those protests, such an activity might have brought Christian missionaries into Turkey.

Within the last five years the State's perspective has changed widely in the context of dialogue.

II. Historical background

The history of the Turkish tribes in Central Asia goes back to the Vth and VIth centuries AD. It is quite difficult to analyze the characteristics of the nomadic people living during that period in the steppes.

For some scholars, the Turks of Central Asia were shamanic. But Shamanism is not a religion, it is simply a cult. The preacher, the holy man who speaks on behalf of the divinity, is called a shaman by the scholars.

The Turkish tribes used to follow the naturalistic and pantheistic interpretations of divinity, such as Buddhism, Brahmanism and Hinduism. They were also mazdeist, manichean and nestorian Christian according to the geographical places where they started to settle down. People living close to Iran accepted Mazdeism, or some other sects of Zoroastrianism. Missionaries from different religions played an important role in converting them to the religions of sedentary peoples. The adapters of the new religions made syntheses with the characteristics of their former cults and beliefs.

One of the important syntheses, even a syncretism, was the case of the Alawis, who still follow some traditions and forms of worship of their former religions.

At the beginning, when Arab Muslim soldiers conquered Iran, Transoxiana and Central Asia, the Turks accepted the new religion by force. But in the following century, they started to become widely Muslim by their free will. They chose to become the mercenaries of the Abbasid Caliph and settled in the cities with their families.

Some Turkish nations in the East insisted on keeping their traditional beliefs.

For example the Ouigour Khan, Alp Qoutlugh Kulug Bilge (759-780), who was given the title "emanation of Manes", converted to Manicheism in 762. An important part of the Turkish tribes were Manicheans. The Ouigours were Manicheans until the XII-XIIIth centuries.

The traditions and the worship forms of an ancient religion cannot be easily erased. Therefore in the Xth century, recently Islamized Turks knew the two versions, Sunnite and Shiite, of this new religion, along with surviving elements of belief from their former cult. It can be said that the Anatolian Turks adopted Islam in the shape of a pluri-dimensional harmonization. The ordinary people's interpretation of Islam was Alawism. But the Seljuk and Ottoman rulers followed the sunnite tradition, because it can be said that the Seljuk and Ottoman Empires, in ideology and in jurisprudence, were the continuation of the Umayyads and Abbasids.

Historically, what social, religious, theological, philosophical and ideological factors were at the origin of such a progressive tendency at the heart of Anatolia?

What are the characteristics of Anatolian Alawi belief?

Firstly, it must be said that the origins of this confraternity or sect, which announced itself as an opposition movement against the Umayyads, go back to the battle of Sıffın, in 657, the date of the split of the Muslim community into three branches. The Alawis, who are faithful to the tradition of Ali and his two sons, Hassan and Hussein, demonstrate their hate against Caliph Mouaviye during the religious ceremony of Ayine-i Djem. The anniversary of the murder of Hussein, on the 10th of the month of Mouharrem 61 (680), is commemorated by the practice of the fast of Mouharrem, which lasts for 12 days; they do not cultivate their passion like the Shiites, that is to say reaching pain through theatrical and sometimes bloody representations. They prefer singing and dancing calmly around the allegoric representations of the Kerbela incident.

During the Umayyad dynasty, the opposition people preferred to remain faithful to the tradition of Ali. They hid their faith and

they even applied a doctrinal principle called "taqiyye". The Sufis of this period, although they were Sunnites, felt some sympathy for the tradition of Ali.

Alawis from the common people knew Islam also from the point of view of hallagian Sufism. Hussein Ibn Mansor El Hallaj, who lived in 856-922 and was crucified in Bagdad by the Abbasid Caliph and Vizier Hamd, had travelled many times to Transoxiana.

"The final aim of the most important travel of Hallaj was to reach and to islamize the Turkish race in its cultural center".

The nestorian Turkish cultural centre was Almalig, the manichean Turkish cultural centre was Qoço. Hallaj was to come to Qoço in 896. One of his sons settled down in Nishapour.

The hallagian legend took an exceptional place in the process of islamization of the Turkish people; it did not only offer them a moving literary leitmotiv, it also provided an ideal type of Saint-hood.

