



THE MUTUAL ROLES
OF RELIGION AND STATE IN EUROPE

INTERFÉRENCES MUTUELLES
DES RELIGIONS ET DE L'ÉTAT DANS
L'UNION EUROPÉENNE

Edited by

BALÁZS SCHANDA

This book is dedicated to
Professor em. Enrico Vitali
University of Milan, Italy



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Edited by

BALÁZS SCHANDA

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PREFACE

The 24th annual conference of the European Consortium for Church and State Research took place in Budapest on the 8th and the 9th of November, 2012. Members of the Consortium have shared their insights into the role of religion and state in Europe, how major religious communities regard the state and what politics and the law expects from religious communities.

Besides national reports three major papers were presented by Professor *Norman Doe*, Professor *Marco Ventura* and Professor *Richard Potz*. Besides national reports their papers are also included to this volume. Closing reflections were given by Professor *Rik Torfs*.

Special thanks are due to *Norman Doe*, who has contributed significantly in shaping the grille thématique for national reports. Professor *Doe* has also helped the publication of this volume by checking the language of non-native English speaker authors. In this work he was assisted by two colleagues at Cardiff: *Kate Millar* and *Miranda Brijlall*, both of whom are undergraduates at Cardiff Law School.

The conference was made possible by a grant of the European Union and Hungary enhancing scientific research at the Pázmány Péter Catholic University.

Budapest, 2012

Balázs Schanda

THE MUTUAL ROLES OF RELIGION AND STATE IN AUSTRIA

RICHARD POTZ AND BRIGITTE SCHINKELE

I. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

Historical Background

The oldest elements of the socio-cultural and psychological factors determining Austrian law on religion go back to the Habsburgian counter-reformation and the Josephinian established church, some of which remained influential until the nineteenth and twentieth centuries. On 1 May 1934, the last attempt was made to instrumentalize Catholicism for the political system with a corporative-authoritarian constitution (*Christlicher Ständestaat*). The “*Anschluss*” to Nazi Germany on 13 March 1938 brought an end to the denominational structure of Austria. The Concordat of 1933 was declared invalid and that of the German Reich was not extended so that no concordat was applied to Austria.

After the reconstitution of Austria in 1945, as a transitional measure, the laws and statutory instruments adopted after 13 March 1938 were maintained in force insofar as their contents did not contradict “the existence of a free and independent Austrian State and the principles of a true democracy, or conflict with the sense of justice of the Austrian people, or contain ideological traits of National-Socialism”. A number of laws (e.g. the Act on Unifying the Law on Matrimony and Divorce¹ and the Law on Church Contributions²) were transferred almost entirely to the legal system of the Republic.

1 *Gesetz vom 6. Juli 1938 zur Vereinheitlichung des Rechts der Eheschließung und Ehescheidung (im Land Österreich und im übrigen Reichsgebiet)*, DRGBl I p. 807 (GBILÖ 1938/244).

2 *Gesetz über die Erhebung von Kirchenbeiträgen im Lande Österreich*, GBILÖ 1939/543.

After 1945 the Catholic Church, as the most important religious community, had to come to terms with its past as it had supported the authoritarian regime between 1934 and 1938.

Since 1950, the question of the continued validity of the Concordat of 1933 has created a conflict between the dominant political parties because of the Concordat's provision on marriage law, which in some respects had the texture of a "*Kulturkampf*". In 1957, the Federal Government expressly recognised the validity of the Concordat. This provided the starting-point of new State and Church relations and new legislation.

By the end of the 1950s, which had linked cultural conservatism with revolutionary changes in the technical and economical fields, the church was definitely no longer able to be successful with such a strategy. The mid-1960s finally brought about a change in the attitude towards the Churches, as institutions in the sense of "believing without belonging". This has many reasons: on the one hand, the Church was captured by the identity crisis of all major institutions; and on the other hand, the Church was not able to use the Second Vatican Council in a decisive way as an opportunity for change. As in other places, the development in Austria also took a rather contrary course as was reflected particularly in the public debate about the encyclical "*Humanae Vitae*".

A new and larger field of conflict arose in the 1970s with the introduction of the legal possibility of a first-trimester abortion. In the following years, there were also discussions on several pieces of new legislation, such as in the field of monument protection, data protection, registration law and the question of the inclusion of religion in the census.

Since the 1990s, there have been some changes in the public perception of the Churches. They were increasingly seen as reminders of social problems, in particular concerning asylum and immigration law, development cooperation and ethical issues associated with new technologies (in particular in the field of bio-sciences).

Religion in the Policy Statement of the Austrian Government

The policy statement of the Government at the beginning of each legislative period in principle has the task of clarifying the priori-

ties of the Government's forthcoming work. It is interesting that the policy statement of the recent Austrian Government (during the period of 2008 to 2013) refers to religion only three times. This restraint can be interpreted in two directions: religions are of minor interest for the State's policy or there is almost no acute problem in the relationship between State and religious communities. It seems that in the present case this restraint was a mixture of both.

The three points in the statement are the following:

First, the statement refers to religion in connection with penal law. Under the heading, "Traditionally Based Violence" (*Traditionsbedingte Gewalt*) it is emphasised that there is no justification, exculpation or mitigation of punishment by relying on tradition, belief or religion. This statement is aimed at discussion of the treatment of honour crimes as they are often brought in connection with Islam or Islamic-shaped cultural backgrounds.

Secondly, religion (*inter alia*) is mentioned several times in the context of anti-discrimination law. In this context, it is to be noted that in autumn 2012 an amendment of the Law on Equal Treatment has been drafted where the principle of equal treatment is expanded beyond the ground of racial or ethnic origin to the grounds of gender, religion or belief, age, and sexual orientation in relation to access and supply of goods and services which are available to the public, including housing.³

Thirdly, the policy statement includes a commitment to organise a parliamentary *enquête* concerning the nationwide introduction of the subject "Ethics" in secondary schools, dealing in particular with the relationship of this subject to the existing religious instruction courses.

This parliamentary *enquête*, under the title "Values Education through Religious and Ethical Instruction in an Open Pluralistic Society" (*Werteeziehung durch Religions- und Ethikunterricht in einer offenen, pluralistischen Gesellschaft*),⁴ took place on 4 May 2011. Among the participants were representatives of all legally recognized Churches and Religious Societies.

The Minister responsible for religious affairs, *Claudia Schmied*, stressed that the separation of church and state is a fundamental

3 407ME XXIV.GP-Ministerialentwurf-Gesetzestext.

4 http://www.parlament.gv.at/PAKT/VHG/XXIV/III/III_00234/fname_218887.pdf.

constitutional principle. This separation, however, has in Austria always led to a productive interaction, in which each part takes care of its tasks and responsibilities. In this sense, some participants point out that religious education fulfils an important social function because it is increasingly difficult for young people to understand the importance of cooperation, social action, solidarity and humanity in a society that focuses sometimes unilaterally and unconditionally on competition and financial success.

Parliamentary Discussions and Inquiries on Religious Topics

Although some amendments of special laws on religion (Federal Law on the Legal Personality of Religious Denominational Communities,⁵ Law on the Orthodox Church⁶) were enacted, members of Parliament show embarrassingly low interest in questions of State-Religion relations in this context. Only in the case of the new Law on the Jewish Religious Community (2012),⁷ there have been some discussions regarding the situation of liberal Jewish groups under this new law. Principal questions on State-Religion relations were not really discussed on this occasion.

Recently, internal problems or specific legal issues of an individual church or religious community were not only the reason for specific public criticism, but were also provoking parliamentary inquiries directed towards the responsible Federal Ministers. Sometimes they were taken as the starting-point for a fundamental questioning of the limits of religious freedom in particular and the Austrian system of law on religion in general – especially the Concordat of 1933 and the “privileges” of legally recognized Churches and Religious Societies.

If one considers these parliamentary inquiries as a criterion for the political orientation of the Austrian party spectrum in religious affairs, clear patterns can be seen. Critical and principal questions that deal with the Catholic Church are usually made by the Greens. In this context the criticism of the Catholic Church because of child abuse cases was used as the basis of discussions on State and Church relations. Another aspect was the growing debate on cross-

5 *Bekennnisgemeinschaftengesetz*, BGBl. I 1998/19, as amended BGBl. I 2011/78.

6 *Orthodoxengesetz*, BGBl. I 1967/229, as amended BGBl. I 2011/68.

7 *Israelitengesetz*, BGBl. I 2012/48.

es in classrooms following the relevant German decisions and recently the *Lautsi* decisions of the ECtHR.⁸ As far as the engagement of Catholic institutions in the charitable sphere is concerned, especially in the field of asylum, questions to the Government regarding these activities come from politicians of the right-wing parties.

Political evergreens are the criticism of Islam and specific Muslim topics respectively. The two right-wing parties like to make an issue out of activities of Islamic groups in Austria,⁹ the financing of the Islamic Religious Pedagogy, and ritual slaughtering during *Kurban Bayrami*.

Organized Cooperation of Religious Communities

In 2009 the Austrian Government planned to establish a “Council of Religions” (*Rat der Religionen*) as a sort of dialogue-forum, probably taking Article 17 of the Treaty on the Functioning of the European Union as a model. However, this could not be realized. This is the reason why the religious communities founded the Platform of the Legally Recognized Churches and Religious Communities (*Plattform der Kirchen und Religionsgesellschaften*) in 2012, thus giving themselves a new structure for cooperation. The focus of attention is on an exchange of views on relevant political and legal developments in fulfilling their special commitment arising from their public law status.

On the occasion of the recent debate on circumcision,¹⁰ another council has been established, the Platform of the Monotheistic Religious Communities (*Plattform der monotheistischen Religionsgemeinschaften*).

General Remarks

1. As stated above, it is a result of the Austrian historic-political preconditions that religion today plays practically no role in Austria for nationhood and national consciousness. However, from time to

8 Cf. below.

9 10010/J XXIV. GP; 10009/J XXIV GP; 10008/J XXIV GP.

10 Cf. below.

time, a non-specific Christian identity is mobilized for Islam-critical political positions.

2. The social significance of the Churches – especially of the Catholic Church – nowadays is concentrated on the largely positive perception of the church’s activities in the field of social welfare, especially the work of the Catholic *Caritas* and the Protestant Evangelical *Diakonia*. In more traditional circles of the Churches, it is often complained that in public, though itself positive, the Churches are mainly or even exclusively perceived on the basis of their commitment in charitable work.

The status of private schools and religious instruction courses within the state school system are subject to differentiated assessments for political reasons. Over and over again, these areas give rise to discussions on “privileges”, especially those of the Catholic Church because of the existing Concordat. Not realizing that all legally recognized Churches and Religious Societies enjoy the same legal status owing to the general state laws is a characteristic of such criticism. In recent years such activities of groups with members expressly not belonging to any denomination have been increasing, for instance the associations “*Die Konfessionsfreien*” (or “Religion is a Private Matter”).

3. In the history of the Austrian law on religion, there was a development from controlling to facilitating. For some time, there have been signs of reversal. To give a paradigmatic example, the new Law on the Jewish Religious Community contains a range of instruments which increase state control. However, it must be taken into consideration that this Law has been drawn up in cooperation with the Jewish Community.

As a whole, the State’s view on the role and value of religion as such is usually not the subject of political debates. However, within the constitutional principle of denominational neutrality in matters of religion, the State in principle takes an open-minded attitude towards religion or religious communities respectively.

II. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

Constitutional Guarantees

The Austrian Federal Constitution¹¹ guarantees the right to religious freedom in a comprehensive way, encompassing its individual as well as its corporative elements. The neutrality of the State in matters of religion is a consequence of these fundamental rights in connection with its commitment to non-discrimination on the basis of religion. However, one has to stress that this does not mean that the denominationally neutral State is not allowed to set measures of promotion in favour of religious communities as socially relevant factors. Therefore, the denominational neutrality of the State has to be carried out in a way that integrates aspects of religion and belief – of course without the State identifying with or discriminating against any denomination.

Because of the rather positivistic concept of the Federal Constitution there is no preamble. Some years ago (2003-2005), on the occasion of the “Austrian Convention”,¹² a project for elaborating a revised version of the Constitution, the integration of a preamble and a reference to God or religion had been discussed. In this case, no consensus could be found, but at least the whole initiative of a revised Constitution has not been brought to an end.

In this context, an amendment of the Federal Constitution, from 2005,¹³ should be mentioned whereby the imparting of values within a comprehensive education has been embodied in the Constitution by means of implementing aims of State schooling. Among other matters, broadmindedness and tolerance are described as fundamental values of schooling on the basis of which the highest standards of education and their continuous development are to be guaranteed for the entire population. Within a broad framework the importance of being connected to social, religious and moral values as well as broadmindedness towards the religious and philosophical

11 *Bundes-Verfassungsgesetz*, BGBl. 1930/1 as amended.

12 Cf. H. Kalb, R. Potz, B. Schinkele, 'Religions- und Weltanschauungsfreiheit im aktuellen österreichischen Verfassungsdiskurs', (2005) 52 *Österreichisches Archiv für Recht und Religion* 1.

13 *Bundes-Verfassungsgesetz*, BGBl. I 2005/31.

convictions of others are highlighted. These criteria are explicitly considered to be an adequate substratum to enable people – irrespective of origin, social situation, and financial background – to take responsibility for themselves, their fellow men, the environment, and future generations. As far as the imparting of religious values or doctrines is concerned, it naturally applies only to persons open to religious education and development.

Public Holidays

In all countries most of the public holidays are traditionally religious feasts – in Austria therefore they are mainly of Catholic origin, with the exception of 1 May and National Day. However, there are some special regulations for adherents of religious minorities. According to the Rest Periods Act,¹⁴ Good Friday is a recognized holiday for the members of the Protestant Church, Augsburgian and Helvetian Confession, the Old Catholic Church, and the Protestant-Methodist-Church. As a consequence of the new Antidiscrimination Law,¹⁵ on the one hand, these “privileges” have been discussed because of their compliance with the principle of equal treatment. On the other hand, additional holidays have been granted to religious minorities especially in numerous collective bargaining agreements. In several areas, negotiations in this regard are still going on. Furthermore, religious holidays are taken into account for the purposes of the School Acts, for instance the Sabbath for pupils of the Jewish Religious Community and the Seventh-Day-Adventists and the last days of Ramadan for Muslim pupils.

Denominational Private Schools

The legally recognized Churches and Religious Societies are among those *ex lege* authorized to operate, i.e. to found and to ensure the continued existence of private schools. Private schools are granted public status if their operators, heads and teachers can guarantee proper and regular instruction in accordance with the aims of Austrian schooling.

¹⁴ *Arbeitsruhegesetz*, BGBl. 1983/144 as amended.

¹⁵ *Gleichbehandlungsgesetz*, BGBl. I 2004/66 as amended.

In the case of legally prescribed types of schools, the results achieved in class must be equivalent to those at a State school of the same type. The fulfilment of these preconditions is legally presumed in the case of recognized Churches and Religious Societies. If a private school is operated by a non-recognized religious community, the conditions for the achievement of public status have to be approved in every single case. However, this differentiation between two categories of private schools is considered to be unconstitutional.

Only recognized Churches and Religious Societies are to be granted subsidies towards the costs of teaching personnel for the denominational private schools which have public status.¹⁶ Because of its public-law status, the Islamic Community also enjoys the “privileges” for denominational private schools. Thus, there is an Islamic gymnasium organized as a denominational private school according to Austrian Private Schools Act.

Religious Instruction

Religious education is guaranteed by Article 17 (4) StGG (Basic Law on the General Rights of Nationals¹⁷), which provides that the respective Churches or Religious Societies are charged with the classes in religious education in schools. Systematically seen, like the regulation of denominational private schools this article also puts into concrete form the parents’ right to respect their religious or philosophical education and the children’s right to education according to Article 2 First Additional Protocol to the ECHR.¹⁸

The wording of the constitutional guarantee makes clear that the concept of religious education classes in school is accepted in Austria. This is how the denominational character of this instruction is particularly emphasized. The religious communities, not the State, are organizing the classes, despite the fact that, as a compulsory subject, religious education enjoys equal standing with other subjects. For all pupils who are members of a legally recognized

16 § 17 *Privatschulgesetz* (Private Schools Act), BGBl. 1962/244, as amended BGBl. 1972/290.

17 *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger (StGG)*, RGBL. 1867/142.

18 *1. Zusatzprotokoll zur Europäischen Menschenrechtskonvention*, BGBl. 1958/210.

church or religious society, religious education of their denomination is a compulsory subject at basic primary and secondary schools. However, there is an entitlement to withdraw for conscientious reasons.

Since the introduction of Islamic religious instruction in Austrian public schools in 1983, the school administration has been faced with several problems, although the system works well overall. The foundation of the Islamic Religious Pedagogical Academy, which was established according to the regulations for pedagogical academies in the Austrian Private Schools Act, was in the interests of the Islamic community and the Austrian school administration. Meanwhile, the legal foundation of this Academy has changed according to the Higher Education Act 2005.¹⁹ Some years ago the research department “Islamic Religious Pedagogy” was established at the University of Vienna. Its main task is the instruction of religious educational teachers at secondary schools.

Religious education at schools has been strongly criticized for granting privileges to the recognized Churches and Religious Societies and some have even called for its abolition. For about fifteen years, ethics classes have been introduced and they are usually evaluated quite well. A draft law is in preparation to implement ethics classes into the regular curriculum. According to the competent Federal Minister’s announcement, ethics classes should be provided for all pupils – however, not until the concrete structure and the exact relationship with the religious instruction are clearly defined. At more or less regular intervals, such questions give rise to the most vivid principled discussions on the importance of religion in society and they are still going on.

Public Symbols

According to § 2 (1) Law on Religious Instruction²⁰ in all public schools and those schools granted equality of that status, as far as religious education is a compulsory subject, the school operators are charged with the duty to hang a cross in each class room presupposing that the majority of the pupils belong to a Christian de-

19 *Hochschulgesetz*, BGBl. I 2006/ 30 as amended.

20 *Religionsunterrichtsgesetz*, BGBl. 1949/190 as amended.

nomination. This is one of the exemplary fields which caused some significant public discussions about the presence of religion. For the first time the Constitutional Court²¹ had to deal with this question on the occasion of an application concerning the display of a cross in a kindergarten in Lower Austria.²² The Constitutional Court considered the provision concerned to be in compliance with the constitution, especially the State's neutrality in religious matters. The Court stated that the legal requirement to display a cross neither implied a preference for a certain religious conviction nor represented an infringement with the prohibition of indoctrination. Due to the relationship of State and Church in Austria, based on an institutional separation, the interpretation of the cross symbol in the sense of a State church could be excluded. Though being in accordance with the result and the essential parts of the Court's reasoning, it should not be left unmentioned that the negative component of religious freedom has not been taken into consideration in an adequate way. Besides, one has to underline that the legal provision concerned – like the corresponding regulations regarding classrooms – might be improved insofar as there should be a legal possibility for the kindergarten's operators to make a decision deviating from that principle, taking into account all the facts and circumstances of each case.

The usual equipment of courtrooms with crosses, however, does not intend to take into consideration religious interests as such – on the contrary, religious convictions might be abused in the interest of a (real or supposed) more effective administration of jurisdiction. In this context, the cross cannot be interpreted as an offer of exercising the fundamental right to religious freedom and consequently it should be removed.

Ethics-commissions

The establishment of ethics-commissions is going to be of increasing significance. It is no longer possible to do medical research

21 VfGH 9. 3. 2011, G 287/09; cf. 'Schulkreuze in österreichischer und europäischer Perspektive', (2010) 57 *Österreichisches Archiv für Recht und Religion*, 353-524.

22 According to the Federal structure of the Austrian system law on kindergarten falls within the competence of the *Bundesländer*. Cf. § 3 (1) and § 12 (2) *Niederösterreichisches Kindergartengesetz* 2006, LGBl 5060-2.

with human beings without having a special infrastructure for institutionalized value-judgments and counselling. The ethics-commissions which have different legal foundations are independent bodies consisting of medical and non-medical experts, among them a person entrusted with pastoral care or having another ethical legitimacy.

Human Rights Supervisory Board (Menschenrechtsbeirat)

According to an amendment from 1999 of the Security Police Act²³ a Human Rights Supervisory Board has been established by means of a constitutional provision. Its task is to advise and supervise security and other bodies authorized to exercise direct power of command regarding compliance with human rights (§ 15a). The Board consists of 11 members, among them a representative of the Catholic and Protestant social welfare organizations (*Caritas and Diakonie*).

Protection of "Religious Sentiments"

The Penal Code (1975)²⁴ contains two provisions concerning the protection of religious and public peace as an aspect of public order. According to § 188 Penal Code, "Disparaging Religious Doctrines", a person who disparages or ridicules a person or a thing, subject to worship in an inland church or religious community, a religious doctrine, a legally-admissible observance, or a legally-admissible institution/establishment of such a church or religious community in public, and under circumstances which are calculated to constitute public nuisance (outrage to decency), is to be punished with prison for up to six months or a fine. The primary object of the protection is religious peace but the protection of "religious sentiments" is taken into consideration indirectly.

Regarding "Incitement to Violence" (§ 283), the level of criminal law relevance is higher. This penal provision refers to a person who publicly provokes or incites to a hostile action towards an inland church or religious community or towards a certain group belonging to such a church or religious community, to a race, a

23 *Sicherheitspolizeigesetz*, BGBl. 1991/566 as amended.

24 *Strafgesetzbuch*, BGBl. 1974/60 as amended.

nation, an ethnic group, or a country in a way that is calculated to endanger public order; such persons is to be punished with prison for up to two years. Likewise a person is to be punished who stirs up hatred towards a group named above, swears at it or runs it down it in a way which interferes with human dignity.

General Remarks

The selected areas mentioned above show the tendency of recognizing the importance of the religious dimension assumed by the State without valuing religion as such. As a whole, the State appreciates the religious communities as important groups within civil society, in somewhat the same way as it does other non-governmental organisations, however, respecting their special mandate far reaching beyond such aspects. To put it in a nutshell, the religious communities are an essential part of the comprehensive “ethic-reservoir” forming a necessary basis of a State.

Owing to State neutrality in matters of religion, the Austrian Courts in their findings scarcely ever deal with the importance or the value of religion for individuals, society or the State expressly. However, a positive attitude towards religion and belief in principle from an individual and a State perspective is reflected indirectly in court decisions. This is so primarily insofar as the fundamental right of religious freedom is understood in a comprehensive way in connection with a certain increasing dynamic interpretation. The Constitutional Court’s case law in particular has been changing since the early 1980s in such a significant way that it is to be qualified as a “paradigm shift”. Subsequently, the Court departed from a certain attitude of “judicial self restraint” which was replaced by a more evolutionary and progressive approach. Nowadays, a certain degree of “judicial self activism” is a distinctive feature of its jurisdiction. More and more fundamental rights are not only understood as rights with a merely defensive effect towards the State (*status negativus*) but also as objective principles. Thus, they might impose certain positive obligations which the State has to comply with in order to render possible an effective exercise of the fundamental rights (*status positivus*), even in order to protect an individual’s right against infringements by private parties (the so-called “*Drittwirkung*”).

It should not be left unmentioned that the scope of ecclesiastical “internal affairs” in weighing up with the “General State Laws” according to Article 15 StGG is constructed by the Courts in a quite extensive way, especially concerning the position of Churches as employers, hence the so-called “*Tendenzschutz*”.²⁵

Notwithstanding a thoroughly open attitude towards the sphere of religion, the religious communities would probably welcome clearer statements about the importance of religion for individuals and society in State legislation as well as in case law. Churches and religious societies have the right to deliver expert opinions on draft law regarding the general affairs of religious communities or special ones applicable to them specifically.²⁶ To give recent examples, numerous assessments were submitted regarding the Life Partnership Law²⁷ and amendment of the Federal Law on the Legal Personality of Religious Denominational Communities.²⁸

Special laws on the external affairs of Churches and Religious Societies are elaborated in cooperation with the religious community concerned. In this manner, a completely revised version of the Law on the Jewish Religious Community has been drawn up,²⁹ and a new Law on the Islamic Religious Community is in preparation. It must be emphasized that this cannot hide the fact of involving delicate problems for the State in case of different positions and interests within a concrete community. Such difficulties became particularly evident with respect to the liberal members of the Jewish Religious Community.

The recent debate on the legality of ritual circumcision which was set off also in Austria by the German judgment demonstrated significantly the sensitive relationship with the Jewish Religious Community owing to the Austrian history.³⁰ Furthermore, the inte-

25 Cf. R. Potz, ‘State and Church in Austria’, in *State and Church in the European Union* (Baden-Baden, 2005), and B. Schinkele, ‘Zum Tendenzschutz von gesetzlich anerkannten Kirchen und Religionsgesellschaften’, in: (2009) 10 Österreichisches Recht der Wirtschaft, 678.

26 This right is provided in the Law on External Affairs of the Protestant Church (§ 14 *Protestantengesetz*) and benefits all legally recognized religious communities because of constructing this provision as a most favoured church clause. Cf. also § 7 *Israelitengesetz*.

27 *Eingetragenes Partnerschafts-Gesetz*, BGBl. I 2009/135 as amended.

28 *Bekennnisgemeinschaftengesetz*, BGBl. I 1998/19, as amended BGBl. I 2011/78.

29 See above fn. 7.

30 *Landgericht Köln*, 5 July 2012, Az. 151 Ns 169/11.

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gration of Muslims as an important aspect within the debate concerned had to be taken into consideration. The legality of ritual circumcision was intensively discussed not only in public – politicians and representatives of other religious communities also submitted comments.

THE MUTUAL ROLES OF RELIGION AND STATE IN CYPRUS

ACHILLES EMILIANIDES

I. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

During the Turkish and British rule of Cyprus, the Orthodox Church of Cyprus constituted the nation-leading political organization of the Greeks under foreign sovereignty; thus, the Archbishop of Cyprus was also the leader of the 'Ethnarchy', acting as both the spiritual and political leader of Greek Cypriots. Makarios, the first president of the Republic of Cyprus, was also the Archbishop of the Greek Orthodox Church. Regardless of the importance of the Orthodox Church in Greek Cypriot political affairs, the role of religion in Turkish Cypriot politics was relatively limited; this was a direct result of the secularisation of Turkey following the reforms of Kemalism.

From 1960 until his death in 1977 Makarios was not only the President of the Republic, but also the most notable and influential political figure of the island. In the 'Times' editorial on the day following his death, Makarios was described as 'one of the most instantly recognisable figures of international politics'. All parliamentary political parties supported, at least nominally, the policy of Makarios; while AKEL (the communist party of Cyprus) had initially opposed Makarios, following 1960 Makarios enjoyed their continued and overwhelming support including that of AKEL. The only major political coalition besides AKEL, from 1960-1969 was the Patriotic Front, which was a coalition of all politicians who supported Makarios. When the first political parties were formed in 1969, Makarios' prior approval and blessing was provided; prominent political figures of the island's history, including the centrist Presidents Spyros Kyprianou and Tassos Papadopoulos, and the socialist President of the House of Representatives Vasos Lyssarides, considered themselves as the political successors of Makarios.

Ever since the death of Archbishop Makarios in 1977, the political system of Cyprus has been completely secularised, as religious functionaries in principle refrain from participating actively in elections and are not appointed to public offices. The Archbishop and other religious ministers restrict themselves in general to the exercise of their spiritual roles, without interfering in the exercise of the executive powers of the Republic. Consequently, religious influence in political life has diminished substantially; no political party claims that it is guided by spiritual truths or that it has the support of the Orthodox Church. In addition, the fact that the Archbishop or Metropolitans of the Church support a particular political party is of little significance to voters. The Archbishop, the Metropolitans, or members of the clergy, might support or express their preference towards a particular presidential candidate, without this dictating the results of any presidential, parliamentary or municipal elections; the political parties exercise much more influence over their supporters with respect to the outcome of any political election than the leaders of the Church.

Almost all political parties and many politicians receive funding from the Church during elections or with respect to their political activities; not only the Archdiocese, but also the Monastery of Kykkos, have funded many political activities of diverse political orientations. The communist AKEL has also received funding from the Church on many occasions. Moreover, many politicians regularly ask the Church to assist their voters and arrange meetings with the Archbishop, the Bishop of Kykkos or other Metropolitans, in order to enable their voters to receive grants or other donations from the Church. While in such cases the Church is exercising its role in helping the poor, or people in need, or in general providing for their members, politicians also satisfy their voters through arranging meetings with religious functionaries or through vouching for their voters who need assistance.

In view of the fact that the Orthodox Church engages in many economic activities in Cyprus and is a principal shareholder in various enterprises, the political role of the Church in funding political activities may also be exercised indirectly through its related commercial companies. However, it is not the case that the Church's funding of political activities is necessarily associated with the political beliefs of its Archbishop or of particular Bishops.

The policy of the Church has been to support political activities of different political parties; accordingly, many politicians who express political views different than those of the Archbishop with respect to a Cypriot issue regularly receive funding or support from the Church.

Ever since the inter-communal conflict of 1963 and the self-dissolution of the Greek Communal Chamber, the Ministry of Education has been considered to function as the successor of the Greek Communal Chamber. Since the death of Makarios, the practice of all Presidents of the Republic has been to consult the Greek Orthodox Church before appointing a new Minister of Education and Culture. While the President of the Republic has the power to appoint a new Minister of Education and Culture without consulting the Church, it has been considered that the Church ought to have the opportunity to express its opinion before appointing a new Minister of Education and Culture; this was due to the fact that education has been a matter of particular interest to the Church. However, after the Church expresses its opinions, the President may well appoint a Minister of Education and Culture who does not enjoy the support of the Church. Therefore, consulting the Church has been a practice aimed at the President taking an informed decision after consulting all interested parties, rather than a procedure aiming to bind the President. Consequently, many Ministers of Education and Culture have not enjoyed the support of the Church and have been political appointees. Dimitris Christofias was the first President of the Republic who appointed a Minister of Education without previously consulting the Orthodox Church; this might have been due to the fact that Christofias does not enjoy a good personal relationship with Archbishop Chrysostomos I.

While there is no political influence in religious canon law, political parties have always shown particular interest in the elections of a new Archbishop of the Orthodox Church of Cyprus. After the death of Makarios, the nomination of Chrysostomos I was initially supported by AKEL, DIKO and EDEK; however, eventually no elections were held and Chrysostomos I was unanimously elected as Archbishop. The involvement of political parties in elections for a new Archbishop was more intense during the 2006 elections. AKEL, the communist party of Cyprus, officially supported the nomination of Bishop of Kykkos Nikiphoros; many of the layper-

sons elected as General Representatives in the Electoral Assembly on behalf of the Bishop of Kykkos were officials of AKEL; outside the polling stations, members of AKEL attempted to persuade voters to support the nomination of the Bishop of Kykkos. The Secretary-General of AKEL and subsequently President of the Republic, Dimitris Christofias, had called upon all members of his party to support the candidacy of the Bishop of Kykkos as signifying a new prosperous era for the Church of Cyprus; such views were also expressed by other senior officials of AKEL.

Although AKEL was the only political party to support a candidate officially, the nomination of the Bishop of Kykkos was also supported by various politicians from all other political parties. A meeting organised by the Bishop of Kykkos prior to the elections was attended by the right-wing former President of the Republic, Glafkos Clerides, members of the House of Representatives representing DISI, DIKO and EDEK, as well as other politicians and well-known businessmen; all expressed their support for the nomination of the Bishop of Kykkos and called upon all members of the Orthodox Church to vote for him. While Athanasios, the Metropolitan of Limassol, never enjoyed the extent of political support enjoyed by the Bishop of Kykkos, he was also supported by a few members of the House of Representatives who hailed from Limassol; however, the main supporters of the Metropolitan of Limassol were Greek Orthodox Christians who attended Church more regularly and considered that the Church ought to focus on its spiritual role, rather than participation in political and financial activities.

Consequently, the Bishop of Kykkos was considered as the representative of a Church participating in political and financial activities, while the Metropolitan of Limassol was considered as the representative of a more spiritual-oriented Church. The third major candidate, the then Metropolitan of Paphos and current Archbishop Chrysostomos II, was the one eventually elected, despite not enjoying the support of major political parties or politicians, by taking advantage of the peculiarities of the system of election.

There is little doubt that the Archbishop of Cyprus is considered as a prominent figure in the island. The official Cypriot Protocol ranks the Archbishop second, following only the President of the Republic. The fact that the Orthodox Church represented the great majority of the population, and further enjoyed significant

economic power, enabled the Archbishop of the Orthodox Church to discuss their concerns with the President of the Republic as equals. The representation of the three religious groups of the Republic in the House of Representatives, albeit in a limited manner, also enabled religious minorities to discuss their main concerns with the members of the House of Representatives and the Government. From 1998 until 2003, the state had appointed a Presidential Commissioner for Religious Groups, Overseas Cypriots and Repatriates who represented the state in this dialogue with the representatives of the three religious groups. Subsequent governments have not so far appointed a new Presidential Commissioner, arguing that since most of the issues of concern fall within the competence of the Ministry of the Interior, a Co-Ordinator within that Ministry would be more capable of handling issues of concern to these religious groups, even if those issues fall within the competence of other ministries.

II. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

Article 2 of the Constitution explicitly provides that Orthodox Christians were to automatically be considered as members of the Greek Community of the island, whereas Muslims were to be considered as members of the Turkish Community of the island. Orthodox Christianity and the Islamic religion thus constitute one of the criteria of the bi-communal character of the Republic of Cyprus, since Article 2 of the Constitution provides that the Greek Community comprises, *inter alia*, all citizens of the Republic who are members of the Greek Orthodox Church, while the Turkish Community comprises, *inter alia*, all citizens of the Republic who are Muslims. The three communities with constitutionally-stipulated minority status were all defined as 'religious groups' (Armenians, Maronites and Roman Catholics). Article 110 of the Constitution further provides for the rights and privileges of the Orthodox Church, the Vakf and the three religious groups, thereby recognising their unique legal status, whereas Article 18 of the Constitution safeguards religious freedom.

The Republic of Cyprus has adopted a system of co-ordination between the State and the major religions and Christian creeds.¹ The State has recognised broad discretionary powers with regard to the main religions' internal affairs, administration of their property, family matters, and in general matters of a communal character. The model prevailing in Cyprus is essentially a pluralistic model, which recognises and embraces the public dimension of religion, while at the same time attempting co-operation with all religions. The significance of faith in people's lives is therefore considered as worthy of protection by the state and where the function of the state overlaps with religious concerns, the state seeks to accommodate religious views, in so far as they are not inconsistent with state interests.

In consequence, pluralism is achieved through the recognition that the state and the various religions occupy in principle different societal structures; religious neutrality is not, however, achieved simply because there is religious autonomy, but also through positive measures on behalf of the state, which aim at the protection of religions. Other religions and rites, such as Jews, Jehovah's Witnesses, Buddhists, Protestants or Orthodox Christians who follow the Old Calendar, enjoy religious freedom according to Article 18 of the Constitution, and are equal before the law, so that no legislative, executive or administrative act should discriminate against them. However, such religions are not considered as religious groups in the constitutional sense and, therefore, do not enjoy the special constitutional status of the five main religions of the island; difference in treatment between the five constitutionally-recognised religions and other religions principally occur with respect to religious education, direct financing and family law.

The Supreme Court acknowledges the significance of religious faith and religious liberty:

'Tolerance as a legal concept is premised on the assumption that the State has ultimate control over religion and the churches, and whether and to what extent religious freedom will be granted and protected, is a matter of state policy. The right of religious liberty is a fundamental right. The days that oppressive measures were adopted and cruelties and punishments inflicted by Governments in

1 In general, see A. Emilianides, *Religion and Law in Cyprus* (The Hague, 2011).

Europe and elsewhere for many ages, to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard, have gone. Mankind has advanced and the right to freedom of thought, conscience and religion is now a fundamental right'.²

Whereas the Republic of Cyprus does not provide funding to religions *per se*, significant religious assistance is, however, provided to religious communities with regard to the construction or repair of their churches, monasteries and cemeteries, and for other religious purposes, in the form of state aid. It should be observed that such state aid is provided by the Central Government and is in practice provided only to the five major religious communities and not to other religious organizations.

Religious education is another field where the positive role of religion is emphasized. Article 20 of the Constitution provides that every person has the right to receive, and every person or institution has the right to give instruction or education subject to such formalities, conditions or restrictions as are in accordance with the relevant communal law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or the standard and quality of education or for the protection of the rights and liberties of others including the right of the parents to secure for their children such education as is in conformity with their religious convictions. Religious lessons given in primary and secondary schools follow the doctrine of the Eastern Orthodox Church. In secondary education, the courses are given by graduates of university schools of divinity, while in primary education they are given by the class teacher. Attendance is compulsory for Orthodox pupils; atheists or members of other religions, however, may be excused. Furthermore, the right of religious groups to set up and operate their own schools is safeguarded, and such schools are financially assisted by the State.

2 *Pitsillides v. The Republic* [1983] 2 CLR 374.

THE MUTUAL ROLES OF RELIGION AND STATE IN CZECH REPUBLIC

JIRÍ RAJMUND TRETERA AND ZÁBOJ HORÁK

I. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

(1)

The Czech Republic is undoubtedly a State which respects religion and its value. The roles of Christianity and Judaism are often emphasised in Czech history. On the other hand, the State in the Czech Republic is constitutionally obliged to be neutral towards both religion and non-religion – it must not prefer a particular religion or ideology (including atheism). This is why statements made by State bodies are generally cautious in evaluating religion as such. But, from time to time, a positive evaluation is revealed in statements by State representatives, above all the Government and the President of the Republic, with regard to religion and its value to the State, society, and the individual. There are several recent examples:

1. The Policy Statement of the current Government of the Czech Republic, 4 August 2010 (issued at the beginning of its term of office), contains these words: “The government acknowledges the historical and irreplaceable position of the churches and religious societies as traditional institutions which are a part of society.”¹
2. The speech of the President of the Republic during the National Pilgrimage to St. Wenceslas, 28 September 2011, the Day of Czech Statehood, contains these words: “The St. Wenceslas Legend is one of the constitutive elements of our Statehood, it is and it has always been an authentic part of our self-perception and the context of our life. We have been grounded in the St. Wenceslas Legend,

1 Part V, Education, youth and sport, science and research, culture, see <http://www.vlada.cz/assets/media-centrum/dulezite-dokumenty/Policy-Statement-from-the-Government-of-the-Czech-Republic.pdf>.

we have continued it, it has been our inspiration and I would plead for continuation of it in the future.”²

3. The Act “On Property Settlement with Churches and Religious Societies”, was adopted by the Parliament of the Czech Republic, 8 November 2012, and published under No. 428/2012 Sb.³ on 5 December 2012. The aim of the Act is reparation of property wrongs committed by the communist regime to religions from 25 February 1948 till the end of 1989, and the abolition of State stipends for clergy. This settlement is not only a response to the challenge of the Constitutional Court to end 20 years of passivity by Parliament in this field,⁴ but also resolves this issue as a requirement of justice, and expresses the positive attitude of public authority to the churches and religious societies.

(2)

The profession of religion in the Czech Republic is considered a manifestation of personal freedoms. It promotes pluralism in a democratic society and contains significant moral and cultural values. In such a way, it enriches society. Religious organizations are considered as enriching society through various cultural, scientific, sport, educational and other non-profit activities. They are regarded as creators of social life and social cohesion.

However, in the Czech Republic, religion is not considered to be important in sustaining nationhood and the national conscience to the same extent as it may in some other European countries. The Czech historical tradition is divided into two streams: catholic and reformed.⁵ In the past, these streams competed with each other to play a leading role in the national community, even in the first half of the twentieth century. Both are minorities in the nation now and exist alongside the prevailing non-denominational groups of inhabitants. The numbers of adherents of other Christian and some non-Christian religions are small but, nevertheless, they are increasing. Therefore, the role of religion is regarded more as a connecting

2 See <http://tisk.cirkev.cz/res/data/134/015234.pdf?seek=1>.

3 Sb. = Collection of Laws of the Czech Republic.

4 The Decision of Constitutional Court of 1 July 2010, No. Pl. ÚS 9/07.

5 The Czech reformed tradition includes the ancient Hussite movement which later contributed to the spread of Protestantism.

bridge between social groups rather than an expression of Czech nationhood.

Be that as it may, religions played a significant role in opposing those totalitarian regimes which ruled over the country in the recent past (Nazism 1939-1945, Communism 1948-1989). This opposition is considered a factor in promoting democracy in the Czech Republic.⁶

Religions are not asked to assist the functions of the State in the Czech Republic. But, many of them help to provide care for prisoners and former prisoners after their return to normal life, care for soldiers, post-traumatic care for policemen and firemen, and care for the victims of criminal offences. They do so on their own initiative and conclude agreements with public authorities in order to fulfill these activities.

Moreover, religions perform certain cultural functions. Religious organizations look after thousands of historical monuments in towns and villages, such as churches, parish houses, monasteries and other buildings, including their richly decorated interiors. Religious organizations also play an important part in national music life, in many library, archival and museum activities, and in the public education system through both their own confessional schools of all grades and the teaching of religion at public elementary and secondary schools. The charitable work of religions has a profound effect on a wide range of people, such as those with severe disabilities, the terminally ill, the elderly, and mothers in difficult situations. The care is provided in special facilities and homes which are usually owned by churches.

The problem of particular religions which could be considered a threat to society, individuals and the State, was discussed during the process leading to the Act "On Churches and Religious Societies" prepared in 1999-2001. The Department of Churches of the Ministry of Culture, which prepared the bill, expressed the need to address this problem, especially in connection with the proposed liberalization of registration of churches and religious societies, namely, changing the requirement as to membership from 10,000 to

6 See J. R. Tretera, 'The Czech Bishop's Conference and the Process of Democratization in the Czech Republic', in: A. G. Chizzoniti (ed.), *Chiesa cattolica ed Europa centro-orientale, Libertà religiosa e processo di democratizzazione, Vita e Pensiero* (Milano, 2004), pp. 45-107, 551-605.

300 believers. The Department proposed that the Act should require that the teaching and activities of a church or a religious society be such as not to threaten (1) the rights, freedoms and equality of individuals and associations (including other churches or religious societies); (2) the democratic basis of the State, its sovereignty, independence, and territorial integrity; and (3) public morals and order, and not to be in any other way contrary to law. Moreover, religions must not be clandestine in whole or in part. These provisions were incorporated into the Act “On Churches and Religious Societies” No. 3/2002 Sb., as its Article 5.⁷

(3)

There is no general duty on the State to fund religion. But, State contributions are welcomed. Indeed, the State provides financial subsidies for those activities of religions which benefit the public e.g. religious schools, charities, etc.

(4)

Extra-legal documents of State bodies, containing political views on the role and value of religion in society, are very rare, as already mentioned above. However, the Parliamentary debate on the Bill to address the property settlement between the State and Churches and Religious Societies (see above) was very lively throughout 2012 until the November vote.

This Bill was prepared according to the Policy Statement of the Government of the Czech Republic of 4 August 2010 which was based on a political agreement between three political parties which formed the current coalition government:

“The government's aim is to conclude as soon as possible the question of a settlement between the state and the churches and religious societies so that certain wrongs can be made right and the churches and religious societies can then fulfil their functions independently of the state.”⁸

⁷ See <http://spcp.prf.cuni.cz/aj/3-02enb.htm>.

⁸ Part V, Education, youth and sport, science and research, culture, see <http://www.vlada.cz/assets/media-centrum/dulezite-dokumenty/Policy-Statement-from-the-Government-of-the-Czech-Republic.pdf>.

The Act concerns 17 registered religions. They were all consulted and the Bill was submitted to the Parliament of the Czech Republic. In the House of Deputies (Lower House) it was approved on the 13 July 2012. But parliamentary discussion reveals that the left-wing parliamentary opposition was strictly opposed to the Bill and the Senate (Upper House), along with the social democratic majority, rejected the Bill – 43 senators voted against (from a total number of 77 present). The Bill returned to the House of Deputies and was approved by the qualified majority 102 members (of a total of 200 members) on 8 November 2012. The opposition argued, above all, against large expenses involved at a time of economic crisis.

II. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

(1) The development of the State's understanding: outline

The State's political understandings of the role and value of religion in society changed rapidly in Czechoslovakia after the Velvet Revolution from November to December 1989.⁹ Over a short period (1990-1991), the whole legal system was substantially reformed and democracy was re-introduced after 40 years of totalitarian government. The constitutional changes were crowned by the Charter of Fundamental Rights and Freedoms from 9 January 1991, published as an enclosure to the Federal Constitutional Act No. 23/1991 Sb., and republished under No. 2/1993 Sb. as a part of the constitutional system of the Czech Republic upon dissolution of the Federal State.

Section 1 of Article 2 of the Charter declares: "The State is founded on democratic values and must not be bound either by an exclusive ideology or by a particular religion." This was the constitutional basis for several pieces of legislation which followed dealing with religious freedom and the position of churches and religion. The first was promulgated under No. 308/1991 Sb., and the second, currently in force, under No. 3/2002 Sb. The above-

⁹ See J. R. Tretera, Z. Horák, 'Czech Republic', in: M. Hill (ed.), *Religion and Discrimination Law in the European Union* (Oxford, 2011, published in Trier, 2012), pp. 87-88.

mentioned provision of the Charter formed the basis of the decision of the Constitutional Court of 27 November 2002, which struck down some provisions of Act No. 3/2002 Sb.¹⁰ The legislation from 1990-1991 was shaped by political ideas at that time which stressed the need for the religious freedom of individuals and religious organizations and their freedom from State interference. The legislation, whose roots lie in the post-revolutionary period, affect political decisions even today.

(2) The State's recognition of the value (and danger) of religion

(a) The State's recognition of the value of religion is most evident in its adoption of religious freedom and securing of free profession of religion in public. Religious freedom is protected expressly by Articles 15 and 16 of the Charter of Fundamental Rights and Freedoms. Article 15 (1) states explicitly that everybody has the right to change his or her religion or faith, or to have no religious beliefs. Article 16 (1) concerns the right to profess freely a personal religion or faith, alone or jointly with others, through religious services, instruction, religious acts, or religious rituals. Religious freedom is guaranteed to everyone, not only to members of recognised (registered) religious communities.¹¹ Article 16 (2) of the Charter refers to the collective dimension of religious freedom. It covers the freedom of religious communities to administer their own affairs: in particular, to constitute their organisations, appoint their clergy, and establish religious orders and other church institutions independently of the institutions of the State. Limitations upon the exercise of these fundamental rights under the provisions of Article 16 (4) are very similar to those under the Article 9 (2) of the European Convention on Human Rights. Such limitations provided by law are justified if they are necessary in a democratic society for the protection of public security and order, health, and morality, or the rights and freedoms of others. When applying the statutory limits, the substance and purpose of the respective rights must be respected – Article 4 (4). In addition, Article 17 deals with freedom of expression, Article 19, the right to assemble, and Article 20, the

¹⁰ This decision of the Constitutional Court was published under No. 4/2003 Sb.

¹¹ There are 33 registered religions in the Czech Republic: 21 registered before 2002, 12 registered 2002-2012.

right to associate – these may also be seen to implicitly protect religious freedom.¹²

(b) The protection of religious sentiments and protection against hate speech are implemented by the Criminal Code Act, No. 40/2009 Sb. This protects the human dignity of believers and their convictions. The protection applies equally to all religions and beliefs, including atheism. Defamation of religion or atheism, religious hate speech, and anti-religious hate speech may be punished if extreme. The Criminal Code also contains offences dealing with Restriction of Freedom of Religion (§ 176), Incitement of Hatred to a Group of Persons or Restriction of their Rights and Liberties (§ 356), Genocide (§ 400), Assault against Humanity (§ 401), Apartheid and Discrimination of a Group of People (§ 402), Founding, Supporting and Propagating a Movement Aiming at Oppressing Human Rights and Liberties (§ 403), Expressions of Affection for a Movement Aiming at Oppressing of Human Rights and Liberties (§ 404), Denial, Casting Doubts on, Conniving and Justifying of Genocide (§ 405), and Persecution of Inhabitants (§ 413).¹³

(c) Religion, public and social festivals, *and* school holidays: All Saturdays and Sundays during the year are free and cannot be translated. Christmas and Easter are state holidays and form part of the national cultural heritage. Christmas holidays last for three days now, from 24 until 26 December, and Easter Monday is also a state holiday. There are three other state holidays that have religious roots: the Day of the Slavonic Missionaries St. Cyril and Methodius on 5 July;¹⁴ the Day of the Burning at the Stake of Master John Hus on 6 July;¹⁵ the Day of Czech Statehood on 28 September,

12 See J. R. Tretera, 'State and Church in the Czech Republic', in: G. Robbers (ed.), *State and Church in the European Union* (Baden-Baden, 2005), pp. 43-44.

13 See Z. Horák, 'Religion and the Secular State in the Czech Republic', in: J. Martínez-Torrón, C. W. Durham (eds.), *La religion et l'État laïque/Religion and the Secular State, Interim National Reports* (Provo, Utah, 2010), p. 260.

14 St. Cyril, monk, and his brother St. Methodius, archbishop, came in 863 from the Byzantine Empire to Great Moravia, the old Slavonic State spread across the territory of the Czech Republic and Slovak Republic.

15 Jan Hus, a catholic priest and a rector of the Charles University in Prague, was burnt at the stake on 6 July 1415 during the Council of Constance because of his theological views on reform of the Church. This directly affected the Hussite movement in the fifteenth century.

which is the day of the death of the Czech martyr Prince St. Wenceslas in 929. According to an order of the Ministry of Education, Youth and Sports, published under No. 16/2005 Sb., school vacations are longer: the Christmas vacation lasts from 23 December to 2 January, and the Easter vacation is Maundy Thursday, Good Friday and Easter Monday. This order binds all schools. Pupils do not have the right to take other religious holidays at public schools. But, the school director may for good reason give all pupils 5 days' free time. One reason may be the religious holidays of different denominations. In church schools, holidays are usually taken according to the church customs of their founder. It concerns all pupils. In Jewish schools, for example, all pupils (not only Jewish pupils), have time off during Jewish holidays.¹⁶

(d) Public symbols: Religious symbols, such as crucifixes, wayside shrines, Stations of the Cross, Trinity and Marian columns, St. John Nepomuk statues, stone conciliation crosses, and others, are considered as a traditional embellishment of the Czech landscape. All are protected by the law as religious symbols. The same protection is provided for Christian and Jewish cemeteries. Religious symbols are not used in State and municipal buildings. The law does not prohibit it, but it is not a custom to use them in such spaces. Citizens and other inhabitants are free to wear religious symbols (such as a cross or a Star of David stars or a Hussite chalice at the neck) in public, e.g. in public schools. This matter is of particular concern to pupils, teachers and other staff. Any restriction should be considered as contrary to religious freedom, which is secured by the Constitution. On the other hand, it must be emphasised, the inhabitants of the Republic do not wear such symbols often or in ostentatious form; this may be attributable to a long-established civil tradition in use from pre-communist times.¹⁷

(3)

These areas of law illustrate that the State values religion *per se*. Above all, this is the result of historical tradition and recognition of

16 See J. R. Tretera, Z. Horák, 'Religion in Public Education in the Czech Republic', in: G. Robbers (ed.), *Religion in Public Education* (Trier, 2011), pp. 110-111.

17 *Ibid.*, p. 108.

a European culture based on Christianity and Judaism. But, it is also the result today of State recognition of religious freedom.

(4)

There are many judicial decisions grounded in the idea that religion is valuable to the individual, society and the State. In the above-mentioned decision of the Constitutional Court of 27 November 2002, the Constitutional Court struck down several provisions of Act No. 3/2002 Sb. The Court states in the grounds of its decision:

“However, in the Constitutional Court’s opinion, this limitation clearly does not correspond with the purpose and mission of churches and religious societies. As stated elsewhere in this finding, the task of these entities cannot, under any circumstances, be reduced to the mere profession of a particular religious faith – as the contested provision de facto says – but their role in society is considerably wider and also consists of radiating religious values externally, not only through religious activities but also, e.g. charitable, humanitarian and general educational activities. Therefore, limiting churches and religious societies to freely making use of their legally obtained income only in the area of professing religious faith is an arbitrary interference on the part of the State in the private law essence of these entities, and this interference is clearly not legitimized by any relevant public interest; ...”.

(5)

Churches and religious societies expressed their full agreement with the decision of the Constitutional Court of 27 November 2002. Moreover, representatives of the Government and of 17 churches reached an agreement to effect a partial property settlement in the relationships between the State and churches on 25 August 2011. The general approach of religions to State legislation and case law concerning the role and value of religion is positive. Statements of the Czech Bishops’ Conference, Ecumenical Council of Churches in the Czech Republic, Federation of Jewish Communities, and individual religions emphasise that religions are keen to continue the cooperation system which respects the autonomy of religions.

THE MUTUAL ROLES OF RELIGION AND STATE IN ESTONIA

MERILIN KIVIORG

INTRODUCTION

When the Estonian Constitutional Assembly held heated discussions over each provision and meaning of the draft Constitution of the Republic of Estonia (after the regaining of independence from the Soviet Union in the 1990s), there was no real discussion about the provisions relating to freedom of religion or belief and the relationship between State and Church/Religions. It clearly was not one of the priorities. While this fact may have been indicative of the future relationship between the State and Religion, it also gave considerable room to develop gradually this relationship and to determine what the mutual roles of religion and state are. As to identifying where Estonia stands in terms of the classification of the relationship today, it probably fits, most comfortably, into the category of cooperation systems. The Estonian constitution expressly protects freedom of religion for individuals and religious communities. There is no State Church, but cooperation between the state and religious communities has been accepted within the limits of law.

The low priority of religion in the Constitutional Assembly debates can also be explained by the fact that compared to Lithuania or Poland, historic religious traditions and national identity have been weakly connected for Estonians.¹ Most Estonians do not belong formally to any religious organisation. It should be said that no church has really won the hearts of Estonians. It has been argued that this is due to Soviet occupation and atheistic education. This is only partially true. In contrast, for example, to Scandinavia, the Estonian Evangelical Lutheran Church (hereinafter EELC)

1 A. Kilp, 'Secularisation of Society after Communism: Ten Catholic-Protestant Societies', in: A. Saumets & A. Kilp (eds.), *Religion and Politics in Multicultural Europe*, (Tartu, 2009), p. 226.

never managed to become the national church of Estonia.² For example, *Saard* has pointed out that until the early twentieth century Lutheranism had a colonial nature in Estonia: ‘the mentality showed its first signs of retreating only in the 1920s’.³ Additionally, pre-Soviet (first period of independence 1918-1940) statistics show definite signs of secularisation in the Estonian society already in the 1920s and 1930s.⁴ In the 1920s leading anticlerical politicians almost managed to eliminate religious education from schools.⁵ The above may leave an impression that the Estonian society may be hostile to religion. It is true that the Euro barometer survey carried out in 2005 showed that Estonia was the most sceptical country in Europe in regard to belief in the existence of God. Less than one out of five declared any belief in God (approximately 16 %). However, this probably shows a relative coolness towards traditional religions. More than 54 % were shown to believe in a non-traditional concept of ‘some sort of spirit or life force’.⁶ Although there are discrepancies between different surveys, they seem to suggest that religion is both an individual and private matter in Estonia. These surveys also give one confidence in saying that the majority of the Estonian population is not hostile to religion.

It has been pointed out that the strong secular orientation of the Estonian society has a direct effect on everyday politics today. Religion is not at the forefront of political debates and does not feature as a main characteristic of any political party in parliament. There are no influential Christian parties in Estonia.⁷ Issues of mo-

2 See, e.g., M. Ketola, ‘Some Aspects of the Nationality Question in the Lutheran Church of Estonia, 1918-39’, *Religion, State and Society* 27, No. 2 (1999), p. 239.

3 R. Saard, ‘The Church at Decisive Periods of National Identity in the 19th and 20th Centuries’, *Estonian Culture* IX (2007).

4 Statistical Office of Estonia, ‘2000 Population and Housing Census: Education, Religion’ (Tallinn, 2002), p. 40.

5 P. Valk, *Ühest heledast laigust Eesti kooli ajaloos*, (Tallinn, 1997); M. Kiviorg, *Religion and Law in Estonia* (The Hague, 2011).

6 European Commission, ‘Special Eurobarometer: Social values, Science and Technology’ (2005), p. 11.

7 The Estonian Christian Democrats Party (*Erakond Eesti Kristlikud Demokraadid – EKD*) is not represented in the Parliament. According to the Central Commercial Register (*Äriregistri teabesüsteem*) it has only 2073 members, which places it amongst the small political parties in Estonia. Data updated to 30 June 2010. Central Commercial Register, https://ariregister.rik.ee/erakonnad.py/liikmed_list, 1 July 2010.

rality, family values, etc. are connected to nationalism and national identity rather than religion.⁸

However, it does not mean there have been no debates at all over the years. There is an ongoing public and political debate regarding the role and preferential treatment of traditional religious communities. This debate is related to wider questions about the identity or the (re)-building of the Estonian identity after the collapse of the Soviet Union, and more recently in the context of belonging to the EU and the ever more global world. The role of the Government has been criticized for trying to force one brand of religion on Estonians. Due to historical reasons, any ideological push, however small, to one direction seems to make large segments of society uncomfortable. Religion is not perceived as a problem in Estonia as long as it remains in the private sphere.⁹

I. STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

The cooperation between the State and religions that has evolved after the collapse of the Soviet Union indicates recognition of the value of freedom of religion or belief, and the value of religion to an individual's identity. The State has also recognised the importance of religious organisations in contributing to public functions. The cooperation between State and Church (religious communities) has been accepted in many areas of common social concern (education, health, rehabilitation, unemployment, crime prevention, etc.). To some degree, the cooperation also reflects and contributes to the fulfilment of the idea of a welfare state enshrined in the Estonian Constitution.¹⁰ In this regard, the cooperation has a very pragmatic nature.

8 L. Kalev, M.-L. Jakobson, T. Saarts, 'Eesti poliitiline kultuur: alusväärtused', *Riigikogu Toimetised* 18, 2008.

9 R. Ringvee, 'Sallivus ja religioon Eestis' [Tolerance and Religion in Estonia], *Virumaa Teataja*, 19 September 2007.

10 Article 10 of the Estonian Constitution sets forth that Estonia is a State based on social justice. This brings the ideas of welfare state into Estonian legal system. The provision is located in the Chapter of Fundamental Rights, Freedoms and Duties. This fact has importance regarding its interpretation. However, the welfare state concept embodied in the above constitutional provision has never been explicitly

It can be argued that the State also sees the role of religious organisations alongside other non-profit/third sector associations in developing active civil society. In 2002 the Estonian Parliament approved a policy paper on the 'Development of Estonian Civil Society'.¹¹

Although in this policy paper there is no explicit mention of religious communities they are clearly among the non-profit making organisations considered to be important participants in policy making and the development of civil society. In this policy document, the State clearly sees its role as a facilitator of this participation.

As to policy documents explicitly related to religion, on 17 October 2002, the Government and the Estonian Council of Churches¹² signed the Protocol of Common Concerns. This protocol provides a broad basis for specific contracts and cooperation in fields of common interests (education, preservation of culturally important objects, financing, international relations, chaplaincy, etc.). The preamble of the agreement makes some general observations concerning the need for such cooperation. It emphasises the fact that because of the tragic past of Estonia and atheistic propaganda during the Soviet occupation there is a serious lack of knowledge about and interest in spiritual matters. The role of education about different religions and the importance of integration of different segments of society are also stressed, and ecumenical/Christian cooperation is seen as a leading force in helping to solve many of these problems. The protocol also establishes the ground for research on the current state of and changes in religious/spiritual needs and values of the Estonian population. The preamble declares that the future of the State and the nation depend on the quality of the next generation, and in this regard, devotion to family and youth work carries special importance. Hence, it is quite a significant agreement, which involves cooperation in citizenship

discussed at the political arena when the relationship between the State and religion (religious communities) is addressed.

11 Tallinn, 12 December 2002.

12 The Estonian Council of Churches consists of 10 Christian Churches. The Estonian Council of Churches is a rather unusual ecumenical organization (registered as a non-profit organization) which has members who normally are not interested in ecumenical cooperation. It also includes churches with a relatively short history.

building. It clearly makes statements which go beyond simple recognition of the importance of religious organisations in fulfilling public functions. It can be seen as recognising a role for churches in contributing to social cohesion, nationhood, and the national conscience. This agreement has not been favourably looked upon by non-Christian communities. Although it has been argued that other religious organisations have in principle the right to seek the same type of cooperation, no other religious organisation has yet been able to establish it. However, it is fair to note that Christian communities generally have been more active and capable of initiating and applying socially relevant projects. Considering the latter, one can argue that, to some degree, it is only logical that cooperation with the State follows. These communities are more organised and they already have the capacity to take on these tasks. However, whether this alone should justify the State not seeking a more even involvement of various religious communities is a matter of debate in Estonia.

Some further examples can be given of policy papers indicating the State's position on the value of religion to the State, society and individual. On 11 March 2003, the Estonian government approved a policy paper '*Pühakodade säilitamine ja areng*' (Preservation and Development of Sacred Buildings). The paper provides a basis for several legislative and financial actions to support the development of churches over the period from 2004 to 2013. On the basis of this paper, which recognises the historic, cultural and communal importance of Christian Churches, allocations are made every year from the State budget. The immediate aim is to restore culturally and artistically important buildings. The majority of churches having historical value belong to EELC and the Estonian Apostolic Orthodox Church (hereinafter EAOC), but also to other minor communities.

However, this policy paper has a wider purpose, as it sees Christian Churches as partners of the State. For example, it sees churches as having an important role not only in preserving national identity and cultural heritage, but also in carrying out social work, educating the young, fostering regional development and community life in the countryside with high unemployment and in providing people with spiritual guidance by educating them on religious matters after the vacuum caused by the Soviet times, in

doing so giving them support in a globalising world. Thus, financial contributions from the state may extend beyond the mere preservation of sacred buildings. As stated in the policy document, the basis of this wider goal is the aim expressed in the Estonian Constitution - to preserve the Estonian nation and culture.

Cooperation with religious communities and financial subsidies by the state for the common good have been accepted; however, how extensive such cooperation should be is hotly debated and has caused non-Christian and secular communities to express concerns about equal treatment. These problems have also been pointed out by the Chancellor of Justice in one of his annual reports, where he has quite rightly observed that ‘many of the issues in this field tend to remain outside the sphere of the Constitution and a debate and agreement in society is needed to find an answer to them’.¹³ The statement also reflects the reality that Estonian national identity may not be so easily ascertained. Moreover, as stated in the introduction, for historical reasons, any ideological push to one direction will make large segments of society uncomfortable.

As the active cooperation of the State with Christian Churches has been under criticism for some time, slight changes of direction have emerged, which indicate that both the State and Churches look for wider acceptance of this cooperation in society. With the initiative of non-Christian communities the Round Table of Religious Organisations (*Usuliste Ühenduste Ümarlaud*) was established in April 2001. The Round Table comprises non-Christian movements in Estonia and was established with the aim of presenting their views more successfully in their relationships with the State. It was created in consideration of the fact of State favouritism towards Christian religions. When it was initiated, new proposals about religious education were hotly disputed in society.¹⁴

13 The Annual Report 2003-2004 of the Chancellor of Justice of Estonia (Tallinn, 2005), p. 63; Chancellor of Justice, <http://www.oiguskantsler.ee/files/37.pdf>, 1 May 2010.

14 It seems that different fractions of Estonian society have finally agreed that good general education also includes knowledge about religions. More importantly, there seems to be an agreement now as to the proportions and methods of teaching about religions and ethics. It took 20 years to achieve this agreement. The major concern has been the content and purpose of the RE and how to strike a balance between Christianity and other worldviews. In this regard, the primary concern has been the protection of freedom of religion or belief of students and parents, both non-believers and non-Christians.

Today, the initiative and especially the community representing Estonian indigenous beliefs (House of Taara and Native Religions) have been able to contribute to policies on protection of the environment and the historical/cultural heritage. They have also received some financing from the State. In the 2009 budget allocations were made to the community representing the Estonian indigenous religion. The allocation was made for research on historical secret sites of the indigenous religion and for the project aiming at raising awareness about the preservation of nature.

To sum up, two major areas of academic/public debate can be detected in Estonia: (1) the role of major churches in Estonia, and (2) equal treatment of religions. There seem to be at least two different or even opposing views on how Estonia should be modelling its relationship between State and religion. The first one recognises the historical contribution of Christian churches in shaping Estonian culture, values and identity; however, it takes into account the diversity of beliefs (in past and present), and the fact that Estonia may be considered to be one of the least religious countries in Europe.¹⁵ This view places the emphasis on individual and collective freedom of religion or belief and sees the privileged position of churches as strongly debatable in Estonian society. However, cooperation between religious organisations (not just Christian churches) and the State in mutual fields of interests is recognised. The second view is based on the historical importance of Christian churches in Estonia – and the more active role and privileged position of churches is seen as necessary to shape Estonian statehood and perhaps its post-Soviet identity. The latter view is not so dominant in academic circles (or in public debate generally), but rather reflects current policy choices and strong symbolic gestures by key political figures in support of major churches.¹⁶ It also reflects how part of the EELC sees its own role.¹⁷

15 This, of course, would depend on the criteria which is used to assess religiosity of the population.

16 The current Prime Minister (Andrus Ansip – Reform Party) regularly takes part in public events organized by the Church. However, this has been common practice throughout recent Estonian history, and cannot be attributed solely to the policies of one party or government.

17 There are different understandings of the State and Church relationship within the Church itself. Roughly speaking, the conservative wing of the Church sees its fu-

These two contradicting views were most visible in the quarrel over the liberty statue, which was erected to commemorate the Estonian War of Liberation against Bolshevik Russia and Baltische Landeswehr (1918-1920). Part of the liberty statue is a cross, which triggered heated debate over its symbolic meaning and value in contemporary Estonian society. The religious dimension of the debate was fuelled by the fact that the head of the selection commission (established with the decision of the Estonian Government to select the project and design submitted on public competition) was the Archbishop of the EELC. It was argued that his nomination as a leader of the commission did not guarantee impartiality as regards different worldviews represented in Estonia.¹⁸ At the time even the Estonian President mentioned in his interview with a major newspaper that unfortunately the Estonian public had not received a clear answer (from the commission) as to what the statue symbolised in order to assess the proposed design of the statue.¹⁹ The cross forms a prominent part of the statue and is its major feature.

It has been explained now that the cross symbolises the Liberty Cross (*Vabaduse Rist* – a high State honour meant to be given for exceptional bravery). It was established during the first independence period, but has never been awarded to anybody. Now situated at the top of the statue, it is symbolically given to the Estonian people. However, the meaning of the cross still creates debates. It is justified to say that whatever it symbolises, it does not symbolise the unity of Estonian society over the questions regarding religion. Perhaps some sort of consensus should have been reached in society before the statue was erected.

As to areas where the State has seen religion as a threat to society, the individual and the State, reaction to so-called new religious movements (NRMs) can be pointed out. At the beginning of the 1990s there was an influx of an increase in the activity of NRMs.²⁰

ture in a closer relationship with the State and more progressive wing in an active mission amongst the Estonian population.

18 See, e.g., 'Avalik pöördumine', <http://www.vabadusesammas.co.ee>, 1 May 2010; M. Kala, 'Riik ja kirik – koos või lahus?', *Postimees*, 11 September 2007.

19 *President Ilvese intervjuu ajalehele Postimees* 1 September 2007, <http://www.president.ee/et/meedia/intervjuud.php?gid=102298>, 1 May 2010.

20 The expression 'NRM' here does not mean necessarily absolute or world novelty, but rather novelty in Estonia or Europe. In this sense, it includes, for example, nine-

It is probably right to say that there was a phobia against these movements in society and correspondingly in politics. These movements were popularly considered dangerous, particularly in the 1990s. According to one of the surveys in 1998, both Estonians and Russians in Estonia had the most negative views about Jehovah's Witnesses.²¹ To be blunt, on the one hand, this was related to ignorance about different religious beliefs generally, and, on the other, it showed that Estonian society was not used to active proselytising. The activities of traditional religious communities known to Estonians were simply very different.

At the first reading/discussion of the 1993 Churches and Congregations Act in Parliament concern was raised as to the influx of the NRMs to Estonia. It was pointed out that the ideological background of many of these organisations is unknown in Estonia. It was suggested to include in the law a provision which would allow a government official to suspend activities of a religious person or organisation on the suspicion of illegal activities (this had an analogy in the 1934 Churches and Congregations Act).²² Eventually the provision was not included in the 1993 law.²³ The matter was/is in the competence of the Estonian courts and is regulated by generally applicable (criminal) law.

It is probably right to say that by 2002, widespread phobia in society against the NRMs was over. Accordingly, it got reflected in politics too. Before the adoption of the 2002 Churches and Congregations Act by the Estonian Parliament, the Estonian Council of Churches sent a letter to the parliamentary commission asking it to take measures in the new law to limit the activities of 'non-constructive religious communities'. This proposal did not get political support. Despite the phobia in the 1990s, it needs to be em-

teenth-century communities such as Jehovah's Witnesses or the Bahá'í. It is not used here as a pejorative term. The choice of the term seeks to emphasize neutrality and is preferred to terms such as 'sects' or 'cults' which seem to have clearly negative connotations in Europe.

21 R. Liiman, *Usklikkus muutumas Eesti Ühiskonnas* [Religiosity in Changing Estonian Society] (Tartu, 2001), 84. They were negative towards Muslims and Hindus as well (Estonians were slightly more negative regarding Muslims than Russians).

22 'Kirikute ja koguduste seaduse esimene lugemine (A. Veidemann)', *Riigikogu stenogramm, II Istungjärk*, 4 April 1993.

23 RT I 1993, 30, 510.

phased that Estonia has never been a place of serious anti-cult movements.

Muslims have lived on the Estonian territory since the eighteenth century.²⁴ The majority of Muslims are ethnic Tatars. They have integrated well into Estonian society and there is no reason to associate them with radical Islam. *Linnas* has pointed out that Islam in Estonia is liberal and has lost many of its specific features. There are also no visible signs of this faith in the public domain. She also notes that Estonian society is tolerant of Muslims which she attributes to the traditionally indifferent attitude of Estonians to religious matters in general.²⁵ Before Estonia joined the EU in 2004, there were discussions on the possible influx of migrants from traditionally Muslim countries, or Muslims from other EU countries. So far, there is only a limited number of new arrivals. They are from different global regions and do not form any significant ethnic religious communities. Estonia is not yet facing any of the challenges related to the growing Muslim communities experienced in other European countries. The openness of the Estonian society to the possible influx of Muslim communities has been a topic in public debates. This influx is not necessarily seen as a threat but definitely a great challenge. Concerns have been expressed as to the capacity of Estonia to welcome new arrivals, because of its small population and the already existing large Russian-speaking minority. It is also fair to say that the State has not conceptualised how to respond to possible challenges that new immigration may bring along. The State has only focused on applying conservative politics to immigration issues as a primary solution to avoid potential problems.²⁶

24 M. Kiviorg, *Religion and Law in Estonia* (The Hague, 2011).

25 R. Linnas, 'Islam Eestis' [Islam in Estonia], in: L. Altnurme (ed), *Mitut usku Eesti* (Tartu, 2004), p. 65. The author of this article is not convinced that this indifference or tolerance would in all cases extend to new immigration. Some recent surveys show that Estonian society might not be so tolerant after all. OECD (2011) 'Society at a Glance – OECD Social Indicators' www.oecd.org/els/social/indicators/SAG.

26 P. Pullerits, 'Eesti sõnum võõrastele: te ei ole siia teretunud!', *Postimees*, 16 October 2009. Currently immigration is discouraged although all forms of immigration are possible, such as family reunification, immigration for work and study purposes, asylum and protection from inhuman treatment.

II. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

The Constitution and main Legislative Acts (Non-profit Organisations Act and Churches and Congregations Act) reflect the political recognition of the importance of religion for individual identity. These laws also reflect recognition of the importance of collective expressions of religion for individuals. The recognition of the value of religion to individual identity is reflected in the general right to self-determination of persons (both individuals and groups), which stems from Article 19 of the Estonian Constitution. Article 19(1) of the Constitution states that: 'all persons shall have the right to free self-realisation'. The importance of religion for individual identity is further protected by Article 40 of the Constitution, which sets forth everyone's right to freedom of conscience, religion and thought. The right to religious (church) autonomy is considered to be an essential part of collective freedom of religion which is protected by Article 40 of the Constitution and by the Articles 48, 19(1) and 9(2).²⁷ To a large extent, it can be argued, that the Constitution and principal laws recognise the value of religion to others (individuals) rather than valuing the religion per se.

State recognition of the value (but also the danger) of religion to individuals is most evident in the Constitution. Article 40 itself states that freedom of religion, 'alone or in community', is assured 'unless it endangers public order, health, or morals'. In addition, the Constitution contains four general limitation clauses: the first sentence of Article 3(1),²⁸ Article 11, Article 13(2),²⁹ and Article 19(2). Article 11, however, is the most important limitations clause: 'Rights and liberties may be restricted only in accordance with the Constitution. Restrictions may be implemented only insofar as they are necessary in a democratic society, and their imposition may not distort the nature of the rights and liberties.' Thus, every case of restriction of rights and liberties has to be justified and pass the test of proportionality. Article 19(2) constitutionalizes

27 This was expressly stated in the Presidential veto to the 2002 Churches and Congregations Act, RTL 2001, 82, 1120.

28 'State power shall be exercised solely on the basis of the constitution and such laws which are in accordance with the constitution.'

29 'The law shall protect all persons against arbitrary treatment by state authorities.'

the common-sense idea that, in exercising their rights and liberties, all persons must respect and consider the rights and liberties of others ('and observe the law').³⁰ As to other laws re-affirming the constitutional principles, incitement to hatred, violence or discrimination on account of religion is forbidden by § 151 of the Penal Code (*Karistusseadustik*) if the incitement has caused risk to a person's life, health or property. Granting special privileges or restricting the rights of a person on religious grounds is forbidden in § 152.³¹ It should be mentioned that in Estonian law there is no provision *expressis verbis* prohibiting proselytism and there are no blasphemy laws.

The Estonian Constitution encompasses several important principles determining the relationship between State and religious communities. Article 40 of the Constitution stipulates the principle of institutional separation of the State and religious associations: 'There is no State Church'. However, as noted, this has not been interpreted as a rigorous policy of non-identification with religion. Cooperation between the State and religious associations in areas of common interest is an established practice today. Thus, the principle 'there is no State church' is not interpreted similarly to disestablishment in the United States or the principle of *laïcité* in France. It has been pointed out that the Estonian Constitution does not make any reference to secularism as a constitutional principle. However, the stipulation 'There is no State Church' is referring to the principle of neutrality.³² The principle of neutrality in the Estonian Constitution is a reflection of the neutrality and impartiality principle adopted by the European Court of Human Rights, which should be understood as an obligation of the State to be a neutral and impartial organiser of various beliefs. *Maruste* rightly observes that under the Estonian Constitution the State needs to be careful when giving preference to one religious community over another - the justification for doing so must be objective and reasonable, especially when financial subsidies or public services are in-

30 See R. Alexy, 'Põhiõigused Eesti põhiseaduses' [Fundamental Rights in the Estonian Constitution] *Iuridica, eriväljaanne* [the special issue] (2001), pp. 5-96.

31 RT I 2001, 61, 364; last amended RT I 20 December 2012, p. 3.

32 *Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne* [Commentaries on the Estonian Constitution] (Tallinn, 2002), p. 121.

volved.³³ In this regard, he makes special reference to the equality principle. As mentioned above, there have been heated debates over preferential treatment of Christian Churches in Estonia. It is probably fair to say that the meaning of the principle of neutrality as regards religion is still under construction in Estonian constitutional theory and practice. There have been no court cases to clarify how principles of neutrality and equality need to determine the mutual roles of the State and religion. In total, only a very few cases related to religion have been decided by courts and they do not necessarily shed light on how the courts interpret the role of religion.

The religious freedom clauses in the 1992 Constitution were followed by the 1993 Churches and Congregations Act (*Kirikute ja koguduste seadus*).³⁴ When the drafting of the new law started in the early 1990s, there was pressure from the EELC for special legal status. The Church in question also proposed to make a distinction between 'old' and 'new' religions.³⁵ The head of the Office for Religious Affairs expressed her concerns in the official newspaper of the EELC. She pointed out that small churches have problems, not least attempts by the Lutheran Church to take hold of all key positions. 'Some representatives of the Lutheran Church support the idea of a State Church although they do not want to admit this in public.'³⁶ It needs to be emphasised that there was no unified approach in this regard within the EELC itself.

Ringvee points out that in line with the general libertarian trend in Estonian policy making at that time, the 1993 law did not eventually follow the tradition in many Continental European countries of a multi-tiered system of legal recognition of religious associations.³⁷ This tradition was followed in many other post-socialist countries. The 1993 law treated all religious associations equally,

33 R. Maruste, *Konstitutsionalism ning põhiõiguste ja – vabaduste kaitse* [Constitutionalism and Protection of Fundamental Rights and Freedoms] (Tallinn, 2004), p. 522.

34 Churches and Congregations Act, RT I 1993, 30, p. 510.

35 V. Jürjo, 'Kas riigikirik?' [A State Church?], *Eesti Kirik*, 17 December 1992.

36 A. Veidemann, 'Toimetuse helistas' [Phone Call to the Editor], *Eesti Kirik*, 18 June 1992.

37 See, e.g., R. Torfs, 'Experiences of Western Democracies in Dealing with the Legal Position of Churches and Religious Communities', *Religious Studies Review* 1, No. 1 (2007), pp. 67-73.

regardless of membership numbers or length of existence.³⁸ Ringvee observes that:

The 1993 law established the subsequent liberal policies on religion in Estonia. There were various reasons for this liberal approach. After independence in 1991, Estonia chose the road of radical liberal reform in both economic and social life, and these reforms had their effect in the field of religion. The principle of the free market was introduced to the religious sphere, and it turned out to be well suited to the generally individualist mentality of Estonians.³⁹

In the process of drafting the new Churches and Congregation Act, in 2002, debates about preferential treatment of some religious organisations intensified once again. The representatives of the EELC proposed the idea that larger churches should have a special status as legal persons in public law or that their relations with the state should be regulated by bi-lateral agreements. This idea again did not get support from smaller religious communities or from the legislature. The arguments put forward for preferential treatment were not fully substantiated and explained. Firstly it was argued that as larger churches had preferential treatment before the 1940s (i.e., before Soviet occupation), they simply needed to continue having it now. It was also not clear what public legal status would entail in an Estonian context. There is no legal tradition in Estonia comparable to the German experience as to the status in public law of some religious communities.⁴⁰ Secondly, it was argued that traditional Churches, like the EELC and the EAOC cannot organise themselves under the law in accordance with their own understandings of their internal organisation. The latter concerns were sufficiently taken into account in the drafting of the 2002 Churches and Congregations Act. Today, the commentaries of the Estonian Constitution point out that the public legal personality of churches

38 R. Ringvee, 'State, Religion and the Legal Framework in Estonia', *Religion, State and Society* 32, no. 2 (2008), p. 185.

39 *Ibid.*, p. 186.

40 G. Robbers, 'State and Church in Germany', in: G. Robbers (ed.), *State and Church in the European Union* (Baden-Baden, 2005). However, some religious communities enjoyed status in public law, before the first independence period, during the Tsarist times in Estonia. See W. Meder, 'Ülevaade Eesti kirikuõigusest', *Õigus* 1 (1938), 10-26.

would be in contradiction with the requirement that there is no State Church.⁴¹

However, it should be noted that although not incorporated in law, the reality of Church and State relationships indicates that Estonia might not be so different from the most common European model guaranteeing religious freedom as such at one level, but granting certain (additional) advantages and privileges to a limited number of religious groups. This can be seen, for example, in the aforementioned cooperation between Christian Churches and the State which extends to citizenship-building, financial subsidies, the prominent position of Churches in public and social festivals, and strong symbolic gestures by key political figures in support of major churches.

As to how religions themselves see their role to be reflected in law, a couple of examples can be given. The Archbishop of the EELC has criticised the State for trying to treat all religions and ideologies equally and for laws that are far too liberal.⁴² In his vision, the Church needs to become an inseparable part of life in the Estonian nation. However, he makes the express distinction between becoming a State Church and becoming a National Church, referring to the latter as being the aim of the Church. The model of the State Church as subjecting the Church to State control is seen as undesirable. He envisages the future of the State and Church relationships in long-term bi-lateral agreements. He also criticises the Church itself as sometimes hoping for too much support from the State (he labels it as the mentality of thinking in favour of a State Church), and for a too passive attitude as to the development of the church and its relationship to the Estonian people. The Archbishop also points out that it is unrealistic today to talk about the

41 Eesti Vabariigi Põhiseadus: Kommenteeritud väljaanne [Commentaries of the Estonian Constitution], 2 täiendatud trükk (Tallinn, 2008), Article 40.

42 A. Pöder, 'Tulevikupeegeldusi kirikust', Paper given at the Scientific Conference: The Estonian Evangelical Lutheran Church on the Way to Tomorrow [Teaduskonverents Eesti Evangeelne Luterlik Kirik – teel homsesse] (Tartu, 2007). Religious organizations and clerics have expressed their negative views about abortion, euthanasia and homosexuality. These themes have generated some, but not extensive public debate. Several positive changes in laws have been carried out with the initiative of religious organizations. For example, family law now allows the authorization of clergy to register marriages, the alternative service was re-organized with an input from religious institutions (including Jehovah's Witnesses) and a chaplaincy service has been introduced in the armed forces and in prisons.

National Church comprising the entire Estonian population, but encourages church members in an active mission. Thus, he calls for the real public involvement of the Church. However, from his speech it can also be discerned that there are different understandings of the State and Church relationship within the Church itself. Roughly speaking, the conservative wing of the Church sees its future in a closer relationship with the State and a more progressive wing in an active mission amongst the Estonian population.⁴³

CONCLUSION

The above has highlighted that there is a slight discrepancy in the State's understanding of the role and value of religion depending on the perspective: legal or political. While Estonian laws are built on the principle of equality, the political approach since regaining independence from the Soviet Union has been to favour traditional Christian communities and especially the historically dominant EELC. Because there is no overwhelming support in society for these religious communities the State's political views on the role of Christian Churches in society and *vis-à-vis* the State have not always been received without opposition. As noted above, Estonian national or religious identity may not be so easily identified. Additionally, historical factors, including experience of forced-upon ideas especially during the Soviet times, have made Estonian society extra-sensitive to any ideological push (however small) in one direction. Despite the above, there are no dramatic drifts or problems regarding religion in Estonian society today. The mutual roles of religion and state are determined by generally amicable cooperation between religions, the State and society. To a large extent this cooperation has a pragmatic nature contributing to the common good, but it is aimed at protection and recognition of the value of religion to individual identity. Protection of the importance of religion for individual identity is also enshrined in various laws. How-

43 *Kilp* notes that far too close a cooperation may be tempting. In addition to its spiritual goals the Church has institutional interests. It needs to pay the bills. Dependence on allocations from the State budget may turn the Church into a timid domestic animal who does not want to disagree with its sponsor. A. Kilp, 'Religiooni ja poliitika vahekorra põhimõtetest Euroopa demokraatias', paper given at the EELC Conference on Christian Values in Estonian Politics (Tallinn, 2008).

ever, it is clear that discussion over the preferential treatment of Christian communities and especially the EELC will continue. The place of religions in Estonian society and their relation to this nation's identity will be a matter of debate for years to come. In recent years, probably due to European and global events involving religion, public debates over Estonian identity have intensified. Because of the fairly rapidly declining population (as indicated in the 2011 census) Estonia may also need to deal with problems of immigration sooner than it has expected. Dealing with increasing diversity will most likely add another twist to this local identity debate.

INTERFÉRENCES MUTUELLES DES RELIGIONS ET DE L'ÉTAT EN FRANCE

BRIGITTE BASDEVANT-GAUDEMET

La conception qu'une religion et un État peuvent avoir de leur interdépendance, de leurs appuis réciproques et parfois de leurs oppositions est étroitement liée au contexte social général dans lequel s'inscrivent les religions et l'histoire religieuse du pays. Ces données sont propres à chaque État, et à chaque religion. En conséquence, les situations sont très diverses selon les pays, même si une évolution européenne générale se dessine, atténuant ces diversités.

Pour nous limiter à la France, l'étude de la situation actuelle impose donc une prise en compte de l'histoire des relations entre religions et États, relations mouvementées et souvent conflictuelles. Le legs du combat des *deux France* pour reprendre l'expression d'Émile Poulat imprime sa marque dans les conceptions politiques comme dans les réalisations juridiques.

I. LA CONCEPTION EXPRIMÉE PAR L'ÉTAT DU RÔLE ET DE LA VALEUR DES RELIGIONS – ASPECT POLITIQUE

Les sources extra-légales sont nombreuses.

Les gouvernements et pouvoirs publics font de très nombreuses allusions à la place qu'ils assignent aux religions ou au fait religieux dans la société, que ce soit auprès de chacun des individus ou dans l'espace public.

Il peut s'agir de circulaires ministérielles (cf. infra II). Elles émanent le plus souvent (mais non uniquement) du ministre de l'Intérieur et sont élaborées, au sein de ce ministère, par le Bureau des Cultes.

Divers rapports officiels des principaux corps de l'État abordent le sujet, ou sont parfois expressément et entièrement consacrés à la question, comme le *Rapport public* établi par le Conseil d'État

en 2004 intitulé, *Un siècle de laïcité*¹. Plus récemment, un recueil a été établi par le Bureau des Cultes, à la demande du ministre de l'Intérieur Claude Guéant, intitulé *Laïcité et liberté religieuse, recueil de textes et de jurisprudence*².

Lors des campagnes électorales, ces thèmes sont fréquemment évoqués et les partis politiques expriment leurs opinions, différentes selon l'orientation de chaque formation.

La réception annuelle du Président de la République accueillant, début janvier, les représentants des grandes religions en France pour leur présenter ses vœux et ceux de l'État constitue toujours, pour le chef de l'État, l'opportunité de préciser les options de son gouvernement.

Les déplacements du chef de l'État, ou des membres du gouvernement, sont aussi des occasions d'importantes prises de position³.

Un chef d'État peut souhaiter recevoir certains honneurs, liés à une religion donnée. Nicolas Sarkozy avait ainsi reçu officiellement le titre de Chanoine honoraire de Saint-Jean du Latran⁴, au cours d'une cérémonie que ni Mitterrand, ni Pompidou n'avaient réalisée. Le sujet a été évoqué au lendemain de l'élection de François Hollande qui, à ce jour, n'a pas donné suite.

D'autres manifestations sont aussi l'occasion pour les pouvoirs publics de donner leur opinion sur un mouvement religieux, comme par exemple le dernier congrès du Rassemblement des Musulmans de France (RMF), la plus large organisation islamique du pays. La réunion se tenait au Bourget et s'ouvrait, en avril 2012, dans un climat de tension dû aux récents attentats commis à Toulouse. Le président Sarkozy avait demandé de veiller à ce qu'il n'y ait aucun

1 Conseil d'État, «Rapport public 2004, jurisprudence et avis 2003; un siècle laïcité», in Études et Documents du Conseil d'État, n° 55, Paris, La Documentation française, 2004, 480 p.

2 Édité par la Direction des Journaux officiels, avril 2011, 504 p. Il avait été projeté de qualifier ce travail de «Code de la laïcité», titre abandonné car il ne s'agit nullement de «codifier» le droit des religions, mais de mettre un recueil de textes à la disposition des utilisateurs.

3 Discours du Président Nicolas Sarkozy devant le pape Benoît XVI, au Palais du Latran, le 20 décembre 2007, ou à Riad en janvier 2008.

4 Titre honorifique que le chef de l'État de la France a le droit de porter depuis Henri IV.

appel à la violence et avait demandé la suppression de certaines interventions auparavant prévues.

Des débats d'ampleur nationale peuvent être projetés, comme ce fut le cas à l'automne 2009⁵, ou peut-être organisés.

Quel rôle l'État reconnaît-il à la (aux) religion(s)?

Sur ce point, l'étude de la situation du XXI^e siècle ne peut faire abstraction de l'histoire.

L'Ancien Régime a son influence mais nous ne l'évoquons que très rapidement: En France, dans le régime de la monarchie de droit divin, la religion catholique, celle du roi, de l'État, des sujets, assure la cohésion de la nation et de l'État⁶. Pour chaque individu, l'appartenance à la religion catholique est une condition nécessaire à la jouissance de l'ensemble des droits reconnus à un sujet du royaume. Le non catholique est «l'exclu»; exclu des fonctions publiques, exclu du droit de témoigner en justice, des actes qui doivent être passés sous serment, exclu d'un mariage régulier, du cimetière commun, etc. Il est tenu à l'écart, généralement considéré comme étranger ce qui, dans l'ancien droit, correspond à une condition discriminante très inférieure. Cette vue doit toutefois être nuancée car les mécanismes de naturalisation étaient très fréquemment utilisés afin justement de pouvoir assimiler l'ancien étranger aux régnicoles. À l'égard de l'État, la religion justifie l'autorité du roi, roi de droit divin, Roi Très Chrétien⁷, qui se pose depuis l'époque médiévale en protecteur de l'Église dont il garantit les privilèges, honorifiques, patrimoniaux et juridictionnels. Parallèlement, l'Église enseigne l'obéissance due au monarque. Surtout,

5 Un large débat sur «les valeurs de l'identité nationale», avait été annoncé par Éric Besson, ministre de l'Immigration, de l'Intégration et de l'Identité nationale, soutenu par d'assez nombreux militants de l'UMP. Pourtant, au sein même du gouvernement, certains avaient rapidement pris acte des oppositions soulevées par cette initiative. Il devait s'agir d'un débat tant sur la laïcité que sur l'identité, la cohésion nationale et l'Islam, preuve du lien, voire de l'amalgame, entre ces notions. Le débat n'eut pas lieu; le parti socialiste le qualifia de dangereux et inutile (Bertrand Delanoë, maire de Paris notamment). De tous bords, nombreux furent ceux qui craignant des dérapages xénophobes s'étaient élevés contre cette idée.

6 Voir notre contribution au colloque L'affiliation religieuse en Europe, Strasbourg, septembre 2012; voir aussi, Alain Tallon, Conscience nationale et sentiment religieux en France au XVI^e siècle, Paris, PUF, 2002, 315 p.

7 Henri IV, né protestant, est désigné «roi» selon les lois fondamentales du royaume; pourtant il n'accède véritablement au trône qu'après sa conversion au catholicisme.

Église catholique et roi s'accordent dans la répression des crimes contre l'État et la religion, au premier rang desquels vient naturellement l'hérésie. L'Église de France, l'épiscopat, les assemblées du clergé entendent aider le roi dans sa politique unificatrice du royaume en luttant contre les protestants.

L'idéologie révolutionnaire a voulu détruire cette union. À l'appui mutuel que s'apportaient les deux puissances, la Révolution a substitué une lutte parfois acharnée entre Église et État. Le changement ne s'est pas fait dès les tout premiers temps de la Révolution, mais s'est amorcé en 1792 pour culminer l'année suivante. Plus que les événements révolutionnaires eux-mêmes, ce fut l'image, de plus en plus forte, qui se forma au cours des décennies suivantes, présentant l'Église catholique indissociablement liée à une royauté d'Ancien Régime réactionnaire, refusant tout progrès et se heurtant au libéralisme, aux idées nouvelles, telles que Révolution et régimes républicains tentaient de les mettre en œuvre.