The Divan and the "Hikams" of Ahmet Yesawi (who died in 554/1162) reflect the philosophy of Hallaj. The disciples of Ahmet Yesawi, along with other mystical hallagian Muslims from Transoxiana, became missionaries and were infiltrated into Anatolia during the XIth and XIIth centuries. They are called "the saints or the hermits of Horasan" (Horasan Erenleri).

The saints of Horasan and the dervishes who migrated to Anatolia, the precursors called "Baba-father" or "dede-grandfather", belonged to heterodox groups. These precursors and saints, who were very close to manichean, mazdeist or sometimes buddhist-shamanist cults, preached non-conformist doctrines and spread a form of Islam that was very simple and more accessible than that of the Sunnite fakihs.

The mystical and pantheistic hallagian influence was very clear and quite distinct. Purification of heart and spirit prevailed over religious rites. This mentality and this form of belief are the main characteristics of the Alawis and the Anatolian Bektachis: they do not say the daily prayers, they do not fast for Ramadan and they do not go on pilgrimage to Mecca, because for them the ultimate aim of religious rites is to purify the human being's heart. They claim to

be able to realize this purification without following the traditional Sunnite and Shiite forms and rites.

The infiltration of heterodox dervishes into Anatolia created a movement of opposition against the Seljuk dynasty, which followed the Umayyad and Abbasid traditions in fıqıh. The dervishes Baba Resoul and Baba Ishak rebelled against the monarchy with the support of a mass of people, mostly farmers (XIIIth century). This famous rebellion by the Babais was defeated by the Seljuk Amir Necmuddin and his army, formed of Turks, Georgians, Kurds and Christian mercenaries. The Christian mercenaries were placed at the first rank in the army.

The babai tradition was followed by the famous Hacı Bektaş Veli (XIIIth century), the founder of the Bektashi order. This order or confraternity still bears the characteristics of the hallagian ideology today. For example, the gibbet of Mansour (Darè Mansour) plays a structural and fundamental role in the ceremony of initiation.

Islam, which was established in Anatolia under a harmonized and hallagian form, found in the Anatolian peninsula, and notably in the East, a form of Christianity that had equally kept some of the characteristic concepts of manichean cults. Towards the West, in the mountains and rural areas, surviving elements of paganism can equally be found. It is known that today, in western Anatolian villages, some dances and religious rituals of the Alawis display a kind of analogy with the mysteries of Dionysos.

As for the Anatolian population of that period, western sources indicate 10 million, specifying that the Turks who came from Central Asia did not exceed 300,000; however, oriental sources indicate 4 million native Anatolians (Greeks and Armenians) and more than 1 million Turks coming from the East. An indisputable and undeniable fact in the history of Anatolia in the XIth and XIIth centuries is the meeting and the mixture between the cultures, religions and sects of numerous peoples.

I think that the cultural aspect of the Anatolian Alawis' interpretation of Islam originates from this meeting. Anyway, Anatolia had known pantheism since Antiquity. Anatolian paganism inclined towards a kind of naturalistic monism.

In the XII[th] and XIII[th] centuries, a new form of pantheism shook Anatolia. Mouhyiddin Ibn Arabi, who came from Spain, preached to Muslim people in Anatolia a mysticism of an immanent character.

The mysticism of the Muslim orthodoxy is characterized by its sobriety and its austerity, in which the divine essence always remains hidden under a veil of sublimity. Human reason cannot reach the Transcendent. Muslim orthodoxy, being faithful to the interpretation of Plato, establishes a clear and distinct separation between the world of *ideas* and the *sensible* world. Thus, a form of dualism exists in Muslim orthodox theology.

Christianity, being faithful to the interpretation of Aristotle, considers that the creation and existence are explained through a form of universal monism. Transcendence in Christianity is not as separated as in orthodox Islam.

In the mysticism of Mouhyiddin Ibn Arabi, the Divine is present in immanence as a universal monism.

Far from excluding the virtues of discursive reason, muhyidinian mysticism considers these virtues as paths to reach ecstatic union. Ecstatic union is considered as an annihilation of the soul, which, in being integrated in God, loses not only its consciousness, but also its personality just as in the buddhist Nirvana. Mouhyiddin Ibn Arabi is one of the most characteristic examples of Muslim heterodox mysticism, for which pantheistic identification is the acme of perfection.

At the beginning of the XIII[th] century, Ibn Arabi moved towards the East. After his pilgrimage to Mecca, he settled down in Anatolia, where he found many disciples. So the mysticism of Mouhyiddin Ibn Arabi shook Anatolia under the reign of the Sunnite Seljuk Empire of Anatolia.