On ne saurait trop insister sur la classification des valeurs qui s'opéra en France au XIX^e siècle: Deux blocs antagonistes et irréciliables se formèrent à partir de l'analyse qui était alors faite de la Révolution⁸: Les partisans de l'un ou de l'autre des deux camps ne pouvaient que s'affronter. D'un côté, la défense de la République, de la Révolution, ou tout simplement des évolutions; de l'autre côté et dans une opposition que certains estiment irréciliable, l'Église que l'on présente alors comme indissociable de la réaction et de la monarchie. Si le schéma nous apparaît aujourd'hui comme discutable, et faux, il convient de ne pas minimiser son rôle au XIX^e et encore pendant une large partie du XX^e siècle: Église catholique et République sont inconciliables, l'Église apparaissant comme maintenant les populations dans l'obscurantisme. Cette vision, qu'elle soit exacte ou fautive, fut largement répandue dans l'opinion publique et la société pendant plus d'un siècle. Le Magistère romain l'adoptait aussi, dans son opposition au «nouveau gouvernement» français.

Alors que cette conception de la Révolution se développait dans la société, parallèlement, les pouvoirs publics, dans le cadre

8 Brigitte Basdevant-Gaudemet, «Quelques étapes de l'anticléricisme en France. Aux origines de la laïcité à la française», État et Église en Europe occidentale (19e-20e s.) dans une perspective d'histoire administrative, *Jahrbuch für europäische Verwaltungsgeschichte*, t. 14, 2002, p. 21-40.

du régime des cultes reconnus établi par Napoléon, prenaient en compte le facteur religieux, positivement ou négativement. Selon quel processus, ou sous quels aspects les religions étaient-elles prises en compte?

Si Napoléon avait organisé la reconnaissance juridique et institutionnelle des quatre grandes religions présentes sur le territoire, les gouvernements marquèrent néanmoins leur préférence, ou au contraire leur hostilité, pour telle ou telle de ces quatre religions. La Restauration voulut rétablir des liens très étroits avec l'Église catholique. On dit souvent que la Monarchie de Juillet fut aux mains de la bourgeoisie protestante. L'anticléricalisme de la fin du siècle eut l'Église catholique pour cible officiellement déclarée. Quant à l'antisémitisme, il en vint à viser une «race» alors qu'il concernait auparavant principalement une «religion». Dans ces oscillations, il est difficile de dire dans quelle mesure les pouvoirs publics demeuraient attachés aux valeurs proposées par les religions. Ajoutons que même les catholiques, tant la hiérarchie ecclésiastique que les autorités publiques, faisaient preuve d'un gallicanisme difficilement conciliable avec l'ultramontanisme que Rome aurait voulu imposer de ce côté-ci des Alpes.

Les valeurs des religions – ou de la religion dominante qu'était l'Église catholique – étaient alors supplantées par leur utilité publique. La paix sociale voulue par Bonaparte fut le premier motif des négociations avec Pie VII. Par la suite, ce fut l'utilité reconnue aux congrégations religieuses qui motiva le soutien que les gouvernements ont pu leur apporter: utilité – ou nocivité selon les jugements portés – en matière scolaire; utilité en revanche fort peu contestée dans le domaine de l'assistance; utilité encore moins contestée pour soutenir la politique coloniale, dont les congrégations ont sans doute constitué le principal appui pour les gouvernements, même anticléricaux.

Constatons aussi les difficultés de la sécularisation. À partir de la Révolution de 1789, la France se veut une société sécularisée. Gouvernement, législateur et société affirment leur attachement aux droits de l'homme, déclarés par la philosophie des Lumières et non pas définis par une autorité spirituelle. Pourtant, les réminiscences du christianisme demeurent. Les droits de l'homme sont proclamés «en présence de l'Être Suprême». De même, si depuis la loi du 20 septembre 1792, le mariage est un contrat civil, conclu devant

l'officier d'état civil et si le droit français ne connaît aucune autre forme de mariage, néanmoins, lors de la rédaction du Code civil, Portalis précise que si le mariage est en premier lieu un contrat et non sacrement, il est néanmoins «le plus *saint* des contrats»⁹.

Dans le même esprit, la répression des atteintes à l'ordre public remplace souvent l'ancienne répression des atteintes au religieux. Le *religieux* laisse la place à *l'intérêt général*. Les valeurs républicaines prennent le relai des valeurs religieuses. Néanmoins, il serait abusif d'analyser la politique anticléricale des Républicains au cours des années 1880 comme une lutte sans merci pour un monde que l'on voudrait totalement transformé par l'athéisme. Ainsi, lorsqu'en 1882 Jules Ferry remplace dans les écoles les cours d'instruction religieuse par les cours d'instruction morale et civique, il demande aux instituteurs d'enseigner «la bonne vieille morale de nos pères» à ceux qui avaient, pour leur compte suivi le catéchisme¹⁰. Jean Baubérot a montré que le programme de Jules Ferry était de conserver la morale traditionnelle, une morale commune à tous les Français et donc important ferment d'unité de la communauté nationale républicaine; mais aussi une morale à laquelle il convient, disait Jules Ferry, de ne pas chercher de fondements, ni religieux, ni laïques, ni agnostiques.

Si Jules Ferry n'a pas voulu attiser les conflits, les oppositions existèrent cependant, virulentes souvent, et les réalités historiques que nous venons d'évoquer expliquent largement la situation française actuelle.

Aujourd'hui, le rôle que l'État reconnaît aux religions, à l'égard de l'État, de la société, de l'individu présente des caractères spécifiques, conséquences de la valeur que constitue la laïcité.

De nos jours, ce n'est qu'indirectement que l'État fait appel au rôle des religions, en tant que communauté religieuse, dans quelque domaine que ce soit.

En France, l'État sollicite la laïcité, que certains estiment comparable à une religion civile. La comparaison doit néanmoins être maniée avec prudence: la notion de religion civile correspond à la réalité historique, au paysage religieux et à la société américaine.

⁹ Rapport présenté par Portalis au Conseil des anciens en 1797.

¹⁰ Jean Baubérot, *La morale laïque contre l'Ordre moral*, Paris, Seuil, 1997, 364 p.

Sa transposition en France où l'histoire a connu d'une part une religion d'État, et par la suite un anticléricalisme virulent me semble ne pas tenir compte du legs laissé par l'histoire propre de chaque État.

Sans assimiler la laïcité française à une religion civile, essayons de cerner ce que les pouvoirs publics entendent invoquer, aujourd'hui, lorsqu'ils recourent à la laïcité. C'est dans la Constitution de 1946 que le terme de laïcité est, pour la première fois, expressément inscrit¹¹. Sans nous attarder sur l'évolution du concept¹², aujourd'hui, la laïcité est un «vivre ensemble» présentée depuis 15 ou 20 ans comme constituant une valeur essentielle de la République¹³, peut-être la valeur supérieure, fédérant toutes les autres valeurs. Lorsqu'en 2003, Alain Juppé accole les trois termes de *liberté, égalité, laïcité*¹⁴, n'est-ce pas pour promouvoir la laïcité au rang de devise de l'État équivalente peut-être à la Fraternité proclamée en 1848? La laïcité implique une neutralité des pouvoirs publics à l'égard de tout fait religieux, neutralité qui, en France, va de paire avec le régime juridique de séparation posé en 1905. La laïcité se doit d'autre part d'apporter les solutions à toutes les tensions, souvent héritées de l'histoire, entre expression des religions et orientations cherchant à maintenir les religions hors de l'espace public.

Promouvoir la laïcité au rang de valeur républicaine et nationale interdit d'accorder ce rôle à une religion particulière. Le «vivre ensemble» républicain de la laïcité accepte, voire favorise, toutes les religions qui, elles-mêmes, adhèrent à cette philosophie. Il y a alors correspondance entre les valeurs de la laïcité et les valeurs communes à l'ensemble des grandes religions, en France. Les

11 Constitution du 27 octobre 1946, titre I^{er}, art. 1: «La France est une Républiques indivisible, laïque, démocratique et sociale». Constitution du 4 octobre 1958, titre I^{er}, art. 2: «La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion».

12 Concept que le Conseil constitutionnel se garde bien de définir trop précisément; cf. Philippe Ségur, «Le principe constitutionnel de laïcité», *Annales de l'Université des sciences sociales de Toulouse*, 1996, p. 117-134.

13 Alain Bergounioux, «La laïcité, valeur de la République», *Pouvoirs, revue française d'études constitutionnelles et politiques*, n° 75, 1995, p. 17-26.

14 Alain Juppé, «*Liberté, égalité, laïcité*», tribune dans le journal, *Le Monde*, 29 octobre 2003.

religions, par leur adhésion à la laïcité, renforcent la cohésion de la communauté nationale.

En conséquence, la laïcité devient également synonyme de liberté religieuse, droit fondamental qui constitue l'une des composantes essentielles d'un régime démocratique et, finalement, de l'État de droit. On retrouve l'appel des pouvoirs publics à la laïcité comme fondement de l'État.

Cette conception a des conséquences concrètes visant notamment à reconnaître et à favoriser les interventions des religions – dès lors qu'elles adhèrent à la laïcité ainsi comprise – dans de multiples domaines, dont la culture, l'enseignement, l'assistance etc. Des nuances apparaissent néanmoins.

L'évaluation, par l'État, du rôle des religions, entre protection, collaboration et méfiance selon les situations concrètes

Si l'on s'entend pour encenser la laïcité, politiquement, ce ne sont pas les mêmes religions, ou les mêmes forces religieuses qui, en pratique, sont ainsi portées aux nues. En mai-juin 2012, le changement de majorité présidentielle, s'accompagne sans doute d'un changement de l'orientation politique de l'État à l'égard des religions.

La politique de Nicolas Sarkozy à l'égard des religions a sans doute été guidée par divers facteurs, pas strictement «religieux». Pourtant, il a parfois pu sembler faire cause commune avec l'Église catholique de France et avec le Saint-Siège en marquant, parallèlement, peut-être plus souvent au cours de son quinquennat, quelque distance ou réticence à l'égard d'autres religions ou de certains mouvements. Les options du parti socialiste seront sans doute différentes.

Les gouvernements de droite ou de centre droite, notamment l'UMP, se sont souvent montrés favorables à l'Église catholique. Telle était l'attitude de Nicolas Sarkozy en tant que ministre de l'Intérieur et des Cultes alors que Jacques Chirac était Président de la République et telle fut la ligne adoptée par le Président Sarkozy.

Quelques faits conduisent à se poser la question de savoir si une évolution est perceptible:

- Comme ministre de l'Intérieur, Nicolas Sarkozy semble vouloir montrer bienveillance et appui à toutes les grandes religions de France. Il est notamment soucieux de la construction d'un Islam de France, qui trouverait toute sa place dans l'État et dans la société. Tel est l'esprit dans lequel il réunit ce que l'on appelle couramment la Commission Machelon, du nom de son président et dont l'intitulé officiel était: *Commission de réflexion juridique sur les relations des cultes avec les pouvoirs publics*. Celle-ci remit son rapport au ministre de l'Intérieur en septembre 2006¹⁵. Les auteurs proposent certains aménagements juridiques permettant, entre autres choses, de mieux utiliser les systèmes d'aides financières indirectes sur fonds publics aux associations cultuelles. Sans que le rapport ne le dise, les auteurs souhaitent que mécanisme profite à tous, y compris les musulmans.
- Lors de son quinquennat, le Président Sarkozy adopte fréquemment une position ouvertement favorable à l'Église catholique. Dans divers discours, dont certains firent grand bruit¹⁶ et furent abondamment critiqués par l'opposition, il affirme vouloir remettre la religion au cœur de la vie de la cité, la religion visée étant incontestablement l'Église catholique romaine. Il souligne volontiers l'apport culturel des religions avec, le plus souvent, une allusion nette à l'Église catholique. François Hollande quant à lui n'aborde guère la question de l'apport culturel de religions qu'il affirme respecter toutes, pour leurs valeurs humanistes.
- Dans les années 2004-2008, la rénovation du Couvent des Bernardins, en tant que centre culturel, est largement financée sur fonds publics. Les bâtiments sont ensuite inaugurés par l'archevêque de Paris Mgr. Vingt-Trois lors du voyage du pape Benoît XVI à Paris en septembre 2008 et prennent alors leur dénomination définitive, celle d'*Académie catholique de France*.
- Citons encore les fameux «accords Kouchner» conclus en décembre 2008 entre le gouvernement français (représenté par

15 Rapport publié: *Les relations des cultes avec les pouvoirs publics*, Paris, La Documentation française, 2006, 83 p.

16 Cf. supra, discours du Latran dec. 2007, discours de Riad janv. 2008.

Bernard Kouchner ministre des Affaires étrangères) et le Saint-Siège, relatifs à la reconnaissance par l'État des grades et diplômes conférés par les Instituts catholiques, établissements privés d'enseignement supérieur dont le fonctionnement dépend de l'autorité romaine. Le texte tendait à prévoir des mécanismes de reconnaissance académique. Nombre de voix autorisées se sont élevées pour dénoncer, non pas tant la «faveur» faite à l'Église mais l'atteinte qui aurait été portée au principe constitutionnel du monopole de collation des grades et diplômes universitaires par l'Université seule. Le Conseil d'État a d'ailleurs vidé ces accords de tout contenu en affirmant que la «reconnaissance d'un *diplôme ecclésiastique* est de la compétence des autorités de l'établissement dans lequel souhaite s'inscrire son titulaire»¹⁷.

- Parallèlement, c'est souvent quelques craintes ou une certaine méfiance qui apparaissent dans plusieurs prises de positions du gouvernement Sarkozy. Méfiance à l'égard des sectes; méfiance aussi à l'égard de diverses associations musulmanes auxquelles les pouvoirs publics reprochent de ne peut-être pas se couler dans le moule de la laïcité, considérée comme si nécessaire à la cohésion sociale.

L'évaluation du gouvernement socialiste pourrait être différente. Lors de la campagne électorale du printemps 2012 aboutissant à la victoire de François Hollande et du parti socialiste, la question des religions n'a pas été absente des débats, même si les questions financières, économiques et sociales dominaient naturellement.

Comme candidat, François Hollande a eu l'occasion d'exprimer lui aussi son attachement à la laïcité mais, contrairement à Nicolas Sarkozy, il conçoit cette laïcité comme ayant pris ses distances vis-à-vis de toutes les religions, y compris et peut-être en premier lieu vis-à-vis de l'Église catholique. Une laïcité garante de la paix publique et du rejet des communautarismes grâce à l'école publique, elle-même garante de l'intérêt général de citoyens égaux en droit; une école publique qui est la condition de l'émancipation de chacun. Le candidat Hollande propose une ferme défense de cet enseignement public, quitte à réviser certaines dispositions rela-

¹⁷ CE 9 juil. 2010.

tives à l'école privée (point sur lequel il reste cependant prudent, conscient du danger qu'il y aurait à ouvrir la boîte de pandore). Il annonce également vouloir annuler le décret sur la reconnaissance des diplômes signé avec Rome, décret dont il dit lui-même que le Conseil d'État l'a déjà vidé de toute portée.

Dans un tout autre domaine, le parti socialiste évoque diverses réformes futures – non encore élaborées – qui ne sont pas dans la stricte ligne de l'enseignement de l'Église catholique, qu'il s'agisse de l'euthanasie, du mariage homosexuel¹⁸, de la possibilité d'adoption pour des couples homosexuels. Lorsque ces questions sont débattues, le parti socialiste reste sourd aux options défendues par les religions.

Néanmoins, dans un autre domaine, le jour de l'élection présidentielle, François Hollande a choisi de fêter sa victoire dans sa ville de Tulle sur la place de la cathédrale et non sur la place, pourtant plus vaste, du centre administratif de la ville.

Si l'UMP semblait parfois se méfier de certains courants et accorder sa confiance à l'Église catholique, le PS prend sans doute davantage de distances avec toutes les religions, de façon plus générale.

II. LA CONCEPTION EXPRIMÉE PAR L'ÉTAT DU RÔLE ET DE LA VALEUR DES RELIGIONS – ASPECT JURIDIQUE

Les décisions juridiques reflètent assez fidèlement les attitudes politiques de la majorité au pouvoir.

Les décisions juridiques sont de natures diverses.

Ne nous attardons pas à la législation royale de l'Ancien Régime, très abondante sur les questions religieuses afin de permettre au monarque l'exercice de la police des cultes¹⁹. Passons également sur les multiples lois, cléricales ou anticléricales, promulguées au cours du XIX^e siècle, souvent dans un souci de contrôle et surveillance stricte, là aussi comme sous l'Ancien Régime.

18 Promis lors de la campagne et de nouveau promis, pour un proche avenir, un mois après les élections.

19 Gabriel Le Bras, *La police religieuse dans l'ancienne France*, Paris, 1946, 164 p.

Actuellement, inutile de rappeler qu'en France l'État ne «reconnait» aucun culte (Art. 2 de la loi du 9 déc. 1905). Il ne peut donc accorder aucun statut légal d'ensemble à une religion. Les principes de 1789 et ceux de la Convention européenne des droits de l'homme viennent naturellement au premier rang dans l'ordre juridique français.

La Constitution se borne à proclamer le principe de laïcité. En outre, la doctrine est unanime à déduire de la jurisprudence du Conseil constitutionnel que l'article 1 de la loi de 1905, affirmant que l'État garantit la liberté de conscience et d'exercice public du culte, a valeur constitutionnelle. Lors de la récente campagne à l'élection présidentielle, le candidat Hollande avait évoqué le souhait de constitutionnaliser l'ensemble de la loi de 1905²⁰, ce qui aurait comme effet de figer un texte qui, depuis un siècle, a connu de nombreux aménagements. La constitutionnalisation de l'ensemble de la loi aboutirait notamment à figer le droit relatif aux aides financières indirectes que l'État peut parfois accorder à une communauté religieuse. D'autre part, elle fragiliserait considérablement le régime des cultes reconnus en vigueur dans les départements d'Alsace et de Moselle. Les catholiques, mais également les représentants des autres grandes religions en France, s'étaient émus de ce projet soutenu, en revanche, par le Grand Orient de France.

Les lois ne sont pas et ne peuvent pas être des lois sur «les religions». Pourtant une législation existe, assez abondante, relative aux questions de vie quotidienne des individus ou des groupes et qui – en fait – règlemente précisément tel ou tel aspect de la vie religieuse dans le pays. La religion n'est abordée qu'indirectement mais chacun sait que, bien souvent, elle est l'objet premier de la loi. Les domaines sont multiples: école, assistance, fiscalité, jours chômés, tenue vestimentaire dans l'espace public et bien d'autres sujets.

À côté des lois relativement peu nombreuses, il existe en France une importante jurisprudence apportant des précisions fondamentales et permettant aussi souvent une évolution du droit. La

20 Il s'agit du n° 46 des Engagements pour la France, où le candidat Hollande proposait d'inscrire un second alinéa à l'article 1 de la Constitution, rédigé ainsi: «La République assure la liberté de conscience, garantit le libre exercice des cultes et respecte la séparation des Églises et de l'État, conformément au titre premier de la loi de 1905, sous réserve des règles particulières applicables en Alsace et Moselle».

jurisprudence fut essentielle au XIX^e siècle, tant celle de la Cour de cassation que celle du Conseil d'État²¹. Depuis l'instauration du régime de séparation, si la législation se fait moins abondante, en revanche, la jurisprudence garde sa place primordiale. Dès le lendemain de la promulgation de la loi de 1905, les cours suprêmes sont intervenues pour interpréter, voire préciser, bien des dispositions. Leur jurisprudence s'est d'ailleurs inscrite dans une très grande fidélité aux décisions prises lors du régime des cultes reconnus²².

Pour évoquer certains domaines, dans lesquels le droit accompagne plus ou moins directement les options politiques, limitons nous à quelques exemples, récents et significatifs. Le droit peut refléter les options politiques, qu'elles soient favorables, hostiles, ou méfiantes à l'égard des religions. Les questions de financement, des sectes, ou de la neutralité de l'espace public constituent trois exemples, illustrant chacune de ces hypothèses.

Le droit favorable aux religions; les financements indirects

La France tient au maintien des dispositions de l'article 2 de la loi de 1905, aux termes desquels l'État «ne salarie, ne subventionne aucun culte». Toute aide financière directe à une activité cultuelle sur fonds public est donc prohibée, sauf loi contraire. Pourtant, nous l'avons dit, nombreux sont ceux souhaitant que des cultes récemment développés sur le territoire national puissent bénéficier d'une sorte de «rattrapage» pour augmenter le nombre des lieux de culte. Le Rapport Machelon dont nous avons parlé prenait position en ce sens. Les solutions juridiques ont en partie suivie. Notamment, le 20 juillet 2011, le Conseil d'État rendait une série de cinq arrêts reconnaissant la possibilité, pour une collectivité territoriale, de subventionner une association cultuelle ou une activité liée à un culte, dès lors que les installations projetées avaient aussi une «utilité publique», un intérêt général ou local. Dans ces décisions, le Conseil d'État a pris en compte l'intérêt public que constitue une

21 Voir le Répertoire méthodique et alphabétique de législation de doctrine et de jurisprudence, (dit Répertoire Dalloz), t. 14, 1853, au mot «culte», p. 650 à 952 et le Supplément au Répertoire, datant de 1990.

22 Voir notre article, «Un siècle de régime des cultes reconnus et un siècle de régime de séparation», Revue historique de droit français et étranger, t. 82, 2004, p. 45-69.

politique culturelle et éducative; ou l'équipement nécessaire à la visite d'un lieu par une personne à mobilité réduite; ou l'aménagement d'un abattoir rituel pour le rendre conforme aux critères de salubrité publique; il a aussi étendu les possibilités d'utilisation des baux emphytéotiques, etc. Philippe Portier considère que le Conseil d'État se fait ici l'écho des demandes sociétales.

Ces arrêts furent immédiatement suivis d'une circulaire ministérielle de 30 pages (29 juillet 2011), intitulée «Édifices du culte, propriété, construction, réparation et entretien, règles d'urbanisme, fiscalité». La circulaire reprend les principaux arrêts, intervenus depuis 1905 et fait le point des règles juridiques applicables aux édifices du culte, en conséquence de la jurisprudence. Ce mécanisme correspond à un mode privilégié d'élaboration du droit des religions en France: décisions des cours suprêmes, reprises dans des circulaires plus souvent que dans des lois.

Le droit hostile aux «religions»; les «sectes»

En ce qui concerne les «sectes», pour reprendre une terminologie peut-être critiquable mais cependant largement utilisée, la méfiance de la France est souvent perçue comme une véritable hostilité, sans doute plus marquée que dans bien des pays. La lutte est menée au sein de la société et auprès des particuliers; elle est encouragée par les pouvoirs publics qui en prennent largement l'initiative.

La loi About-Picard du 12 juin 2001 intervient pour renforcer tant la prévention que la répression des mouvements sectaires portant atteinte aux Droits de l'Homme et aux libertés fondamentales. Elle introduit dans le Code pénal la possibilité de poursuivre «l'abus frauduleux de l'état d'ignorance ou de la situation de faiblesse»²³. On poursuit l'emprise mentale abusivement exercée et non la dérive sectaire par elle-même. Dans le même esprit, dix-huit mois plus tard est créée la *Mission interministérielle de vigilance et de lutte contre les dérives sectaires*²⁴ qui publie ses rapports annuels adressés au Premier ministre. Jurisprudence et circulaires

23 Art. 223-15-2 du Code pénal.

24 Décret de Novembre 2002, créant la Miviludes.

ministérielles continuent à marquer l'hostilité de la classe politique et du système juridique aux «sectes»²⁵.

Le droit méfiant à l'égard des religions; la neutralité

L'obligation de faire respecter la neutralité du service public, ou de l'espace public, est un autre thème, constamment repris par la classe politique et qui trouve aussi écho dans des décisions juridiques formelles.

L'obligation de neutralité du service public est fermement réaffirmée et protégée juridiquement. Après des rapports rendus par diverses commissions, parlementaire ou extra-parlementaire, et pour formaliser juridiquement l'avis de ces commissions²⁶, une loi fut promulguée en mars 2004, loi sur *le port des signes religieux ostensibles*, souvent appelée «loi sur le voile islamique». Afin d'assurer le respect de la laïcité dans l'enseignement public, le texte interdit «dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse». La loi constitue l'aboutissement de l'évolution d'une jurisprudence du Conseil d'État qui s'était faite plus restrictive quant à la possibilité, pour les jeunes filles, de participer voilées aux cours.

L'un des prolongements récents est par exemple le jugement du tribunal administratif de Montreuil rendu le 24 novembre 2011 qui autorise une école primaire publique à inscrire dans son règlement intérieur l'obligation de neutralité pour les personnes bénévoles, accompagnant les activités scolaires²⁷.

La même neutralité est demandée dans les autres services publics, notamment hospitaliers. Dans cet esprit, en avril 2006, le

25 Depuis 2000, le Conseil d'État reconnaît aux Témoins de Jéhovah le droit de former des associations culturelles, ce qui revient à leur reconnaître les mêmes avantages (notamment financiers) que ceux accordés aux religions. Notons pourtant que des décisions comparables étaient intervenues bien des années auparavant dans nombre de pays européens.

26 La Commission de réflexion sur l'application du principe de laïcité dans la République, présidée par Bernard Stasi, remit son rapport au Président de la République en décembre 2003 (Publication à la Documentation française, 78 p.). Une autre commission, parlementaire celle-ci, travaillait en même temps et aboutit à des conclusions assez semblables.

27 En l'espèce, le tribunal a donné raison au directeur de l'école qui interdisait à une mère voilée d'accompagner une sortie de classe.

gouvernement sollicite du Haut Conseil à l'Intégration la rédaction d'une «charte de la laïcité dans les services publics»²⁸

Plus récemment, à la neutralité requise dans les services publics, s'ajoute la volonté d'assurer la laïcité ou la neutralité dans l'espace public. Par cette formulation envisageant la neutralité de l'espace publique, on vise à combattre le port du voile intégral, burqa ou niqab.

Au cours de l'année 2008, plusieurs décisions ou avis interviennent:

Un arrêt du Conseil d'État du 27 juin 2008 confirme le refus d'accorder la nationalité française à une Marocaine qui porte la burqa au motif qu'elle adopte «une pratique radicale de la religion incompatible avec les valeurs essentielles de la communauté française, et notamment avec le principe de l'égalité des sexes».

Dans le même sens, saisie d'une demande d'avis, la Haute autorité de lutte contre les discriminations et pour l'égalité (HALDE) déclare, le 15 sept 2008, que «la burqa porte une signification de soumission de la femme qui dépasse sa portée religieuse et pourrait être considérée comme portant atteinte aux valeurs républicaines présidant à la démarche d'intégration et d'organisation de ces enseignements». Elle met également en avant des exigences de sécurité publique ainsi que la protection des droits et libertés d'autrui²⁹.

Ni le Conseil d'État, ni la HALDE ne critiquent la religion, mais ils s'en prennent aux manifestations de pratiques religieuses et à leurs éventuelles conséquences.

Des propositions de loi sont déposées, une commission d'enquête créée³⁰. Le Président de la République prend position: «Le problème de la burqa n'est pas un problème religieux, c'est un

28 Charte de la Laïcité dans les services publics, Paris, La Documentation française, 2007, 440 p.

29 Il s'agissait d'interdire le port de la burqa dans le cadre d'une formation linguistique obligatoire en vertu d'un contrat d'accueil et d'intégration. La HALDE estima l'interdiction conforme aux exigences des articles 9 et 14 de la Convention européenne des droits de l'homme.

30 En septembre 2008, proposition de loi du député Jacques Myard visant à lutter contre les atteintes à la dignité de la femme résultant de certaines pratiques religieuses; le port d'un voile sur le visage empêchant toute reconnaissance ou identification doit être érigé en infraction pénale. Proposition de résolution d'André Gérin et plusieurs autres députés (9 juin 2009) tendant à la création d'une commission d'enquête sur la pratique du port de la burqa ou du niqab sur le territoire national.

problème de liberté, de dignité de la femme [...]. Je veux le dire solennellement, elle [la burqa] ne sera pas la bienvenue sur le territoire de la République»³¹.

Le 11 octobre 2010, est finalement promulguée la loi «interdisant la dissimulation du visage dans l'espace public». Dans les rangs du parti socialiste qui, à cette date, est dans l'opposition, ce n'est qu'une faible minorité de députés et de sénateurs qui votent la loi³².

Ici encore le texte législatif s'inscrit dans un long processus. Il répond à la politique religieuse du gouvernement français au cours de ces années et se présente comme voulant protéger les valeurs fondamentales de la République: le «vivre ensemble», le respect de la dignité de la personne, le refus de l'exclusion et, au tout premier plan, l'égalité entre l'homme et la femme. On ne parle pas de la valeur que peut représenter la religion pour l'individu, la société, ou l'État. On envisage seulement les conséquences de certaines pratiques pour estimer leur compatibilité avec les valeurs de la société ou de l'État, soit les valeurs attribuées par le monde politique à la laïcité. Le texte de loi devant entrer en vigueur six mois plus tard, une circulaire ministérielle du Premier ministre François Fillon du 2 mars 2011 précise, comme cela avait été prévu, les modalités de mise en œuvre de la loi.

Faveurs, hostilité, méfiance, force est de constater les tensions, réelles en France, entre les apports des religions ou mouvements religieux à la société ou aux individus et un monde politique souvenant sur la réserve³³.

Faveurs et méfiances dépendent des hommes politiques au pouvoir, des projets de lois, des matières envisagées et certains exemples conduisent à s'interroger pour savoir si elles ne dépendent pas également des religions concernées, ou plus encore des catégories de personnes concernées. C'est ce que craint Jean

31 Discours du Président Sarkozy devant le Congrès réuni à Versailles, le 22 juin 2009.

32 18 députés et 46 sénateurs. François Hollande ne vote pas le texte.

33 Jean-Louis Schlegel, «Le religieux face au politique», *Ceras*, revue Projet, 267, sept. 2001.

Baubérot lorsqu'il déclare que la «laïcité est tendre pour les uns et dure pour les autres»³⁴.

CONCLUSION

En conclusion, revenons sur la force de l'histoire dans le régime des cultes en France, soit sous son aspect politique, soit dans ses manifestations juridiques. Si sur le fond chacune des questions concernant les religions transcende les clivages politiques, il n'en reste pas moins que dans l'opinion publique comme dans les positions adoptées par les hommes politiques, l'enjeu de ce que l'on perçoit comme étant favorable ou défavorable aux religions – ou à une religion – demeure passionnel. Rappelons seulement l'immense manifestation parisienne de juin 1984 contre le projet d'Alain Savary visant à réformer l'enseignement privé pour aboutir à un service unique de l'enseignement. La manifestation populaire avait entraîné l'abandon immédiat du projet.

Au delà de ce fait concret ou d'autres épisodes comparables que l'on pourrait citer, ce qui domine c'est la tendance à l'effacement des religions ou du moins le désir de les voir se couler dans le moule d'une laïcité synonyme d'état de droit ou de démocratie. Ce schéma, demandé par la majeure partie de la classe politique et parfois par la société, situe le dialogue entre religions et État français dans un contexte bien spécifique où le religieux tend à être pris en compte essentiellement pour le soutien qu'il apporte aux valeurs de la République. S'il est de l'essence même d'une religion que d'apporter à la société, l'histoire propre à la France conduit souvent le politique à brimer les religions dans l'autonomie qu'elles voudraient avoir pour définir les valeurs qu'elles entendent proposer. Le gallicanisme ne serait-il pas mort? La forme que prend en France la séparation entre politique et religieux, ainsi que la fréquente méfiance du premier envers le second, tend à laisser moins de

34 Jean Baubérot, *Le Monde des religions*, 21 juin 2012 où l'auteur dénonce plus particulièrement la condition faite aux immigrés et descendants d'immigrés. Voir aussi du même auteur, *La laïcité falsifiée*, Paris, La Découverte, 2012, 212 p.

place que dans la plupart des pays européens³⁵ aux apports sociaux, culturels, éthiques que les religions souhaitent proposer par elles-mêmes à l'individu ou à la société, ce qui, pourtant, n'interdit nullement aux religions de s'exprimer, sur la société ou sur des choix politiques³⁶.

35 Jean-Paul Willaime, *Europe et religions, les enjeux du XXI^e siècle*, Paris, Fayard, 2004.

36 Exemple: les religions ont pris position, et ont largement critiqué la loi Brice Hortefeux de 2007 sur l'immigration, loi au demeurant en partie censurée par le Conseil constitutionnel.

THE MUTUAL ROLES OF RELIGION AND STATE IN GERMANY

GERHARD ROBBERS

I. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

There is no general political perspective of the role and value of religion in Germany, let alone a specific one concerning the state's understanding thereof. Within society, political parties and the media a great variety of perspectives may be found, but, on the whole, the question is a matter of rather rapid political development.

However, a statement of the Federal Ministry of the Interior on its official website may have representative value. It provides:

“The work of the churches and religious communities is of great socio-political relevance. By far the predominant part of the people in Germany belongs to a Christian church or other religious community. This shows the important significance which religious communities still have for the people and for society as a whole. With their faith convictions and the resultant value ideas, they offer orientation for the activities of the individual as well as for the state and society. At the same time they provide for their members a strong motivation to engage in charities, voluntary services and honorary work for other people”¹.

II. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

Constitutional Recognition

A general perspective on religion, but not a special recognition of churches or other religious communities, is found in the preamble

1 http://www.bmi.bund.de/DE/Themen/Gesellschaft-Verfassung/Staat-Religion/staat-religion_node.html.

of the current 1949 German constitution which is presented in the light of the immediate pre-existing German history:

“Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.”

This *invocatio dei* makes reference to the idea of God; it is not an *advocatio dei*, which would directly place the constitution under the will of God.

The preamble does not restrict its reference to the Christian idea of God. It would be unthinkable that in 1949, after the murder of Jews by the Germans, and in the attempt to reconnect Germany with its pre-Nazi and anti-Nazi good traditions, the new German constitution would exclude the Jewish idea of God. It is generally understood that the preamble of the Basic Law does not refer to any specific idea or teaching of God such as the Christian, the Jewish or the Muslim or any other specific concept of God. Instead, the reference to God is a reference to religion as such. The preamble of the German constitution by making reference to God acknowledges the existence of transcendence, of the idea that there is more than the visible world, that there is something beyond. By this reference to responsibility before God the preamble of the Basic Law accepts that there is something more and other than the state and its constitution, something that goes beyond what is made by humankind. It thus acknowledges that the state which the constitution creates and structures is not all-encompassing – that is, the state is not total. The reference to God in the German constitution is anti-total and is thus anti-totalitarian.

Specifically related to religious institutions, the 1948 Constitution of Rhineland-Palatinate provides in Article 41: “(1) The churches are recognized institutions for the safeguarding and strengthening of the religious and moral foundations of human life.” The 1992 Constitution of Saxony likewise says in Article 109: “(1) The significance of the churches and religious communities for the safeguarding and strengthening of the religious and moral foundations of human life is recognized.” And the Brandenburg Constitution of 1992 stipulates in Article 36: “(3) The Land

shall recognize the public mandate of the churches and religious societies.”

The ongoing relevance of religion and churches in particular in the public sphere is visible in the recent past of Germany:²

After the liberation that came with the end of the Second World War in 1945, religious freedom took a place in the forefront of the new constitutional order. It can be argued that the suffering of the Jewish people (regardless of their individual beliefs), the relatively strong moral positions of the Catholic Church and of parts of the Protestant churches, and the fundamentally anti-religious policy of the National-Socialist regime were reasons for the far-reaching guarantee of freedom of religion and belief in the new constitution. Taking responsibility for the murder of millions of European Jews by Nazi Germany in the 1940s has led Germany to give to the Jewish religious communities, though still small in numbers, the space for a very visible role in society.

While the 1949 (in its Articles 41-48) and the 1968-1974 (in its Article 39) constitutions of the German Democratic Republic promised freedom of religion, the state was explicitly atheist, discriminated against religion, and often persecuted individual believers. Yet, the Communist state accepted the existence of religious communities. Opposition against the regime could develop under the umbrella of the churches. The Protestant and Roman Catholic churches were a political factor of the utmost importance during German reunification at the end of the 1980s. Throughout the existence of the German Democratic Republic, from 1949 to 1990, the churches remained a counterpart to the ruling system. They maintained their independence in spite of manifold and often successful attempts by the regime to place its own people in church offices as unofficial collaborators of the Secret Service. The regime accepted the churches and other religious communities as existing and somewhat autonomous institutions. Their property was not expropriated and was generally regarded as public property. Contacts between church institutions in East and West Germany remained largely intact. These contacts were often used to transfer money secretly and pay to enable the emigration into the West of

2 The following is to a large part taken from: G. Robbers, *Religion and Law in Germany* (Alphen aan den Rijn, 2013).

people who had been arrested for attempted escape from the Republic. During that time, the Protestant Church came largely to accept a description of its existence as a 'church in socialism', to be distinguished from a possible 'church for socialism' or a 'church against socialism'. The Protestant Church, historically far stronger in the country than the Roman Catholic Church, then protected people who opposed the regime in the late 1980s. In substance, this development was closely linked to events in Poland which were supported by the Roman Catholic Church. The famous 'Monday Demonstrations' which contributed to the final breakdown of the Communist regime started from the Protestant church St. Nikolai in Leipzig on 4 September 1989. They followed the 'prayers for peace' led by pastors *Christian Führer* and *Christoph Wonneberger* starting in 1982. During the demonstrations, hundreds of thousands of citizens of the German Democratic Republic gathered to protest against the regime and to demand full freedom of travel. Many of the demonstrators were not church members, and were often non-believers, but found a place to meet, to discuss, and to demonstrate in a space that had been created by religious communities.

Law on Churches

There is no specific single law on churches in Germany. Provisions regulating the role of religious communities are dispersed throughout the legal order.

The Presence of Religions in the Public Sphere

Treaty Law

The 1955 'Treaty between the Land of Lower Saxony and the Protestant Land Churches in Lower Saxony', also called the Locom Treaty (*Loccumer Vertrag*), proved most influential with regard to the political role of religious communities in Germany after the catastrophe of Nazism and the Second World War. In the Locom Treaty, the Land Government of Lower Saxony and the constitutional representatives of the Protestant Land churches in Lower Saxony declare that they are conscious of their joint responsibility for the Protestant element of the Lower Saxony population, and that, in compliance with the public assignment of the churches and their independence, they have decided to develop the treaty

further, with adherence to the rights of the churches within the meaning of true free order. Furthermore, they agree that the Land Government and the church managements shall strive to have regular meetings to deepen their relations, and that they will at all times make themselves available to discuss questions concerning their mutual relationship. They also agree that the Protestant Land churches will enter into close cooperation among themselves, in order uniformly to represent their interests towards the state, and that they will appoint joint representatives to the state and establish an agency at the seat of the Land Government. The treaty has been a reference point for a number of subsequent treaties between the state and religious communities in shaping the political relationship between them.

Rather recently, the Land Hamburg and the Land Bremen have concluded treaties with Muslim communities. In the Hamburg treaty with the larger Muslim communities, the preamble states among others things that the parties conclude the treaty conscious of the fact that citizens of the Muslim faith form a significant section of the inhabitants of Hamburg and that their lived faith has become a solid part of religious life – they do so: wishing to affirm and reinforce the free exercise of religion by those citizens of the Islamic faith as part of a plural and cosmopolitan society; convinced that religion can render a valuable contribution as a mediator between different cultures and traditions; and wishing to acknowledge and support the participation of the Islamic religious communities in the religious, cultural and societal life of the city.

The idea of ‘public assignment’ (which may also be translated as the public mission or public task of the religious communities) has been of foremost importance to their political functions. The idea of public assignment has its origins in a narrow notion of freedom of religious teaching. Freedom of public teaching had to be fought for against the persecution by the Nazi regime. For example, in 1934, the Theological Declaration of Barmen issued by the Confessional Synod of the German Evangelical Church in opposition to the Hitler Nazi regime stated that it is the assignment of the church to teach the message of the free grace of God through sermon and sacrament to all people. After the moral and material devastation under Nazism, Germans felt that religious communities should be able to make a broad contribution in terms of ethics and politics.

Today, the religious communities' public assignment is a centre-piece of their involvement in the political sphere. Several treaties between religious communities and the state have reiterated the notion of a 'public assignment' of the religious community, as it is the case in the 1992 constitution of Brandenburg.

Media and Religions

The churches have a special public mandate that is secured by state-church treaties and that has its foundations in religious freedom. Accordingly, this allows churches to have a say and a right to be informed by the state in matters and affairs of public life. Because of their public mandate, religious institutions have designated time-slots on television and radio in the relevant laws of the *Länder*. They are also, as a result, given a representative position on the supervisory boards of public institutions where a particular societal representation is necessary. The churches offer advice to the broadcasting commissions of public broadcasting corporations such as German Television Channel II (*ZDF*), *ARD*, and the Land-based broadcasting corporations, which are the supervisory commissions for private television and radio stations, as well as appraisal and classification boards which identify and restrain those scripts and films that are deemed harmful to young viewers and listeners.

Religious communities, both Christian and Jewish, also hold seats in those bodies which determine at what age young people should be allowed to view specific movies and whether certain publications are deemed to be pornographic, for example, or are otherwise to be sanctioned. It remains to be seen whether and how the Muslim population can also be represented in these areas.

Religions and State Political Institutions

Religious communities are not represented as such in parliament or in any equivalent bodies. Nonetheless, members and personnel of religious communities can run for parliament and similar institutions, and exercise political functions like everyone else. There are no legal restrictions on any such activities. However, some religious communities have introduced internal restrictions for their personnel concerning political offices. The Federal Constitutional Court has declared it constitutional for a religious institution to deny its own office-holders the right to stand for public office

while they exercise a religious office. The Catholic Church, for example, does not permit priests to run for public office. Yet, if any particular Catholic priest chooses to do so, the German state will not hinder him.

According to state law, the right to vote and to be elected is in no way restricted. Any such regulation on incompatibility would not be in harmony with Article 3 section 3 GG, whereby no one is to be disadvantaged or privileged on the basis of his or her religion. Furthermore, Article 33 section 3 GG states that the enjoyment of civil rights, admission to public office, and the rights acquired in the civil service exist independently of one's religious beliefs. No one is to be disadvantaged on the basis of his or her religious belief.

Religions and Political Parties

Political parties are in general grounded in the basic convictions, ideas, and value systems for which they stand. In many fields, however, political parties overlap. People of all creeds and none can be found in almost all relevant political parties. In most of the relevant political parties in Germany, religiously oriented members form internal groups in various grades of formal organization. Religious affiliations thus have an influence in the political sphere.

There are political parties that explicitly express in their programmes, or even in their names, a basic relation to religious backgrounds. Religious communities do not have specific links with specific political parties, however. Members of political parties can only be natural persons. Religious communities cannot therefore directly found a political party. One may nonetheless identify somewhat stronger sympathies for certain political parties in certain religious communities, or in parts of them, while such sympathies may change over time and according to issue.

The Christian Democratic Union (*Christlich Demokratische Union [CDU]*) is a Christian, democratic political party that has been a leading political force in Germany since the beginning of the Federal Republic of Germany. In the 2009 federal parliamentary elections, the *CDU*, together with its Bavarian sister party, the Christian Social Union (see below), won 33.8 % of the overall vote, making them the strongest faction in the election. On a European level, the *CDU* is a member of the European People's Party. The

party is explicitly based on Christian values, but is, however, not organizationally linked to any specific Christian denomination. The *CDU* has about 530,000 members, and has always been open for people from all Christian and non-Christian denominations. Jews, Muslims, and people without a specific religious affiliation have held and hold offices for the party. When the party was founded, in 1945, the term ‘Christian’ in its name also stood for overcoming the political antagonisms between Catholic and Protestant parts of the German population. Another major religiously influenced political party in Germany is the Christian Social Union (*Christlich-Soziale Union in Bayern e. V. [CSU]*), a predominantly Christian political party that is based in Bavaria. It is almost identical to the *CDU*. On federal level, *CDU* and *CSU* form one single faction in the federal parliament.

There is no specific Muslim political party. Individual Muslims are members in all of the larger political parties; however, the Muslim electorate mostly prefers the Social Democratic Party of Germany (*SPD*) and the *Bündnis 90/Die Grünen* (Green Party) in elections.

Political Representation of Religions

Political representation of religious communities is often structured on the basis of special church institutions. The great churches such as the Protestant and the Roman Catholic churches in Germany have established institutions that represent them in the political sphere on the federal level as well as at the level of the *Länder*.

Education and Ethics

According to Article 7 section 3 GG, religious instruction shall form part of the regular curriculum in state schools, with the exception of nondenominational schools. Without prejudice to the state’s right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction. The system of religious instruction in state schools as provided for by Article 7 section 2 GG is in general well accepted. However, the system has always been the object of some criticism.

Religious instruction in state schools as outlined in Article 7 section 3 GG is a common task of state and religious communities.

Both partners work together to provide this educational service to pupils.

The general system of religious education in public schools is confessional. It is Catholic religious education for Catholic pupils, Protestant religious education for Protestant pupils, Christ-Catholic religious education for Christ-Catholic pupils, Jewish religious education for Jewish pupils, Christian-Orthodox religious education for Christian-Orthodox pupils, etc. Since Catholicism and Protestantism are the main religions in Germany, Catholic religious education and Protestant religious education prevail in terms of numbers.

As a matter of practice, the curricula of religious instruction, notwithstanding their character of being confessional, include information about other relevant religions. This information is therefore given from a confessional perspective. In practice, this information is objective. One can say also from a legal point of view that this information has to be objective because religious instruction remains a state competence and pupils have a right to objective information.