In the faith of the Anatolian Alawis, there is a kind of trinitarian belief which resembles that of the Christians. Hakk (God), Mohammed and Ali act as substitutes for the Father, the Son and the Holy Spirit. There also exists a parallelism between Saint Mary and Fatima, the wife of Ali and daughter of Mohammed.

It should be noticed that the janissaries were Christians who

were recruited between the ages of 8 to 18. They always kept traces of their original beliefs. The majority of the janissaries belonged to the Bektashi-Alawi confraternity.

The glorious advance of the Ottoman Muslims towards the West, as far as Vienna, did not really affect the traditions and the religions of Eastern Europe. Except for some Albanian, Bosnian and Bulgarian tribes, the people of the occupied territories remained faithful to Orthodox Christianity, at the cost of paying a tax to the conquerors.

As for the new Muslims of the Ottoman Empire, the majority chose the Alawi-Bektachi interpretation of Islam. The Bektashi confraternities are widespread in Albania, Kosovo, Sarajevo and Skopje even today.

It is very interesting and curious to see that these new heterodox Muslims were once heterodox Christians, namely manichean bogomiles. The doctrine of a preacher called Mani or Manes, born in South-East Anatolia in 216, had become widespread in a short time on three continents, harmonizing Christian and mazdeist elements. Heterodoxies and Christian and Muslim deviations have their roots in manichean theology.

All the different factors that I have mentioned in this chapter show that the theology of the Anatolian Alawis is based on a pluridimensional harmonization.

III. Legal status

A) *In general*

As I have mentioned before, secularism is one of the basic pillars of the Republic of Turkey. This principle is prescribed in the Constitution of 1982 and was also accepted in the preceding Constitutions.

Article 2 of the current Constitution describes the Republic of Turkey as a "secular" state. Article 24 of the Constitution, which is about Freedom of Religion and Conscience, interrelates secularism with freedom of conviction and of belief, granting everyone "the right to freedom of conscience, religious belief and conviction".

With an exception, which takes the form of a "limitation to the abuse of fundamental rights and freedoms", the article allows "rites of worship, religious services and ceremonies".

The Constitution, again as a requirement of secularism, stipulates that "none shall be compelled to worship or to participate in religious beliefs and convictions" and that "none shall be allowed to exploit or abuse religion and religious feelings, or things held sacred by religion, in manner whatsoever, for purposes of personal or political influence, or for even partially shaping the fundamental order of the state on a religious basis". Turkey does not have any official religion and the articles concerning freedom of religion in the Constitution reflect the approach and the philosophy of a modern state, which presents a certain conformity with article 18 of the "Universal Declaration of Human Rights". "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief, and freedom either alone or in community with others, in public or in private, to manifest one's religion or belief in teaching, practice, worship or observance".

However, in the same Constitution, the obligation of religious education in elementary and secondary schools is also prescribed. Such a regulation brings about a contradiction with the principles of the modern concept of secularization.

In Turkey, where 99% of the population is Muslim, compelling Christian and Jewish children to attend Sunnite Muslim religious education in schools cannot have any reasonable justification, according to the philosophy of liberalism, human rights and freedom of religion. This regulation constitutes a very serious problem for the Syriac Christians whom the government does not consider to be an official Lausanne Treaty minority. For the other Christians, the problem was solved by the Lausanne Treaty of 1923, which accepted the Armenians and the Greeks as minorities. Children belonging to these minorities are exempted from Muslim religious instruction by law.

On the other hand, as I explained before, around 15% of Turkish Muslims are Alawis. The State does not have the right to compel them to follow Muslim Sunnite religious education in schools.

Another contradiction in the secular Turkish State is the institution of the Presidency (or Directorate) of Religious Affairs, which is linked to one of the Ministries of the State. This government institution regulates the religious life of the Muslims living in the country. The appointment of religious officials, including "imams", and the administration of the 70,000 (or more) mosques are organized by the Presidency of Religious Affairs. In the State, the Presidency of Religious Affairs takes important amounts from the budget, but it provides services neither to the Alawi Muslims, who do not go to mosques but practice their faith and worship in the "Cem Houses" (the places of worship of the Alawis), nor to the Jews and the Christians.

The Turkish secular system has adopted the French "laïcité" in a synthesis with the tradition of the Ottoman Empire, which chose to control religious life through the "Şeyhülislam", the Muslim sheiks. The idea of controlling religion and gaining its support for State policy goes back to the Byzantine Empire.

B) *Status of religious confessions (confraternities, denominations and sects)*

As a social fact, like other religions and sects in other countries, Islam has always been important in the social, economic and political life of the Republic of Turkey, as well as of the Ottoman Empire.

In the history of the Ottoman Empire, the convents (tekke and zaviye) of the different confraternities or denominations were centres of culture and education. But towards the end of the XVIIth century, social corruption destroyed their educational role and they became hotbeds of conspiracy.

After the Kemalist Revolution, which bears many similarities with the French bourgeois Revolution, and after the establishment of the Republic in 1923, the new regime closed down the convents and the confraternities, since most of them had supported the Ottoman dynasty during the war of Independence.

But as social realities, they have continued to influence the social and political life of the country. They have always been illegal, but their numerous activities take place both in Turkey and in Europe, notably in Germany where around 3 million Turks live.

The most important Muslim confraternities or denominations (tarikat) are the Nakshibendilik, the Kadirilik, the Rifailik, the Nurculuk, the Süleymancılık, the Isıkçılık, the Mevlevilik, the Bektashilik and the Alevilik.

Let us examine the principal confraternities in Turkey today and try to explain their philosophy and their strategy.

Nakşibendilik: This is one of the most widespread and important Sunnite confraternities in Turkey. The mother of the former President of the Republic Mr. Turgut Özal was a "nakshi", just like himself and his two brothers. They have always had a certain power in government, administration and commercial and industrial life.

Mohammed Bahaeddine Al Bukhari (1317-1389) is the founder of this confraternity. The "nakşibendilik" is a severely disciplinarian confraternity. The fundamental element is inner purification, which must be realized under the direction of a "sheyh-şeyh" who is called "murchid-i kamil" (the perfect guide). Currently, the most important "şeyh" is Dr Esat Coşar, a former professor at the Faculty of Theology of the University of Ankara. The exercises to which the candidate or the member must submit are very hard and painful in order to form within him a spirit of humility and of blind and passive obedience.

One must equally practice repentance, solitude, austerity and compassion. But this "tarikat" also stresses the importance of leading a normal life which can be helpful for others and which can secure the individual's interests in everyday problems. There is a parallelism between the philosophy of the "nakshis" and that of the Christian puritans.

The laws of secularism in Turkey provoked a violent clash between the government and the nakshis (for instance the revolt of Şeyh Sait and the insurrection of Menemen in 1925-30). The reason is that this "tarikat" stresses the importance of observing Koranic Law in daily life; it is very much attached to tradition, and is opposed to dialogue with other religions and to modernism.

In the 1950's, the Fatih neighbourhood in Istanbul, around the İskenderpaşa Mosque, became one of the concentration points of the "nakshis". The disciples of this tarikat are active in political life.

The former leader of the Refah (Welfare) political party, Necmettin Erbakan, is a nakshi. They have many publications and a radio station.

Kadirilik: Abdoul Kadir Geylani (1078-1166) is the founder of this Sunnite confraternity. The existence of this tarikat in Turkey dates back to the XVIIth century. At the beginning of the XXth century this confraternity was very powerful in Turkey.

For the "kadiris", the Koran is the truth itself, but in order to be able to understand the essential, one must let oneself go, in order to reach ecstasy. The body is nothing but an envelope, a cage for the soul, which was created independently and long before the body. One must turn one's back on visible things, which are but sensory appearances, and look at the inner world with the eyes of the heart. It is a question of training, by practising away from the crowd, by listening and by executing the precepts of Şeyh. During the Zikr ceremonies (repetitive invocations for ecstasy), the "kadiris" come together in a room, make a circle and put their hands on the shoulders of their neighbours. They start to sing and when they come to the name of God, they shout: Hou, hou..., they close their eyes and they turn their heads from right to left. All this is accompanied with musical instruments.

The "kadiris" were convinced that they were the only true Muslims. They were opposed to any innovation in society. It was impossible to discuss the idea of dialogue with "kadiris". But today they are very open. This confraternity is widespread in the regions of Marmara and the Black Sea. They have a daily newspaper called "Yeni Mesaj", a TV channel called "Mesaj TV", and a radio station.