Quite a number of religious communities make use of this system. Minority religions also teach religious instruction in the general system. This is the case for Jewish religious teaching for Jews, Christian-Orthodox religious teaching for Christian-Orthodox, etc. Religious instruction is not limited to traditional or Christian religious communities. As a new development, in Hesse, Muslim communities have also started to teach Islam as a regular subject in state schools.

Safeguarding marriage, family and social cohesion

There are certainly expectations within society that religious communities be a safeguard for marriage, the family and social cohesion. State political expectations are less strong. Concepts of marriage and the family vary between the different religious communities; there is quite a lot of competition for the most relevant guidance.

On the other hand, state institutions closely cooperate with religious charities in matters of youth care. Caritas and Diaconical work are very strong features of public welfare in general.

By way of conclusion, one may say that churches and religious communities represent a very strong force in the general cohesion of society. They contribute to values, morals and good governance, and their functions in these areas are generally well-respected.

THE MUTUAL ROLES OF RELIGION AND STATE IN HUNGARY

BALÁZS SCHANDA

Rather than offering a comprehensive historical and philosophical-theological analysis, this paper seeks to provide an insight into the present political role of religion in Hungary, with a special focus on areas in which this role receives legal recognition.

I. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

Different actors in the political arena have divergent understandings on the role and value of religion – especially that of the traditional religions. Whereas conservative forces generally appreciate religious values and sometimes build on the work of religious communities (even when church leaders would rather keep a distance from politics), centre-to-left and liberal forces (especially those who have not as yet overcome the communist legacy) have a more turbulent relationship with religion. Left-wing politicians practicing religion are rather exceptional, whereas on the right wing an expressly secular or anti-clerical attitude would be exceptional.

Government programs (policy papers adopted by Parliament when a new prime minister is elected) may praise religion and religious communities to some extent but such statements are rather formal. The program of the present centre-to-right government (2010) appreciates the role of religious communities (besides volunteers and civil society) with regard to their services to senior citizens and supporting youth.¹ Moreover, the programs of the 2002² and 2006³ socialist governments included sections on church

1 <http://www.kormany.hu/download/c/27/10000/a%20nemzeti%20egy%C3%BCttm%C5%B1k%C3%B6d%C3%A9s%20programja.pdf> “Program of national cooperation”.

2 <http://www.dura.hu/hirek/2002/05/kormprogr.htm> “Program of the national center, the democratic coalition”.

policies, mentioned church-related organizations with regard to the fight against drugs, and appreciated the moral, educational, cultural and social activities of churches.

After four decades of communist rule, negative aspects of religion hardly ever appear in public – if they do, it is more related to new religious movements rather than to the traditional religious communities of the country. Anti-clerical, secularist statements are rather characteristic of certain figures than of political parties or movements. Beyond the boundaries of established politics, far-right actors in the public sphere repeatedly voice anti-Semitic sentiments. Since 2010 a far-right political party is also represented in Parliament as an opposition party.

Traditional (Christian) religions are generally seen as the foundation of nationhood: the Hungarian State emerged from Christianization at the turn of the Millennium. Protestantism – especially the Calvinist Reformation – has also shaped national culture. The historical and cultural role of religion is often underlined by both state and religious leaders. The value appreciated here is tradition rather than religion as such – but tradition itself is certainly of a religious nature. Whereas the promotion of democracy is not at the top of the public agenda of churches, moral values, human rights (especially the right to life and freedom of religion), family and environmental issues, bioethics, the challenge of integration of people with disabilities, as well as poverty are all issues associated with churches, even by non-adherents – and these topics are often the subject of debate. Also, church-run institutions (schools, homes for the elderly or disabled) are generally trusted and respected. This engagement of churches is generally appreciated and supported by the state, even if practical obstacles may emerge. Church-run institutions seem to face more difficulties with left-wing governments than with right-wing ones – generally, the latter have a better understanding of the internal reality of churches.

The efforts of the Catholic episcopate to contribute to a historic Slovak-Hungarian reconciliation (along the same lines as those of the German and Polish Catholic Bishops' Conferences in the

3 <http://www.parlament.hu/irom38/00064/00064.pdf> „New Hungary. Freedom and solidarity. Program of the Government of the Republic of Hungary for a successful, modern and just Hungary.”

1960s) cannot be overlooked. Meanwhile, the fate of Hungarian minorities in the neighbouring countries is on the agenda of churches too – especially that of the Reformed Church. The ecumenical activities of churches, as well as their engagement in Jewish-Christian dialogue, carry a message that goes beyond the religious agenda. Presided over by a number of distinguished Jewish personalities and figures from various Christian ecclesiastical communities, the Christian-Jewish Society plays a unique role focusing on inter-religious dialogue.⁴ In a separation system the Government certainly has no competence with regard to ecumenism but efforts of religious leaders and communities to foster religious peace and social reconciliation are certainly welcome.

The presence of the church, and in particular the presence of the clergy, may of themselves have a legitimizing effect. A picture with the pope at an audience or a blessing of a new roundabout by the local deacon would both be desired by many politicians (from prime ministerial candidates to local mayors). The message is not one of piety but rather one which respects tradition and expresses goodwill to a faithful minority and the institution of the church as such.

Supporting religion politically may still be justified on the basis of its former harassment under communist rule. As well as the beneficial social side-effects of active religious communities, the promotion and expression of cultural identity may also be built on the religious heritage.

The liberal-secularist agenda which regards religion as a merely private matter (with the consequence that more separation is favoured in symbolic terms) has become marginal in Hungary. Between 1990 and 2010 such ideas were voiced not only on blogs and editorials but also in Parliament. The left-wing liberal party was voted out of parliament in 2010.

4 <http://www.kzst.hu>.

II. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

Constitutional recognition

Following the landslide victory of a centre-to-right alliance at the parliamentary elections in 2010, Hungary replaced its constitution of 1949 which, at the collapse of communism, had only been revised, not replaced. In January 2012 the new constitution ('Basic Law') came into force.

The Basic Law begins and ends with a reference to God, but this is done in a particular way. The very first words of the preamble quote, without quotation marks,⁵ the national anthem ("God bless Hungarians"), namely, a poem from 1823 which served as the anthem even during the communist regime. The anthem is also sung sometimes at the end of church services, and in this context it bears a religious content. At soccer matches or other public events probably many Hungarians singing it (or listening to it) have no religious feelings as such. This way the national anthem is a manifestation of patriotism, with a text that is deeply rooted in the national culture.

At the very end of the Basic Law there is a solemn declaration which echoes the wording of the preamble of the Basic Law of Germany, referring to the awareness of the members of parliament passing the Fundamental Law of their Responsibility before God and man.

The preamble ("national avowal") contains an acknowledgement of the role of Christianity in upholding the nation. This is, on the one hand, an acknowledgement of historical fact. On the other hand, it is not the religious content of Christianity that is endorsed, but its role in forming the nation – the declaration is descriptive, not prescriptive. The preamble also shows respect for the various religious traditions of the country: "We recognize the role of Chris-

5 As János Zlinszky points out: the person obliged by the very first commandment of the Constitution cannot be subjected to orders prescribed by law: J. Zlinszky, *Észrevételek az új Alkotmány „hűsvéti” szövegéhez. Az új Alaptörvényről – elfogadás előtt. Tanulmánykötet az Országgyűlés Alkotmányügyi, igazságügyi és ügyrendi bizottsága által 2011. április 8-án azonos címmel megrendezett tudományos konferencián elhangzott előadások alapján* (Budapest 2011), pp. 26, 27.

tianity in preserving nationhood. We value the various religious traditions of our country.” There is no reference to a non-religious, secular or agnostic heritage;⁶ the omission makes the text less inclusive than the preamble of the Polish Constitution of 1997. It has to be noted that it is the religious heritage and not the present-day social role of religion that is acknowledged. Whereas nowadays religiosity and secularism co-exist, historically secular values are hardly traceable.

As for the text of the Basic Law, its provisions on religion are not new. The wording of freedom of religion remains unchanged. The wording of the separation of church and state is slightly changed and lays more emphasis on church autonomy and the co-operation of church and state.⁷

The religious neutrality of the state is a consequence of its commitment to non-discrimination on grounds of religion. The references to Christian heritage in the preamble do not introduce any changes in this respect. The expression of the cultural identity of the nation may have become more intense, and more provocative for sensitive minorities, but the religious neutrality of the state is not at stake. The constitutional culture of the country will serve as a solid basis for the interpretation of the Basic Law as well as with regard to religious rhetoric and religious rights.

Law on churches

Preambles (non-normative introductory sections to laws) provide a perfect insight into the mindset of the law-maker. The preamble of the cardinal act on the right to freedom of conscience and religion and on the legal status of churches, denominations and religious communities,⁸ deserves to be quoted in full:

Churches and religious communities in Hungary are factors of outstanding importance for creating communities and perpetuating values in society. In addition to their faith-based activities, church

6 A. Jakab, ‘Az új Alaptörvény keletkezése és gyakorlati következményei’, *HVG ORAC* (Budapest, 2011), p. 181.

7 Instead of “In the Republic of Hungary the church shall operate in separation from the state.” the new text says: “The State and Churches shall be separate. Churches shall be autonomous. The State shall cooperate with the Churches for community goals.”

8 Act CCVI/2011.

and religious communities play a significant role in the country's and nation's life through the instructive, educational, higher educational, healthcare, charity and social work they undertake; the family, child and youth protection services they provide, as well as through cultural and environmental protection, sports and other activities, and by nurturing national identity. Hungary also recognises and supports the activities of churches and religious communities in playing a pivotal role in the life of Hungarian communities abroad.

Parliament –

– In order to guarantee freedom of conscience and religion, to ensure the autonomy of churches as a guarantee of the respect for the beliefs of others, and to regulate relations between the churches and the State;

– Having regard to the Universal Declaration of Human Rights, to the Convention on the Protection of Human Rights and to international covenants drawn up in relation to the fundamental right to religious freedom of conscience, and to the fact that according to Article 17 of the Treaty on the Functioning of the European Union, the European Union respects and does not prejudice the status of churches and religious associations or communities in the Member States;

– In accordance with the Fundamental Law, and with regard to the constitutional requirement to separate the operation of the State and the church, but properly enforcing the principles of working together to their mutual benefit;

– Continuing the tradition embodied in the acts ensuring religious freedom;

– Having regard to the ideological neutrality of the State and to the endeavours to ensure the peaceful coexistence of denominations;

– Respecting the agreements concluded with the churches;

– Recognizing that the key to promoting the common good is respect for the dignity of the human being, which allows not only natural persons and families, but also the churches to freely fulfil their mission;

– Having special recognition of the outstanding role of the churches which have constant determining significance in the history and culture of Hungary –

in order to implement the Fundamental Law, and on the basis of Paragraph (3) of Article VII of the Fundamental Law adopts the following Act:

(...)

The previous act on religious freedom (1990-2011) had a tighter preamble which also referred to values of religion:

Churches, denominations and religious communities in Hungary are entities of prominent importance capable of creating values and communities. In addition to their efforts falling within the sphere of religious life, they also play a significant role in the nation's life through their cultural, educational, teaching, social and health care activities, and by fostering national identity.

For the enforcement of freedom of conscience and religion, for promoting attitudes respecting others' convictions and realizing the principle of tolerance, and as a guarantee thereof, for the purpose of ensuring the independence of churches and regulating their relationship with the State, in harmony with the Constitution and the international conventions of the Republic of Hungary, Parliament hereby creates the following Constitutional Act: (...)

The new preamble is not only longer but the legislator also declared more explicitly public appreciation of church activities. On the other hand, state neutrality in religious issues had not been expressly mentioned previously.

The new religion law introduces a two-tier system which differentiates between churches recognized by Parliament and religious associations registered with a court. Freedom of religion must be enjoyed by all communities without any distinction as to the legal form of the community. Religious communities do not need to make use of any particular legal form, but they may do so: a non-recognized group or a religious association is to enjoy the same freedom as a recognized church.⁹ As well as identifying some important but problematic issues, the Venice Commission regards the new Act to “constitute a liberal and generous framework for the freedom of religion”(107), “a generous framework that permits the recognition of a relatively high number of churches in comparison to other European countries” (21).

9 Decision 8/1993. (II. 27.) AB.

The new law focuses on recognized churches – it ensures them a wide autonomy, protection and support, and introduces a recognition procedure which requires a political decision on recognition. Whereas the number of recognized churches remains limited, it became easier to set up a religious association. Religious associations have the same right as recognized churches with regard to their autonomy, data protection, and the protection of secrets entrusted to clergy (the “seal of confessional” or similar data in other denominations). Churches and religious associations are exempt from state control to the same extent.¹⁰ Religious communities do not have to strive for recognition. Functioning as a “recognized church” is just one of the possible legal forms, even if it is the most protected and prestigious one.

However, with regard to the protected sphere of the social presence of churches and religious associations, differences in treatment cannot be overlooked. A non-exhaustive list of relevant issues would include the right of churches to offer religious education in public schools, to be present in the public media, to get involved in the preparation of legislation, etc. It has to be noted that smaller communities are not likely to make use of some of these rights; for example, they may not be able to assemble a sufficient number of children for the purposes of organizing religious education on schools premises. Churches also enjoy more protection in criminal law, e.g. the clergy of recognized churches qualify as persons “pursuing public tasks”,¹¹ whereas the ministers of religious associations do not enjoy this protection. This means a qualified punishment for the perpetrator of murder and robbery against clergy, as well as punishment for those attacking a person performing or relating to a public task. The clergy enjoy a status equal in this respect to that of teachers, medical staff, public transport workers or firemen.

All churches that are registered as a “church” have the same rights and the same obligations.¹² Equality, however, remains a matter of legal status, not social significance. Consequently, external, social differences between religious communities may be taken

10 Act CCVI/2011. § 36. § (2).

11 Act IV/1978 § 137. 2. j).

12 Act IV/1990. § 15 (3).

into account by the legislator, if these are of relevance in any given issue. As churches play highly different roles in society (some maintain schools, others do not, some run theological colleges, others do not, some have lost their property during communism, others have not, etc.), a number of laws may only apply to some of them. Practically the four largest denominations (the Catholic Church, the Reformed Church, the Lutheran Church and the Alliance of Jewish Communities) often receive special attention – but this does not mean that they have a privileged legal status. Equal freedom of recognised churches and religious associations does not mean equal rights and public support – therefore, the recognition criteria and the recognition procedure become of central importance.

The presence of religions in the public sphere

On the one hand, religion is appreciated as a community-building factor in historical perspective. This, however, only applies to the traditional religious communities of the country. On the other hand, the legislator repeatedly appreciates the role of religious communities providing services to society (especially in education and social care).

Official symbols, holidays and the names of public places and institutions provide good examples of public recognition of the historical and social significance of religious traditions. Coats of arms are determined by heraldic traditions. The coat of arms of Hungary contains a double cross – originally the symbol of royal power, not that of Christianity. The coat of arms also depicts the royal crown headed by a cross, portraying saints. Besides respecting certain religious holidays, such as Christmas or All Saints, the national day of Hungary is Saint Stephen's Day. Saint Stephen (997-1038) was the first, state-founding king of Hungary. Church, state, civil and family celebrations are interlinked in a special way on that day. Representatives of state organs attend the solemn mass and the procession honouring Saint Stephen, and at local festivities ministers of religion – often Protestant pastors too – play an important role in the celebrations.

Beyond the constitutional and national levels, the local dimension is also important. Local holidays may include the festivals of

the patron saint of a town or village, and local coats of arms are often inspired by religious symbolism – even in cases where symbols are newly-designed and not determined by historic traditions. Several counties (e.g. Csongrád, Esztergom, Fejér, Tolna) depict patron saints on their coats of arms, and this is true of a number of cities (e.g. Győr, Veszprém, Vác). Some newly-designed coats of arms also use the picture of a local church.

Streets, squares and public institutions may bear names of a historic religious character (such as the name of a saint). After the fall of communism, generally, the historic names of streets and public institutions (such as hospitals) were restored – and local municipalities in some cases gave the names of saints to new institutions. A number of streets carry names of saints, the Holy Spirit or the Holy Trinity. These were restored after 1989 but generally no new ‘religious’ names were used. Some hospitals and many pharmacies have traditional names of saints.

It is often difficult to differentiate between the intrinsic and the public value of religion: from the perspective of a religious community, even a religious service has a public relevance and its social engagement is an expression of the faith. The Josephine tradition values the “side effects” of religion but this cannot be detached from core religious activities. Religious leaders often point to the social engagement of their community in order to gain public acknowledgement. These activities are often the focus of fundraising campaigns (e.g. for tax assignments).

The relevance of case law in a continental legal system is limited. It was, however, the Constitutional Court that elaborated the doctrine of state neutrality with regard to religion and ideology. The Court did not add new elements valuing religion, but acknowledged the value of religious communities. The jurisprudence of the Constitutional Court is binding. Religious communities generally refrain from comments about decisions made by the Constitutional Court.

Education and ethics

The liberal legislation of 1990 on religious freedom (passed in one of the last sessions of the last communist parliament) proved to be a safeguard for religious freedom for two decades. The religion law

of 1990 was replaced as from 1 January 2012 by Act CCVI/2011, and a new education law also came into force on that date (Act CXC/2011). In the future, recognized churches will have the right to provide religious education in public schools (though smaller communities could not make use of this right in practice). The status of optional religious education in public schools is to increase as the new education law provides for instruction in ethics for those who do not opt for religion classes in elementary schools (§ 35, § (1)). The position of churches may become stronger in education as more schools extend the length of school hours. As children spend more time at school, and so will not gain free time when they do not attend religious education, more children are likely to take part in religion classes. As religion classes offered by churches are an indirect substitute for ethics, the competency of churches has been recognized in transmitting social and ethical values to future generations.

Besides religious education churches seem to be recognized as competent organs with regard to ethics. Churches are also represented in the National Economic and Social Council, a consultative body of employers' organizations, trade unions, science and NGOs.¹³ The Council is supposed to comprise social partners focusing on economic policy and other related matters. Churches are also represented in various consultative bodies, like the National Crime Prevention Commission or the Drug Prevention Committee. The churches' presence in such bodies is sometimes formal, but the invitation itself is a sign of their social significance as well as of expectation.

Safeguarding marriage, family and social cohesion

The institutions of marriage and family are protected by the Constitution. As well as legal guarantees, religious communities have their share in the protection of these social institutions. Since 1895 Hungary has an obligatory civil marriage regime.¹⁴ Since 1962, however, the separation of church and state has resulted in changes: a civil wedding does not have to precede a church wedding – so a

¹³ Act XCIII/2011.

¹⁴ Act XXXI/1894 (on marriage law).

person can enter a marriage in church without any consequences under state law (in state law such couples may qualify as non-married cohabitants). Before that time, clergy assisting at such weddings, where the spouses did not undergo a prior civil marriage procedure, committed a criminal offence – except in the case of the danger of death. Due to strict separation, canonical or other religious marriages are not regulated by state law in Hungary.

According to the Constitutional Court, the protection of Sunday as a day of rest and certain holidays (Christmas, Easter, and All Saints) has a secular purpose.¹⁵ Certainly, historically, there were religious reasons for prescribed holidays; however, the present holidays are those celebrated by the vast majority of people in society (not only practicing Christians). Nevertheless, safeguarding Sunday as a universal day of rest helps Christians to practice their religion.

In short, the State seems to appreciate the presence of religious communities in society, especially that of the traditional churches. The presence of churches, however, has to be determined on the basis of their identity and not on the basis of appreciation by the public power.

15 Decision 10/1993 (II. 27) AB, ABH 1993, 105.

INTERFÉRENCES MUTUELLES DES RELIGIONS ET DE L'ÉTAT EN ITALY

FRANCESCO MARGIOTTA BROGLIO

I. PERSPECTIVES POLITIQUES

Je voudrais avant tout préciser que, pour l'histoire de notre nation qui est un cas unique dans le panorama européen, les références à la "grille thématique" ne sont pas toutes valables pour elle. Nous devons considérer deux points de départ. D'abord, l'Italie est le seul pays européen à avoir sur son territoire, dans une enclave au sein de sa capitale, une puissance religieuse qui, depuis Rome, guide environ un milliard deux cent millions de catholiques éparpillés dans le monde entier. Ensuite, la situation spéciale qui se caractérisa au moment de la fondation de l'État Unitaire (1861), État qui se constitua à la suite d'une guerre contre la Papauté qui perdit l'État pontifical en 1859 et la ville de Rome en 1870. L'ensemble de ces facteurs marquèrent profondément l'identité de la nation et produisirent, au cours des 150 années qui suivirent l'unification (1861-2011), une dialectique permanente entre pouvoirs publics et pouvoirs religieux catholiques, nullement perturbée par les minorités religieuses historiques trop exiguës pour avoir une importance politique. Il faut en outre tenir compte que pendant de nombreux siècles, l'Église de Rome exerça un rôle négatif et fit obstacle à la réunification du territoire et qu'en même temps, durant autant de siècles, elle fut en substance gouvernée par des prélats en grande majorité italiens: au Quinzième siècle, 50 % des cardinaux étaient italiens, au Seizième 70 %, au Dix-septième 84 %, au Dix-huitième 76 %, au Dix-neuvième 66 % et c'est seulement au Vingtième siècle que les Italiens descendent à 40 %, mais sur un nombre de nominations cardinalices qui avaient presque doublé par rapport au siècle précédent. En outre, la présence du Saint-Siège «seulement en Italie [...] a poussé la culture laïque à se concevoir comme une sorte d'anti-église et ses intellectuels à s'opposer à cet autre corps organisé d'intellectuels – considérés comme n'étant pas effectivement nationaux – qu'étaient les

clercs»¹. Ajoutons que le pouvoir temporel du Souverain Pontife d'abord, et le contraste entre la société civile et la société religieuse ensuite, ont fait obstacle à la constitution en Italie, comme c'est arrivé dans d'autres pays européens, d'une «église nationale» et ont laissé survivre une foule d'églises «communales» dans de nombreuses localités historiques qui se reconnaissent dans le culte des «saints patrons» et qui les célèbrent chaque année même «civilement».

Il faudra la dictature totalitaire fasciste (1922-1943) pour conclure un «Traité de paix» entre l'Italie et le Saint-Siège qui crée l'État du Vatican, et un Concordat qui régisse les prérogatives de l'Église et de ses institutions dans le système juridique italien (Accords du Latran, 1929). Mais le contraste survivra avec ce qui a été défini comme le «culte du Licteur»², avec cette religion politique fasciste «qui conduisait les Italiens sur les places, avait le soutien de l'État et des rituels imposants», qui était présentée «comme un mouvement de réforme et de renaissance religieuse, point d'arrivée de la tradition spirituelle italienne la plus authentique», et qui voudrait que «l'Église se mette au service du nouveau régime et de la nouvelle religion»³. Les conflits recommenceront avec la naissance de la République (1946) qui se donnera une Constitution qui met en valeur toutes les religions et toutes les libertés et qui sépare législation civile et morale religieuse, mais qui conserve intégralement le système de rapports entre l'Église catholique et l'État défini par les Accords de 1929, tout en prévoyant même un système de négociation directe avec les autres cultes pour définir leur statut. Conflits qui se répèteront au cours de la deuxième moitié du XX^e siècle et au début du XXI^e siècle à cause de la prétention de l'Église romaine de se considérer détentrice d'une éthique chrétienne générale valable pour toute la société sur des questions comme le divorce, l'avortement, la recherche scientifique, la vie en couple, la conception, le contrôle des naissances, la fin de vie. Ce qui a produit, ces quarante dernières années, un éloignement progressif de la législation civile de la morale catholique, consacré, pour ce qui est du divorce et de l'avortement, par des

1 Galli della Loggia, 1998.

2 E. Gentile, 1993.

3 M. Viroli, 2009.

référendums populaires. Après la fin du XX^e siècle et la disparition de la «Démocratie chrétienne» (qui avait été précédée après la première guerre mondiale par le «Parti populaire italien» guidé par un prêtre, Don Sturzo, et qui, après la seconde, grâce aux liens étroits avec l'Église italienne, avait marqué de son hégémonie la vie publique dans les quarante premières années de la République, mais aussi freiné les interventions directes des hiérarchies catholiques dans la vie politique), l'épiscopat a assumé un rôle politique et moral direct qui a produit une sorte de «néo-guelfisme». Néo-guelfisme qui, à cause de l'irréversible sécularisation des consciences et du contexte social, pousse l'Église de Rome, dans l'incapacité de gérer l'impact avec une modernité non laïque, mais certainement insensible à cause de son «indifférence», et presque pour compenser cette incapacité, à tenter d'exercer une fonction publique et d'orientation morale, aussi parce que toutes les forces politiques les plus importantes ont fini, en diverses mesures, par chercher des consensus au-delà du Tibre. De toute façon, on ne peut dire, aujourd'hui, que l'État se soucie de concevoir au niveau politique un rôle des religions et de leurs valeurs, alors que la société et les individus sont de plus en plus caractérisés par un refus persistant des «valeurs» chrétiennes, par une indifférence grandissante à l'égard du modèle familial proposé par l'Église, par des croyances essentiellement individualistes et par une forte autonomie par rapport aux directives qui proviennent des hiérarchies catholiques. Je vous citerai quelques indicateurs significatifs: les baptêmes ont diminué d'environ 20 %, les églises se vident (la fréquentation dominicale est passée de 39 % en 1993 à 32 % en 2009, concentrée surtout dans le Sud), les élèves des écoles confessionnelles diminuent, ceux qui ne suivent pas l'enseignement de la religion catholique dans les écoles publiques étaient 9 % en 2006, les mariages civils sont passés de 1,6 % en 1966 à 34 % en 2006 (42,5 % dans les chefs-lieux de provinces), les enfants nés hors mariage sont environ 20 % en 2006, les unions libres ont quadruplé en vingt ans, les vocations sont de plus en plus rares et le clergé de plus en plus vieux. À cet égard, on peut rappeler que, au cours des cinquante dernières années, le nombre des prêtres a diminué de plus de 30 % et que celui des séminaristes d'environ deux tiers; les prêtres diocésains et les religieux sont passés de 36000 en 2000 à 32000 en 2009 (moins 12 %), les ordinations ont diminué de 23 %

et les candidats au sacerdoce entre 2000 et 2005 ont diminué de 12,4 %; en outre 5 % du clergé des diocèses est constitué par des prêtres d'origine étrangère. En revanche, on note une augmentation des activités d'assistance et de bienfaisance et en général celles d'engagement social, mais avec une augmentation aussi du remplacement du personnel religieux par du personnel laïque. Il faut également rappeler que parmi les quatre millions et demi d'immigrés présents sur le sol italien plus de la moitié étaient en 2011 chrétiens (30 % d'orthodoxes, 19 % de catholiques, 4,5 % de protestants), 33 % sont musulmans, 1,9 % hindouistes, 1,3 % d'autres religions orientales, 1,1 % animistes et 0,1 % juifs. Plus de 4 % seraient athées ou agnostiques déclarés⁴. Une situation bien différente par rapport à celle de l'année de naissance de la République, ce qui pose quelques problèmes pratiques sur le plan de la vie en commun à un niveau acceptable, mais qui n'engage pas les orientations politiques et ne met pas en crise la cohésion sociale. Cependant, quelques formations politiques voudraient limiter leur liberté religieuse (par exemple la construction de mosquées, la définition précise de secteurs confessionnels dans les cimetières, les prières sur les lieux de travail etc.), mais elles n'ont pas réussi à interdire, comme dans d'autres pays européens, le port du voile pour les femmes et les symboles religieux dans les lieux publics. Dans un système fondamentalement séparatiste et en tout cas fondé sur la laïcité et la neutralité, l'État n'exerce pas de contrôles particuliers et n'intervient pas sur les questions religieuses qui doivent être résolues dans le cadre des principes constitutionnels et des lois en vigueur qui, en général, sont favorables à la liberté des cultes qui peuvent être aussi reconnus comme des personnes juridiques sur la base de la loi n° 1159/1929 et qui sont protégés des outrages par le Code pénal. Cependant, après les lois sur le divorce et l'avortement et après la réforme des Accords de 1929 avec le Saint-Siège (1984-85) et les premiers accords (intenses) avec les cultes différents du culte catholique, il n'y a pas eu de débat politique sur le rôle des religions: seize projets de loi cadre sur la liberté religieuse provenant des différents gouvernements ou des membres du parlement (1990-2010) n'ont jamais été approuvés par les Chambres et les

4 Dossier Caritas-Migrantes, juin 2012; voir aussi Naso-Salvarani, Un cantiere senza progetto. L'Italia delle religioni, EMI, 2012.

rare discussions parlementaires significatives n'ont eu aucun écho dans l'opinion publique. Des accords signés par les gouvernements avec des cultes différents du catholique attendent toujours depuis une dizaine d'années d'être approuvés par le Parlement.

II. PERSPECTIVES JURIDIQUES

La Constitution de la République (1948) a fondé le statut des religions sur la base de l'égalité et de la liberté, mais ces principes sont longtemps restés lettre morte dans un cadre confessionnel garanti par le Parti de la Démocratie Chrétienne auquel l'appui des institutions ecclésiastiques avait permis de s'affirmer comme premier parti politique jusqu'à la moitié des années soixante. La Constitution ne qualifie pas l'État sur le plan de la religion ou de convictions non religieuses, mais en 1989 (arrêt n° 203) la Cour constitutionnelle a classé la laïcité parmi «les principes suprêmes du système constitutionnel».

Le type de démocratie adoptée est, par ailleurs, caractérisé par la valorisation des corps intermédiaires, ce qui aboutit à privilégier des formes communautaires autonomes comme les groupes «intermédiaires», familiaux, culturels, professionnels ou religieux (surtout pour les catholiques). Le danger de réponses «polycratiques» était évident, puisque chaque groupe cherchait à faire valoir ses propres prétentions sur ses membres. Au niveau confessionnel, ce risque fut très important pendant les vingt premières années de la République, en raison de la puissance de l'Église de Rome. Par ses nombreuses institutions et organisations, cette dernière contribua massivement à l'hégémonie du parti catholique (la Démocratie chrétienne) et au conformisme confessionnel qui en découlait⁵.

Pour retrouver et reconstruire la neutralité religieuse de la Constitution, on procéda par paliers, lents et contrastés. Entre 1967 et 1983, on élabore pas moins de sept projets officiels de modification du Concordat de 1929 pour l'adapter aux principes constitutionnels. Mais ce n'est qu'en 1984, avec l'Accord de révision du concordat, que le Saint-Siège prend enfin acte que la Constitution de 1948 a abrogé le principe d'une religion d'État (loi 121/1985).

5 Jemolo, 1960.

La papauté accepte que l'enseignement de la religion catholique dans les écoles publiques ne soit plus obligatoire, mais simplement facultatif pour les élèves, et renonce également, à contrecœur, à l'autorité juridique exclusive de ses tribunaux sur le mariage célébré à l'église et enregistré à la mairie.

Pour compléter ce dispositif, la loi 222/1985 réforme le système de financement direct du clergé (portion congrue) et met au point un mécanisme fiscal complexe fondé sur un acte volontaire. Chaque année, les contribuables affectent 8/1000 de leurs revenus à l'Église catholique et aux autres cultes signataires d'une entente avec l'État et déduisent les sommes versées librement par eux aux confessions religieuses.

Entre 1984 et 2004, une série d'ententes ont été conclues avec de nombreuses Églises et confessions. Toutes sont inspirées par les mêmes principes de neutralité et de respect de la diversité religieuse, ainsi que par le souci de satisfaire les intérêts religieux individuels et collectifs.

Les cultes «ont le droit de s'organiser selon leurs propres statuts», à condition qu'ils ne soient pas «en contradiction avec les dispositions juridiques italiennes» (Constitution, article 8,2). L'exercice du culte, en privé ou en public, est limité aux rites qui ne sont pas «contraires aux bonnes mœurs» (article 19). Ainsi, grâce à une uniformité substantielle des clauses de chaque entente, une sorte de droit commun de l'égalité, de la liberté et des diversités religieuses s'est institué. Il a rapproché le régime des cultes minoritaires de celui de l'Église catholique majoritaire, y compris du point de vue du financement indirect. En juillet 2004, on comptait 13 ententes signées dans ce cadre.

Mais ce sont sans aucun doute la politique législative des années 1970 et 1980, ainsi que la jurisprudence récente de la Cour constitutionnelle qui contribuèrent de façon décisive à restaurer l'autonomie de la conscience, cette liberté «privilegiée»⁶ de croire ou de ne pas croire. Cette politique réintroduisit aussi la distinction entre morale religieuse et civile, le respect et la protection des minorités religieuses. On élaborait de nombreuses réformes: loi sur le divorce en 1970, réforme du droit de la famille en 1975, loi sur l'avortement en 1978, largement approuvée par référendum comme

6 Finocchiaro, 2003.

l'avait été la loi sur le divorce. Cet arsenal législatif fut complété par la loi sur le changement de sexe en 1982 et par la loi sur le procès pénal, en 1989, qui déconfessionnalise le serment. Plusieurs mairies ont créé des registres pour les couples homosexuels.

Au lendemain de la loi sur le divorce, la Cour constitutionnelle affaiblissait la référence constitutionnelle aux Accords du Latran (Art. 7.2 de la Constitution). Elle établit que ces derniers «ne pouvaient» contrevenir aux «principes suprêmes» de l'ordre constitutionnel de l'État et soumit à un contrôle de constitutionnalité les lois dérivant desdits Accords.

Mais c'est surtout après la réforme des Accords du Latran (1984-1985) que la Cour a redéfini, en matière religieuse, les principes de l'État pluraliste, esquissés à la naissance de la République. Ainsi, la Cour a insisté sur le fait que le respect des principes de liberté, d'égalité et de neutralité de l'État à l'égard de toutes les confessions peut aussi, le cas échéant, impliquer un traitement différencié selon la confession. Or conformément à la volonté de l'Assemblée constituante, l'État doit assurer à chacun «une garantie égale de liberté et la reconnaissance des exigences globales de chaque confession» (arrêt 235/1997). Mais le respect de ces principes et de cette neutralité peut se trouver garanti non par référence aux confessions, mais au nom «du droit de tous ceux qui relèvent des diverses religions de jouir de facilités» prévues par la loi. Exclusion de ces facilités une confession constituerait une violation de la liberté égale pour tous.

Dans ce cas, en effet, le statut de la confession doit être considéré «en tant qu'il est pré-ordonné à la satisfaction des besoins religieux du citoyen, c'est-à-dire en fonction d'une jouissance effective du droit à la liberté religieuse» (arrêt 195/1993). Pour la Cour, la liberté des confessions de s'organiser et d'agir (article 8 de la Constitution) «représente la projection nécessaire au plan communautaire» de l'interdiction générale de discrimination religieuse inscrite à l'article 3 de la Constitution (arrêt 346/2002). Il en découle, par exemple, que réserver les contributions publiques pour les bâtiments du culte aux seules confessions qui ont conclu des accords avec l'État (concordat ou ententes) viole le principe constitutionnel d'égalité de toutes les communautés religieuses et le droit, garanti à tous, de manifester sa croyance (religieuse ou non) et d'en exercer le culte en public (arrêt 195/2003).

En matière pénale, la Cour a retenu comme anticonstitutionnelle toute disposition de loi qui «différencie la protection pénale du sentiment religieux de chacun selon la foi professée». Pour la Cour, «en matière de religion», le même respect de la conscience s'impose, quelle que soit la confession d'appartenance (arrêt 440/1995).

Il en va de même en matière d'outrage à la religion: une attitude d'équidistance et d'impartialité identique doit garantir la «même protection de conscience à toute personne se reconnaissant dans une foi» (arrêt 508/2000).

Il faut aussi souligner que, dans sa jurisprudence la plus récente, la Cour motive ses décisions en se fondant sur le principe suprême de laïcité redéfini dans les arrêts 203/1989 et 13/199. Celui-ci «implique non pas l'indifférence de l'État à l'égard des religions, mais sa garantie de sauvegarde de la liberté religieuse dans un régime de pluralisme confessionnel et culturel» (arrêt 203/1989), ainsi que son «impartialité envers toutes les confessions religieuses». La Cour ne «saurait tolérer qu'un comportement visant à empêcher ou à troubler l'exercice des fonctions, cérémonies ou pratiques religieuses de cultes autres que le culte catholique, soit jugé moins sévèrement que lorsqu'il s'agit des mêmes faits à l'égard du culte catholique» (arrêt 327/2002).

En 2001, la réforme du titre V de la Constitution (art. 118), a réintroduit le critère de «subsidiarité» pour la répartition démocratique des compétences appliquées à des sujets (privés) religieux. On constate que «l'aspiration séparatiste à un droit commun, non seulement des cultes mais de tous, semble sur le point d'être réalisée ou, pour le moins, d'accomplir de grands progrès»⁷. Ce désir, loin d'être contradictoire, s'insère dans un État qui, «dans sa socialité, inclut aussi la religion»⁸, laquelle à son tour doit aussi respecter intégralement le système juridique national et les règles du jeu démocratique.

Néanmoins, le projet de certaines religions, qui n'acceptent plus d'être considérées comme relevant de la sphère privée et revendiquent pour leurs institutions des espaces et un rôle publics, peut mettre en danger le système italien de neutralité religieuse

7 Onida, 2004.

8 Finocchiaro, 2003.

fondé sur le présupposé libéral du pluralisme. Une telle volonté conteste en effet «l'autonomie absolue du politique»⁹. Si l'on considère que le pluralisme implique la privatisation du phénomène religieux¹⁰, alors, la volonté de redonner un caractère central à l'aspect institutionnel des cultes¹¹ et la redécouverte de la religion comme «lien identitaire collectif»¹² s'accordent très mal avec un statut des religions héritier d'une évolution législative plus que centenaire.

Ces changements législatifs ont profité de l'affirmation de l'individualisme religieux et moral. Ils ont aussi eu tendance à limiter profondément, voire à éliminer, le rôle public revendiqué par la religion antique et traditionnelle des Italiens. Or, l'Église catholique, comme on l'a déjà souligné dans la première partie, a sa «capitale» et ses plus hautes autorités dans l'État du Vatican, enclave romaine. Elle a élevé ses clochers jusque dans les villages les plus petits et les plus reculés de la péninsule et elle jouit encore de la confiance d'une large partie de la population italienne (64 %) et 86 % des Italiens se considère catholique romain. Mais «elle n'a plus le même poids dans la pratique et la croyance religieuses ou dans le domaine de la morale»¹³. Là, «l'éthique de la situation prévaut désormais sur celle de la conviction»¹⁴.

Dans les prochaines années, l'Italie aura à gérer le problème de la «gouvernabilité» du facteur religieux qui, pour certaines confessions (islamique, orthodoxe-byzantine) et dans un cadre mondial d'«affrontement des civilisations»¹⁵, peut redevenir un facteur important d'identité collective¹⁶. Les soupapes de sûreté, introduites par la Constitution et par un dialogue formalisé (concordat et ententes) avec les religions, devraient permettre à la «laïcité à l'italienne» de soutenir, mieux que d'autres systèmes juridiques européens, le siège des fondamentalismes religieux¹⁷.

9 Filoramo, 2004.

10 Berger, 1992 et 1999.

11 Casanova, 1994.

12 Filoramo, 2004.

13 Pace, 2003.

14 Guizzardi, 2003.

15 Huntington, 1996.

16 Kurtz, 1995; Filoramo, 2002.

17 Schlegel, 2003.

THE MUTUAL ROLES OF RELIGION AND STATE IN LATVIA

RINGOLDS BALODIS

I. ATTITUDES TOWARDS RELIGION: CONSTITUTIONAL DIMENSION

The Latvian political system and official attitudes towards religion

Latvia is a unitary republic based on the rule of law and the principles of proportionality, justice and legal certainty. It is a parliamentary democracy with a pluralist system of political parties. There is a clear separation of powers with a system of checks and balances that is in place. Fundamental rights are guaranteed and widely respected.

The Constitution is a written, codified and single document which is quite brief and laconic. It is a flexible document in that it is quite easy to amend. International and non-Latvian legal norms (EU law) take priority over domestic legislation and can probably be regarded as being of the highest status. When there are conflicts between such legal norms on the one hand and a national legal norm on the other, the international or EU norm prevails.

A key principle in the Constitution is that Latvian is the official language. The sovereign power of the state is vested in the Latvian people. This means that all state authority must be justifiable as the will of the elected representatives of the people who are, ultimately, the sovereign element of governance. Parliament is elected via general, equal and direct elections via secret ballots and proportional representation. Another fundamental constitutional principle which is increasingly important is openness toward European integration. It is no longer possible to understand national law without taking into account EU laws.

The separation of church and state has never implied segregation of religion from society or the complete exclusion of the church from social life. This would not be possible in a democratic country, as religion and religious associations form one of the

structural elements of society. The role of the church in the internal national processes in Latvia should not be underestimated. Public polls show that 70 % of Latvian citizens and 60 % of non-citizens trust the churches. Embracing this potential, churches have sought to influence state policy and law. Latvia is a multi-confessional country, where the three largest denominations are the Catholics, the Lutherans, and the Orthodox Church. There are about 170 different denominations and religious groups. A Law on Religious Organisations, special agreements with the traditional denominations and special Laws for Churches governs the state-church relationship in Latvia. It is based on separation, respectful neutrality, religious freedom, and the delegation of some peculiar powers. The government has delegated the right to register marriages to some denominations only; their clerics thereby perform the responsibilities of state officials, but they are not provided with any compensation from the state.¹

II. SPECIFICS AND THE UNIQUENESS OF THE CONSTITUTION OF LATVIA OF 1922: THE ABSENCE OF RELIGION INCLUDES AN ELEMENT OF ATTITUDE

The Republic of Latvia was proclaimed on 18 November 1918, but on 15 February 1922 the Constituent Assembly adopted the Latvian Constitution (*Satversme*). The adoption of the constitution was a moment of triumph for the Latvian people, and also the beginning of the formation of constitutional law. The adoption of the Latvian Constitution was a real testimony of the political unity and the political maturity of the Latvian nation.² As we know, the statehood of Latvia was interrupted, because the USSR occupied Latvia in 1940 and the statehood of the Latvian people was put on hold. In the Declaration of 4 May 1990, Latvia proclaimed the restoration of independence and recognised occupation as a legal fact. It is important to note that the restoration of independence after half a century is a rather rare event at the global level and cannot be com-

1 R. Balodis, 'Latvia', in: G. Robbers (ed.), *Encyclopedia of World Constitutions*, Vol. II (New York, 2007).

2 R. Balodis, 'The Constitution of Latvia', *Rechtspolitisches Forum (Institut für Rechtspolitik an der Universität Trier)*, 2004, Nr. 26.

pared, except with two other Baltic states with similar fate – Lithuania and Estonia. Latvia’s situation was more unique, because it not only regained independence but also restored its Constitution of 1922. Lithuania and Estonia, through referendums in 1992, adopted new and basic laws which stimulated the development of constitutional laws, while interpreting the Constitution in Latvia required looking through ninety year-old reports of the Constitutional Assembly of Latvia which survived Soviet times. From the viewpoint of comparative constitutional law, the case of Latvia’s Constitution is unique, because restoration of the basic laws of the state after so many years in oblivion is an unprecedented event. Furthermore, the constitution was not only restored but it continues to function. It is the only precedent of its type in the world. Although the restored constitution is considered sufficiently modern and applicable in the twenty-first century, it did not contain a chapter on fundamental rights. However, the Constitution of 1998 in Chapter VIII deals with fundamental human rights. The peculiarity of Latvia lies with the restoration of statehood and the Constitution of 1922 – and in trying to define state opinion about religion there was considerable debate about constitutional norms. The Constitution of Latvia is concise in form. In addition, the preamble of the Constitution is very laconic: the People of Latvia in their freely elected Constituent Assembly choose for themselves such state Constitution (*Latvijas tauta savā brīvi vēlētajā Konstitucionālā asamblejā ir nolēmusi sev šādu valsts Konstitūciju*). However, debates about the preamble show clear views about the state’s attitude towards religion. Religious-minded members of parliament had proposed (unsuccessfully) adding to the preamble: “Thanking Almighty God for [its] gained freedom” (*Pateikdamies Visuvarenajam Dievam par iegūto brīvību*). From the records it can be clearly concluded that Latvia, by way of constitutional declaration, should be considered secular. The majority of members of parliament considered that the mention of a higher power could be open to misinterpretation. A clear majority of deputies rejected adding a religious introduction; so God is not mentioned in the Constitution of Latvia.³ Members of parlia-

3 R. Balodis, ‘Satversmes 99. panta komentārs/Latvijas Republikas satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības’ (Comments on Article 99 of Constitution/Comments on Constitution of Republic of Latvia. Chapter VIII. Fundamental

ment were aware of the great importance of the laconic wording of the Constitution. The debates about the preamble show that secularism as an ideology of the state was initially a clear guideline before amendment of the 1998 Constitution, when the state's Basic Law was supplemented with the new – Human Rights – section which set out separation of church and state (Article 99).