Rifailik: The founder of this Sunnite confraternity is Ahmet Rifai (1118-1183). This tarikat recommends total withdrawal from the crowd, solitude, concentration on oneself, liberation from sensory impressions. God did not give to human beings the capacity of total understanding. Meditation consists in thinking only of God and of remembering nothing else but his attributes. In the state of ecstasy, one must reach such a point as to become insensitive to painful experiences: walking on needles, etc.

This confraternity was renovated and modernized (in the end of

the XIXth and the beginning of the XXth centuries) by an intellectual, Kenan Rifai Efendi, a graduate from the Lycée of Galatasaray. Today, women have a quite privileged place in this confraternity. Thanks to Kenan Rifai Efendi, this confraternity is still very popular. It has attracted many intellectuals, such as Mrs Samiha Ayverdi and Mr Agah Oktay Güner, a former Minister of Culture and current vice-president of the political party ANAP (Motherland Party). This confraternity is now open to dialogue with other religions.

Nurculuk: Said Noursi, of Kurdish origin (1873-1960), who was born in the village of "Nours" near Bitlis in Turkey, is the founder of this religious stream. In his youth, Said Noursi was very active. First he worked with the "Young Turks", then against them. First he supported Atatürk, then he criticized him very strongly. Then he was often exiled.

Said Noursi claimed to be a disciple of Abdoul Kadir Geylani and of Imam Rabbani. Their disciples are called "disciples of the light (nur-nour)". "Nour" means the celestial or divine light. The nourdjous form neither a confraternity nor an association but an intellectual religious stream. They read the works of Said Noursi. They are quite powerful among young people and they have many publications. Although there are some very fanatical nourdjou streams, some of them are open to dialogue with Christianity. It is known that Said Noursi had written to the Pope for a collaboration with Christianity in the struggle against every kind of materialism, notably Marxism.

The nourdjous and Said Noursi supported Adnan Menderes when he was prime minister in 1950-60. The majority of the nourdjous supported Süleyman Demirel when he was president of the Republic. They are widespread in the Aegean Region, in Isparta and Western Anatolia.

One of the disciples of Said Noursi, Mr Fethullah Gülen, has become a very important personality in the last years. He owns a TV channel (Samanyolu TV), a daily newspaper (Zaman Gazetesi) which sells about 300,000 copies, and many monthly and weekly publications. He is known as an open-minded and modern person. For example, the problem of the Islamic scarf is nothing but a

negligible problem for him. He has visited the Greek Orthodox Patriarch Bartholomeos for dialogue. He also went to the Holy See to visit the Pope. The Writers and Journalists Foundation of Mr. Fethullah Gülen is very active. They have organised international inter-religious symposiums.

Mr. Gülen has more than 200 schools worldwide, especially in Central Asia, and two universities. Last year some secular pressure groups, newspapers, TV channels and the Army began a campaign against him, but this campaign was not successful. Even Prime Minister Bülent Ecevit, a politician of the Left, has said: "Mr. Fethullah Gülen is a very respectable religious man. You cannot force me to say anything bad about him; his schools are very important for Turkey. These institutions teach the rules of the free economy vis-à-vis globalization to students of foreign countries, in Turkish, in English and in their own languages".

Mr. Gülen had gone to the USA before the campaign and he has not returned yet.

Süleymancılık: They became popular in 1965; their denomination comes from Süleyman Hilmi Tunahan (a XXth century theologian and lawyer, and a precursor of important mosques of Istanbul). In conformity with his activities as precursor, he taught Koranic courses, and then he began to organize these courses on a larger scale. In fact, this "tarikat" is a branch of the nakshibendilik. The former students of these Koranic courses have formed a kind of clandestine society where a very tight solidarity reigns. They are quite powerful in political and social life. For them secularism is nothing but atheism. Currently, they govern more than 1000 student halls where almost 100,000 students reside. 90% of these young people go to non-religious schools. These halls are known as disciplinarian places. They are very powerful in Europe, especially in Germany. They are not open to dialogue in terms of religion.

Işıkçılar: The name of this confraternity comes from its founder Işık (XXth century), a very conservative former professor at the Istanbul Kuleli Military College. His son-in-law Dr Enver Ören is an important industrialist and the owner of a right-wing daily newspaper, Türkiye (Turkey), which sells about 300,000 co-

pies. Dr Ören was very close to former president Mr Turgut Özal and his government. In his newspaper, different tendencies and views of the Right and the Centre can be found together. Dr Ören likes to play pluridimensionally, therefore he is open to every kind of dialogue. He also owns a TV channel, TGRT.

Mevlevilik: This is the oldest and the most influential confraternity among intellectual Muslims. The founder is Mawlana Djalaleddine Roumi (1207-1273), who invited into his poems all kinds of tendencies and religions. This confraternity enjoyed the protection of the Seljuks, the Quaramans, the Ottomans, and even the leaders of the Republic after 1950. The Mawlevi leaders and their descendents are called "Tchelebi". The elegance and the refinement of their ceremonies and rites, which have almost become traditional folkloric dances, distinguish their disciples from those of other confraternities. Among the Mawlevis, there are Christians, Hindus and Jews. The confraternity is sincerely very open to all kinds of cultural and religious dialogue.

Bektashilik: This is the confraternity attributed to Hadji Baktash (XIIIth century). The janissaries were bektashis. Today, bektashism is very widespread among Turkish and Albanian Alawis. Bektashism is a very tolerant confraternity, it is even designated as a model of religious tolerance. But this confraternity is closed to the outer world. It is not possible to give even an approximate number of their disciples or an idea of their influence on political and social life. It is known that they support the social-democratic parties. An important group of bektashis are freemasons. As I said before, this order or confraternity has always kept the characteristics of hallagian thought.

Alevilik: As I said before, the theology of the Anatolian Alawis is based on a pluridimensional harmonization. I mentioned in the beginning of this work that they meet the same kind of problems as non-Muslim people in Turkey.

Today, the Anatolian Alawis are subdivided into many groups. Their loyalty to religious tradition is represented by the foundation called CEM, whose president is İzzettin Doğan, "dede-grandfather", a professor at the University of Galatasaray. The Federation of European Associations of Alawis, close to the views of the daily newspaper Cumhuriyet, tries to harmonize the principles of the social-democrats and even Marxist ideology with the progressive aspect of the sect. In Alawite associations like "Hacı Bektaş Dernekleri" (Hacı Bektaş Associations) and "Pir Sultan Abdal Dernekleri" (Pir Sultan Associations) and convents like Shakoulu-Istanbul, Merdivenköy, a kind of heterogeneity reigns among the Alawis.

C) *The situation today*

It is a fact that, since the beginning of the Republic, Muslim fundamentalists have always been disturbing the social and political life of the country. But we cannot consider all Muslims, even all Islamists, as fundamentalists.

On the other hand, we must say that some fundamentalists and even some terrorists managed to penetrate the Islamist political parties. Some Islamist political leaders have also put forward fundamentalist arguments.

The Milli Nizam Partisi (National Order Party), Milli Selamet Partisi (National Salvation Party), Refah Partisi (Welfare Party) and Fazilet Partisi (Virtue Party) have represented Islamic ideology. Historically and consecutively, all those parties have shared the same ideology and the same permanent staff. Except the last one. Since the 1970's Professor Necmettin Erbakan has been the leader of each one.

In January 1998, the Constitutional Court closed the Islamist Refah (Welfare) Party for violation of the secular nature of the Republic (Articles 68 and 69 of the Constitution and Law on Political Parties) and banned six of its leaders, including Necmettin Erbakan, from politics for five years. The Fazilet (Virtue) Party took its place in political life. But the Attorney General filed indictment seeking the closure of the new Islamist party, for promoting antisecular activity and representing the ideology of a banned party. Today out of 450 deputies in the parliament, 110 seats belong to the Fazilet Party. The case is pending before the Constitutional Court.

Personally I think that today's Fazilet Party is conscious enough to adopt a new strategy and ideology, similar to that of the Christian Democrats in Europe or elsewhere.

In 1997, among the other measures against fundamentalism, secular education courses have become compulsory in schools over a period of eight school years.

The Islamic Imam-Hatip schools, in existence since 1950, have been very popular among conservative and Islamist Turks as an alternative to secular public education. Many children of parents who have recently become rich attend these secondary schools, especially in Anatolia. An important proportion of these Anatolian "nouveaux riches" prefer secondary schools of this kind for their children.