III. THE CONSTITUTION OF 1922 DISCUSSED BUT DID NOT INCLUDE ARTICLES ABOUT RELIGION: THIS REAFFIRMS THE NEUTRALITY OF THE STATE

On 15 February 1922, when the Constitution was adopted, only the framework of the organisation of polity was accepted. However, when the second part of the Constitution, with its fundamental human rights catalogue, was prepared, it was not accepted. This unsupported second section, part of the Constitution project “Basic Rules of Citizens’ Rights and Responsibilities”, proposed 5 articles about relations between state and church and religious-cultural rights, which reveal a very secular attitude towards religion in pre-war Latvia. Of course, from a legal standpoint, these views are not strictly relevant when interpreting the Constitution, because they were not approved by the Constitutional Assembly. However, discussions about them show a significant proportion of religiously constitutional issues in the second part of the draft. The inclusion of Article 109 and Article 111 ensures that the principle of religious freedom was taken into consideration during the third reading of the draft. The principle of separation of church and state was included in the draft with Article 110 and Article 108.1 to ensure the preservation of religious education in schools which remains under the supervision of the Church. Finally, linking the status of Church officials with Latvian citizenship is covered in Article 113. It should be noted, however, that the second reading voted out three articles relating to religion. Article 112, which imposed bans on the Jesuit order operating in the territory of Latvia, was rejected. From the perspective of current and past comparative constitutional law,

Human Rights, *Autoru kolektīvs Prof. R.Baloža zin. vadībā. – Rīga: Latvijas Vēstnesis (Official Gazette)*, 2011. – 330. lpp.

it would be curious for such an article to have been accepted. While discussing Article 109,⁴ at second subcommittee stage it was emphasised that this freedom must be inextricably linked with national minorities' rights which should be fully protected. Furthermore, it was suggested to supplement draft Article 109 with a new sentence: "No citizen can be forced to perform any religious ceremonies, to be a member of a religious fellowship or to perform any duties in its favour." It was also proposed to include the provision: "No one shall be forced to reveal his religious beliefs, membership of any religious community, and these shall not be an obstacle to the acceptance of public office." Moreover, initially, there were no objections to Article 110: "The church is separated from the State. There is no state church". There was disagreement about the concept of separation which led to the opinion that the second sentence of the Article was sufficient and any further elaboration of separation was unnecessary; it was therefore deleted. There were no debates on Article 111 which was unanimously accepted.⁵

IV. CONSTITUTIONAL INTERPRETATION AND RELIGIOUS FACTORS AFTER THE CONSTITUTIONAL AMENDMENTS OF 1998: THE PRESENT

As mentioned above, the Constitution of Latvia 1998 was amended, creating a Chapter on human rights (VIII),⁶ and its adoption was essentially a symbolic settlement of previously unfinished work. Regulation of basic rights from now on is included in superior law – the state constitution: civil and political rights, economic, social and cultural rights, and "third generation rights" (those favourable to the environment). Religion is treated in Article 99: "everyone

4 Article 109 of the rejected project: All citizens of Latvia have full freedom of conscience, religion and worship. The state protects freedom of worship expression, as far as this expression is not against the existing laws and regulations of public peace and order.

5 Article 111 of the rejected project: Believers of different denominations have the right to unite in religious fellowships within the existing law. These fellowships are autonomic in structure and internal life. All of these fellowships are public organizations and have legal personality.

6 Amendments of the Constitution, *Latvijas Vēstnesis* (Official Gazette), No. 308/312 (1369/1373), 23 October 1998.

has the rights to freedom of thought, conscience and religion; the Church shall be separate from the State. By 2012 only one judgement in the Constitutional Court had been issued regarding religion (or more accurately freedom of religion). Constitutional Court judgement No 2010-50-03, examined “Cabinet regulations No 423, 30 May 2006 ‘Penitentiary internal rules’” which prohibited keeping a rosary in prison. The Constitutional Court examined compliance of the prohibition with Article 99 and concluded that the Constitution protects not only the existence of religious belief but also its expression; also freedom of thought, conscience and religion are important values for a democratic society. This freedom embraces religious, non-religious and atheistic beliefs, as well as rights to accept or reject religion. According to the decision, the expression of religious freedom is closely related to freedom of expression (Article 100), and therefore subject to restrictions necessary in a democratic society. Internal expressions must not be limited.⁷

Article 99 consists of two sentences about the functional relationship between church and State. The first main sentence has a “Religious freedom clause”,⁸ and the second subordinate sentence a “Separation clause”. In Latvia, protection of the freedom of religion clause applies to natural persons (every believer, irrespective of links to the State) and to legal persons (e.g. religious organisations). For legal persons, an important condition is their existing registration, type, and purpose as specified in their statute as an expression of the will of the members.

7 Constitutional Court judgement on 18 March 2011, No. 2010-50-03, paragraph 7, <http://www.likumi.lv/doc.php?id=227463>.

8 The religious freedom clause is also subject to Article 89, because by existing international agreements this principle is mandatory. First sentence of Article 99 is textually and in terms of content similar to ECHR Article 9.1.

V. THE CONCEPT OF RELIGION FROM THE PERSPECTIVE OF LATVIAN LEGISLATION

Law on Religious Organisations

The primary law in Latvia relating to religion is the Law on Religious Organisations,⁹ which regulates their registration and “public relations resulting in the implementation of freedom of conscience and the activities of religious organisations”. The law “guarantees for the Latvian population freedom of religion”, but does not provide any explanation of what religion is. The law only provides a legal definition of religious activity – “religious activity is devotion to religion or belief, to practise worship, to perform religious or ritual ceremonies and preaching” (Article 1 (1)). Thus, the law clearly states that religious practices must be respected, but religion is not defined. This is understandable: as the content of religious beliefs, doctrines, and types are so different, a universal definition of religion would be incomplete and one-sided. Attempts to cover all religions, trying to find a relatively universally acceptable all-inclusive term for religion would be unsuccessful, because a complete exhaustive list would not be possible. Practice shows that attempts to define religion legally have failed, either because an understanding of the term is too general, or, vice versa, too limited. Legal definitions do not achieve the desired effect, since in most cases they are still open to interpretation. The narrow definitions of religion can often be discriminatory against other religions. Religion has so many forms and is interpreted so differently, that it cannot be adequately defined, but only described.¹⁰ Even attempts to define certain terms cause problems. In actuality, Latvia is a partial separation state, where constitutionally declared separation of church and state does not consistently work in practice:

In terms of this status of partial separation, it should be noted that governments of Latvia, mostly in their political documents/programs, refrain from a clear expression of opinion about

9 Law on Religious Organizations, *Latvijas Vēstnesis* (Official Gazette), No. 146, 9 September 1995.

10 S. Krūmiņa-Koņkova, V. Tēraudkalns, ‘Reliģiskā dažādība Latvijā’ (Religious Diversity in Latvia), *Īpašu Uzdevumu ministrija sabiedrības Integrācijas lietās sekretariāts, Izdevniecība Klints* (Rīga, 2007), 66. lp.

religion. This is understandable, as it could easily lead to misunderstandings that are difficult to correct. The exception is the 15 July 1999 declaration about the work of the Cabinet of Ministers. In the declaration, in addition to many guidelines about how to overcome crisis in the country, economic development, preservation of culture and the creation of competitive educational system, for the first time in the history of Latvia were included guidelines for relations with traditional religions and sects. Paragraph 12 of declaration promises strengthening the development of civil society: the Government will (1) support religious organisations in the moral education of the population; (2) improve the state's cooperation with traditional religious confessions; and (3) monitor entry of new religious movements in Latvia from the point of view of interests of national security, public order and public health.¹¹

The question is not about religious tolerance but about interpretation of the constitutional "separation clause", because there is no clear opinion about where the borderline between the state and church should be strictly drawn.¹²

Specific laws on the major religious denominations

During 2006-2008 the Latvian Parliament adopted seven special church laws.¹³ Although these address some of the issues requiring regulation, as a point of substance the Latvian model seems most to resemble that of Italy and Spain.¹⁴ Latvia is similar to Spain where a central part is played by a principle of religious neutrality. Unlike

11 Deklarācija par Ministru Kabineta darbu (Declaration of activities of the Cabinet of Ministers), *Latvijas Vēstnesis* (Official Gazette), 16 July 1999.

12 R. Balodis, 'The Constitutional and Administrative Aspects of State and Church Regulation in the Republic of Latvia. Religion and the Secular State', in: J. Martínez-Torrón, C. W. Durham (eds.), *La religion et l'État laïque/Religion and the Secular State, Interim National Reports* (Provo, Utah, Washington, D.C. 2010), p. 476.

13 For example a law on the Latvian congregations of the Church of Seventh Day Adventists, *Latvijas Vēstnesis* (Official Gazette), No. 93 (3669) 12 June 2007; A law on the Latvian Union of Baptist Congregations, *Latvijas Vēstnesis* (Official Gazette), No. 86 (3662), 30 May 2007; A law on the Latvian Pomora Church of Old Believers, *Latvijas Vēstnesis* (Official Gazette), No. 89 (3674), 20 June 2007; A law on the Latvian Evangelical Lutheran Church, *Latvijas Vēstnesis* (Official Gazette), No. 188 (3674), 3 December 2008; A law on the Latvian Orthodox Church, *Latvijas Vēstnesis* (Official Gazette), No. 188 (3972), 3 December 2008.

14 R. Balodis, 'The recent developments of Latvian model of Church and State relationship: Constitutional changes without revising of Constitution', *Jurisprudencija* 2009, 3 (117).

the American State-Church Establishment Prohibition Clause, co-operation or support for individual churches is allowed on condition that the religious freedom of other churches is not restricted. The laws were made as a result of the industry of Jānis Šmits, representative of Latvia's First Party (*Latvijas Pirmā Partija*) and Lutheran cleric, who from 2003-2004 was an advisor to the Deputy Prime Minister on religious affairs and arranged the signing of contracts with traditional churches in June 2004. These were later recast by the Ministry of Justice, submitted to parliament and, after consideration by the Legal Affairs Committee, approved in 2008 in three readings.¹⁵

In Article 2 of the laws, the Lutheran, Roman Catholic, Orthodox, Seventh Day Adventist, Methodist, Jewish and Old-Believer churches were legally recognised as “traditional religious organisations” which have invested in the development of the country. For example, Section 2 Part 2 of the Latvian United Methodist Church Law provides: “The objective of the Law is to regulate the legal relations between the State and the Church and set the common objectives of the State and the Church in the social, legal, educational and cultural areas, in line with the constitutional traditions and the provision of Article 99 of the Constitution of the Republic of Latvia, considering the long-standing existence and spread of the Church as a traditional religious organisation in the territory of Latvia, as well as recognising its contribution to and rich experience in the areas of society's physical and mental health, education, culture, social support and other areas.”¹⁶

15 Special bills were submitted to the parliamentary Legal Affairs Committee. While considering them in parliament, representatives of religious unions (churches) were invited to express an opinion in an attempt to reach an agreement on wording and content, as well as to find a compromise between the wishes of religious unions (churches) and principles of legislation.

16 Law on the Latvian Unified Methodist Church, *Latvijas Vēstnesis* (Official Gazette), No. 91 (3667), 6 July 2007.

VI. THE PRESENCE OF RELIGION IN THE POLITICS OF LATVIA

The attitude of churches towards politics

Since 1918, when Latvia was founded, there have been many different political parties with a Christian orientation – Latvian National Christian Union, Russian Old Believers' Party, Latvian Christian Farmers Party, Orthodox Party, Latvian Christian Democratic Union (LKDS), but never before have religious factors been so important as in the twenty-first century in the eighth and ninth term of the Latvian parliament.

Lobbying and the main traditional church in the Government

It should be noted that in Latvia religious factors tend to be used in every parliamentary and municipal election, but in the 2002 Parliamentary elections religion was very prominent. The “*Latvijas Pirmā Partija*” (Latvia’s First Party – LFP) was created on the initiative of three clergy; it focused mainly on Christian values and the call to base public policies on them. Existing Latvian legislation does not prohibit religious organisations from participating in election campaigns. During the parliamentary elections of 2002 the major churches (Lutheran, Roman Catholic and Orthodox) took an active part in the election campaign and the LFP was even nicknamed “the clergy party”. LFP members were returned to Parliament, become part of the coalition government,¹⁷ and acted as lobbyists on behalf of the main traditional church in the law-making process.¹⁸ From 2002 to 2011, when the party suffered defeats in the early Parliamentary elections, LFP activists used a variety of Christian festivals to encourage the faithful to be politically active and influence public policy by voting for their party.¹⁹ In addition, the heads of churches attended party congresses, blessing its mem-

17 R. Balodis, ‘Church and State in Latvia’, in: G. Robbers (ed.), *State and Church in the European Union* (Baden-Baden 2005), p. 267.

18 The principle „one confession – one church” can be added to the merits of lobbyists (see the Article 7 Part 3 of the Religious Organizations Law: ‘Communities of one confession can form in the state only one religious union [church]’).

19 A. Rancāne, I. Egle, D. Arāja, ‘Politiku slavināšanai izmanto dienvanu’ (Church is used for glorification of politicians), *Diena*, 23 December 2004.

bers in their political activities,²⁰ as well as in regular church services. For example, on 22 September 2002 at 11:00 on Latvia State Television II, a program was broadcast of an ecumenical service in which heads of traditional denominations led prayers for Latvia and its parliamentary elections. The event was also covered in the main Latvian Lutheran newspaper “Sunday Morning” (*Svētdienas rīts*): “We took part in this service, because we love Jesus. We know that our faith will not fail us as we definitely vote for LFP, which stands for Christian values and honesty”.²¹ It should be noted that heads of churches called the faithful to vote for people of good reputation.²²

In Latvia the Latvian Evangelical Lutheran Church may be regarded as most politically active. Clergy of this church were among most active at the beginning of National Awakening. Lutheran pastors actively participated in politics at the start of 1990s. The present archbishop of the Lutheran church Jānis Vanags participated in the radical Latvian National Independence Movement (*Latvijas nacionālās neatkarības kustība – LNNK*) and in soviet times in the radical Green movement (*Zaļo kustība*). Upon resumption of the state, until 1999, this church refrained from active politics until the situation changed at the start of this century. Notable was [its] archbishop’s Jānis Vanags announcement in 2001 on Latvian Independence Day, November 18. In Latvian TV’s 1st program, which is state-owned, the archbishop announced that **the Christian church hereafter will start to increase its claims to power and will not forget promises made**. The archbishop said: “We will confront power with the people, to achieve positive results”. He also made such statements, as “people are deprived of the opportunity to enjoy life in their own country. (...) Ten years ago, people were standing at barricades and fell for their country. Would they now do the same? If not, then the country is stolen from the people, with which to be proud, about which to rejoice and for which to give their heads. There is nothing more dangerous and destructive for a country, if people see instead of the nation-state the formation of an oligarchy which for one is a feeder, for others, an enslaver.”²³ These

20 I. Egle, ‘Nerimsies cīņā pret oligarhu varu’ (Will not stop fight against power of oligarchy), *Diena*, 2 June 2003.

21 G. Stalte, ‘Aizlūdz par valsti un vēlēšanām’ (Prays for state and elections), *Svētdienas Rīts*, 21 September 2002.

22 I. Egle, ‘Aicina vēlēt labas reputācijas cilvēkus’ (Calls to elect people of good reputation), *Diena*, 18 September 2002.

23 J. Vanags, ‘LELB arhibīskaps. Sabiedrības pauperizācijas cēloņi un sekas’ (LELC archbishop. Cause and effect of pauperization of society), *Labā Vēsts*. – 2001. – apr. – maijs. – 15. lpp.

are political announcements which coincided with the entry of pro-church forces in Latvian politics.

Both Catholic and Lutheran clergy have appeared in TV commercials calling people to vote for Christian values, which at that time had included only the LFP.²⁴ Priests have been seen on party lines, as political functionaries, and even as public officials. Of these the best known are three Lutheran clergymen Ēriks Jēkabsons, Jānis Šmits and Ainārs Baštiks. From 2002-2005 Baštiks, held office as Minister of State for Children and Family Affairs, Jekabsons as Minister for Interior Affairs, and Šmits as Secretary General of the eighth Saeima, Chairman of Parliament's Human Rights and Public Affairs Committee, and Chairman of Parliament's National Security Committee. As last representative of LFP, Schmits played an important role in strengthening the regulatory framework of churches and in shaping public awareness of religion in the second half of this century's first decade. The LFP in parliament, government and the public space has positioned itself as a lobbyist for religious organisations and as an enforcer of Christian values in national politics.²⁵ Its party leadership announced in 2002 that Christian politics is the only alternative to unprincipled Latvian politics.²⁶ The LFP in its policy documents highlighted that it is "centrist, based on the beliefs of the Christian world, and conservative", guided by belief in supreme spiritual values and service to God, community and state. It is noteworthy that serving God is mentioned first.²⁷

It should be noted that in 2002 was also founded the party "*Jaunais Laiks*" (The New Time), which by trying to compete with LFP for religiously-oriented voters, organized a solemn affirmation in church for its candidates. All New Time candidates, totalling eighty-one, at the beginning of August 2002, made a solemn promise in Riga Dom Cathedral to serve the Latvian people, and to act in

24 A. Rancāne, I. Egle, D. Arāja, 'Politiku slavināšanai izmanto dievnamu' (The Church is used for the glorification of politicians), *Diena*, 23 December 2004.

25 'Vai jauns iesākums LR politikā' (Is it new beginning in politics of Republic of Latvia), *Latvijas Luterānis*, 21 June 2003.

26 I. Egle, 'Pirmā partija ar mācītāju vadībā' (First party under the guidance of clergyman), *Diena*, 2 August 2002.

27 'Latvijas pašvaldību vēlēšanu dokumenti. Latvijas Pirmā partija' (Documents of local elections of Latvia. Latvia's First Party), *Latvijas Vēstnesis* (Official Gazette) 19 February 2005.

accordance with Latvian laws and party statutes. The oath was accepted by ministers of the Lutheran and Baptist churches and one Orthodox priest. Each candidate individually before the altar signed a solemn affirmation and in chorus called upon God for help to fulfil his promise.²⁸ The National Anthem was played in church and the party leader held the National Flag.²⁹ Religious factors were used also by the subsequently dissolved *Tautas Partija* (People's Party), which on May 2, 1998 organized a service dedicated to its founding congress in Jesus Heart cathedral in Rēzekne.³⁰

The LFP has also tried to support traditional and other religious organizations. Finance was placed at their disposal after the parliamentary elections in 2002 when LFP members were returned to Parliament and joined the coalition government. In 2004 the LFP ensured that 1,481,176 Ls³¹ from the State budget were allocated to the development of the infrastructure of sacral tourism. Under the aegis of the Party the churches have received almost 2 million euro from state and regional budgets. Both smaller and larger sums have been allocated to more than 160 religious organizations (mostly Lutheran, Roman Catholic, Orthodox, Seventh Day Adventist, and Old-Believer parishes). The allocated funds have been spent mainly on the renovation and painting of, and the installation of sewage and heating systems in, churches.³²

In 2011 Parliament was dissolved and early elections were held. LFP members were not re-elected, and it can be confidently said that Christian values are not represented in the current parliament. Interestingly, the party which in its infancy was against oligarchy,³³ was forced to leave politics not only labelled a party of

28 “‘Jaunā laika” deputātu kandidāti baznīcā sola kalpot tautai un ievērot likumus” (Candidates of „New Time” in church promise to serve nation and comply with the law), *Latvijas Luterānis*, 7 September 2002; I. Egle, ‘Pirmo reizi partija sola baznīcā’ (For the first time party promise in church), *Diena*, 2 August 2002.

29 Ibid.

30 R. Balodis, *Valsts un Baznīca* (State and Church), (Rīga, 2000) p. 366.

31 According to official exchange rate of Bank of Latvia of August 2012 1 euro = 0.70 LVL.

32 R. Balodis, ‘The financing of religious communities in Latvia’, in: B. Basdevant-Gaudemet, S. Berlingò (eds.), *The Financing of Religious Communities in the European Union. Le financement des religions dans les pays de l’Union européenne* (Leuven, 2009), p. 235.

33 One of the leaders of party, clergyman Ē. Jēkabsons in second party congress especially accented, that „War has started. Latvia is independent but not free, be-

oligarchs, but also changing its original name to one of so-called oligarch,³⁴ although one cannot deny the benefits of the LFP legacy, both in financial terms and in forms of regulatory framework.

The demise of the pro-Christian party also meant the absence of a direct focus for political lobbying for churches. A good example is the work of the Spiritual Affairs Committee which was constituted in 18 September 2001 by Prime Ministerial order.³⁵

The Committee consists of invited leaders or representatives of the Evangelical Lutheran, Roman Catholic, Orthodox, Old-Believer, Methodist, Baptist, Seventh Day Adventist, Moses Believers (Jewish) denominations, the Latvian Old Believers Pomorian churches and representatives of political parties represented in the Saeima. The Committee is chaired by the Prime Minister. According to the byelaw of the Spiritual Affairs Committee its tasks are to coordinate development and implementation of projects [relating to] state and church, express its view to the Cabinet of Ministers and other government institutions on issues related to the activities of religious organizations in Latvia, as well as express its opinion to government institutions when they deal with matters affecting the rights or obligations of denominations, religious organizations or believers. Given the task of committee to promote and improve collaboration of state and religious organizations, the Spiritual Affairs Committee may be the institution, which in this initial stage will express its opinion about forming particular relations with religious unions (churches).

The Spiritual Affairs Committee, which for many years was maintained by the activism of the LFP for churches, decayed like other political initiatives after 2011, when in the early parliamentary elections pro-church political forces did not make it into parliament.

cause in Latvia is weak democracy and oligarchy still strongly rules.” (I. Egle, ‘Nerimsies cīņā pret oligarhu varu’, *Diena*, 2 June 2003).

34 In 2011 the party changed its name – synthesized it with the name of its leader and named itself “Šlesers Reform Party LFP/LW” (“Šlesera reformu partija LPP/LC”).

35 Prime Minister’s of the Republic of Latvia order No. 322.

VII. THE OFFICIAL ATTITUDE TOWARDS RELIGION, RELIGIOUS ORGANISATIONS AND CHURCHES

Public attitudes towards religion and the church in public events (national and religious holidays)

According to the law on holidays, commemoration days and celebration days, Article 1 on holidays sets days which have no connection to religion, for example: New Year's Day (1 January), Labour Day/Convocation of the Constituent Assembly of the Republic of Latvia (1 May), Day of Proclamation of the Declaration of Independence of the Republic of Latvia (4 May), Day of Proclamation of the Republic of Latvia (18 November), New Year's Eve (31 December), and Mother's Day (second Sunday of May). However, there are also public holidays that are Christian – Good Friday and Easter and Easter Monday and Christmas (24, 25 and 26 December). The law states that “for Orthodox, Old-believers and believers of other denominations, Easter, Pentecost and Christmas are celebrated on days set by their denominations”, which in practice means that other religious holidays are not recognised. Given that a large part of the population is Orthodox, celebrating Christmas by the Julian not Gregorian calendar, every year in parliament the so-called Russian parties propose that the Orthodox Christmas Day (7 December) should be declared as an official holiday. In 2009 discussions on this issue were very vocal, because Latvian leader Valdis Zatlers appeared on state television on Christmas and congratulated the Orthodox.³⁶ Usually Presidents and Prime Ministers of Latvia speak to the nation on New Year's Eve. In 2012 the President of Latvia Andris Bērziņš expressed the view that the Orthodox holiday should be made a national holiday. Given that in Latvia there are a large number of Russian-speakers, whose primary element of identity is their Russian culture, of which orthodoxy is an integral part, the celebration of Christmas became a political matter and the reaction was instantaneous – the Mayor of the capital of Latvia, Nils Ušakovs (also leader of the so-called Russian party “Harmony Centre”, *Saskaņas Centrs*) re-

³⁶ A. Lazdiņš, ‘Slavē, ka prezidents runā, bet mudina svētkus atzīt likumā’ (Prises that President speaks, but encourages to recognize holidays in law), *Diena*, 7 January 2010.

marked that “the official recognition of Orthodox Christmas is not an ethnic or linguistic issue as in Orthodox churches there are Latvians, Russians and other ethnic groups, but this official recognition could become a very important [and] positive signal to Russian-speaking residents of Latvia, most of whom are Orthodox or Old Believers.”³⁷ Moreover, on 8 January 2012 the Prime Minister, Valdis Dombrovskis, attended a Christmas service led by the Latvian Orthodox Church Metropolitan of Riga and all Latvia, Alexander – and the President, Andris Bērziņš, and the Speaker of the Saeima, Solvita Aboltaņa, sent congratulations to the Latvian Orthodox read out during the service.³⁸

The State’s attitude towards Orthodoxy is illustrated in 2006 when the government accidentally transferred a working day from 5 May to 22 April,³⁹ falling in Orthodox Easter.⁴⁰

Latvia awaits claims from other denominations (for example, Muslims), to have official holidays. In 2003 Parliament discussed proposals to remove the Eastern Easter Monday and instead make an official holiday on 15 August, Māras Day or Virgin Mary Day, which is an important day for Latvian Roman Catholics. This proposal was not supported.

Economic decline in Latvia, resultant austerity measures in 2009-2011, and the current “economic budget” have all affected religion, including reduced state support for churches. However, an exception is the feast of the Assumption of Blessed Virgin Mary into Heaven celebrated by the Roman Catholic Church on 15 August at Algona, a place of international importance. Every year the state directly supports this feast financially.

In terms of financial support it should be said that the Republic of Latvia in so-called “years of plenty” has developed a national program, the “Renewal of objects of infrastructure of religious tourism” to fund the preservation and rebirth of the spiritual and cultur-

37 I Veģe, ‘Soli tuvāk pareizticīgo Ziemassvētku atzīšanai’ (One step closer to acknowledging Orthodox Christmas), *Neatkarīgā*, 23 February 2012.

38 Svētki, ‘Pareizticīgo un vec ticībnieku 2011./2012.gada Ziemassvētkos’ (Holidays. In Orthodox and Old-believers Christmas in 2011/2012), *Latvijas Vēstnesis*, 10 January 2012.

39 Government wanted to move Friday, May 5 to April 22, because May 5 fell between official holidays – May 4 (Day of Proclamation of the Declaration of Independence of the Republic of Latvia) and weekend holidays.

40 <http://www.delfi.lv/archive/index.php?id=13874737>.

al heritage of Latvian churches.⁴¹ Within the framework of this program, more than 2 million euro are provided for the renewal of churches. Most support is given to churches of the Evangelic Lutheran and Roman Orthodox [traditions], but [support is also given] to Orthodox, Old-Believer and Baptist [churches].⁴² For the purpose of objectivity, it must be noted that in the first program of religious tourism...money was given [for, for example] projects [and] repairs so that churches immediately felt the benefit and people [then] voted for [the] parties in parliamentary elections.⁴³

One reason for state support is the numbers of people involved in this event, usually about 70,000 people, but in 2000 about 450,000, making this event of national significance. The Roman Catholic Church requests the funding which is about 80,000 Ls.⁴⁴ The event traditionally begins with speeches by the three highest officials of Latvia (President, Prime Minister and Parliament Speaker).⁴⁵ These speeches and the event itself are widely covered in the media. The current President, Andris Bērziņš, as at his inauguration, consistently refers to concepts of “secularism”; in his second year, he participated in the event but did not speak to the faithful.⁴⁶

One of most interesting examples of interaction between state and church are traditions that have developed in connection with

41 Similarly, in 2005 and 2006, state budget include the “Grant for ensuring operations of religious organizations”, which ensured for separate religious organizations restoration of their churches, improvement of infrastructure and allowed them to purchase necessary equipment (Amendments to the Law on Budget for year 2005 *Latvijas Vēstnesis* [Official Gazette], No. 148, 16 September, 2005; Amendments to the Law on Budget for year 2006 *Latvijas Vēstnesis* [Official Gazette], No. 179, 9 November 2005).

42 However, support for more than 90 churches represented only 1000 to 5000 lats. There were churches that received a lot more financial support. For example, Riga St. James Roman Catholic cathedral received 50,000 lats, Talsi Evangelic Lutheran church 49996 lats, Riga St. John’s Evangelic Lutheran church 48350 lats, Ikšķīle Roman Catholic church 47,959 lats, Cesvaine Evangelic Lutheran church 40,268 lats etc. (A. Grīnbergs, ‘Vai būs nauda Latvijas dievnamiem?’ (Will there be money for churches in Latvia?), *Latvijas Avīze*, 14 August 2008).

43 A. Grīnbergs, ‘Vai būs nauda Latvijas dievnamiem?’ (Will there be money for churches in Latvia?), *Latvijas Avīze*, 14 August 2008.

44 ‘TM: Par Aglonas 2012.gada svētku pasākumu plānu’ (Ministry of Justice: About plans for the Aglona holiday in 2012), *Latvijas Vēstnesis*, 13 December 2011.

45 ‘Skat. piemēram, Kristīgais mantojums, ko esam saņēmuši, ir spējīgs kļūt pat mūsu personiskās un valsts atjaunošanas un iedvesmas avotu’ (See, for example, Christian legacy, what we have recieved, is able to become source of our personal and state renewal and inspiration), *Latvijas Vēstnesis*, 17 August 2011.

46 Uzrunu neteiks (Will not speak), *Latvijas Avīze*, 7 August 2012.

the President's inauguration ceremony. In Latvia, it is constitutionally established that the church is separated from state and neither the Law on the election of the president,⁴⁷ nor the Rules of Procedure in Parliament,⁴⁸ or any other legislation, prescribes the official celebration ceremony after the oath is given.⁴⁹ According to the Constitution of Latvia, the President must give the oath in parliament, and the rest is up to the President's protocol. The current president Andris Bērziņš, elected in 2011, chose to depart from the established tradition of previous presidents – Guntis Ulmanis (1993-1999),⁵⁰ Vaira Vīķe-Freiberga (1999-2007), Valdis Zatlers (2007-2011) – namely, to receive a blessing in church from leaders of traditional denominations. Interestingly, some inaugurations have been held in a number of different traditional churches, which was obviously confusing. In the program of activities for the inauguration of President Andris Bērziņš (8 July 2011), unlike his predecessors, after making the solemn oath he did not go to church. For the new president, after the event in parliament, other activities planned (for example, highest awards ceremony, glass of champagne etc.) give a clear signal that the Latvian government is secular not only “on paper”, but also in the highest public official forms.

47 President Election Law, *Latvijas Vēstnesis* (Official Gazette), No. 79 (3655) 17 May 2007.

48 Law on Parliament Procedures, *Latvijas Vēstnesis* (Official Gazette), No. 96 (227) 18 August 1994.

49 Article 40 of the Constitution of Latvia states: “In the next parliamentary session after election, the president on assuming office gives following solemn oath: “I swear that all my work will be devoted to the benefit of Latvian people. I will do all that stands in my power to promote the welfare of the state and its citizens. I will hold sacred and respect the Constitution and Laws of Latvia. For all I will act justly and fulfil my duties conscientiously.”.

50 It is difficult to judge why Latvian presidents until Andris Bērziņš practised going to church after giving the solemn oath in parliament. Most likely is that it could be an attempt to copy the experience of the last president of the Latvian state Kārlis Ulmanis (1936-1940). A monograph of modern day Latvian diplomat Aija Odiņa includes the program of president Guntis Ulmanis' inauguration activities – after the solemn oath in parliament a “service” took place in church, during which senior clergy blessed the new head of state, flowers were laid at The Freedom Monument (Latvian symbol of freedom) and at a memorial for soldiers killed in action (Statue of Mother of Latvia at Brothers' Cemetery) and then the inauguration ball took place at the President's Castle (A. Odiņa, *Protokols* (Protocol), (Rīga, 1998) 158. lpp.).

18 November 1918 is the day of the founding of the Republic of Latvia. As in any country it is an important national holiday. Every year, in the evening of 18 November, a service is held in honour of National Independence Day in Riga Dom Cathedral or St. James' Cathedral (both located in the capital near the President's palace and Parliament building); it is called the "official ecumenical service".⁵¹ This service is not the only activity associated with the holiday, but one of a number of activities on this day. Also this service is broadcasted on TV and countless viewers can look at politicians live whilst in church. 18 November 2000 will remain in the history of Latvia as the day when the largest Latvian church publicly expressed its outrage about processes taking place in the country. On 17 November 2000, the Archbishop of the Latvian Evangelic Lutheran Church, J. Vanags, sent an open letter to the President of the State.⁵²

In this letter the archbishop accused the government of disinterest in the fate of the nation, pointing out that people are having less and less reasons to believe, that the cause of their poverty is the path to freedom. In the letter the archbishop also accused the ruling coalition...of not fulfilling promises about tax relief for the real estate of churches, as well as adoption of a reproductive law to legalize abortion in Latvia. The Lutheran archbishop asked the president to receive [the letter] on the understanding that he would not take an active part in the ecumenical service on November 18, 2000. The Lutheran archbishop expressed the view that Latvia is led by God and that Latvia has disgraced itself. God has made its disgrace visible. His motto was: "If we will not make our leaders to account for their actions, than we will always be trampled under their feet".

Attended by all the political elite, the Archbishop refused to lead the service – it was led instead by a Lutheran pastor with Vanags present. This sent an important political message. The largest Latvian newspapers, for some time, published letters of support from readers and people admiring the Archbishop. A Member of Parliament suggested in the press that the Archbishop should resign. One

51 A. Odiņa, *Protokols* (Protocol), (Rīga, 1998) 159. lpp.

52 J. Vanags, 'Arhibīskapa Jāņa Vanaga atklātā vēstule' (Jānis Vanags in open letter), *Katoļu Baznīcas Vēstnesis*. – No. 26 (164), 1 December 2000; 'Atklātā vēstule V.E. Vairai Viķei – Freibergas kundzei Latvijas Republikas Valsts prezidentei' (Open letter to H.Exc. Mrs Vaira-Viķe Freiberga President of Republic of Latvia), *Labā Vēsts*, December-January 2000/2001.

view was that “the Church has finally said what it had wanted to say for a long time” and the government owed a response to the church and the public.⁵³ Although 2000 saw a public dispute between the Archbishop and the then President, tensions have subsided and subsequent services have taken place with the participation of the highest state officials. Sometimes government officials have been given an opportunity to speak at the event.⁵⁴

The State’s attitude towards Jewish denominations practising the Sabbath is striking. Latvian elections are held on Saturday, which coincides with the Jewish Sabbath celebrations. In September 2011 Parliament amended the Parliamentary Elections Law following criticism from Jewish organisations.⁵⁵ It was provided that on 17 September 2011 (the election date) polling stations were to be open until 10 pm at night to enable access after Sabbath had ended. Previously polling stations were closed at 8 pm: the Jewish Sabbath ends at 8:36 pm.⁵⁶ The new rule applied to urban and rural polling stations. In the capital, Riga, there were four such polling stations, but in two major cities (Daugavpils and Liepāja) there were only two.⁵⁷ The impasse in the matter of the restitution of

53 J. Rimšāns, ‘Vara ir atbildi parādā’ (Government have answer in debt), *Rīgas Balss*, 20 November 2000.

54 These speeches have been quite religiously oriented, even though the church is constitutionally separate from state. Thus President Vaira Vīķe-Freiberga, in the service for national celebration in Riga Dom Church, November 18, 2005 noted the following: “We thank you, Lord, for our freedom, which is bestowed upon us, we thank you for those sacrifices, which were given for the sake of it, and we pray for all the suffering that is carried on in its behalf. We ask you for the power to carry with dignity what others have achieved, we ask you for the power to find in ourselves the resources and opportunities to develop it further, so it may be sublime and great, as its founders intended it. Lord God, protect us from evil, we pray thee! (...) Lord, we ask that you give us the gifts of Holy Spirit, allow it to flow through our being like a violet flames, which cleanses and purifies us from the dross of flesh and spirit, so that we can climb the divine heights and achieve there enlightenment and power. Lord, enlighten our hearts and minds, guide us in our daily lives, and help us to make the right decisions. Lord, we pray, lead us in our path! Lord, we pray, forgive us our sins – all the people and our nation, forgive what our neighbour does or what our ancestors did. (...).”

55 Parliament Election Law, *Latvijas Vēstnesis* (Official Gazette), No. 144 (4542) 13. September 2011.

56 The Parliament Elections Law provides that elections shall be held on Saturday from 7 am to 8 pm.

57 While most people comprehended or were unconcerned about such a development, some expressed a critical attitude. The Latvian Dievturi association (National Pagans) in open letter to parliament and the central election commission expressed confusion as to why the honorary duty of citizens and the assurance of considera-

Jewish property also continues; this has been criticised by the U.S. State Department.⁵⁸ Interestingly, some years ago, when the special law on the activities of Jewish communities was discussed, the issue about the Sabbath days was not addressed.⁵⁹

The isolation of individual religions in legislation

There are in Latvian laws and the regulations of the Cabinet of Ministers different lists of denominations and churches. Similar to Article 91 of the Constitution, Article 4 of the Law on Religious Organisations specifies the “principle of equality” for persons regardless of their religious beliefs. At the same time, Article 5(7) of the Law provides that relations of state and religious organisations may be regulated by special laws (and seven such laws have been enacted), but Article 6(3) enables five denominations (Evangelic Lutherans, Roman Catholic, Orthodox, Old-Believers and Baptists) to teach the Christian religion in schools. Moreover, under Article 14(5) of the Law, chaplains in Latvia work on the basis of Regulations of the Cabinet of Ministers.⁶⁰ Section 5 of these Regulations deal with chaplaincy candidates of ten specified Churches.⁶¹ In addition, Article 51 of The Civil Law mentions eight denomina-

tion to Latvia are subject to and contrasted with religious traditions of a particular minority. (<http://dievturi.blogspot.com/2011/08/latvijas-dievturu-sadraudzes-atklata.html>).

58 The U.S. Department of State annual International Religious Freedom Report, released on 30 July, agrees that the Latvian Constitution and other laws and policies protect religious freedom and, in practice, the government generally respects religious freedom, but also mentions restitution of pre-war Jewish properties as not progressing (Religious hatred still evident, <http://www.baltictimes.com/news/articles/31656/>).

59 A law on the Jewish congregation in Rīga, *Latvijas Vēstnesis* (Official Gazette), No. 98 (3674), 20 June 1998.

60 ‘Noteikumi par kapelānu dienestu (Regulations about chaplain duties): Ministru kabineta 15.02.2011. noteikumi nr. 134. – Nr. 32(4430)’, *Latvijas Vēstnesis*, 25 February 2011.

61 Latvia Evangelic Lutheran church, Riga Metropolis Roman Catholic curia, Latvia Orthodox church, Latvia Old-believers Pomora church central council, Latvia United Methodist church, Latvia Baptist union, Seventh Day Adventist Latvian union, International Church of God Latvian Pentecostal association, Latvian dievturi, and Latvian Pentecostal centre.

tions to which the state has delegated the function of marriage registration.⁶²

Nr.	Function	Number
1.	Teaching Christian religion in schools	5
2.	Marriage registration	8
3.	Proposing of candidates of chaplains	10

The State's attitude towards religion derived from the treatment of sacred sites

In Latvia, more than eight hundred temples and cult buildings are owned by religious organisations, including: 300 by Lutherans, 216 by Catholics, 122 by Orthodox, 66 by Old Believer Orthodox, 66 by Baptists, 79 by Seventh Day Adventists, 24 by Pentecostals, and 8 by the Salvation Army. A large proportion of the churches are listed as historic monuments of national importance. The most famous and best known churches – shrines are: (1) the Aglona Basilica of the Roman Catholics; (2) Riga Dom Cathedral owned by the Lutherans; and (3) the Orthodox Church's convent of Valgunde.

The Aglona Basilica of the Roman Catholics is currently the only officially recognised shrine of the Republic of Latvia. The Basilica was built in 1800 by the Dominican monks. The Aglona Basilica was visited and consecrated by Pope John Paul II in 1993, and attracts many pilgrims. Every year on the 14 and 15 of August there are celebrations to mark the Catholic feast of the Assumption of the Blessed Virgin Mary. Large numbers take part; for example, on 15 August 2003 about 100,000 pilgrims participated in the Aglona celebration. The Catholic Shrine has a particular legal regulation. According to Article 1 of the Law of 1995 "On the International Shrine in Aglona", Aglona is an international shrine, a part of the cultural and historical heritage of Latvia, a cultural monument, and a place for religious pilgrimages. The Shrine of Aglona

62 State has delegated marriage registration function to confessions of Evangelic Lutherans, Roman Catholics, Orthodox, Old-believers, Methodists, Baptist, Seventh Day Adventists and Moses believers (Judaists).

must be used exclusively for religious and spiritual observances under the auspices of the Latvian Catholic Church. On the basis of this Law, the government of Latvia promulgated in 1999 Regulations "Concerning the Activities of Natural and Legal Persons in the Protected Area of the Aglona Shrine". The regulations provide that timber felling and any work affecting the river or lake, any construction or installation of premises and buildings, hotels or places of entertainment may be carried out only with the written permission of the congregation. In the Shrine area, no one may, without the congregation's permission, sell or advertise alcoholic drinks and amusement products. Without the same permission, hunting and fishing in the area are also prohibited. In accordance with Article 11 of the Agreement with the Holy See, the Shrine of Aglona is part of the cultural and historical heritage of the Republic of Latvia, and as such is protected under Latvian law. Besides the building of the Basilica itself, the sacred square in front of the Basilica and the cemetery and spring area, the protected area of the Shrine includes all other buildings, structures and lands belonging to the Catholic Church.⁶³

Riga Dom Cathedral, owned by the Lutherans,⁶⁴ is the seat of the Archbishop of the Latvian Evangelical Lutheran Church and a significant symbol of Latvian spiritual life. The special law for Lutherans does not deal specifically with Riga Dom Cathedral.⁶⁵ This is because the cathedral was already treated in the Law of Riga Dom Cathedral and Monastery.⁶⁶ This law is to ensure the

63 R. Balodis, 'The Constitutional and Administrative Aspects of State and Church Regulation in the Republic of Latvia. Religion and the Secular State', in: J. Martínez-Torrón, C. W. Durham (eds.), *La religion et l'État laïque/Religion and the Secular State, Interim National Reports*, (Provo, Utah, Washington, D.C. 2010) p. 485.

64 Historically, Riga Cathedral was the main bishop's church of Livonia right until 1561 when Livonia collapsed. It is the biggest medieval church and one of the oldest religious buildings in Latvia and in the whole Baltic region. It combines features from Romanesque, early Gothic, Baroque and Art Nouveau periods of architecture. Today, Riga Cathedral is home to the Riga Cathedral community. It also serves the Latvian Evangelical Lutheran Church and is the main venue of Latvian ecumenical worship. It is also one of the busiest Riga music venues and stores a whole wealth of historical, architectural, cultural and artistic treasures from different centuries (http://www.doms.lv/info/?mnu_id=47).

65 A law on the Latvian Evangelical Lutheran Church, *Latvijas Vēstnesis* (Official Gazette), No. 188 (3972), 3 December 2008.

66 Riga Dom Cathedral and Monastery Law, *Latvijas Vēstnesis* (Official Gazette), No. 98 (3256), 7 July 2005.

conservation and protection of the Riga Dom Cathedral and Monastery complex and their heritage value. The law provides for their maintenance, use, management and funding. The law also resolved a legal controversy over ownership. Under Article 2(2) of the law, Riga Dom Cathedral and monastery complex is a holy place of national significance located in the historic centre of Riga and it is included in the United Nations Educational, Scientific and Cultural Organization World Heritage list. Riga Dom Cathedral and monastery complex consists of real estate belonging to the Republic of Latvia and the Latvian Evangelical Lutheran church.

In accordance with Article 7 of the Law on the Latvian Orthodox Church,⁶⁷ the state recognises one sacred place – the Holy Trinity-Sergius convent at Valgunde – with all the constituent buildings, structures and the area around it, its cemetery, the road to and the Holy Hill. If so determined by the Church, the site may be used as an object of cultural tourism.

VIII. THE ATTITUDE OF RELIGION TOWARDS STATE

The attitude of religion towards the state is dynamic. One peculiar attitude indicator is refusal of some Latvian clergy to accept national awards. A national award was publicly rejected by prominent Lutheran clergyman Professor Roberts Feldmanis, who was recognized in the International Biographical Centre of Cambridge 2000 Outstanding Scientists of the twenty-first Century as a major world-class theologian. A national award was also rejected by a Cardinal of the Roman Catholic Church, J. Pujats (then also archbishop). They expressed the view that accepting the award would express a link to secular power and thus to legitimize indirectly the existing political regime. By accepting the award they would accept all the defects of the regime – corruption, paedophilia and disinterest in the fate of ordinary people. Lutheran pastor R. Feldmanis also rejected his award on the grounds that his honour he does not derive from the people. Truth, the highest award of the Republic of Latvia – the Order of the Three Stars – has been accepted by both

67 A law on the Latvian Orthodox Church, *Latvijas Vēstnesis* (Official Gazette), No. 188 (3972), 3 December 2008.

the Lutheran archbishop and the Jewish Chief Rabbi. So, an objective and generalized attitude of religion towards state cannot be induced from these examples.

Latvia is a multi-confessional country where, despite the constitutional principle of equality (Article 91 of the Constitution), laws isolate individual confessions as special partners of cooperation in specific areas. While this does not rule out adding new denominations/churches to the list of traditional confessions, it must be understood that having “listed” or “isolated” confessions with particular relations with the state differentiates between those that have not been endowed with the state’s normative favour. In addition, “isolated” confessions do not have a monolithic attitude towards the state. In 2000 the government signed an agreement with the Holy See – this particularly exercised Protestants and the so-called “Russian church” (Orthodox and Old-Believers). Consequently, agreements were made between these and the state (2004) which later became special laws (2008). This may reflect a principle of formal equality:

Currently, speaking about religious organizations in the Republic of Latvia one should speak not only about their registration, but on a special recognition of separate religious organizations by the state, which is not related to registration. In my opinion, depending on the [particular] form of recognition by the state the religious organizations in Latvia may be divided into two types: (1) traditional religious organizations; and (2) others. Traditional religious organizations may be divided into the Roman Catholic Church, as its status is based on an international agreement, and other traditional religious organizations, which by adoption of special laws in respect of them have gained a special recognition of the state. Others are religious organizations registered pursuant to the Law on Religious Organizations. Religious organizations as unions or commercial structures, or are not registered at all and thus cannot be construed as religious organizations that would have rights to appeal to religious freedom.⁶⁸

The concordat factor in this principle, and hence the attitudes of religions towards the state, is significant. In truth, the principle

68 R. Balodis, ‘Las relaciones entre el Estado de Letonia y las organizaciones religiosas: de la realidad soviética al modelo de España e Italia’, *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 21 (2009), http://www.iustel.com/v2/revistas/detalle_revista.asp?numero=21&id=2.

derives from the founding of the Republic of Latvia – before 18 November 1918 Latgallians obtained a political promise about a concordat with the Holy See. Commitment to conclude concordat played its role in *de facto* recognition by the Vatican in 1920.⁶⁹ The Concordat of 1922, which Latvia signed with the Holy See defined immunity of Roman Catholic Church estate, recognition of canon law, the status of church judicial decisions in secular courts, and ecclesiastical protection.⁷⁰ It provided protection for state as well as for other major religious confessions in the building of relations with the state.