Under new law, students may pursue their studies at Imam-Hatip High Schools upon completing eight years in the secular public primary schools. There are no restrictions on private religious classes outside school hours.

Another measure against the Islamists is the prohibition against wearing Islamic headscarfs at school and at university. Around 50 professors, assistants and university administrators have been dismissed for wearing or encouraging others to wear headscarfs.

Mrs Merve Kavakçı, a newly elected member of parliament (1999) from the Fazilet Party, was criticized by Prime Minister Bülent Ecevit, former president Süleyman Demirel and the National Security Council for wearing a headscarf. Her action was considered a challenge to the secular state. With some manipulations through an administrative decision, she lost her Turkish citizenship (because she also has American citizenship without the authorization of the Turkish government) and subsequently she also lost her parliamentary privileges, although not her elective office since Parliament has not voted to remove her. Meanwhile, she married a man who has only Turkish citizenship. She has regained "Turkish nationality" but the Cassation Court did not accept her membership of the Parliament.

All the measures executed by the State against the Islamists started on February 28th 1997. Until that day, the president of the Islamist Refah Party, Mr Necmettin Erbakan, was the Prime Minister of the governing coalition in which he shared power with Mrs Tansu Çiller's Right Way Party (Doğruyol Partisi), a liberal party of the Right. When Mr. Erbakan took office, he opened the door to all kinds of Islamists, even to some extremists. He invited the leaders

of different religious denominations (tarikat) and the leaders of various Muslim sects to his residence for a Ramadan dinner. That was a big scandal for Turkish public opinion, for secular pressure groups, and especially for the Army.

Mr. Erbakan, in one of his speeches, has said: "Islamic Revolution is the destiny of Turkey, I do not know whether it will be bloody or not".

The Turkish Army was not very happy with his attitudes. As a Constitutional Institution, the National Security Council, whose members are the President of the State, the Prime Minister, the Minister of National Defence, the Minister of Internal Affairs, a few other ministers, the Commander in Chief of the Turkish Ministry Forces, the commanders of the Army, Navy and Airforce and other recently appointed militaries, decided to take serious measures to fight against the fundamentalists in order to maintain and safeguard the secular State.

The decisions of the National Security Council are constitutionally considered as advice for the Parliament and for the government, and they also represent the feelings of the Turkish Military Forces.

The abuse of democratic rights and freedom of religion by Islamists has been severely condemned by the State, as it should be. For instance, the case of the Turkish Hizbullah is a very serious problem. This terrorist organization killed more than 300 people by torture. The State then organized very wide and serious operations against them.

But I think that the State should limit its own power with democratic norms and rules, especially as it has applied for membership of the European Community. The State should differentiate between terrorist Islam and legitimate Islam.

D) *Various problems*

1) *Financial aspects*

a) Muslims

As I mentioned before, religious life is organized by the Presidency of Religious Affairs for Muslim believers. This institution

receives an important amount of funding, about 5% of the budget, from the national income.

So called "illegal" sects and denominations receive their financial support from their own communities.

b) Non-Muslims

They do not receive any financial aid from the government. All the expenses for religious activities, including the salaries of priests and preachers, are subsidized by the members of each community.

2) *Internal structure of religious activities*

a) Muslims

The Presidency of Religious Affairs decides on the appointment of religious officials, including the "imams" and the "muftis". The muftis are the religious officials at the head of each city and town.

The president of the Presidency of the Religious Affairs is nominated by the Government. This institution is linked to one of the Ministers of State.

In the "illegal" denominations and sects, the leader, called the "sheik", is chosen and accepted by the common approval of the members of the community.

In the Alawi tradition, the different sheiks, called "grandfather", must belong to the genealogical line of the caliph Ali, the son-in-law and son of the uncle of the prophet Mohammed.

b) Non-Muslims

They follow the rules of the canonical laws of their communities.

3) *Religion and culture*

a) Muslims

The role of the so-called "illegal" sects and denominations is quite important in the social life of Turkish Muslims. I have explained their activities in the chapter "the status of Religious Confessions".

b) Non-Muslims

As I explained before, the activities of the Greek Orthodox

Church have achieved worldwide significance since the election of Patriarch Bartholomeos in 1991.

The new Armenian Orthodox Patriarch Mesrop II, who was elected in 1998, has also taken a new important position in the cultural and social life of Turkey.

The Syriac Church's cultural activities are rather less important.