The attitude of churches towards the Latvian state is competitive and lobby-orientated. Churches, as a result of the activities of the LFP (2002-2011), realised the opportunities afforded by political lobbying.⁷¹ Churches cannot be blamed of this, because it is actually a rebuke to the state itself – as there is no serious policy on church and state relations, churches themselves are forced into this policy with those political forces which themselves offer a helping hand.⁷² Traditional Latvian churches are positively oriented to any party which expresses pro-religious values. Basically, there is nothing blameworthy with large traditional denominations having their own lobbyists in parliament and the executive, provided this is constitutionally permitted.⁷³

In addition, attitudes of churches towards the state cannot be separated from the experience of the Latvian people towards the state – this is quite reserved and cautious. This is often shown in the dynamics of Parliamentary parties during the second period of independence and with subsequent changing political coalitions.

69 R. Balodis, *Baznīcu tiesības* (The Rights of Churches), (Rīga, 2001) 663-664. lpp.

70 Ibid. pp. 665-666.

71 Archbishop Vanags: “From the perspective of the church, the LFP had most active interest in what people in churches think and need. Finally there is someone with whom we can talk and receive more than formally polite attention, as was often the case in previous parliamentary terms. For that I am grateful to LFP. I think that they helped many Christians to feel that Latvia was their own country which is not indifferent to them.”, S. Benfelde, ‘Kādu reliģiju pārstāv mācītāju partija’ (What religion represents clergy party), *Nedēļa*, 13 February 2006.

72 “If there is a party that really helped all denominations of Latvia, that consistently protected Christian values in our society at the national level, it is the Latvian First Party”, P. Brūvers, ‘Par visu esiet pateicīgi’ (Be grateful about everything), *Svētdienas Rīts*, 19 March 2005.

73 R. Balodis, *Valsts un Baznīca* (State and Church), (Rīga, 2000) p. 355.

People often blame the state for developments rather than taking responsibility themselves for these. The roots of this are in the effects of the totalitarian USSR regime which continue to affect the outlook of people. People do not believe in their hearts in a fair and corruption-free government while belonging to a religious denomination means engagement in a system that is not reliant upon the state.

It is also significant to note that while the official policy of the Latvian government the integration of the Russian and Latvian communities, in 2012, the referendum on the Russian language as the official state language led to a situation where churches positioned themselves along national lines. The Orthodox Church and Old-Believers publicly sought not to express an attitude about the language issue, while the hierarchy of the Roman Catholic Church expressed a clear view about the Latvian language as the only official language in the Republic of Latvia. In February 2012, the Catholic bishops, under the guidance of Archbishop Zbignevs Stankēvičs, publicly stated that the Catholic Church is tolerant and respectful of any nation's culture and language, and called upon "the faithful and all people of good will in so important a time for Latvia, to join [together] to preserve Latvian national identity and language and to participate in the referendum and vote against amendment of the Constitution, including voting against state [plans as to the] language status of the Russian language".⁷⁴

IX. THE ATTITUDE OF THE STATE TOWARDS RELIGION

Overall, the attitude of state towards religion is neutral and secular. However, from the experience of the first period of independence, and the influence of churches, the presence of religion is noticeable even in Parliament. In 1996, a special prayer room for Members of Parliament was built though it seems to be little-visited. But despite this, the suggestion was never made to include provision for daily prayers in the Rules of the Procedure of Parliament.

74 J. Pujāts, Z. Stankēvičs, J. Bulis, V. Lapelis, E. Pavlovskis, J. Cakuls, A. Justs, Ā. A. Brumanis, 'Bīskapu aicinājums. Katoļu baznīca aicina balsot pret grozījumiem Satversmē' (Catholic Church calls to vote against amendments in Constitution), *Latvijas Avīze*, 10 February 2012.

Latvia at constitutional level has clearly defined its attitude towards religion: the Separateness of Church from State. This means that the state must equally relate to its citizens as well as to churches, regardless of their religious type. State confidence cannot be motivated only with the particular religious orientation of an organisation. The State can support religious organisations in the context of objectives not related to religion – for example, funding restoration of church heritage monuments of value to the entire nation, or supporting the social work of churches in caring about socially vulnerable members of society. Within the state, these and other measures can be supported directly and indirectly (through tax incentives).⁷⁵

Attitudes towards certain denominations had formed in the historical development of the Republic of Latvia. Currently, legislation follows the practices of pre-war Latvia. As already mentioned, religious unions (churches) already had a special status in pre-war Latvia – and specific laws defined the operational framework of these organisations.⁷⁶ Even in discussions in Parliament about the wording of Article 99 of the Constitution, it was noted that the state could not have an equal attitude towards all religious denominations in the country. The special role of individual religious organisations has also been highlighted here (e.g. signing cooperation agreements with them).⁷⁷ All together, these denominations represent the majority of Latvian believers and each of them represents a significant percentage of this majority. Their historical, social and cultural contribution to the development of Latvian society and the

75 R. Balodis, '99.panta komentārs/Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības' (Comments on Article 99 of Constitution/Comments on Constitution of Republic of Latvia. Chapter VIII. Fundamental Human Rights), *Autoru kolektīvs prof. R.Baloža zin. Vadībā*, (Rīga, 2011) pp. 321-323. lpp.

76 Regulations on status of Evangelic Lutheran church: Set of laws and regulations, 24.08.1928, No. 22. See also 20 September 1934, Law on Evangelic Lutheran church: Set of laws and regulations, 27.10.1934, No. 16; 8 October 1926, Regulations on status of Orthodox church: Set of laws and regulations, 30.10.1926, No. 17; Law on Old-believer churches: Set of laws and regulations, 18.03.1935, No. 4; 2 October 1923, Regulations on Baptist churches: Set of laws and regulations, 15.10.1923, No. 20; 30 October 1928, Regulations on Seventh Day Adventist churches: Set of laws and regulations, 12.11.1928, No. 24; 12 January 1934, Regulations on Bishop – Methodist churches in Latvia: Set of laws and regulations, 31.01.1934, No. 1.

77 Transcription of Saeima plenary session on 20 August, 1998, http://www.saeima.lv/steno/st_98/st2008.html.

formation of the Latvian mentality is much higher than that of other denominations, as in their possession are cultural and heritage items of national importance whose preservation is a state concern.⁷⁸

At the time of this report, a central object of discussion between the state and churches is that of financial support because of the economic crisis in Latvia.⁷⁹ A good example is the Old-Believers who believe that the state should participate in ensuring security to sacred works of art.⁸⁰ In 2012, icons were stolen from several Old-Believer sites. The Old-Believers considered that the state should provide churches with burglar alarm equipment. The Ministry of Justice's adherence to the constitutional principle is no obstacle for the Old-Believers. The question is currently being discussed, but the state is unlikely assist in this matter.

78 J. Rudevskis, *Tradicionālo reliģisko konfesiju statuss, Satversme un cilvēktiesības*, <http://www.politika.lv/index.php?id=112023&lang=lv>.

79 Budget cuts at various government institutions led to a situation in which the institutions had to sack people, force them to take unpaid holidays, and reduce the number of their regional branches. This inevitably affected the quality of public services. In some cases, local governments financed processes which had once been financed by the national government so as to keep the range of public services from deteriorating. The economic crisis also caused a substantial shrinkage in Latvia's population. According to census results, there were 2,377,383 people in Latvia in 2010, but by 2011, that number had dropped to 2,067,887. This meant that it was very likely that more than 300,000 people emigrated abroad in pursuit of a better economic life. The census also showed that the death rate in Latvia was above the fertility rate.

80 I. Vīksne, 'Latgales ikonu zagļi top nolādēti' (A curse be upon icon thieves in Latgale), *Neatkarīgā*, 16 July 2012.

THE MUTUAL ROLES OF RELIGION AND STATE IN THE NETHERLANDS

SOPHIE VAN BIJSTERVELD

INTRODUCTION

In the Netherlands, the constitutional principles that guide the relationship between church and state are freedom of religion and belief, state neutrality toward religion and belief, and separation of church and state. Of these principles, the first is explicitly laid down in the Constitution (Article 6). The second is implicit in the combination of Article 6 and Article 1, which guarantees equal treatment to everyone and prohibits discrimination, *inter alia*, on the grounds of religion and belief. This neutrality is not exactly the same as the French notion of *laïcité*; it is more open towards religion or belief, as the Article 6 on freedom of religion makes clear.¹ This open attitude is found in the provision that public education should respect ‘everyone’s religion or belief’, and in the provision that guarantees public funding of private, i.e., generally speaking, confessional elementary schooling (Article 23). Ordinary legislation has extended this funding to other private, confessional education and to universities. The third principle, the principle of the separation of church and state, is not explicitly expressed in the Constitution. It must be identified in the light of the previous principles.

To what extent do these principles tell us anything about the way religion is currently valued in politics and law? What dynamics are at play? This short essay explores these questions. Taking traditional attitudes as a starting point (2), we will venture into modern political and legal dynamics. First, we will deal with political perspectives (3). Second, the legal attitude will be dealt with (4). This essay will be concluded with an evaluation (5).

¹ This is also reflected in court rulings, e.g., ARRvS 18 December 1986, AB 1987, 260 (*Jeugdcentrale Hellevoetsluis*) and Opinions of the Equal Treatment Committee acting under the General Equal Treatment Act (for its website, see <http://www.cgb.nl>).

I. HISTORY, TRADITION, AND CONSTITUTIONAL CHARACTERISTICS

At a very basic level, the three fundamental constitutional principles mentioned above that govern the relation of the state towards religion reveal several common characteristics of the attitude of the Dutch state towards religion. The way in which these principles are interpreted and function in the legislative process and in court rulings, can be understood through two general constitutional and political characteristics of the Netherlands.

First, the courts cannot test parliamentary legislation in the Netherlands against the Constitution. This is expressly prohibited in Article 120 of the Constitution. This means that the parliamentary legislature itself is the final judge of the constitutionality of legislation. As an advisory body, the Council of State, too, plays a role in assessing the constitutionality of legislative proposals.

Second, the Dutch electoral system is one of proportional representation. This encourages the representation of many political parties in parliament, all with their own views on religion, and with their own prioritization of values. Another feature is that political parties are not only organized alongside economic dividing lines, but also along confessional lines. At present, three confessional parties are represented in parliament. Three parties (Catholic, and the two mainstream reformed parties) merged in 1977 to form the Christian Democratic Party (*CDA*), which is currently the largest of the confessional parties. Smaller confessional reformed parties merged to form the Christian Union (*CU*). The third is the State Reformed Party (*SGP*); this is, formally, an orthodox reformed party. The combined confessional parties have traditionally been quite strong – the Christian Democrats usually being the largest of all political parties. However, in the last two elections especially, the Christian Democratic Party has experienced considerable electoral losses.

A traditional characteristic of Dutch society is the phenomenon of ‘pillarization’. This phenomenon refers to the organization of societal life according to religious and politico-ideological views. Thus, not only political parties, but also schools, hospitals, youth organizations, housing corporations, employer and employee or-

ganizations, broadcasting companies, sports clubs and numerous other organizations were each based on their own particular set of views. Not only were these organizations driven by their own views, but they also served as a vehicle of emancipation for various other groups in society, whether religious or politico-ideological. In this way, they served various social purposes at the same time. Their value was not only recognized in the political and legal worlds – they also served as a social infrastructure for society, which was, at the height of pillarization, in a way, compartmentalized. In the process of the development of the social welfare state, which reached its peak in the 1970s, the state established its own ‘neutral’ organizations in many social areas (e.g. schools, hospitals) as well as a regulatory and financial framework in which the originally voluntary organizations were becoming part of, whilst being respected by, the state in their original religious or politico-ideological dimension. Instead of the original driving force of social activity, the religious or politico-ideological dimension became more and more a ‘private’ matter to be respected by the state, while the organizations themselves became more and more (viewed as) an executive for the discharge of public functions. In combination with a process of secularization, which also took place in society, the role and place of these organizations in society, changed *vis-à-vis* the state and *vis-à-vis* their clients.

Coming back to the principles of religious freedom, state neutrality towards religion and belief, and separation of church and state, the interpretation and understanding of these principles was conditioned by these realities. However, the religious, political, and legislative domains were not static but interacted with each other, freedom of religion was firmly guaranteed within a stable understanding of religion, state neutrality was inclusive towards religious expressions in the public domain, and separation of church and state was not regarded as a principle to exclude religion or church from the public domain whatsoever.

II. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

Political parties have their own, differing, views on the role and value of religion, as well as on the place of religion in the political domain. It is clear that confessional political parties value both their own religious heritage and the role of religion in the public domain. They show differences in the ways in which, and in the extent to which, they approach other denominations or other religions – at least they have done so traditionally. Other political parties either have stronger views that religion (irrespective of how they value religion) belongs to the private domain. However, a variety of opinions can be discerned here as well. These differences are also reflected in the approach that the various parties show with respect to the interpretation of the principles of freedom of religion, state neutrality towards religion and belief, and separation of church and state. With the process of secularization and the expansion of the social welfare state, in the course of the second half of the last century, these differences have lost their sharp edges. The renewed public and societal debates on religion and the role of religion in the public domain have again brought these traditional differences to the fore, and have triggered debates within political parties on this topic as traditional positions need to be re-evaluated in the light of changed circumstances. No political party can afford not to have a view on this issue, whether in general or with regard to concrete questions. One of the rediscoveries may be or may become that religion can be regarded as private, but that does not mean it is private or that it can be confined purely to the private sphere.

Over time, however, a general trend can be discerned in the way laws which respect religion have been justified. In at least a number of areas, the trend has moved away from valuing religion *per se* towards seeing religion as a fundamental right (see below for examples). This reflects a general trend in society, in which, along with the process of secularization, the value of religion became less self-evident, and in which fundamental rights protection became more pronounced, legally, politically, and socially.

The issue of public morality entered the political agenda in the twenty-first century. Under this broad heading, there has been debate on issues such as the integrity of public office-holders, the exemplary role of (semi-)public officials, and the behaviour of citizens in society ('norms and values'). The Lower House of the Dutch parliament devoted several specific debates to this topic. These fascinating debates also reflected the various attitudes of political parties with regard to religion. Public morality is still generally regarded as an important topic, both in the political domain and in society. It now tends to be discussed in the context of specific issues.

The value and role of religion as seen by various political parties can also be deduced from their approaches towards political issues where religious interests need to be weighed against other fundamental values, for example debates on the desirability of upholding or abolishing blasphemy law or on the scope of anti-discrimination provisions in the Criminal Code. Other values against which religion needs to be weighed are equal treatment (of women, homosexuals), animal welfare (ritual slaughter) or physical integrity (circumcision) or the economy (Sunday closing). The combination of a general decline in understanding of religion (which is not necessarily a decrease of value attached to religion *per se*) combined with a stronger awareness of or adherence to other values, has given rise to a new political dynamic.

Another way of looking at the role and value of religion is through the contribution of religiously-inspired political parties. This includes their contribution to the ongoing debate on the relationship between state, society, and the private individual. Where, for example, liberal parties stress the limits of state action and the predominance of individuals and social democrat and socialist parties stress the role of the state in society, the Christian democratic party builds on ideas of subsidiarity in the Roman Catholic social thought and the similar, though theoretically different, notion of the existence of various spheres in society (including the state) which are guided by their own structural principles, and which all enjoy a 'sovereignty' in their own spheres.

III. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

The Dutch Constitution does not contain a preamble or any explicit references to the source of power, to democracy and the rule of law, to particular values or to the value of religion.² There is no such thing as an *invocatio dei*. The Constitution does not confess to any particular value system as the German Constitution does. There is no hierarchy between fundamental rights. Religion features in the Constitution as a fundamental right. A rights' perspective, therefore, is predominant, not the value of religion per se.

Previous (implicit) references to the value of religion, such as the determination of the religion of the Sovereign Ruler as that of the Christian reformed religion (Article 133) or the reference to the purposes of public education ('for the promotion of religion, as a firm support to the State and to the expansion of knowledge') in the Constitution of 1814 (Article 14) only lasted one year. However, only in recent years, sensitivities with regard to the religious denomination of members of the royal family have disappeared. As to education, ordinary legislation continued for a long time to designate the purpose of (school) education as including the promotion of societal and Christian virtues.³ Today, the Primary Education Act (*Wet op het primair onderwijs*) mentions the development of 'cultural skills' as one of the purposes of education. It is stated that it takes into account that pupils grow up in a multiform society and that it also aims to provide pupils with knowledge of the various backgrounds and cultures of their fellow pupils (Article 8, Paragraph 3, under c).⁴

Apart from the domain of education, many other areas of the law take religion into account. This is done to ensure religious liberty, the protection of religious believers or the functioning of reli-

2 Constitutions in the period between 1798 and 1805, however, did contain references to the value of religion. See Article 8 of the General Principles of the Constitution of 1798; Articles 11 and 12 of the Constitution of 1801; Article 4 of the Constitution of 1805.

3 This was the formulation in primary education law throughout the nineteenth century and into the twentieth century. In the course of the twentieth century, various changes have taken place in the formulation, and the 'Christian virtues' disappeared.

4 See http://www.st-ab.nl/wetten/0725Wet_op_het_primair_onderwijs_WPO.htm.

gious organizations (organizational autonomy). Thus, the Civil Code, the Criminal Code, labour law, mass media law, ancient monument law, privacy law, tax law as well as other areas of the law contain provisions that are directly relevant to religion.⁵

The justification of some of these provisions has changed over time. For example, the justifications of specialized chaplaincy services in the context of public institutions developed from an ethical value, or care for the whole person, towards a justification that stresses the social dimension of fundamental rights. The latter approach recognizes that fundamental rights are not just a hands-off responsibility for the state, but may, under special circumstances, also contain a positive obligation for the state to do something. These justifications are not mutually exclusive, but the perspective has certainly shifted from the value of religion to the fundamental rights perspective. In tax law, to take another example, churches were originally seen as organizations that promoted the general interest, and, therefore, enjoyed certain exemptions as such. This is no longer automatically the case.⁶

During the period of the classic welfare state, the state regarded itself as directly responsible for taking charge of a whole variety of social activities. The trend over the decades since the 1980s has been to acknowledge that responsibility can also be taken through steering at a distance, engaging in contractual relationships with public service providers (tenders), and, generally speaking, by taking on a coordinating rather than an executive role. As a result, the relationship between state and civil society organizations (including religious ones) is in a process of being renewed and reshaped. At the same time, civil society organizations, including religiously-inspired ones, are rediscovering their own original societal mission and inspirational foundation. Especially where these (usually religious) organizations foster values which differ from mainstream societal values, this raises issues of how much of that identity the state can or should accept when ‘doing business’ with these organi-

5 For an overview and discussion, see S. van Bijsterveld, ‘State and Church in the Netherlands’, in: G. Robbers (ed.), *State and Church in the European Union* (Baden-Baden, 2005), pp. 367-390.

6 See, for example, R. Steenvoorde, ‘In het algemeen belang? Het algemeen nut-criterium in recente wetgeving en jurisprudentie met betrekking tot kerken en religieuze instellingen’, in: *Tijdschrift voor Religie, Recht en Beleid* 2011, pp. 30-42.

zations. One example is a Christian organization, like the Salvation Army, which place specific demands on their personnel or of Islamic organizations, which provide homework guidance to school-children, with separate facilities for boys and girls. These issues usually come to the fore at the level of municipalities.

Engaging in dialogue with religious leaders and organizations is a relatively new (or rather, newly rediscovered) development. Not only in situations in which positive contributions of religious organizations are obvious, but also in situations in which (potential) negative societal effects occur (e.g. radicalization), public authorities are rediscovering cooperation and dialogue with religions. They can be allies in combating potentially negative developments or prevent them from happening. Awareness is growing that such dialogues are equally important for public authorities themselves.

Obviously, religions themselves are convinced of their own value. A series of studies has recently been published which highlight the social relevance of churches, both traditional churches and immigrant religious communities.⁷ The background of these studies was to counter the persistent belief that religion is only a ‘private matter’.

CONCLUSION

The above analysis shows that political perspectives on the role and value of religion vary and change over time. As law reflects broader political trends, it is not surprising that legal perspectives on the role and value of religion change likewise. Apart from differences in the intrinsic perspectives on religion, other factors account for this change as well. As religious pluralism becomes more outspoken, speaking of the role and value of ‘religion’ in general may

7 See J. E. Castillo Guerra, M. E. Glashouwer and J. Kregting, *Tel je zegeningen. Het maatschappelijk rendement van christelijke kerken in Rotterdam en hun bijdrage aan sociale cohesie*, Nijmegen: Nijmeegs Instituut voor Missiewetenschappen 2008; Jaap van der Sar and Roos Visser, *Gratis en waardevol. Rol, positie en maatschappelijk rendement van migrantenkerken in Den Haag*, Utrecht: Oikos 2006; Jaap van der Sar, Roos Lombo-Visser, Welmoet Boender, *Moskeeën gewaardeerd. Een onderzoek naar het maatschappelijk rendement van moskeeën in Nederland*, Utrecht: Oikos/BZK: Utrecht/Den Haag 2008.

become less self-evident. Due to secularization, familiarity with religion and firsthand experience with religion is not a matter of course. As a result, speaking and thinking of religion in terms of its value is less self-evident. Parallel to these developments, the emergence of strong fundamental rights' awareness and a dominant approach to religion in terms of fundamental rights causes the approach to religion in terms of their value to retreat to the background.

However important the approach to religion in terms of fundamental rights is and will continue to be, this approach has its limits. In some instances, it is even artificial to discuss legal arrangements or political realities exclusively in terms of fundamental rights. To mention just one example, the value of church buildings on the skyline and in the built environments of towns and villages or in the landscape as a whole cannot be expressed in such terms. Furthermore, if current debates in the Netherlands on religion are analysed, it is clear that specific value issues as well as issues of the value of religion are at stake. To deny this is to deprive the debate of a relevant dimension.⁸

⁸ See S. van Bijsterveld, *Overheid en godsdienst. Herijking van een onderlinge relatie* (Nijmegen; 2009).

THE MUTUAL ROLES OF RELIGION AND STATE IN POLAND

MICHAŁ RYNKOWSKI

INTRODUCTION

The discussion on the place of religion, churches and crucifixes in Polish public life started in the autumn 2011. Although there are initially anticlerical statements and drafts, no one dares in public to question the positive role of religion as such. The representatives of public authorities still participate in religious ceremonies, and the bishops and clergy take part in public ceremonies to open new schools, academic years, hospitals, roads, bridges, etc. The death of John Paul II (2005) and the tragic plane crash of President L. Kaczyński and 95 persons close to Smolensk, Russia (2010) showed that there is still a very strong bond between the State and the (Catholic) Church. In this context, it is worth mentioning that the President L. Kaczyński and his wife were buried in the cathedral in Wawel castle in Kraków, among the kings of Poland and five of the most outstanding persons of the Polish history.

Political and legal discussion on the Church-State relationship in Poland is conditioned by a number of factors – three seem to be particularly important:

1. the Catholic Church is still predominant, both in terms of statistics and social influence;
2. the State – the government, parliament, local authorities, even courts – behaves in a church-friendly manner, and this is itself regarded as a kind of (conscious or unconscious) compensation after years of communism;
3. until 2011, there was no political force which would describe itself as anticlerical; this changed with the “Ruch Palikota” (“Movement of Mr. Janusz Palikot”).

Despite decreasing attendance at Sunday services and the presence of Orthodox and Lutheran minorities, many persons, including many right-wing politicians, operate with a simplified model,

namely, “Pole = Catholic”. This is particularly visible during the pilgrimages to the Black Madonna Sanctuary in Częstochowa, where politicians of right-wing parties take seats in the front rows, or even speak from the altar. On 3 May 2012, J. Kaczyński, speaking from the altar at the end of the Eucharist, underlined that “it is impossible to disconnect Poland, Polishness, from the Polish Church”.¹

In legal terms, there are only four judgments of the courts concerning the value of religion (the presence of a crucifix in a public area, discussed below in Section “*The jurisprudence of State courts*”) and, as of autumn 2011, ongoing discussion about the presence of a crucifix in the Sejm, the lower house of the Polish parliament (for which see below Section “*National mourning following the death of Pope John Paul II [2 April 2005]*”). Generally, religious issues seem to be relatively uncontroversial, even for the left-wing (post-communist) Alliance of the Democratic Left. When its leader, G. Napieralski (b. 1974) styled himself the “Polish Zapatero” and wanted to undermine the position of the Catholic Church by mobilizing not only socialists/post-communists but also anti-clerical voters, he received only 13 % of votes in the presidential campaign of 2010. A year later, in 2011, J. Palikot (b. 1964) attempted again to mobilize the anticlerical voters; this anticlerical character was quite clear, as his program did not include any other major points. To the surprise of many, Ruch Palikota received 10.02 % of the votes, which gave them 40 out of the 460 seats in the Sejm. In both cases, G. Napieralski and J. Palikot were clearly anti-clerical, but not anti-religious.

To round off this introduction, it is necessary to explain that the notion of political parties as left, centre or right depends mainly on their attitude towards religion, in particular towards the Catholic Church. The parties’ views on economics, the labour market, etc., seem to play only a secondary role. The Kaczyński Brothers’ Law and Justice, claiming to be the leading right-wing party, has a socialist program and is in permanent alliance with the trade union “Solidarność”. J. Korwin-Mikke, ultra-liberal and enfant terrible of the Polish political scene, calls this party “a pious left-wing”.

1 <http://www.wprost.pl/ar/320112/Kaczynski-polskosc-i-Kosciol-to-jedno-Wieki-mijaja-Czestochowa-trwa/10.08.2012>.

The present report alludes hardly at all to the lengthy process of the ratification of the concordat. The respective discussions took place in the years 1993-1998, so between 15 and 20 years ago; most arguments became obsolete or proved to be unfounded; e.g. left-wing politicians claimed that priests should not perform marriages having legal consequences in the state civil law, as they would neglect their duty to notify such a marriage within 5 days, thus making the marriage illegal; so far, not even one such case has been reported.

I. POLITICAL PERSPECTIVE

The presence of a crucifix in the Sejm (lower chamber of the Parliament)

After years of the People's Republic of Poland (1949-1989), the Polish eagle in the national emblem recovered its crown (despite Poland being a republic), the new constitution was adopted, and the concordat with the Holy See was finally ratified. After one of the ordinary meetings of the Sejm, in the night of 19/20 October 1997, two Sejm deputies (T. Wójcik and P. Krutul) hung a cross over the entrance to the Sejm's main meeting room. There was no decision or resolution in this respect – it was a simple act, carried out by two deputies, who never claimed to act on behalf of the Church, its own party, or anybody else. The spokesperson of the Alliance of the Democratic Left submitted a protest to the Speaker of the Sejm, expressing disapproval, but no formal steps were taken. The presence of a cross was uncontroversial until the autumn of 2011, when immediately after the parliamentary elections the leader of an anti-clerical movement, J. Palikot, asked the Speaker to remove the cross (two motions, the second submitted on 9 November 2011). The applicant claimed that as there was no political or legal basis for the presence of a crucifix, the Speaker was responsible for the order in the Sejm and, therefore, should issue a simple order to remove the crucifix.

The speaker of the Sejm immediately commissioned four legal opinions, which were prepared and presented in December 2011.² A short summary of each is worth presenting here.

R. Piotrowski (University of Warsaw) underlined that the crucifix was hung by the politicians, not by the clergy; it was not hung for religious purposes, as no services are celebrated there. He notes that although some deputies were against the presence of crucifix in the room, a number were also against its removal. As there was no legal basis for its display, deputies cannot claim that its presence was *contra legem*. The author suggests that the religious opinions of the deputies are expressed in votes, the results of which are not dependent on the presence of the cross. *R. Piotrowski* believes that national symbols should reunite, as in the case of the national anthem, flag and emblem. Symbols which divide (like a cross) should not be regarded as national symbols. Although *R. Piotrowski* favours removal of the cross, he disagrees with the applicants when they claim that there is no reason why Christianity should be favoured: the preamble of the constitution itself underlines that Polish culture is anchored in the Christian heritage of the nation and in human values.

R. Wieruszewski (Polish Academy of Science, Poznań) stressed that as the cross carried the body of the crucified Jesus, it has to be regarded as a religious, not a cultural symbol. After analysing the international and national contexts (for Polish jurisprudence, see Section “*The jurisprudence of State courts*”), *R. Wieruszewski* considered that the presence of the cross did not violate any law, nor influence the decisions taken in the Sejm, nor influence the Sejm as an impartial body, nor, finally, violate the principle of non-discrimination, as deputies belonging to other religions may express the wish to display their own religious symbols (the latter seems slightly theoretical in Poland, although as the cross was clearly Catholic, the Orthodox might wish to add an Orthodox cross).

D. Dudek and *P. Stanisław* (Professors at the Catholic University in Lublin) were of the view that as there was no legal basis to do so in 1997, so there was no legal instrument to allow the Speaker of the Sejm to remove the crucifix; the applicants of “Ruch Palikota”

2 *Zeszyty Prawnicze Biura Analiz Sejmowych*, No. 4 (32)/2011, Warszawa 2011.

also mention the possibility of removing “other measures, which Ms. Speaker will regard as appropriate”. The experts argue that it is impossible to ask the Speaker to create a situation of (alleged) compliance with law by using illegal methods. Moreover, *D. Dudek* and *P. Stanisz* stress the fact that the unquestioned presence of a cross for 14 years (five parliamentary periods) is also a sign of a broad political consensus which should not be challenged. Finally, hinting at the declaration adopted by the Sejm after the first *Lautsi* judgment (see below Section “*The Sejm’s resolution following the Lautsi case*”), they argued that it seems that the deputies agree with the presence of the crucifix in the room.

L. Morawski (Nicolaus Copernicus University in Toruń) claims that the presence of a cross does not imply partiality: the cross is also present in many coats of arms and flags of various States; the cross of St. George on the English flag does not mean that England is more religiously-oriented than Ireland. *L. Morawski* notes that it is impossible to remain neutral in this respect: while displaying the cross seems to please the Catholic majority, its removal is not neutral either, because it aims to please the non-believing minority.

Prime Minister D. Tusk, commenting on these four opinions, said (16 December 2011) he was satisfied that according to the experts the presence of the crucifix did not violate the constitution.³

Following discussion in the Sejm, 69 deputies submitted a draft resolution,⁴ “recalling values which are represented by the presence of the cross in the Sejm”. This draft was sent to the Sejm’s Commission of Culture and Media, which on 12 January 2012 recommended adoption of the resolution (doc. 112). In this draft, which was never adopted, the deputies underlined that “the cross is not only a religious symbol [...] but in public sphere recalls the readiness to sacrifice for other persons (...) The cross, present in each suffering, each experience, is a source of hope and courage. It teaches love. [...]” The deputies stressed that the cross accompanied Poles in uprisings, lagers and concentration camps, and was defended in many towns under the communist regime: “In the history of our country a fight with religion and the cross was under-

3 <http://www.wprost.pl/ar/283813/Krzyz-zgodny-z-prawem-premier-sie-cieszy/10.08.2012>.

4 Document No. 5, dated 9 November 2011.

taken by the enemies of our Nation, who only in this way saw an opportunity to destroy our identity”.

In an exposé of 18 November 2011, inaugurating a second term as Prime Minister, D. Tusk stated that, in times of financial crisis, it is particularly important to build national community, and this needs common signs, symbols and traditions. He said: “We do not have to share 100 % in each other’s values; nobody will impose this on another person. But, we should not Christianise anyone by force, and in particular nobody should be ‘laicized’ by force. May no politician dare to desecrate symbols which are important and holy to the majority of Poles. The cross cannot become a mace with which to hit political opponents, but it should not be a reason for another political war, here in Sejm or outside [...] We will be truly modern, when we are able to respect together our fundamentals, be it the cross, the memory of John Paul II, [or] our national symbols, like the flag or eagle”.⁵

At the end of June 2012, deputies of the Ruch Palikota brought a lawsuit against the Sejm for the violation of their personal rights.⁶ On 14 January 2013 the civil court in Warsaw ruled that although the atheist deputies may feel “uncomfortable”, the presence of the cross neither violates their personal rights protected by the civil code nor their freedom of religion. Therefore, the court rejected their case.

II. THE CHURCH FUND – PLANS FOR ITS TRANSFORMATION OR ABOLITION

The Church Fund was established in 1950 by the communist government as a compensation for confiscated real-estates of churches and religious communities. During the communist period, its only activity was the payment of social security for retired priests. After 1990 it also included funds for the renovation of churches. The Church Fund was financed by the State with approximately 90 million złotych p.a. (ca. 21 million euros). Once the process of

5 http://www.premier.gov.pl/centrum_prasowe/wydarzenia/premier_w_expose_uwierzmy_w_p,8320, pp. 20-21.

6 <http://tvp.info/informacje/polska/poslowie-ruchu-palikota-chca-pozwac-sejm-za-krzyz/7814602>.

the restitution of ecclesiastical properties commenced in the 1990s,⁷ and churches received some of their confiscated properties, a discussion began about the ratio of the Church Fund. In the exposé commencing his second term as Prime Minister, D. Tusk mentioned the Church Fund as an institution requiring a change (p. 16). Ministers of the D. Tusk government declared that in times of financial crisis, all sectors should look for savings, and the church should not be excluded – in more concrete terms, the clergy should start paying for social security themselves.⁸ Despite comments from right-wing politicians, including J. Kaczyński, that this was yet another attack on the church, on 20 November 2011 Archbishop S. Budzik declared on behalf of the Bishops' Conference that the Catholic Church was ready to negotiate changes to the Church Fund, implicitly proving that certain politicians are *plus catholiques que le Pape [ou les évêques]*.⁹ The negotiations, currently at a very early stage, propose that a percentage of tax could be paid by the faithful to the Church when completing their tax declaration, similar to the models which exist in Italy, Spain and Hungary. In the winter of 2013, these discussions were far from completed.

One should also bear in mind that other churches (non-Catholic and non-Roman Catholic) are beneficiaries of the Fund; indeed, its abolition would be more disadvantageous to other churches than to Roman Catholic Church, which would compensate the liquidation of the Church Fund by a percentage collected from taxes.¹⁰

The motion of Ruch Palikota, submitted on 20 January 2012, aiming at simply abolishing the Church Fund, was rejected by the Sejm on 15 June 2012, with 77 % of deputies voting in favour of rejection.¹¹

7 'La questione dell'espropriazione e della restituzione della proprietà delle Chiese nell'Europa centro-orientale', (2010) *Quaderni di Diritto e Politica Ecclesiastica*, p. 341.

8 Minister M. Boni in *Gazeta Wyborcza*, 25 June 2012, p. 3; interview entitled "Let's not fear the Church", Minister of Finance J. Rostowski in *Polityka*, 25 June 2012.

9 http://www.gazetaprawna.pl/wiadomosci/artykuly/567732,episkopat_jest_gotowy_do_rozmow_o_funduszu_koscielnym.html.

10 P. Borecki, 'Dylematy likwidacji Funduszu Kościelnego i komisji regulacyjnych', *Przegląd Sejmowy*, June 2012; pp. 19-33.

11 Doc. 256 and 396.

*National mourning following the death of Pope John Paul II
(2 April 2005)*

In the hours following the death of Pope John Paul II, the government adopted a resolution on national mourning (on the night of 2-3 April 2005). The text underscores the “pain of all Poles” – thus assuming that everybody was in mourning. The resolution was addressed to all citizens of the Republic, public authorities, the entities of local self-government, and social and professional organisations, to remember in mourning His Holiness John Paul II. Indeed, many private enterprises, like restaurants, cinemas and supermarkets stopped operating on Sunday 3 April, on a voluntary basis, and the TV stations did not broadcast commercials. Massive participation by representatives of public authorities at a number of Masses reflected the strong link between the State and Church. On the day of the funeral, there was a public holiday. No politicians dared express a contrary view as to the role and importance of John Paul II and the Church in general (the controversial J. Palikot was at the time regional leader of Civic Platform (*Platforma Obywatelska*)).

*The Cross at the front of the President's Palace (the so-called
Smolensk-Cross)*

This paper would be incomplete without describing events which continued for a couple of months in 2010. After the crash of the presidential plane close to Smolensk, Russia (10 April 2010), a group of scouts brought a big cross to commemorate all the victims killed, and installed it in front of the Presidential Palace, in the heart of Warsaw. Right-wing supporters organized regular prayers and gatherings there. After a couple of months, acting President B. Komorowski decided to move the cross to a neighbouring church. This resulted in massive protests. The situation escalated day by day. The number of supporters and opponents grew: mainly (but not exclusively) elderly, ultra-Catholics were confronted with young persons, who organized happenings and finally ridiculed the whole situation. The Episcopate refused to take a position, while the clergy from the local Church of St. Anne were willing to receive the cross. Its official removal to the church was blocked by the “defenders” of the cross. The “Smoleńsk-cross” became at the

beginning of August 2010 the only topic covered by media across the political spectrum. Left-wing deputies (Deputy Speaker of Sejm J. Wenderlich) described the situation as a capitulation of the whole State to a group of zealots. Right-wing politicians presented the political tensions in simple terms: we, Poles, are defending the cross; they want to destroy the cross, so they want to destroy us, etc. On 12 August, the bishops finally issued a statement calling for removal of the cross to a church because the cross was being desecrated and misused for the political purposes of the parties involved; at the same time, the bishops stressed that according to Article 25 of the Constitution, the impartiality of the State is not supposed to mean “anti-religiousness”, and its neutrality is not supposed to mean “aggressive laicity”. The bishops also referred to the preamble of the Constitution, according to which Poland is a homeland both of persons who believe in God and of those who do not believe; therefore, freedom of religion cannot be interpreted as a freedom from religion, but as a freedom to practice religion, including in a public space.¹² The cross is now in St. Anne’s Church in Warsaw.

*The Sejm’s resolution on intensifying action to protect Christians around the world*¹³

The Sejm’s resolution under the title indicated above was adopted on 18 March 2011. As stated in the text, due to the multi-centennial tradition of Polish religious tolerance, Poland has a right to call for the better protection of people discriminated against on the basis of their belief. The resolution supports recent resolutions of the Council of Europe and European Parliament, and the position of the EU Council of Ministers. It calls on the EU and its States to enhance the protection of Christians in the whole world.

State awards for senior clergy

The President of the Republic grants orders: among these, the most important is the Order of the White Eagle, established in 1705, re-

¹² http://wiadomosci.gazeta.pl/wiadomosci/1,114873,8244605,Oswiadczenie_Prezydi-um_Episkopatu_Polski_i_metropolity.html.

¹³ *Apel Sejmu RP*, published in *Monitor Polski* 2011, No. 26, item 274.

established in 1921 and again in 1992. Among the 103 Polish citizens who have received this Order since 1992, were: John Paul II (with order licence No. 1); 8 cardinals and bishops, all Roman Catholic; and posthumously-beatified Rev. J. Popiełuszko (a priest murdered by the communist secret service). These awards illustrate the respect which Presidents L. Wałęsa, L. Kaczyński and B. Komorowski showed towards the highest representatives of clergy; no Orders of the White Eagle were granted to clergy by (post-communist) President A. Kwaśniewski.

III. LEGAL PERSPECTIVE

The Constitution of 1997, Concordat of 1993, and Statute on Religious Freedom 1989

There are two provisions of the Constitution of 1997 which seem relevant here: the preamble and Article 25. The preamble reads:

“We, the Polish Nation – all citizens of the Republic,

Both those who believe in God as the source of truth, justice, good and beauty,

As well as those not sharing such faith but respecting those universal values as arising from other sources,

Equal in rights and obligations towards the common good – Poland,

Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our *culture rooted in the Christian heritage of the Nation* [emphasis added] and in universal human values [...].”

This wording is, as is well-known, the result of consensus. It was suggested by the first non-communist Prime Minister, Mr. T. Mazowiecki. It underlines the role of the Christian religion, but also acknowledges space for non-believers. It is worth mentioning that the Preamble refers to God, but does not specify Jesus Christ or the Holy Trinity, and was thus acceptable to non-Catholics and non-Christian minorities in Poland.

Article 25 of the Constitution is the legal basis of the church-state relationship and is formulated in clearly:

1. “Churches and other religious organizations shall have equal rights.
2. Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life.
3. The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.
4. The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.
5. The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.”

The concordat of the Republic of Poland with the Holy See, signed in 1993, but ratified only in 1998, provides in Article 1 that “the State and the Catholic Church are – each in its area – independent and autonomous and they commit themselves to a full respect of this principle in their mutual relations and in actions in favour of the development of a human being and the common good”. The respect of the State *vis-à-vis* the Church is declared in the preamble:

“– underlining the mission of the Catholic Church, the role played by the Church in the thousand-year-history of Poland and the importance of the pontificate of His Holiness John Paul II for the contemporary history of Poland [...];

– noting the substantial contribution of the Church in the development of human person and in the strengthening of morality”.

An important sign of the trust between the State and the churches and religious communities is the fact that marriages celebrated by clergy of 10 denominations have legal consequences in civil law; on the other hand, unlike in Spain and Italy, the annulment of mar-

riages pronounced by the ecclesiastical courts has no status in civil law and is not considered by state courts while ruling on divorce.

The statute, which guarantees freedom of religion and conscience,¹⁴ states in its preamble that the State recognizes “the historical contribution of churches and other religious communities in the development of national culture and in the strengthening of basic moral values”. The statutes on the relationship with churches or religious communities do not include preambles (unlike the statute on relations with the Catholic Church) and do not contain any statements as regards the State’s perception of religions or churches. Even the statute on the relations with the Catholic Church does not include any statement on values.

The Sejm’s resolution following the Lautsi case

Following the first judgment of the European Court of Human Rights in the *Lautsi* case (30814/06), the Sejm adopted a resolution (a non-binding act) entitled: “protection of freedom of religion and values constituting the common heritage of the nations of Europe” (MP 78, it. 962). In this resolution the Sejm stated:

“– acknowledging that the sign of the cross is not only a religious symbol and sign of the love of God towards the people, but that in the public sphere it recalls also the readiness to sacrifice [oneself] for another person, representing values creating respect for each person and their rights [...]

– underlining the leading and positive contribution of Christianity in the development of the rights of the human person, the cultures of the nations of Europe, and the unity of our continent

– underlining that both individuals and communities have a right to express their religious and cultural identity, which is not limited to the private sphere

– recalling that in the past, in particular during the nazi and communist dictatorship, acts against religion were linked to the massive violation of human rights and led to discrimination

– keeping in mind the words expressed by John Paul II in his historic speech in the Polish parliament in June 1999 that “the democracy

14 Statute adopted on 17.05.1989, most recently amended in April 2011, OJ. 2011, No. 112, it. 654.

without values very easily turns into open or camouflaged totalitarianism”

– expressing its concern about decisions which are aimed against freedom of religion, ignore the rights and feelings of believing persons and destroy social peace, and critically assessing the judgment of the European Court of Human Rights, questioning the legal basis of the presence of crosses in school classes in Italy.

The Sejm of Republic of Poland addresses the parliaments of the Member States of the Council of Europe [asking] for a common reflection on the methods of protecting freedom of religion in the spirit of support for the values [which are the] common heritage of the nations of Europe”.

This resolution was adopted in the presence of 402 deputies (out of 460), with 357 for, 40 against and 5 abstentions. 357 of 460 deputies represents a majority of 77.60 %, higher than any majority required by the Constitution (D. Dudek, P. Stanisz), and therefore should be regarded by all means as representative.

Right-wing deputy A. Górski on 18 December 2009 put a written question to the government of Poland concerning the judgment of the ECHR in the *Lautsi* case (question 13510). In its answer of 11 January 2010, the government pointed out differences between Italy and Poland (where there is no obligation to display crosses in school classes), claiming that as the legal systems of the two countries are different, the case against Poland could be even declared inadmissible. The government referred to the judgment of the Appellate Court in Łódź concerning a crucifix in a Municipal hall (sygn. I ACa 612/98, see below Section “*The jurisprudence of State courts*”) and referred to the Sejm’s resolution passed on 3 December 2009 (discussed above).

The jurisprudence of State courts

The Constitutional Court in its judgment of 2 December 2009 (Case U 10/07) decided that the impartiality of public authorities “may not mean factual institutional equality between the Roman Catholic Church, which prevails in Polish society as regards numbers of believers, and the other churches and religious communities. It cannot at the same time mean activities of the State (of public authorities) which would accept a prevalent position for one

church by discriminating against other churches and religious communities. Acceptance of the existing status quo by the State in terms of the religious structure of society cannot lead to an increase in the prevailing position of a church as the result of activity by the State (public authority)”.

The case law includes thus far four judgments concerning the presence of crucifixes. These cases have given the State courts an opportunity to express their views on church-state relations in Poland.

The earliest case dates from 1990, that is, before the Concordat and before the Constitution of 1997. In 1983, a female employee working as an administrative assistant in a hospital hung a crucifix in her office (in which she worked with an immediate superior and a colleague). The director told her to remove it, as “displaying religious symbols in the state offices was against the principles of freedom of religion and belief”. As the employee did not comply, she was dismissed in May 1985 and she challenged the decision. The local labour court agreed with the woman and decided that she should be reinstated. The district court overturned the judgment of the local court, because the employee had violated two instructions from her superiors, which justified her dismissal. The display of religious symbols denied the sovereignty of the socialist state *vis-à-vis* religion. The Minister of Justice declared this second judgment to be a flagrant violation of the labour law and a violation of the interests of Poland. Finally, the Supreme Court (Administrative, Labour and Social Security Chamber) ruled on 6 September 1990 (I PRN 38/90) in favour of the woman; in its judgment, the Court stated that “the symbolism of the cross is understandable and positive not only for Christian culture, but also for humankind in general”.

In the second case, from almost a decade later, the Appellate Court in Łódź (28 October 1998, I ACa 612/98, commented in *Przegląd Sejmowy* 3(38) 2000, p. 105-113) disagreed with a citizen, who claimed that the display of cross in the meeting room of the city council violated his personal rights. The applicant was not a member or an employee of the city council; he did not even attend meetings in this room, but saw the crucifix when meetings of the city council were broadcast on TV. The Chair of the City

Council refused to remove the crucifix. The case then went to court. The Court did not find a violation of the law.

The third judgment occurred a decade later (25 November 2010): a citizen of the town Swinoujście requested removal of a crucifix from municipal offices, claiming that it violated his personal rights and subjected him to Catholicism. The appellate court agreed with the district court: “the applicant did not prove in any way that the presence of the cross discriminates against him or limits his freedoms”. The applicant disagreed, claiming that both of the judges were biased – everyone should feel comfortable in the municipality – the presence of symbols of only one religion offends that. The applicant declared he would challenge these judgments before the Supreme Court, and in case of failure, before the European Court of Human Rights.

The latest judgment concerned the presence of a cross in the main meeting room of the Sejm (see above Section “*The presence of a crucifix in the Sejm [lower chamber of the Parliament]*”). The district court in a judgment of 14 January 2013 did not perceive the presence of the cross as a violation of personal rights or as a limitation on freedom of religion.¹⁵ The violation of personal rights must be objective and not subjective. So far, as general perceptions are concerned, the presence of a cross limits no-one’s rights. The cross as such has no proselytist function. The judge (in an oral statement) stated that one day, when the Ruch Palikota obtains a majority in the Sejm, it will be possible to remove the cross; however, “this shall be done through a vote in a meeting room, not a judgment in a court room.”

SUMMARY

Discussion about church-state relations is not at the top of the political agenda today, or at least, it was not until 2011. Although the bishops never cease to declare that the (Catholic) Church in Poland was and is under constant attack and is being persecuted – with very little or no evidence at all – discussions actually focus on four issues important for the churches. These are: the restitution of

¹⁵ *Gazeta Wyborcza*, 15.01.2013, p. 2.

church properties, linked with the existence of the Church Fund (see Section “*The presence of a crucifix in the Sejm [lower chamber of the Parliament]*”); legalization of same-sex partnerships or marriages (first drafts of statutes were being prepared in the spring of 2011 and July 2012); financing in-vitro fertilization (as of 2011); and abortion (which, after being heavily discussed in 1990s, recurs from time to time). These four topics create occasional opportunities for politicians to take a position on church-state issues.

When in January 2012 the Ruch Palikota sought, in a motion,¹⁶ to de-criminalize blasphemy (Article 196 of the Criminal Code of 1997), the motion was refused by the Sejm. Nevertheless, the discussion continues.

While certain politicians tend to have extreme views, Cardinal K. Nycz, Archbishop of Warsaw, referring to attempts to impose Christian values on non-believers, said recently in an interview that “he would not like to live in a Catholic State of the Polish Nation”.¹⁷

Last but not least, priests are not involved directly in politics. Although neither the Elections Code of 5 January 2011 nor the previous electoral statutes prohibit priests from standing for election to the Sejm, Senate or local authorities, after 1990 they have never stood for any political office. An exception in this regard is Mr J. Godson, the first deputy to the Polish Sejm of African origin, who used to be a minister of God’s Church in Christ (Pentecostal). Also, in the Ruch Palikota there is (Catholic) ex-priest R. Kotliński, leader of many anti-clerical campaigns, and as of 2011 deputy to the Sejm.

¹⁶ Doc. 240.

¹⁷ “Mundurek katolika”, interview with Card. K. Nycz, *Polityka* 29 (2867), 18.07.2012, p. 36.

THE MUTUAL ROLES OF RELIGION AND STATE IN PORTUGAL

JOSÉ DE SOUSA E BRITO

Portugal became independent in 1143 when the kingdom under Afonso Henriques was recognized by the Emperor of León and Castile. One element of the picture of the Portuguese state in the Middle Ages was that it was part of western Christianity as a larger not only religious but also cultural and political entity. Afonso Henriques, seeking to have his kingdom recognized, entered a feudal relationship with the Pope as a vassal, paying a tribute in 1143, but only recognized as king in 1179. Pope Innocent IV, seven days after deposing the German emperor Frederic II on 17 July 1245, deposed the Portuguese king Sancho II and passed the kingdom to his brother Afonso III. The mutual roles of Church and State changed in accordance with European history through the Renaissance, Reformation, Counter-Reformation and Enlightenment, with the special case that the Reformation had little impact because of the Inquisition, but Roman Catholicism continued to be the official religion of the State until the Republic was declared in 1910 and issued the Law of the Separation of State and Churches on 20 April 1911.

However, the Law of Separation was only one episode of the continuous warfare between the Catholic Church and the Portuguese Constitutional State since the first monarchical constitution of 1822. The constitutional movement was opposed by the Catholic Church, which condemned the doctrine of human rights, and especially that of religious liberty, until the acceptance of both in the last session of the Second Vatican Council in 1965. Therefore, the constitutional state had to defend itself against the ideological attack of the Church through the institution of the *beneplacitum*, i.e. the declaration of satisfaction of the State with the content of the documents of Rome (decrees of the councils, apostolic letters and any other ecclesiastical constitutions, etc.), before publication in Portugal, “preceding approval of parliament if general in character”, and “if they do not oppose the Constitution” (as provided in

all monarchical constitutions, of 1822 – Article 123, XII, 1826 – Article 75, § 14, 1838 – Article 81, XII). Many of the leaders of the constitutional movement were freemasons who were also Catholics, but, towards the late nineteenth century, many were atheists. One of those, and indeed the most prominent politician of the Republican Party, Afonso Costa,¹ wrote the Law of Separation, initiating a systematic and intrusive attack against the Catholic Church; excluding the clergy from corporations in charge of the cult, extinguishing all congregations, deporting the Jesuits, expropriating Church property, and punishing the protesting bishops with banishment from their dioceses. The *beneficium* was extended beyond the Roman documents to all dispositions of ecclesiastical authorities (Article 181 of the Law of Separation). The Constitution of 1911 included the extinction of the Company of Jesus and of all other religious congregations and monastic orders (Article 12). The Law of Separation was softened after seven years by new legislation (Decree No. 3856 of 22 February 1918); this allowed Catholic corporations to be ruled in accordance with canon law, but contributed to weaken the constitutional state, which fell to a military coup in 1926. This was followed by the dictatorship of Salazar from 1932 until his death in 1968, which was continued by Marcelo Caetano until the revolution of 1974.

The “corporative” “new state” proclaimed, again, the separation of state and church in the Constitution of 1932 (Article 46). But, in 1935, the provision in § 3 of Article 43, stating that “the education ministered by the state is independent of any religious cult, but should not be hostile to it”, was removed and another phrase was added saying that the moral virtues enunciated by state education are “oriented by the principles of Christian doctrine and morals, which are traditional in the country”. The radical legal change occurred with the Concordat of 1940, to the extent that the word “separation” signified subsequently no more than the mere separation typical of jurisdictionalism – under which state and

1 Some reports attributed to him in 1911 the assertion that the Law of Separation would eliminate Catholicism within two generations. In 1914 he declared this to be a slander: see R. Rego, *História da República*, III, Lisboa: Círculo de Leitores, 1986, pp. 73-74; A. H. de Oliveira Marques, *Portugal da Monarquia para a República*, Lisboa: Presença, 1991, p. 510; F. Catroga, *O Republicanismo em Portugal. Da Formação ao 5 de Outubro de 1910*, Coimbra: Faculdade de Letras, 1991, pp. 257-261.

church exchange privileges or rights of interference in each other's specific sphere. According to the Concordat of 1940, Catholic marriages are ruled by canon law so that divorce does not apply to them and that the nullity of Catholic marriage and dispensation applicable to non-consummated marriages are judged by the ecclesiastical tribunals.² The right of *beneplicitum* is abolished,³ but the *ius nominandi* of bishops is substituted by a right to prior consultation and to objections of a general political character.⁴ The ecclesiastics are not public officials but there is equivalence to them in many respects.⁵ The Concordat is celebrated "in the name of the Holy Trinity", but the state recognizes only the principles of traditional Christian doctrine and morals and therefore ensures that Catholic religion and morals are taught to all students in primary, complementary and intermediate state schools, unless their parents ask for exemption.⁶ Following the Concordat, the Constitutional Revision of 1951 declares the Catholic religion as "the religion of the Portuguese nation",⁷ and that of 1971 provides that the state is "conscious of its responsibilities before God".⁸

The later introduction of the name of God in the Constitution gave rise to debate not only between believers and atheists, but also among Catholics. This was partially due to a radical change in the position of the Catholic Church by the declaration *Dignitatis Humanae* in last session of the Second Vatican Council. In this declaration, the ideal of the Christian state, which goes back to Constantine,⁹ was abandoned and separation was adopted as a consequence of the evangelical principle that there should be no coercion in matters of faith, the human rights to freedom of religion and belief, and religious discrimination. It was therefore clear after

2 Articles XXIV and XXV.

3 Article II.

4 Article X.

5 See articles XI, XV, XVIII.

6 Article XXI

7 Article 45.

8 Article 45.

9 The ideal of the Christian state was still defended in 1955 by Pius XII, under invocation of Constantine: "the Church does not dissimulate that she considers in principle such collaboration [between Church and state] as normal and that she sees as ideal the unity of the people in the true religion and the unanimity of action between she and the state (Vous avez voulu, *Doctrina Pontificia*, V, 1960, BAC, p. 535).

1965 that the Concordat (and many provisions of the Constitution) did not correspond to Catholic doctrine.

The fate of the “First Republic” and the radical change in the political ideas of Catholic MPs help to explain the unanimous consensus of the Constituent Assembly after the revolution of 1974 about avoiding the historical “religious question”, the conflict between Church and State, and a very wide conception of religious liberty. A first, successful attempt to avoid the “religious question” was the speedy conclusion of an Additional Protocol to the Concordat in 1975 – according to this, Article XXIV of the Concordat, excluding divorce and Catholic marriages, was substituted by an article recalling for Catholics their religious duty not to use the civil facility of divorce. In a second provision, the Additional Protocol declared that “the other articles of the concordat of 7 May 1940 remain in force”. This declaration sought to reassure the Catholic Church in the midst of revolutionary turmoil – it did not contradict the teaching of the second Vatican Council but it would be contradicted by the new constitution.

A wide conception of religious liberty was embodied in Article 41 of the new Constitution of 1976:

1. Freedom of conscience, of religion and of forms of worship is inviolable.
2. No-one may be persecuted, deprived of rights or exempted from civic obligations or duties because of his convictions or religious observance.
3. Churches and other religious communities are separate from the state and are free to organise themselves and to exercise their functions and forms of worship.
4. Freedom to teach any religion within the ambit of the religious belief in question and to use the religion’s own media for the pursuit of its activities is guaranteed.
5. The right to be a conscientious objector is recognized, the objectors having the duty to civic service for a period identical to that of the obligatory military service.

Numbers 1 to 4 were unanimously approved and number 5 had 3 votes against it, 8 from MDP, a leftist party close to the Communist Party, and 21 abstentions from the Communist Party. Modifications were made in 1982: the introduction of a new number 3:

“No authority may question anyone in relation to his convictions or religious observance, save in order to gather statistical data that cannot be individually identified, nor may anyone be prejudiced in any way for refusing to answer”; and a wider rule about conscientious objection in number 6 (former number 5): “The right to be a conscientious objector, as laid down by law, is guaranteed”.

Once the most common grievance against the Concordat, the prohibition of divorce as to Catholic marriages, was removed, discrimination against minority religions and other violations of the new Constitution in the Concordat remained outstanding problems to be solved. The legal situation of minority religions was improved through liberalisation of their legal constitution as associations of private law by Decree-Law No. 594/74 of 31 January 1983, granting them access to social security for their ministers (Regulative Decree No. 5/83), and enabling them to teach their religion in primary and secondary schools if requested by a prescribed number of pupils (Decree-Law No. 286/89 of 29 August 1989 and Decree-Law No. 329/98 of 2 November 1998). They also received emission time on public television (Law No. 58/90 of 7 September 1990). All of these developments were clearly insufficient but they explain partially why the necessary reforms could be delayed (i.e. no risk of the religious question) until the Constitution was developed through the Religious Liberty Act (Law No. 16/2001 of 22 June 2001) and the Concordat of 2004.

The political discussion about the Religious Liberty Act focused on two questions: should the Act precede the revision of the Concordat or *vice versa*? And: should the Catholic Church be more or less covered by the Act? Catholics were divided: some considered that the Concordat should be dealt with first, some felt that nothing more had to be changed in the Concordat, and the Bishops' Conference accepted the proposal of the socialist government that the Act should come first. This was because of grievances about discrimination and the Concordat, with the legislation that developed it, should be left outside the Act. The discussion concentrated therefore on Article 58 about “Legislation applicable to the Catholic Church”. The Concordat between the Holy See and the Portuguese Republic dated 7 May 1940, the Additional Protocol to the same of 15 February 1975, are kept, as well as the legislation applicable to the Catholic Church, not being applicable to the same

provisions of this Law relating to Churches or religious communities registered or settled in the country, without prejudice to acceptance by agreement between the State and the Catholic Church of any arrangements. According to the Portuguese Constitution, the Concordat as an international treaty is above the law but subject to the Constitution, so that with Article 58 the Act was applicable to the Catholic Church as far as it could be – which was not much. Nevertheless, the parliamentary discussion of the Act clearly revealed that the Concordat had to be revised immediately after. The Episcopate accepted this consequence so that the Act and then the Concordat could be voted in parliament almost unanimously. The Act entailed in Article 5 a “Principle of Cooperation” that was not included in the Constitution but expressed a central political element of the Act: “The State will cooperate with the churches and religious communities settled in Portugal, taking into consideration their representativeness, namely in view of the promotion of human rights, of the integral development of each person and the values of peace, freedom, solidarity and tolerance.” As a consequence, besides granting the rights of religious liberty to all religious communities, the law gives only to those which acquired the status of being settled in the country the same cooperation that the Catholic Church also has. Only these bodies can enjoy possibilities that are not necessary consequences of religious liberty, but are, nevertheless, compatible with it. This becomes necessary because of the principle of equality, since such possibilities are enjoyed by the Catholic Church: to celebrate civil marriages in a religious form, to be a member of the Commission of Emission Time in Radio and Television, to be a member of the Commission of Religious Liberty, to conclude agreements with the state, and to benefit from the same taxation provisions, such as exemption of VAT. Such possibilities are not considered discriminatory because they are reasonably grounded on the duty of the state not to interfere in the religious market in favour of religious communities that are not yet settled in the country.

The Socialist Government, who had in the first place submitted the Act to Parliament in April 1999,¹⁰ asked the Holy See to initiate

10 The Act resulted from a Project of Law (Projecto de Lei Nº 27/VIII, Diário da Assembleia da República, II série-A, 3-12-1999, p. 108-(2) introduced by socialist

negotiations for the revision of the Concordat. The Holy See and the Portuguese Bishops' Conference, in a communiqué of 9 February 2000, responded positively. Parliament backed the Government in a resolution of 19 April 2000.¹¹ The Portuguese negotiating committee was constituted in 6 June 2001.¹² In a way, such negotiations were facilitated by the fact that the Catholic Church had participated very actively in the preparation of the Act, responding to each public hearing of the religious communities with propositions or comments on the text of each Article, under the presupposition that the regime applicable to the religious communities settled in the country should be acceptable to the Catholic Church¹³.

The concordat was negotiated by two committees, one of the Portuguese Republic, presided over by the Portuguese Ambassador to the Holy See (Ribeiro de Menezes), with two lawyers (representing the Minister of Justice – Gil Galvão – and the Minister of Foreign Affairs – João Geraldes, substituted, after a change of government, by Cerradas Tavares), and one of the Holy See, presided over by the Nuntius in Lisbon (Eduardo Rovida), with the former President of the Portuguese Bishops' Conference (João Alves), who presided after retirement of the Nuntius, and a law professor of the Catholic University (Sousa Franco), who had subscribed as Minister of Finance to the proposal of the Religious Liberty Act. The text was first suggested by the Portuguese side, which had asked for the revision, and was discussed in common sessions. The Government, the Bishops' Conference and the Holy See were regularly informed and the Bishops' Conference gave advice when asked. The final text was examined by the Secretary of State of the Holy See and by the President of the Portuguese Republic and was signed in Rome on 18 May 2004 by the Secretary of State Cardinal Angelo Solano and the Prime Minister Durão Barroso. The Portuguese Parliament

MPs, among them the former socialist minister of justice, Vera Jardim, who had in the antecedent legislative period presented the same text to Parliament as a Law Proposal of the Government (Proposta de Lei Nº 269/VII, *Diário da Assembleia da República*, II série-A, 24.4.1999, p. 1614).

11 Resolução da Assembleia da República No. 39/2000 of 19 April 2000.

12 Resolução do Conselho de Ministros No. 67/2001 of 6 June 2001.

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

approved the treaty for ratification on 30 September 2004. In the preamble of the 2004 Concordat there is no invocation of the Trinity. It begins by the assertion that “the Catholic Church and the State are autonomous and independent in each one’s own order”. The liberty of the Church needs neither to be addressed nor mentioned. Instead, religious liberty is mentioned as “the context” within which State and Church cooperate – it sets limits to their cooperation. The historical relations between the State and the Catholic Church are invoked and the 1940 Concordat is praised as having reinforced such ties and as having consolidated the activity of the Catholic Church to the benefit of the faithful and the whole community. There is no qualification to such a praise – but it is recognised that an actualisation is needed because of the profound national and international transformations, especially because of the new democratic Constitution of Portugal, open to the norms of the European Community and the contemporary international law, and because of the evolution of the relations between the Church and the political community. The unconstitutionality of the 1940 Concordat¹⁴ have been systematically removed. Article 1 of the Concordat asserts that the State and the Catholic Church are committed to cooperation for promoting the dignity of the human person, justice and peace. It is similar to the principle of cooperation found in the Religious Liberty Act in regard to all religious communities settled in Portugal (Article 5, No. 1). As a whole, the Concordat of 2004 is the main political consequence of the Religious Liberty Act.

14 The arguments for them can be found in J. de Miranda, ‘A Concordata e a ordem constitucional portuguesa’, in A. Leite et al. (note 2), pp. 67-84. They have been taken up in the Memorandum mentioned in note 7 and in the Report of the Law Proposal of the Religious Liberty Act.

THE MUTUAL ROLES OF RELIGION AND STATE IN SLOVAKIA

MICHAELA MORAVČÍKOVÁ*

INTRODUCTION

It is first necessary to underline that today there is no comprehensive and specific document dedicated to the State's paradigm for the role of religion in society. The approach of the State is, rather, to be found dispersed amongst both historical and recent legal and extra-legal documents, statements and debates. We shall study these using, in the main, legal-historical method and politological analysis.

I. HISTORICAL BACKGROUND

The creation of the independent and so-called first Czechoslovak Republic was connected to a dynamic development of church-state relations as well as hidden and open conflicts between the state and churches. However, it did not bring any significant changes in legislation operative in the period of the Austro-Hungarian Monarchy. The attitude of the state towards churches did not change in practice. The issue of separation, and the constitutional resolution of state-church relations in 1918-1920, was one of the most complex initial political-legal problems faced by the state. However, neither the temporary constitution of 1918, nor its amendment in 1919, dealt with the subject of religious issues.

After the creation of the independent Czechoslovak Republic, "Modus Vivendi" was passed in 1928 – an agreement between Czechoslovakia and the Holy See which guaranteed mutual respect as between the partners. Nevertheless, as compared to the former period, the mutual relationship between the state and church did not change significantly. Among the most burdensome periods of Slo-

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vak history is the era of the military Slovak state. It was created on March 14, 1939 as Hitler's satellite. The preamble of its constitution defined the entity as a Christian state. Jozef Tiso, a Catholic priest, became its president. One fifth of the Parliament in the Slovak Republic was comprised of clergy. On 25 March 1939 the Holy See acknowledged the Slovak Republic. The Slovak government naturally placed great importance on this. Diplomatic relations were established in June 1939. Gradually, especially as a result of the "Jewish question" and other problematic issues, relations with the Holy See worsened. The era of the military Slovak state and the attitude of president Tiso towards "solving the Jewish issue" was one of the most difficult moments within Slovak history.¹ The contemporary attitudes of political parties and elites towards this era in Slovak history continue to be important. Particularly nationally oriented political groups interpret this period as an effort by Tiso and his co-workers to protect the Slovak nation and territory.

During the post-war period churches represented an influential political power. According to the population census of March 1950, 99.72 % of inhabitants identified themselves with a church and only 0.28 % claimed to have no religion. Within the People's Democratic Regime, the government proclaimed and actually ensured freedom of religion in practice. All churches showed the loyalty towards the restored Czechoslovak Republic. In Slovakia, the situation of the Catholic Church was a bit more complicated and its relations with the state were tenser than those of other churches.²

By the time of the February 'subversion' in 1948, and shortly after, the dismantling of what was left of democracy in Czechoslovakia came to its peak. The Communists took over. The prior interest of the communist regime was to manipulate churches according to its own interests via their representatives. However, when these steps did not prove effective, communism engaged in anti-church activities to minimize the social influence of the church and estab-

1 Comp. W. Brandmüller, *Holokaust in der Slowakei und katholische Kirche* (Neustadt an der Aisch, 2003), 215 p.

2 It paid a bitter price for its ties with the Hlinka's Public Party which ruled in the Slovak Republic 1939-1945. The ban of the Hlinka's Public Party and the lawsuit with Tiso and other state representatives harmed the Catholic Church, since the dividing line between the Church and political Catholicism was not firmly laid.

lish strict state control. Act No. 217/1949 Zb.³ Created the State Office for Church Affairs as a central organ of state administration. One year later a law was passed on economic provision for churches and religious associations. This enabled the state to operate a differentiated approach towards clergy. This law also brought into existence the principle of state approval for clergy. Churches and religious associations ceased to have a partial public law character and became completely dependable on the state economically. The majority of church property and church schools were nationalized. The Communist state had never considered separation of the church from the state. It assumed that such a step, on the basis of the prior historical experiences, would raise the problem of the social influence of churches.

The Prague Spring in 1968, when Alexander Dubček became the first secretary of the Communist Party, stimulated democratization along with a new state church policy. The censorship of the church press ended, the ceiling for ministers was abolished and communication between Catholic ordinaries and the Holy See was allowed. Occupation of Czechoslovakia by armies of five Warsaw Pact states in 1969 put a halt to the process of democratization. A process of ‘normalization’ was begun. Hard-liners replaced the Pro-Reform Party and state officials, and they sought to exclude churches from state control. A regression in terms of church-political situations and a return to the pre-1968 state-church relations followed. A new, state-collaboration movement of Catholic clergy, *Pacem in Terris*,⁴ was formed. Through this, the Communist Party sought to influence church activities according to party interests. State-church relations were reduced to church-political control, suppression of church activities, and public religious manifests.

3 „Zb.“, or since 1993 „Z.z.“ – abbreviations for „Zbierka zákonov“, i.e. Collection of Acts.

4 John Paul II issued *Quidam episcopi bulla* at the beginning of March 1982. According to this, clergy should not engage directly or indirectly, openly or secretly, in the pursuit of political goals, even though such goals may be presented in the form of humanistic ideals, peace and social progress.

After November 1989

The transformation of church-state policy and changes in the position of churches and religious associations was a natural feature of social-political development after November 1989. Churches regained independence. As well as calls to abolish the leading role of the Communist Party, to transform politics, to realize freedom of the press, and so on, a demand for religious freedom and the separation of churches from the state arose by way of public demonstration during the so-called Velvet Revolution. New legislation provided churches full self-administration; though, it did not release them from direct economic links with the state. It brought partial separation, abolished state control over churches, and gave them freedom of choice over their own matters. However, links with the state in the economic sphere persist to the present day, and the obligatory state contribution to worship represents a petrifying of these links. It should also be pointed out that this does not represent a real economic security for churches. It must be understood in the context of restitution. The Slovak Republic was one of the first among the post-communist countries to address the return to churches and religious associations of property confiscated in the period from 8 May 1945 to 1 January 1990 and the property of Jewish religious communities in the period from 2 November 1938. Questions about the restitution of church property are still hotly discussed.

Since 1 January 1993

As the Czech and Slovak Federative Republic broke up and a sovereign Slovak state came to existence on 1 January 1993, the so-called “repeated national identification process” was under way in Slovakia. Those aspects of religion which were perceived to have symbolic national significance represented a focus of attention. In its preamble, the Constitution of the Slovak Republic refers to the Constantine-Methodius spiritual heritage and historical message of Great Moravia. In Article 1, it claims that it is not bound by any ideology or religion. Article 24 guarantees freedom of thought, conscience, religion and faith.

Since 1990, the Christian agenda has been a stable part of the Slovak political scene represented mainly by the Christian-Democratic Movement, partially by Slovak national parties, Mečiar's Movement for Democratic Slovakia, the Party of Hungarian Coalition and the Slovak Democratic and Christian Union. Christian democracy, a key political idea for the Christian-Democratic Movement, respects almost exclusively Catholic doctrine. Several of the parliamentary political parties through their leaders refer to Christianity either within their political program or verbally. However, the program of no political party provides for any comprehensive doctrine about religion in the public space. In the period before and immediately after the creation of the Slovak Republic, Vladimír Mečiar, nationalists and exponents of the Velvet Revolution, and "nationally oriented Christians" (united under the Slovak Christian-Democratic Union), significantly influenced the Slovak political scene. They later fused with the right wing Slovak National Party. The period of Vladimír Mečiar's governments (1990-1998) was one of the most traumatizing and polarizing for society.⁵ There is no doubt that the political program of his party was drawn from Christian traditions and referred to the heritage of Constantine and Methodius. He drew on Christian values when designing the political posture in relation to human beings, responsibility, life, family, society, social justice and solidarity. The theoretical starting point of Mečiar and his party was attractive to most sections of the public. Reasons for his repeated election success are still a matter of debate: whether Slovakia was really so traditional and he appealed well to this fact, or whether he managed to update tradition in the ordinary lives of the people. Mečiar laid great importance on good relations with churches, especially the Catholic Church. He also wanted to create a climate in which they could contribute to society particularly with regard to values shared. However, conflict came when church representatives voiced objections to his non-democratic way of handling state

5 Church-state relations cooled off considerably in this period and in some cases grew into open hostility. Prime Minister Mečiar offered to Catholic bishops the establishment of a Catholic university as well as rapid progress in the concordat approval. Then Chairman of the Conference of Bishops in Slovakia, the diocese bishop of Banská Bystrica (Rudolf Baláž) acted critically towards the totalitarian style of Mečiar's government. He refused all the offered accommodating steps.

power and refused to be a state-supported pro-governmental instrument to bind the national and religious awareness of people.⁶ On 30 November 2000, in the new political situation of Dzurinda's government (1998-2002), the National Council of the Slovak Republic acknowledged the Basic Treaty between the Slovak Republic and the Holy See. The treaty stated that the two parties would sign another four partial agreements. The first of them, about spiritual care in the armed forces, was ratified in October 2002. On 11 April 2002, the representatives of eleven registered churches and religious associations signed a similar agreement with the Republic, which, even though it has differences in detail, is by its contents almost identical with the Basic Treaty concluded with the Holy See. The Agreement between the Slovak Republic and Registered Churches and Religious Societies on Pastoral Care for Believers in the Armed Forces and the Armed Units of the Slovak Republic declared that the state and religious organizations acknowledge the current role of registered churches and religious societies in the moral and spiritual sphere.

The Basic Treaty between the Republic and the Holy See, and its preparation, which was already a focus of media debate in 1998, stimulated widespread discussion about the position of religion in the Slovak Republic. Consideration of this treaty in Parliament⁷ was the conclusion of on-going debates between experts and members of the public. The strongest reactions included clericalization, loss of state sovereignty, supremacy of canon law, ideologization of state, and change from a democratic to a Catholic character.⁸ On the other hand, the religious-demographic situation and the positive contribution of churches in various social spheres were used as

6 M. Moravčíková, 'The Slovak Republic', in: H. Behr, M. Hildebrandt (eds.), *Politik und Religion in der Europäischen Union. Zwischen nationalen Traditionen und Europäisierung* (Wiesbaden, 2006), p. 311n.

7 Comp. M. Moravčíková, 'Procedure of Declaration of Consent by the National Council of the Slovak Republic with the Principle Treaty between the Slovak Republic and the Holy See', in: M. Šmid, C. Vasil' (eds.), *Relazioni internazionali giuridiche bilaterali tra la Santa Sede e gli stati: esperienze e prospettive* (Città del Vaticano, 2003), pp. 271-278.

8 Even before the parliamentary elections in 2002, the chairman of the leftwing Smer party, Robert Fico, called for discussion about the separation of church and state in light of the fact that archbishop Ján Sokol challenged the people not to vote for former communists, non-believers and liberals. After the elections, discussion about separation was not forthcoming.

arguments in favour. Consequently, the question of the financing of religion was of particular importance – and it continues to be: whether agreement on financial provision for the Catholic Church by the state should follow or precede the passage of new laws on economic provision for all churches and religious associations.

Political parties and society also dealt with the “church agenda” by approving the “partial” agreement on spiritual care in the armed forces. Debate was less heated than on the draft agreement between the Holy See and the Slovak Republic on Catholic upbringing and education and on the agreement on the same subject with the registered churches. The agreement on Catholic upbringing and education, which was prepared by the Ministry of Education, acknowledged to the Catholic Church an irreplaceable historic and actual role in the area of ethical and moral education of Slovakia’s citizens. Agreements with the Holy See and eleven registered churches were signed in May 2004.⁹ In September 2003, political discussion on abortion and anti-discrimination law was interrupted for a while by media coverage of the amount of state subsidies designed to finance the visit of Pope John Paul II to Slovakia. Slovakia is an example of reconciliation between western and eastern Christians.¹⁰ Even though financial subsidies to churches or the excesses of clergy have always been a popular media and parliamentary theme, it appears that political representatives manage to come to agreement in each election period in spite of the fact that the make-up of parliament has changed significantly several times. A clash of values

9 Comp. M. Moravčíková, A. Riobó Serván, ‘Cooperación del Estado con las Iglesias en Materia de Educación: La República Eslovaca’, in: *Revista general del Derecho Canónico y Derecho Eclesiástico del Estado*, No 7, Enero 2005. <http://www.iustel.com>.

10 According to some experts, the visit could have fitted into his attempt to visit Russia, which met with resistance from the local Orthodox Church. In the statements of Vatican correspondents, the pope’s coming to Slovakia was perceived as an opportunity to “support the life of local Catholics”. Also, Slovakia is often seen by the Vatican as an example of the Orthodox, Catholic and Protestant churches co-existing together. The current mutual understanding between the Greek Catholic and the Orthodox Church is also a focus of attention: “Shortly after the downfall of communism, property arguments between the Orthodox and the Greek Catholic Church were frequent in this country”, the Spanish agency Colpisa wrote, highlighting that today both churches are seeking agreement. For some experts, this reconciliation should serve as an example for countries such as Ukraine, where the Greek Catholic Church awaits reconciliation between the Orthodox Church and the Holy See: <http://www.tkkbs.sk>.

such as human life versus woman's freedom of choice ("classic family" within Christianity versus non-discrimination and the like) seem to be insurmountable. In spite of the fact that this observation may appear trivial, it is important to note that almost immediately after the opening of debate about abortion and non-discrimination, the Slovak political establishment agreed to the proposal to include a reference to God and Christian roots in the Constitutional Agreement of the European Union. On 30 September 2003, the President of the Slovak Republic, nominated for the presidential post by a left-wing party, wrote to the Pope that he wished that Slovakia would join with those states supportive of the effort of the Holy See to incorporate a reference to the Christian heritage into the European Constitution. According to the President, such would represent freedom, justice and peace for both believers and non-believers. Slovak delegates to the Convention on the Future of Europe suggested that Article 2 of the European Constitution should include a sentence that, among other values, the Union recognizes "values of people believing in God as a source of truth, justice, good and beauty as well as values of those who do not share this faith but respect these universal values originating from other sources". Another issue is the draft treaty between the Republic and the Holy See on the exercise of conscientious objection and the draft agreement on the same matter with registered religious organizations.¹¹

II. CONSTITUTIONAL AND LEGAL FRAMEWORK AND THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION

As already mentioned, the 1992 Constitution of the Slovak Republic¹² follows the ideas and spirit of several instruments of international law: Universal Declaration of Human Rights from 10 December 1948; Charter of Fundamental Rights and Freedoms, and

11 Comp. M. Moravčíková (ed.), *Výhrada vo svedomí/Conscientious Objection* (Bratislava, 2007), 720 p.

12 No. 460/1992 Zb. as implemented in Constitutional Act 244/1998 Z.z., Constitutional Act 9/1999 Z.z., Constitutional Act 90/2001 Z.z., Constitutional Act 140/2004 Z.z., Constitutional Act 323/2004 Z.z.

principles and agreements on the integration process in Europe; principles of cooperation in the spirit of the equality of states, etc. The 1992 Constitution of the Slovak Republic, in its preamble acknowledges the spiritual heritage of Cyril and Methodius and the historical legacy of the Great Moravian Empire. In Chapter One of the Constitution of the Slovak Republic (General Provisions), Article 1 (1) provides: "The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound by any ideology or religion."¹³ Article 24 of the Constitution guarantees freedom of thought, conscience, religion and faith. This right includes the right to change religion or faith. Everybody has the right to refrain from a religious affiliation. Every person has the right to express freely his or her own religious conviction or faith, either alone or in association with others, privately or publicly, by worship, religious services and ceremonies, or participation in religious instruction.

According to the Competency Law regulation, the central state authority in relation to churches and religious societies is the Ministry of Culture of the Slovak Republic. The State neither interferes in church activities, nor regulates them methodically. The Ministry of Culture, particularly *via* its Church Department, passes generally binding regulations on the position and activities of churches and religious societies, carries out tasks connected with the preparation of the draft budget for churches and religious societies within the State Budget, coordinates the proceedings of churches and religious societies in settling financial relations with the State Budget, allots financial resources of the State Budget that are intended for churches, religious societies and charity, and oversees their effective and economical use. The principal questions of status and activities of churches and religious societies in the Slovak Republic are regulated by Act 308/1991 Zb. on the freedom of belief and the position of churches and religious societies (as subsequently amended). This Act 308/1991 Zb., as amended by the Act 394/2000 Z.z. and the Act 201/2007,¹⁴ makes more specific the provisions of Article 24 of the Constitution. It stipulates that confession of religious belief must not be a ground for the restriction of constitution-

13 <http://www-8.vlada.gov.sk/index.php?ID=1378>.

14 Act 201 from 29 March 2007, amending and supplementing Act 308/1991 Zb. on the freedom of belief and the position of churches and religious societies as amended by Act 394/2000 Z.z.

ally guaranteed rights and freedoms of citizens – above all the right to education, to work and the free choice of employment and access to information. It also stipulates that the believer has the right to celebrate festivals and services according to the requirements of his or her own religious belief, in accordance with generally binding legal rules. The Act 308/1991 Zb. considers a church or religious society to be a voluntary association of persons of the same belief, in an organisation with its own structure, bodies, internal regulations and services. Churches and religious societies are legal entities and can associate freely. They may create communities, religious orders, associations and similar institutions. Churches and religious societies are special types of legal entities taking advantage of a special status (according to Article 24 of the Constitution) and also other rights awarded to legal entities in general. These include the inviolability of privacy, the protection of property, name and inheritance, the inviolability of communications, freedom of movement and residence, freedom of expression and the right to information, the right to petition, the right to assemble and associate, the right to judicial and legal protection, etc.

The State recognizes only churches and religious societies that are registered. According to Act 308/1991 Zb. as subsequently amended, the registration body is the Ministry of Culture of the Slovak Republic. The preparatory body of a church or religious society may apply for registration if it can prove that at least 20,000 adult persons – citizens of the Republic who are domiciled within its territory – claim membership of the church or religious society.¹⁵ The application for registration must also contain basic documents of the church or religious society to be founded, as well as affirmations of at least 20,000 adult members, who are domiciled within the territory of and are citizens of the Slovak Republic, that they claim allegiance to the church or religious society and support the proposal for its registration. Further, its members must know its basic articles of faith and its doctrine and are conscious of the

15 Article 11 of Act 201/2007 Z.z.: the majority of registered churches and religious societies evidently do not fulfil the relatively high membership condition. These churches and religious societies were registered under the provision of the Law stipulating that churches and religious societies, already pursuing their activities either under the Law or on the basis of State consent by the date of the Law coming into force, are considered as registered. The majority of churches and religious societies in the Slovak Republic work on the basis of deemed registration.

rights and freedoms flowing from church or religious community membership.¹⁶ The above-mentioned framework of state-church relations is supplemented by agreements between the Slovak Republic and the Holy See, and between the Slovak Republic and registered churches and religious societies. The possibility of concluding agreements with the State was granted to churches and religious societies by Act 394/2000 Z.z. amending Act 308/1991 Zb. on the freedom of belief and the position of churches and religious societies. The Catholic Church and eleven other churches made use of this facility. Perhaps extensive criticism or pressure from abroad led the General Prosecutor to file a motion with the Constitutional Court of the Slovak Republic in which he challenged the constitutionality of Act No. 308/1991 Z.z. As indicated in the motion, the General Prosecutor considered the condition of 20,000 declarations of honour as unconstitutional and discriminatory. On 3 February 2010 the Constitutional Court rejected this motion and decided that the requirement was not unconstitutional; also, registration is not a condition free expression of one's belief.

III. CHARITY AND PASTORAL CARE, RELIGIOUS EDUCATION

The charitable work of religious organisations is desired by society, widely appreciated by state, and even supported by state budget, mostly (but not only) via the Ministry of Culture. Pastoral care in the armed forces, prisons, medical institutions, therapeutic centres, etc., is guaranteed by a system of treaties and agreements between the Slovak Republic and Holy See and the Republic and eleven registered religious organizations.

According to Article 24 of the Constitution, churches and religious societies “organise the teaching of religion” and, according to Act no. 308/1991 Zb. (see above), believers have the right to be educated in a religious spirit and – on fulfilment of conditions established by the internal rules of churches and religious societies and by generally binding legal regulations – to teach religion. This issue is addressed in more detail by the Basic Treaty between the

¹⁶ Article 11d of the Act 201/2007 Z.z.

Slovak Republic and the Holy See,¹⁷ and the Agreement between the Slovak Republic and the Registered Churches and Religious Societies.¹⁸ The right to religious education is guaranteed also by Act no. 29/1984 Zb. on the system of primary and secondary schools (School Act). Persons appointed by churches and religious societies may teach religion at all schools and educational institutions, which are part of the educational system of the Slovak Republic. They also have the right, for educational purposes, to establish, administer and employ primary schools, secondary schools, universities and educational institutions in compliance with the provisions of law. These schools and educational institutions have the same position as state schools and educational institutions and they are an important and equal part of the Slovak education system. The Republic gives full recognition to diplomas issued by these schools and institutions and considers them equal to diplomas issued by state schools of the same kind, field or level. Thus, they are acknowledged as equivalent to state diplomas; the same applies to academic degrees and titles.¹⁹

IV. RELIGIOUS SYMBOLS

In connection with preparation for integration into the European Monetary Union, the Central Bank conducted a public survey in which citizens could choose between national designs for Slovak Euro coins. It may be noteworthy that among the internet-voting citizens, more than 70 % chose the Christian motif of the double cross on a triple hill.

At present, there is no law in Slovakia to regulate the use of religious symbols in public places. The Ministry of Education passed a directive about crosses on classroom walls in the state schools. If the majority of the parents of the pupils in the given class wish to place a cross in the classroom, it is within the school director's authority to allow them to do so.

17 Published in the Collection of Acts under no. 326/2001 Z.z.

18 Published in the Collection of Acts under no. 250/2002 Z.z.

19 Comp. M. Moravčíková, 'Religious Education and Denominational Schools in the Slovak Republic', in: E. Aslan (ed.), *Islamische Erziehung in Europa / Islamic Education in Europe* (Wien, Cologne, Weimar, 2009), pp. 457-473.

On 10 December 2009, the National Assembly of the Slovak Republic adopted the Declaration on Displaying Religious Symbols in Schools and Public Institutions (*Vyhlasenie Národnej rady Slovenskej republiky o umiestňovaní náboženských symbolov v školách a vo verejných inštitúciách v súlade s kultúrnou tradíciou krajiny*). The Slovak Parliament declared that the judgment of the European Court of Human Rights, which qualified the displaying of crosses in schools in Italy as a violation of parents' rights to educate their children according to their own beliefs, contradicts the cultural heritage and Christian history of Europe. Displaying crosses in schools and public institutions represents a tradition of many European countries, Slovakia included. To respect this tradition cannot be understood either as a restraint of freedom of religion and belief or as a violation of parents' rights to educate their children according to their own beliefs. The display of religious symbols in schools and public institutions is the right of every member state of the European Union, including Slovakia, and it is in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms adopted in 1950. 103 MPs out of 125 MPs present voted in favour.²⁰

V. THE CATHOLIC CHURCH AND SOCIETY 2012-2016

The Catholic Church and Society 2012-2016 is the title of a document published by the Catholic Church. The preamble spells out the commitment of the Catholic Church to relations with a State to balance the good of the individual and the common good, to respect fundamental human rights and freedoms, principles of subsidiarity and solidarity, and to help the integral human development of individuals and society. It identifies areas where change and progress are needed, e.g. support for life and family, promoting social development, health care reform, relations with the Holy See (two so-called partial treaties are pending), religious upbringing and education, and protection of the cultural heritage. An important goal is to remove and punish corruption in society, namely: "Scandals and evidence of the corrupt behaviour of political elites, officials and

²⁰ The total number of Slovak MPs is 150.

businessmen, which remain unpunished, reduce the level of social trust and deepen people's lack of interest in public affairs.”²¹ This document is one of the recent documents of this type with specific requirements responsive to social development and the social and political life in the country.

CONCLUSION

The approach of the Slovak Republic to the role and importance of religion in society has varied over time. There are no clear criteria, used politically, to determine the value of religion in the public sphere. Atheism was emphasized during the communist period. Currently the Slovak representatives see themselves as halfway between cooperation of the state and religious organizations and secularism. Parity and cooperation between the State and religions are being expressed through the system of treaties and agreements with churches and religious societies, funding charities and pastoral care, religious authorities' presence at public ceremonies and commemorations, invitations to solve social problems as a discussion partner with government, employers and employees (which is a very new element in the system), or regular encounters of the President of the State and the Prime Minister with religious authorities. The most discussed issues are the conditions for obtaining State registration as a Church or Religious Community, and this is contested mostly from the perspective of non-registered religious organizations. Recent problems include the Slovak government's request (induced by the economic crisis) to reduce some holidays, mostly of a religious nature, and the consequent disapproval of the Catholic Church. According to the Programme Statement of the Slovak Government (2012-2016), our Government has an interest in a permanent dialogue with churches and it welcomes their contribution to the “Roma problem”, the integration of disabled people, and the improvement of social conditions for senior citizens.

Generally, religion has always played an important role in the territory of the contemporary Slovak Republic. Christianity used to be a cohesive force in Central Europe and contributed significantly

21 <http://www.tkkbs.sk>.

to the spiritual shaping of this geographical area of unusual diversity. This is so in spite of the many institutionalised forms which have been experienced historically. Above all, the fundamentals of Slovak law on the relations of the state towards religion were formed many centuries ago.

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THE MUTUAL ROLES OF RELIGION AND STATE IN SLOVENIA

BLAŽ IVANC*

INTRODUCTION

This paper examines the state's understanding of the role and value of religion by presentation and analysis of the most important political and legal perspectives considered to be typical of the Republic of Slovenia. The very term "the state's understanding of the role and value of religion" is ambiguous. The state is not a person with its own perception and will. The "will" following from the particular "understanding" of the state is to a great extent marked with personal perceptions and constructed by programs and actions of the dominant political actors entitled (or simply in a position) to execute their programs (political will). It seems that the organic theory of the state (in combination with the separation principle) still causes noticeable confusion and I will try to avoid it as much as possible.

The "political production" of church-state perceptions during the past two decades of the independent Slovenian state has not been overwhelming – but a certain palette of interesting views has emerged. The legacy of the totalitarian regime was the perception that religion is a drug (opium) for the people and the atheistic state had a mandate to "enlighten" them. Thus, the church, in particular the Catholic Church as the largest, was perceived as the most important internal enemy of the communist state. This perception forms an important element of the legacy of the totalitarian regime. Religion as the internal enemy of the state was the basic paradigm of the communist regime. A new paradigm of cooperation between the state and religious organizations only emerged with democratization in 1991. During the period of the new independent state of Slovenia the "cooperation" paradigm was to a great extent followed by the state, but on the political and legal field it was challenged by

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another paradigm that can be described as the “redefinition” paradigm which seems to draw its inspiration from the “internal enemy” paradigm. Another paradigm that also emerged is the “neutrality” paradigm that tends to contain the field of operations of religious organizations (e.g. by narrowing the recognition of their role or by ignoring them completely) and to focus mainly or exclusively on the activities of other parts of civil society: e.g. of non-religious NGOs or pensioners or adherents of a certain political figure (the leader). The discussion will try to present this shift and the varieties of paradigms and to ascertain what is characteristic for the current debate on the role of the state and religions in the modern Slovenia.