The Roman Catholic Church takes a very important place in inter-religious dialogue. The vicar of the Vatican, Mr Marovitch, has organized meetings and seminars among religious leaders. For example, the visit of Mr Fethullah Gülen to the Holy See was organized by him.

The Jewish Quincentennial Foundation has organized many cultural activities over the world in order to reflect the humanitarian attitudes that have existed between Muslims and Jews living in Turkey and the Ottoman Empire, from the days of the immigration of the Spanish Jews in 1492 until today. This foundation is a very important pressure group in Turkish political and cultural life.

4) *Religious assistance in public institutions (prisons, hospitals, the army)*

a) Muslims

In prisons and hospitals, "imams" are officially nominated by the Presidency of Religious Affairs. But they do not take important roles in the context of religious assistance. It can be said that the only job that they perform is taking part in funeral ceremonies.

In the military forces, which are secular, the "imams" do not have any religious responsibilities. Only during war time can soldiers who have followed theological training or with a theological background work in the field of religious assistance.

b) Non-Muslims

There are no Christian or Jewish religious representatives in the prisons or in the army for the needs of the non-Muslims.

In the non-Muslim religious hospitals, Christian preachers or priests work in order to help people in the institution. They are nominated by the Church or by voluntary believers.

5) *Marriages*

For marriages, the civil procedure in the municipalities is prescribed by the Civil Law. Otherwise the marriage does not have any legal status.

But after their civil marriage, couples are free to have a religious marriage according to the traditions of their faith. Muslims do not have the right to perform religious marriages in mosques, but non-Muslims have the right to go to churches or synagogues for their marriages.

Legally there is no obstacle or restriction for religiously mixed marriages in Turkey. The children born of such marriages are free to adopt their own religion when they are 18 years old. Before that age the consent of the parents determines the situation.

IV. Conclusion

Turkey is an important bridge between the West and the East through its historical, geographical and cultural situation.

Culturally and racially, Anatolia is an amalgam of different ethnic groups and civilizations. Beginning from the first Anatolian and Mesopotamian civilizations until today, a rich heritage has determined the vision and the mentality of the people living in this country. From Central Asia, Persia, and Arabia to the Balkans and the Mediterranean Sea, the Turks have experienced many different cultures.

That is why the interpretation of their faith and belief has multi-coloured aspects. It is not sectarian as is the case with others in that area.

On the other hand, with the "Young Turks" and the Kemalist Revolution, Turkish political life and jurisprudence have adopted the conception of "natural law", which is the philosophy of law and state of the Western world, especially that of the French Revolution of 1789.

Of course, we might have inherited some problems in the field of human rights, with regard to some negative aspects of our rich historical heritage.

Compared to the West, where the tradition of the philosophy of "natural law" goes back to the Enlightenment Age, this philosophy

entered our legal system later. It is not easy for new ideologies to be accepted and assimilated by a collective consciousness who has had different conceptions and traditions of law and jurisprudence.

The Western world too has had some problems surrounding human rights in the XXth century. Nazism and fascism are not old ideologies. They still exist in the hearts of some Europeans.

Christianity too has some fundamentalist interpretations. Calvinist theology, with the idea of predestination, reflects conservative approaches. In the USA, where the role of religion is very important, calvinist denominations even try to use their influence to give "American nationality" to Jesus Christ. Large numbers of believers in these denominations are very fanatical.

One can say that catholicism has made considerable progress in the context of democracy, beginning from Saint Thomas of Aquinas. I agree with that statement. But we should not forget that, according to him, if the state does not respect the "Lex Divina", which can only be understood by the clergy, the rulers lose their legitimacy. In that case, people should be on the side of the clergy, in which case revolution becomes legitimate. That means the State should respect and follow the Bible and its interpretations. We know that the Old Testament, which is also part of the Holy Scriptures of Christians, has many strict rules. The rules of the Old Testament are very much respected by some protestant sects and denominations. So, in that perspective, Christianity can also open the door to theocracy.

We know that in the western world, there are Christian Democratic political parties who have close and friendly relations with the Holy See. Some institutions establish the link between the Vatican and the Christian Democrats. There is no such connection and centralization in Turkish Islam.

Religion is also a very important factor in the political and social life of the Christian world. Taking this fact into account, we must try to understand Turkish Muslims with an objective approach.

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