I. THE STATE’S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

One of the most illustrative documents about the perception of religion in pre-independent Slovenia is the once strictly-classified document entitled: “Manual on the work of the Militia in the area of the protection of constitutional order” from June 1985 (hereinafter: “Manual”).¹ In its second chapter (subchapter 5), the Manual provides concrete instructions for Militia (Party Police) forces in relation to the Catholic Church and other religious communities. The title of this particular chapter is self-explanatory: “the Internal Enemy”. The State’s Religious Commission (*Verska Komisija*) served as a forum for religious “dialogue” being basically a pure state-control mechanism which – especially *via* the decisions of the “mini-collegiate body” – issued obligatory instructions for churches and religious communities. In 1986 the Commission allowed the Archbishop of Ljubljana to issue a Christmas pastoral address on radio – and only in 1989 did Christmas day cease to be a working day.

After the adoption of the new Constitution in 1991, the statutory regulation of church-state relations came to a standstill until 1994 when a document of the Joint Umbrella Commission (of the Roman Catholic Church and the Government of the Republic of

1 *Priročnik za delo Milice na področju varstva ustavne ureditve*, Ljubljana, June 1985.

Slovenia) provided for a common understanding of the constitutional provision on the separation of state and religious communities. This extra-legal document not only served as a starting point for the work of the Commission, but is of general importance also for other churches and religious communities. The document established that the principle of separation of the state and church carries historical baggage, since in the past it was “understood mainly in the negative sense of the church being eliminated from public life.” Then the document stressed the importance of the positive perception of the principle of separation of the state and religious communities in the sense of the foundation of equality and the free pursuit of activities of all religious communities according to their own legal organization. Point 7 of the document states: “... with complete consideration for mutual independence and autonomy, it is beneficial that the state and the Catholic Church co-operate and, on the basis of compliance with the Constitution, the international documents on human rights, and the laws of the Republic of Slovenia, reach an agreement on issues where they come into contact while pursuing their respective activities”.² Both parties also stressed that the state should conclude similar agreements with other churches and religious communities. Thus, this particular extra-legal document can be regarded as the foundation of the co-operation paradigm.

The criteria used politically to determine what the values of religion are (or ought to be) an important part of the political parties’ programs. Thus, the discussion takes into account those programs of political parties which succeeded in reaching Parliament and were/are entitled to form legally-binding democratic decisions during the last two election periods.

The New Slovenia-Christian People’s Party (*Nova Slovenija-krščanska ljudska stranka – N.Si*) holds Christian values as the fundamental values of its program.³ The same goes for the Slovene People’s Party (*Slovenska ljudska stranka – SLS Radovana*

2 *The State and Religion in Slovenia* (Ljubljana, 2008), p. 123.

3 *Volilni program N.Si 2011-2015*, <http://nsi.si/assets/files/pdf/Volitve%202011/Volilni%20program%20NSi%202011%20-%202015%20internet.pdf> (Retrieved 1 September 2012).

Žerjava), which is also a member of European People's Party.⁴ Both parties see church-state relations as based on close mutual cooperation. The third member of the EPP is the Slovene Democratic Party (*Slovenska demokratska stranka – SDS*) which, in its moderate conservative political programme,⁵ invokes a Christian ethos and the importance of the Christian heritage (as well as humanistic and enlightenment) as foundations of our culture and civilisation. However, its election program does not specifically refer to the role of religion in the society or in relation to the state.⁶ These three political parties support and promote the “cooperation” paradigm.

The *Zares – socialno liberalni* political party (the parliamentary party between 2008 and 2011) and the Gregor Virant's Citizens List (*Državljska lista Gregorja Viranta*; since 2011) are two political parties that in their programs proclaim a non-ideological attitude, openness, rationality, the de-politicization of society and the importance of civil society (NGOs), but they are silent about the role of religion and religious organizations. The newly-established political party, the List of Zoran Janković – Positive Slovenia (*Lista Zorana Jankovića Pozitivna Slovenija*), which won the elections in 2011, does not refer to the issue of religion or the position of churches in its political program.⁷ The same is also true for the Democratic Party of Pensioners (*DESUS*).⁸ This group of political parties can be regarded as proponents of the “neutrality” paradigm.

The Liberal Democratic Party (*LDS*), which did not make it into the Parliament in 2011, heavily criticized the legislation on state-church relations (the Religious Freedom Act 2007 – RFA). It demanded a change of the RFA to ensure separation between the state

4 *Program Slovenske ljudske Stranke in resolucije sprejete na kongresu*, 17 November 2007, <http://www.sls.si/bin?bin.svc=obj&bin.id=f6aded3c-1912-a13b-76aa-3b868a6f226f> (Retrieved 1 September 2012).

5 *Program SDS*, <http://www.sds.si/menu/5> (Retrieved 1 September 2012).

6 *Program SDS za Slovenijo 10 + 100*, http://www.sds.si/file/2011/10/program-za-slovenijo_novi_281011/Program%20za%20Slovenijo%202011%20-%202015.pdf (Retrieved 1 September 2012).

7 *Program Liste Zorana Jankovića – Pozitivna Slovenija*, <http://pozitivnaslovenija.si/program> (Retrieved 1 September 2012).

8 *Volilni program stranke DeSUS za obdobje 2012-2016 sprejet na 8. kongresu DeSUS na Bledu*, 21 October 2011.

and religious communities. The party claimed that they are not equal and that third parties should be protected from the religious communities.⁹ Thus, the Liberal Democratic Party was the main proponent of the “redefinition” paradigm. When the president of the party council was appointed as director of the Governmental Office for Religious Communities, the party had a substantial influence in the shaping of the “will” of the State during the years 2009-2011.

The political program of the Social Democrats, entitled “Slovenia on top of the World” (*Socialni demokrati – SD*) not only holds the Catholic Church to be a pre-modern institution,¹⁰ but also – from a historical perspective – the second opponent (after “liberal capital”) of the Social Democratic movement in Slovenia that relies on Protestantism.¹¹ Quite odd is the program’s statement about state-religion relations which demands separation of religion from the Church, since “the religion cannot be in the domain of the church”.¹² The position of the Social Democrats not only calls for redefinition of state-church relations, but openly advocates the reintroduction of the “public enemy” paradigm. The main objective of the proponents of the “redefinition” paradigm is to oust religion from the political field, i.e. from all public life. The party holds the state to be the main instrument for their mission.

The third type of extra-legal document that should be mentioned are the treaties establishing the governing coalitions of political parties (from 2008 to 2011 and from 2012 to 2016). The treaty establishing the governing coalition between the Social Democratic Party, the *Zares – socialno liberalni* Party, the Liberal Democratic Party (*LDS*) and the Democratic Party of Pensioners (*DESUS*) for the 2008-2012 mandate (in provision No. 11.7) very briefly stressed that the parties will “... redefine the relation between the state and religious communities considering the principle of the separation of the state and religious communities and the principle of equality between the religious communities” (transl. B.I.). Of great importance is the fact that the parties failed to invoke the

9 *Program LDS*, <http://www.lds.si/file/113350/> (Retrieved 1 September 2012).

10 The political program of Social Demokrats Party, p. 7, <http://www.socialni-demokrati.si/predstavitev/program/> (Retrieved 1 September 2012).

11 *Id.* p. 3.

12 *Id.* p. 19.

constitutional principle of the freedom (autonomy) of religious communities (Article 7/2) and the constitutional guarantee of the right to religious freedom (Article 41).¹³ Here the redefinition thesis gained its new (albeit not first) politico-legal formulation, but was at the same time left without any deeper explanation and argumentation. In 2008 the redefinition paradigm became the Government's official political position, yet the coalition was not able to enact new legislation to enforce it. Basically, the "redefinition" thesis derives from the main thrust of the Draft Religious Freedom and Religious Communities Act which was proposed in 2005 (and in 2006) by MP Mr. Aleš Gulič (LDS).

The treaty establishing the governing coalition between the Slovene Democratic Party (SDS), the New Slovenia-Christian People's Party (*Nova Slovenija – krščanska ljudska stranka – N.Si*), the Slovene People's Party (*Slovenska ljudska stranka – SLS Radovana Žerjava*), the Gregor Virant's Citizens List and the Democratic Party of Pensioners (*DESUS*), for the mandate of 2012-2015, does not contain provisions on the role of religion or religious organizations; but non-religious NGOs are mentioned.¹⁴ The agreement between the coalition parties was that they will not open ideological questions, meaning that the concept of the RFA will not be subject to major changes.

The proponents of the "cooperation" model see the State mainly as the facilitator of public goods and the protector of religious freedom. From their perspective the contribution of religions to the life of society is incontestable. The supporters of the "redefinition" model see the State predominantly as the organic entity which must in all fields be separate from religious organizations. Religion must be restricted to the domain of the individual as a strictly private matter; non-identification is crucial. Thus, their great difficulty is to regulate the public (or collective) domain of religion. Consequently, they tend to equalize churches to other enterprises and only opt for free competition among them whereby the State's mission is to impose a strict financial control over churches and reli-

13 *Koalicijski sporazum o sodelovanju v Vladi Republike Slovenije za mandat 2008-2012: uveljavitev odgovornosti za spremembe*, <http://www.socialnidemokrati.si/wp-content/uploads/2011/10/Koalicijski-sporazum.pdf> (Retrieved 1 September 2012).

14 http://www.vlada.si/fileadmin/dokumenti/si/program_vlade/Koalicijska_pogodba_2012_2015.pdf (Retrieved 1 September 2012).

gious communities. This idea was presented by the Draft Religious Freedom and Religious Communities Act (proposal of Mr. Gulič from 2005) which stressed the importance of “the free market of religious ideas”. The argument was supported with the invocation of the neutrality principle,¹⁵ but his new draft (2006) of the same bill presented the radicalization of this argument: “the back side of the principle of separation between the State and religious communities represents (as prescribed within the Constitution!) a duty on the State to ensure a ‘free religious market’. The manner of ensuring it depends on concrete historical circumstances. If we are dealing with a monopoly, then we hardly argue for a logic which says that the State should automatically give more to the one with greater needs (so-called distributive justice). In this way, we should only aggravate existing inequalities. As more sensible possibilities appear, the withdrawal of the State from the market and the so-called positive discrimination of minor religious communities, that should be applied in a manner [so] that bigger ones should not be impaired...” (transl. B.I.).¹⁶ Apart from this position, the milder adherents of the “neutrality” approach seem not to have a special (public) agenda. Thus, their intentions or actions are hard to foresee. In the best case scenario, they support the status quo in state-church relations.

In 2006 the Government issued an opinion on the 2006 Draft Religious Freedom and Religious Communities Act presented by Mr. Gulič. According to the Government, the agreement between the Republic of Slovenia and the Holy See on legal issues claims neither the exclusion nor strict separation of the state and religious communities, but maintains a system of cooperation in their own field. Thus, the religious communities and the state need to cooperate in areas of common interest for the well-being of the human person and society in general. The draft solutions included *inter alia*: 1. a prohibition on the employment of consecrated religious persons in state organs; 2. the introduction of 21 offences with high fines; 3. a heavy administrative burden related to reporting systems; 4. a partial cancellation of contributions to social security for

¹⁵ *Predlog zakona o verski svobodi in verskih skupnostih* (ZVSVS) EPA: 380-IV.

¹⁶ *Predlog zakona o verski svobodi in verskih skupnostih* (ZVSVS; EPA: 697-IV) from 1. 2. 2006, p. 3.

priests; 5. the levelling of the well-established standard of spiritual care in the armed forces and prisons; these were strongly rejected by the government as being unconstitutional or as imposing too severe limitations on the free exercise of religion. After the draft proposer became the director of the Government's Office for Religious Communities the position of the "State" changed accordingly (2009-2011).

Obviously, the historical experience of Slovenia indicates that the state's views on the role and value of religion, and the reasons underlying these, have over the past 20 years been a subject of highly-charged political debate. The political debate was mostly marked by demagogic and ideological rhetoric which – as a rule and without deeper understanding and argumentation – invoked the constitutional principle of separation between the state and the church as the most important premise for the modern state's perception of religion. The principal lines of the debate were mostly determined by the following dilemma: the system of cooperation despite separation versus the system of strict separation.

II. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

The communist Constitution was a precise legal formulation of the "public enemy" paradigm. The Constitution of the Socialist Federative Republic of Yugoslavia, adopted in 1974, formally guaranteed freedom to manifest one's religion. The constitutional ideological construction provided that religion and its manifestations are strictly a private matter. The Constitution banned all religious activities from public life. Accordingly, the Constitution maintained the separation of religious communities from the state and provided that religious communities are free in their exercise of religious affairs and religious rites. The third paragraph of article 174 allows religious communities to found only religious schools for the education of priests; the state prohibited the establishment of a church educational system. The Constitution declared (as did previous Constitutions) that the abuse of religion and religious activities for political purposes is unconstitutional. This provision served as a basis for the criminal prosecution of believers according to the

system of criminal offences and sanctions enshrined in the Yugoslav Criminal Code. However, the Constitution provided that the community may materially support a religious community. The final paragraph of Article 174 provided that religious communities may be, within the limits prescribed by law, entitled to property (which had already been reduced through confiscations, agrarian reform, and nationalisation in the years after the Second World War). The communist regime introduced and maintained a negative model of separation between state and church which was openly hostile to churches and believers. The legal shift from the “public enemy” paradigm occurred with the adoption of the new democratic Constitution of the Republic of Slovenia (hereinafter: the Constitution).¹⁷ Article 41 provides for freedom of conscience and belief (hereinafter: the right to religious freedom) which broadly protects freedom of self-definition and refers not only to religious beliefs but also to moral, philosophical and other worldviews. The provision enshrines: 1. the assurance of freedom of conscience; 2. the right of a person not to have any religious or other beliefs, or not to manifest such beliefs (the negative entitlement); and 3. the right of parents to determine their children’s upbringing in the area of freedom of conscience. Article 7 of the Constitution determines the basic principles regarding State-Church relations in Slovenia: (1) the principle of separation of the state and religious communities; (2) the principle of equality among religious communities; and (3) the principle of the free activity (autonomy) of religious communities. The constitutional mandate of the State changed from atheistic activism to neutral self-restraint. Consequently, the position of churches and believers in the realm of political reality began to improve from then on. The new RFA 2007 introduced the system of cooperation between the State and the Church.

The State’s (legislative) recognition of the value (and the danger) of religion has not been equally applied to all areas of public life. In the legislation on public schools, religion is seen as a danger to the so-called secular “autonomous school space”. The State’s protection of religious sentiments even in cases of severe violation is seldom and exceptional (the burning of a cross is tolerated as a “cultural” performance). Legislation enables the employment of

17 The Constitution of the Republic of Slovenia (1991).

priests in the army and police forces, but not in prisons and hospitals. The Municipality of Ljubljana in one case prohibited a religious gathering in France Prešeren's Square because religious activities may not be performed in a public square (the square was originally named after Holy Mary and is in front of the Franciscan church in the centre of Ljubljana). One should note that the Act on public gatherings explicitly allows religious public gatherings.

The above-mentioned cases illustrate that there are areas of legislation or acts of public authorities that do not give great importance to religion and the religious rights of individuals.

Regular courts did not deal with many cases involving religious issues. In one case, the civil courts strictly declined to explain the meaning of the autonomous rules of the church because this is not a state matter. It seems that the criminal courts have extremely high thresholds in order to prosecute a case when the religious feelings of believers were harmed by setting a huge cross on fire in the coastal pilgrimage city of Strunjan. This desecration occurred on the five-hundredth anniversary of the local pilgrimage of the Catholic Church. Recently, the Administrative court refused the petition of the Slovene Caritas which applied for an EU subsidy in the area of voluntary work. That is, the Government limited the invitation for public tender in a manner which excluded all religious organizations on the (tacit) ground that they are religious or are a part of religious organizations. One should mention that the Slovene Caritas is the organization with the largest number of volunteers in Slovenia.

In the Conscientious Objection case No. U-I-48/94 (May 1995), the Constitutional Court demanded that the Military Service Act be supplemented since it violated the right to conscientious objection (Article 46). With the enactment of the Denationalization Act the State enabled church property to be returned. Despite strong opposition to the bill, the main purpose of which was to redress injustices, the Constitutional Court ruled in favour of church entitlement to a full restitution.¹⁸ In the Referendum on the location of a mosque case No. U-I-111/04 (July 2004) the court prohibited the referen-

18 See the Denationalization of Church property case No. U-I-107/96 (December 1996) and the Request for an assessment of the constitutionality of the contents of a demand to call for a referendum on the Law on the Changes and Additions to the Law on Denationalisation case No. U-I-121/97 (May 1997).

dum from taking place because it might interfere with the positive aspect of the right to religious freedom (Čepar, Ivanc 2008). In the Census case No. U-I-92/01 (February 2002), when reviewing the Act on the Census of the Population, Households, and Housing, the court protected the negative element of the right to religious freedom (consequently, the answer to the question on religious affiliation was not obligatory). The most disputed decision remains that in Mihael Jarc et al. No. U-I-68/98 (November 2001): the court supported the School Financing Act which prohibited religious activities in public school (premises). But the law was found to be unconstitutional regarding the ban in private schools (Ivanc 2007). The Court issued an Opinion on the Agreement between the Republic of Slovenia and the Holy See No. Rm-1/02 (dated 19 November 2003) (Official Gazette RS, No. 118/03 and OdlUS XII, 89) which did not find unconstitutional provisions regarding the system of cooperation between Church and State (Ivanc 2009).

The most important decision of the court was that on the RFA No. U-I-92/07 (15 April 2010). The Court produced a comprehensive and illustrative explanation of the principle of the separation of the state and religious communities (Article 7) in relation to the right to religious freedom (Article 41); it reads as follows:

“102. ... The dimensions of the principle of the separation of the state and religious communities as well cannot *be understood* without understanding the purpose of the existence of this principle. The aim of this principle is to ensure true freedom of conscience (and, in a broader sense, pluralism as an essential component of a democratic society), and the equality of individuals and religious communities. In other words, it is not the purpose of the principle of the separation [of the state and religious communities] to protect the state itself from religious and other beliefs and associations (the state itself, of course if it is democratic, is not to be protected from anything), but to ensure complete freedom of conscience and the equality of all people, adherents and non-adherents, with its neutral stance. Without this principle, encompassed in freedom of conscience, this human right would be incomplete. It would be incomplete because there would be no effective tool for establishing freedom and equality for all. And, more importantly, without this principle the door would be open in the other direction – to the influence of the state on religious communities. The principle of separation is therefore not statist, but humanistic. A neutral state respects the right of individuals to freely, individually, or collectively pro-

fess their religion or other beliefs. Regarding this, it takes into account that citizens have different religious and non-religious beliefs or that they do not have them at all and that it is responsible for ensuring the freedom of everyone.

103. The religious and ideological neutrality of the state perceived in such a manner is not an obstacle to the cooperation of the state with religious communities. A modern democratic and social state is actively involved in many areas of society, which it promotes in various ways, directly or indirectly. As on the basis of their convictions religious communities carry out tasks in such areas as well, the state must not ignore or even eliminate them in encouraging and promoting various activities in society. The religious neutrality of the state does not entail that religion is pushed to the margins of society, as this could lead to precisely the opposite effect: discrimination based on religion and the denial of neutrality. The principle of separation does not prevent the state from establishing positive relationships, forms of cooperation, and joint efforts with those religious communities that also perform charitable activities, such as the state has in this respect with other organisations of civil society. In doing so, it also cannot be disputed if the legislature assesses in general that religious communities with their fundamental mission – care for religious freedom as a human right – perform an important and useful role in terms of strengthening human dignity in a modern democratic society that goes beyond the pursuit of individual goals. Regarding this, the attitude of the state in *its* relationship to various religious communities must not be inconsistent with the principle of equality, and it especially must not result in the eventual assessment of the state of the legitimacy of the content of such beliefs.

104. This neutrality also does not require the state to be indifferent towards the religious needs of the people. Religion is certainly not a state matter. However, as follows from Article 41 of the Constitution, the state is obliged to take into account to a certain extent the religious problems of individuals and religious communities, which it must approach in a neutral and fair manner. Therefore, although the state does not occupy itself with religious issues, it must nevertheless recognise the importance of religion for individuals and actively create conditions for the exercise of this human right. The interpretation of the first paragraph of Article 41 of the Constitution is crucial for determining the duty of the state in relation to it enabling the religious life of people. Nobody has the right to request public assistance in the profession of religion, unless, of course, such a duty results from the first paragraph of Article 41 of the Constitution. This entails that everything that falls within the scope

of the exercise of the right to freedom of religion determined in Article 41 of the Constitution cannot be considered inconsistent with the principle of separation determined in the first paragraph of Article 7 of the Constitution. The cooperation of the state with religious communities is not in itself illegal from the perspective of constitutional law, even if it exceeds the limit required by Article 41 of the Constitution, namely as long as the state is religiously neutral in acting in this manner and does not identify itself with religion or religious communities. (...)"

The draft RFA (2007), which proceeded from the positive (cooperative) State's understanding of the role and value of religion, gained the support of the vast majority of churches and religious communities. They also accepted the decision of the Constitutional Court on the RFA despite the fact that it called for milder criteria for registration of the religious community and prohibited the employment of consecrated persons in hospitals and in prisons (but not in the police and in the military). The amendments to the RFA that were presented by political parties that are supporters of the "redefinition" paradigm were strongly criticized by the Council of Christian Churches in Slovenia and by the Muslim Community because the amendments were ideologically motivated and confronted already-accepted democratic standards in the area of religious freedom. The amendments not only envisaged religious organizations as enterprises (e.g. their registration would be decided by the Agency of the Republic of Slovenia for Public Legal Records and Related Services – AJPES), but a special commission would be established within the Government that would *inter alia* issue "opinions" about whether the principle of separation was violated. This particular organ closely resembles the old State's Religious Commission.

Recently, the Jewish community, the Muslim community and the Catholic Church in 2011 strongly rejected the position of the Human Rights Ombudsman on the prohibition of boys' circumcision. Thus, the Ombudsman somehow changed the position from an initial total ban of such medical procedure to the appeal for more precise legal regulation.

The provision of the RFA which calls for open and democratic dialogue with churches and religious communities in areas related to their activities is poorly implemented in practice.

FINAL REMARKS

We can conclude that the unfinished paradigm shift towards a more positive (cooperative) model of relations between the state and religion (and religious organizations) is a mark of current debate on the role of the State and religions in modern Slovenia. Two opposing views about the role of religion in society are the main source of highly-charged debates in Slovene politics. Several political parties side with the “neutrality” paradigm; some are willing to go along with the cooperation model, but others are willing to support a “redefinition”.

From the legal perspective, the “cooperation” paradigm was to a great extent introduced and formalised in the following documents: 1. the statement on the understanding of the constitutional principle on separation between state and church; 2. the international agreement with the Holy See; 3. the state-church/religious communities’ agreements; and 4. the RFA (which enjoys the support of all churches and the vast majority of religious communities in Slovenia).

Slovenia’s shift in the state-religion paradigm somehow remains a semi-shift. Due to the growing political support for the strict implementation of the principle of separation – despite the lack of comprehensive political and legal argumentation – substantial changes in the statutory regulation (of the RFA and of special agreements) might take place in order to define strictly, and thereby contain, religious activities and to impose state control over them. However, the case law of the Constitutional Court leans more towards the “cooperative” model. For a young democracy, the substantial debate on the appropriate State-Church relationship still remains a mighty challenge.

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THE MUTUAL ROLES OF RELIGION AND STATE IN SPAIN

AGUSTÍN MOTILLA

I. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

Introduction

Generally speaking, the State's attitudes towards religion depend on which political party is in government. The Spanish political system favours party majorities in Parliament, so we only have the experience of Governments formed by one political party. We will approach the State's understanding of the role of religion by studying the position of the different parties present in the Parliament. The main tool in this research will be parliamentary discussions before passing laws on religious issues. Nevertheless, we will also analyse some documents, or *manifestoes*, approved by the executive committees of the political parties. Spanish history is deeply rooted in the Christian tradition. The overwhelming presence of one religious denomination, Roman Catholicism, in social life and in the political scene is one of the main characteristics of our history. Therefore, the Roman Catholic Church's legal status has been, as it is nowadays, the theme of political and social debate. We will divide this section into three parts: the State's general understanding of religion, the State's attitudes concerning religious minorities and, finally, the social relevance and legal position of the Roman Catholic Church.

The State's Understanding of Religion and minority religious groups

The State's position concerning discussion of the main laws on religion

In parliamentary discussions, concerning the approval of the Spanish Constitution of 1978, there was a common agreement among the main political forces: not to reopen the historical struggles

around the so-called “religious question”, as a consequence of the wide recognition of the right to religious freedom, not only for individuals but also for groups (expressed in Article 16.1 of the Spanish Constitution). There is also a common consensus on safeguarding the State’s neutrality on ideological issues (“no religion shall take the role of an established Church”, Article 16.3). Nevertheless, different points of view arose before the approval of the Constitutional declaration: “The State shall take account of society’s religious beliefs and shall establish cooperative relationships with the Roman Catholic Church and other religions” (Article 16.3 *in fine*). As the Catalanian minority party stated, the Constitutional declaration is so vague that it permits broad discretion for civil servants applying the rule of law,¹ and could lead to possible discrimination between positive religious beliefs and non-religious ideological beliefs.² Parliamentary groups supporting the text of Article 16.3 *in fine*, the right wing of the Popular Party and the governing Democratic Centre Union Party, firmly expressed their commitment to avoid any discrimination, forbidden in all cases by Article 14 of the Constitution.³ The concept of religious confession is used to mean organised, institutionalised and permanent groups of long standing which could therefore maintain a continuous relationship with the State.

The first organic Law approved by the Spanish Parliament was the Religious Freedom Act, of 5 July 1980. The Law was quickly approved within a matter of months, reflecting the Constitutional consensus on the right of religious freedom. However, there were some points of disagreement among the parliamentary groups re-

1 “Moreover, the category of ‘cooperation’ is extremely vague, because it has not defined its own legitimate aims. I would prefer to leave on the margins of the Constitution text the possibility of establishing any kind of relationships between the State and the religious denominations”. H. Barrera Costa, defense of amendment No. 240 of Article 15 (later number 16), 3 of the Project of the Constitution, *Comisión Constitucional del Congreso. BOC. Diario de Sesiones. Congreso de los Diputados*, No. 106, 7 May 1978, pp. 1818-1819.

2 *Ibidem*, p. 2475.

3 “These differences of cooperation should not, in any circumstance, mean discrimination between religious and non-religious beliefs, and from here I state that the Democratic Centre Union excludes the interpretation of the category any kind of unjustified discrimination”. M. Herrero y R. de Miñón, *Constitucional Project debates. Pleno del Congreso, BOC, Diario de Sesiones. Congreso de los Diputados*, 7 July 1978, No. 107, p. 4002.

garding the text of the Law: the rule about religious freedom excluding other types of spiritual, humanistic or ideological beliefs.⁴ This could constitute discrimination against non-religious beliefs.⁵ The Socialist Party also criticised what they believed was an impossible demarcation between religious and non-religious phenomena, such as spiritualism.⁶ The majority Group considered that the Civil Administration would have the competence to distinguish between religious phenomena and activities, and other manifestations of the human spirit.⁷ Another concern of the Socialist Group was to limit the autonomy of religious denominations already registered in the Religious Entities File in labour matters; they proposed that legal autonomy should not mean any kind of infringement of the labour rights of their members. This was approved and passed into the final version of Article 6.1.⁸

Parliamentary debates which took place before the passing of the Evangelical, Jewish and Islamic Agreements, approved in the 10 November 1992 Acts, reflect the common concern to overcome historical intolerance against minority religions in Spain, dealing with those believers with a historical presence in Spain but who had been marginalised: Jews, Muslims and Protestants. This was the first time in our history that these religions obtained bilateral status in Spanish Law. Nevertheless, the Agreements are stipulated with Federations, not with single denominations. That led to a certain kind of State pressure in order to create the Federations, with two separate consequences:

1. As has already been said, the Agreements dealt with the historic minority denominations present in Spain; the civil Administration did not collect data about those groups

4 The fact that the aim of the Government was to develop only the right of religious freedom is also present in the preparation of the text of the Law: the Government asked the advice of the main religious denominations in Spanish society: Catholics, Muslims, Jews, Orthodox, Anglicans and Buddhists.

5 See defence of number 68 and 78 amendments of Andalucía Minority Group. Pleno del Congreso, BOC, *Congreso de los Diputados*, No. 77, 14 March 1980, and BOC, Diario de Sesiones. *Congreso de los Diputados*, 25 March 1980, p. 5100.

6 See Deputy Aguilar defence of the amendment. Pleno del Congreso, BOC, Diario de Sesiones. *Congreso de los Diputados*, 25 March 1980, pp. 5104-5105.

7 See Deputy De Grandes, of Centre Group. BOC, Diario de Sesiones. *Congreso de los Diputados*, 25 March 1980, p. 5105.

8 See Deputy Peces Barba in voce amendment. BOC, Diario de Sesiones. *Congreso de los Diputados*, 25 March 1980, p. 5109.

with a “well-known influence in Spanish society, due to their domain or number of followers” (Article 7.1 Religious Freedom Act). This was criticised by the State Council in its Report to the Project of Agreements of 31 January 1991⁹: “(...) In the Agreements’ Projects – the Council stated – it seems to recognize the implicit existence of such a legal requirement. So they considered the Evangelical and Jewish communities to have the “well-known influence in Spanish society” in order to deal with their “cooperative relationships with the State”. Later we read: “(...) there is no report in the administrative dossier about this legal condition in the particular case, not even an estimation of the number of followers (...)”. The State Council strongly recommends “(...) the necessity that the Government evaluate, with factual data, the accomplishment of the legal requirements. We should understand that the administrative criteria in this case will constitute a legal precedent in future cases dealing with the interpretation of the undetermined concept of “well-known influence in Spanish society (...)”.

2. The aim of the agreements with the denominations is, as the State Council has declared, “to establish ways or tools in order to facilitate each religious denomination obtaining their specific objectives”. As already mentioned, the function of the agreements could not be accomplished in the case of the 1992 Agreements, signed with Federations and not with single denominations. This also explains why the contents of the three Agreements are much the same. As leftist Deputy Castellanos put it, “there is only one Agreement with the different names of the respective religious denominations.”¹⁰ Certainly, the major part of the Agreements consists in general rules which could be extended, without difficulty, to other religious denominations.

During the parliamentary process approving the Agreements, an attempt was made to move them closer to earlier agreements made with the Vatican concerning the Roman Catholic Church: the parliamentary process chosen was the so-called “single reading” – this does not allow for partial amendments; the structure of the approv-

⁹ *Consejo de Estado, Recopilación de Doctrina Legal*, No. 225, 1991, pp. 832-844.

¹⁰ BOC, Diario de Sesiones. *Congreso de los Diputados*, No. 210, 17 September 1992, p. 10277.

ing Law is that of one Article which gives civil effects to the Agreement. However, differences between these and those signed with the Holy See must be emphasised: the last are international agreements and their content is much more favourable to the legal status of the Roman Catholic Church. This fact was remarked upon in the Report of the State Council: Agreements with the Evangelical, Jewish and Muslim Federations “are close to, but different from, agreements with the Catholic Church”.

The State’s position in the different legislatures

Broadly speaking, we can say that the political parties have adopted different positions regarding religious issues, occasionally with some form of dialectic struggle between them. Left wing parties – mostly the Socialist Party and Communist Party under the leadership of Santiago Carrillo – assume positions resembling a kind of “Jacobin liberalism”, heirs of the traditional Spanish anticlericalism. Religion should be reduced to personal preference, the individual space of the conscience, without any role in the public sphere. The public space should be the realm of the lay State which guarantees equality and freedom to all citizens. By way of contrast, right-wing parties used to defend the presence of religious denominations in society and their contribution to the common wealth. Moreover, social pluralism and the neutrality of public powers justify the free action of religious groups in society.

These common trends separate the Socialist Governments from those of the Popular Party:

The **Popular Party Government’s policy** on religious affairs, still sensitive to Spanish public opinion, is to avoid any discussion that would somehow provoke social debate. And politically speaking, the most opportune way to act, according to the Government’s way of thinking, is not to put into effect any reform that would rekindle old feuds between clericalism and anticlericalism. Nevertheless, this option also takes the form of, from a constitutional perspective, unjust or obsolete laws.

The **Socialist Party’s** position on religious issues is well defined in Manifestoes such as that of 2004 “On the defence of a lay society” and 2006, “Constitution, Laicism and Citizenship Education”. We can summarize the text as follows:

- The Socialist Party shares with other leftist groups a kind of **negative conception** of religious phenomena. The Manifestoes refer to them as “fundamentalism, monotheistic or religious”. They stress the idea of a certain radicalization because of migratory movements, but somehow the papers include within this category the attitudes of the Roman Catholic Church hierarchy. Their moral and ideological conceptions “spread division amongst the citizens” and impede “the new citizenship rights”, such as rights to abortion, to homosexual marriage or to women’s equality and non-discrimination. To some extent there is a certain incompatibility between these concepts and modern democracy.
- The Manifestoes generally encourage the strengthening of the State’s laicism as the only way to safeguard human rights, freedoms and the rule of law. This basic principle guarantees freedom of conscience – as a personal option free from religious influence – as well as ideological and cultural coexistence. The Socialist Party understands the concept of laicism as the proscription “to subordinate State action to any creed or religious hierarchy” and “to recognize any superior order to the secular one”.

As we see, the concept of laicism goes beyond strict State neutrality to a real programme of singular actions. As Vice-President Fernández de la Vega stated in May 2008, the political programme would change the Religious Freedom Act to stress the strengthening of the State’s laicism and pass a new Law on the right of freedom of conscience. In the end, the Government did not have enough support in Parliament to achieve this aim. But it was able to introduce a new subject in schools called “Citizenship Education”. The objective of this controversial subject was not only to increase knowledge but also evaluate students’ behaviour concerning Constitutional values (the Law uses expressions such as “know, assume and positively evaluate”, “form a system of values”, “practicing and accepting the rules”, “facilitating the assimilation of values” etc.).

Understanding the action and position of the Roman Catholic Church in Spanish legislation

Since 1976 the State has based its bilateral relations with the Roman Catholic Church on the law through Agreements. In the first of these, signed the same year as the transition to democracy, both the State and the Church agreed to substitute the Franco regime's Concordat with several Agreements inspired by the values enunciated by the Second Vatican Council.¹¹

In the parliamentary debates prior to approval of the Constitution of 1978, there was, as we have said, substantial controversy surrounding the Roman Catholic Church being proposed as the subject of a cooperation relationship with the State (Article 16.3). The parliamentary right wing (the Democratic Centre Union and Popular parties) justified this as the recognition of the social and historical presence of the Church.¹² Beyond the legal text there was, of course, a political message: unlike the Constitution of the Second Republic, the new regime avoids any position on anticlericalism or laicism, but does legalise that of cooperation. Surprisingly, the Communist Party supports this same position¹³ as a gesture towards peace and to overcome the old religious struggles. By way of contrast, the Socialist Party sees the position on the Roman Catholic Church as a subtle tilting of the State towards the Church which could result in justifying historical privileges in its favour.¹⁴

In debates before approval of the Agreements between the State and the Holy See of 3 January 1979, the Socialist Party was opposed to the position the Government had chosen in its relationship with the Church. Instead, it preferred the creation of unilateral law by the State. Furthermore, it was illogical to approve the Agree-

11 Preface of the Agreement of 28 July 1976.

12 The Deputy of the Popular Alliance, Fraga Iribarne, stated: "there is no privilege but [rather] treatment of a real and important fact. Different things should not be treated equally". BOC, Diario de Sesiones. *Congreso de los Diputados*, No. 103, 4 July 1978, p. 3995.

13 "We only recognize an objective fact without any possible comparable measure: the fact of the Catholic Church's main role, different from any other religious denomination". Deputy Carrillo, Communist Group, BOC, Diario de Sesiones. *Congreso de los Diputados*, No. 103, 4 July 1978, p. 3783.

14 See Deputy Martín Toval's intervention, of the Catalonian Socialist Group, BOC, Diario de Sesiones. *Congreso de los Diputados*, No. 103, 4 July 1978, pp. 3999-4000. Despite this, the Socialist Party eventually withdrew the suppression amendment.

ments before the organic development of Constitutional Article 16. Certainly, it is stressed, the Agreements could in the future limit State legislation developing Article 16. Therefore, Parliament should first enact the Religious Freedom Act and then define the specific relationship with the Roman Catholic Church.¹⁵ Once again, the Socialist position regarding the Catholic Church Agreements was purely testimonial: Socialist Deputies and Senators voted in favour of three of them – but not the Agreement on education and cultural affairs. This means, in conclusion, that they accepted the relationship with the Church through an international treaty.

The first Socialist Government tried to avoid any conflict with the Church in issues which do not concern any ideological influence in society. Controversial measures such as financing the Church through the Public Budget, or Catholic chaplaincies in the Armed Forces, were nevertheless developed by the Government. However, issues such as permitting legal abortion in some cases or the new Act concerning the right to education were extremely controversial, and, as we will see, causes of conflict between the Roman Catholic Church and State.

During the term of the first right wing Government headed by the Popular Party, 2001 was characterised by sharp controversy reflected in the media regarding the attitudes and behaviour of the Catholic Church hierarchy. The following three events stimulated intense social debate: the public alignment of bishops in the Basque region with nationalistic party lines defined by the Basque local government; financial scandals resulting from investment by some dioceses in fraudulent businesses or in tax havens; and the criteria for hiring and dismissing the teachers of Catholic religion in public schools. These two latter matters raised doubts as to the markedly distinct legal status of the Catholic Church as compared to other religious denominations.

During the term of the second Socialist Government, the relationship between Church and State became an important and controversial issue; that is, the clash between social and political principles of traditional Catholicism – Catholic bishops and Catholic movements supporting orthodox doctrines – and the secular and lay

15 See Deputy Peces Barba, BOC, Diario de Sesiones. *Congreso de los Diputados*, No. 29, 13 September 1979, p. 1686.

positions, with a certain anti-religion bent in the French style, from some sectors of the Socialist Party, then in power. The truth is that the clerical-anticlerical conflict, which dominated Spanish politics during the nineteenth century and a good part of the twentieth century, has not reached today the same levels of extremism and virulence as those of earlier eras. During the period of the political transition from Francoism to democracy, the political consensus between parties and institutions managed to ameliorate conflicts with the Church, in large part by giving in on issues which were more clearly of interest to the Catholic hierarchy, crystallized in the Agreements with the Holy See of 1979. However, during the term of office of Socialist Prime Minister Jose Luis Rodriguez Zapatero, the social policies he pursued revived past tensions with the Church.

Indeed, the change in the country's Government took place in the days following the tragic terrorist attacks of 11 March 2004, which claimed 200 lives, and injured many others; the Socialist Party came to power, backed by the nationalist parties of Catalonia and the Basque Country. Many of the measures adopted by the Government with regard to social policy (and later transformed into laws), with the sole opposition of the conservative Popular Party, were directed at matters sensitive for the Catholic Church: the teaching of religion and civic values, same sex marriages, acceleration of the divorce process, techniques for assisted reproduction, etc. The Church viewed these as contradicting Church doctrine and Christian principles and triggered published criticism from the Conferences of Bishops, pastoral letters from bishops, acts of protest and demonstrations, campaigns against the Government in the Catholic media, etc. The response from the Socialist Party, and the left in general, opened a debate clamouring for secular government as well as suppression of what were considered to be the privileges of the Catholic Church – sometimes, as we have already said, with a Jacobite wish to expel religious options from society and the public arena. This is reflected in the 2006 Socialist Party Manifesto “Constitution, Laicism and Citizenship Education”. It refers indirectly to the attitudes of the Catholic hierarchy as “monotheistic fundamentalism”, comparing it to similar currents in Islam. It described criticism by the Catholic Church against governmental policies as “belligerent” to lay values. That was because the Church

is opposed to “new citizenship rights” such as abortion and homosexual marriage. State action and public decisions should be out of any “established superior order”. We can also find these intentions in the Government project to approve a new Freedom of Religion Act.

It can be rightly affirmed that in the Socialist legislature the old debate regarding the role that the Catholic Church should play in the life of Spain has gained unusual importance. However, despite the division caused between the political parties by the response adopted with respect to this problem, it is unlikely, as has been shown, that the same degree of radicalization of former times will re-emerge, for various reasons: the culture of public rights and freedoms as both ideological and juridical; the declining influence of the Church hierarchy among its followers – more than 70 % of Spaniards declare themselves non-practicing Catholics, and the same or a higher percentage claim they either do not know or follow official Church doctrine; or the desire of the parties to win the centre vote makes them skirt around positions which are belligerently opposed to the Church. This, for example, explains the fact that in spite of the threatening content of the declarations of the Government or its representatives, steps have not been taken to denounce the Agreements with the Holy See; furthermore, some important matters have in any event been negotiated with the Church to carry out these Agreements, such as financing for the Church.

After the November 2011 general elections and the Popular Party victory, the Socialist Party declared that the stated intention of the Government to reform abortion and Citizenship Education Laws means “setting citizens’ rights back by thirty years” and “right wing support for Catholic doctrine”. In the thirty-eighth Socialist Party Congress, held 4-5 February 2012, the new General Secretary threatened revision of the Agreements with the Holy See if the Government’s plans succeeded. The Congress passed a motion to the same effect. (In the last term, the far left wing in Parliament – United Left Party, Catalanian Republican Party and Galicia National Block – asked for the Agreements to be revised in order to

extinguish “Catholic Church privileges”.¹⁶ None of these proposals were approved by Parliament. The Socialist Party also voted against the motions).

II. THE STATE’S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

Laws reflecting the State’s concept of the role and value of religion

The Spanish Constitution proclaims independence and autonomy between the State and religious denominations: “No faith shall have a State character” (Article 16.3). The Constitutional Court has stated that this paragraph prohibits the State from professing any religious creed. This also means that the State is not allowed to value religious or ideological beliefs, either positively or negatively.

However, that does not mean the Spanish Constitution bans any communication between the State and social beliefs. As paragraph 3 of Article 16 says, “the public authorities shall take into account the religious beliefs of Spanish society [positive mandate], and shall maintain the resulting relationships of co-operation with the Catholic Church [as recognition of the historical and sociological presence of the Church] and other religious denominations”. The promotional concept of the right of religious freedom is also underlined in Article 2.3 of the Religious Freedom Act: “To ensure true and effective application of these rights, public authorities shall adopt the necessary measures to facilitate assistance at religious services in public, military, hospital, community and penitentiary establishments and any other under its aegis, as well as training in public schools”.

Setting down the value of the religious option as a choice of individual and collective freedom, the Religious Freedom Act offers a complete – but not exhaustive – catalogue of rights protected by Law. At the level of individuals, we can enumerate the following: professing whatever religious beliefs they freely choose or professing none at all; changing or relinquishing their faith; freely express-

¹⁶ See, BOC, Diario de sesiones. *Congreso de los Diputados, Comisión Constitucional*, No. 747, 14 February 2007, pp. 18-19.

ing their own religious beliefs or lack thereof or refraining from making any statement in this regard; taking part in the liturgy and receiving support in their own faith; celebrating their festivals; holding their marriage ceremonies; receiving a decent burial; receiving and delivering religious teaching and information of any kind; and meeting or assembling publicly for religious purposes and forming associations to undertake their religious activities as a community. At the collective level, the Act declares the right to establish places of worship or assembly for religious purposes, to appoint and train their ministers, to promulgate and propagate their own beliefs, and to maintain relations with their own organizations or other religious faiths within national boundaries or abroad.

A key field of the right of religious freedom and State protection is that of penal tutelage. In 1995, and after various failed attempts, a new Penal Code was enacted, approved by Organic Law 10/1995 of 23 November. The third section of chapter II of title II includes “criminal offences against freedom of conscience, religious sentiments, and respect for the deceased”:

- The offence of defamation and outrage protects the religious teachings and beliefs of all religions without distinction. This is contemplated in Article 525 of the Penal Code which punishes those who engage in public defamation, through word, documents or other written texts, of the dogmas, beliefs, rites or ceremonies of religions, or who publicly harass those who profess or practice said religion, and thus offend the sensibilities of the members of those religious groups. The most significant element in the wording of the offence of defamation and outrage is the extension of the same to non-religious convictions. According to paragraph 2 of Article 525, “the same punishment – a fine of eight to twelve months – will be incurred by those who engage in public defamation, orally or in writing, of those who do not profess any religion or creed”.
- Article 524 of the Penal Code punishes with a prison term of six months to a year or a fine of twelve to twenty-four months, those who “in a temple, a place of worship or during religious ceremonies carry out acts of profanation offending legally protected religious sentiments”. The criminalisation of such acts

also aims to protect the religious sensibilities of individuals.

- Article 523 of the Penal Code punishes those who “with violence, threats, tumult or acts, impede, interrupt or disturb the acts, functions, ceremonies or demonstrations of the religions inscribed in the public registry of the Ministry of Justice or the Interior”, with a punishment of “six years to six months imprisonment, if the act is committed in a place of worship, or a fine of four to ten months if it occurs in any other place”.
- Article 522 is specifically aimed at punishing acts against religious freedom or the conscience of persons. The offence has two different modalities, sharing the means of commission – using violence, intimidation, force, or any other illegitimate pressure – and the punishment – a fine of four to ten months. In the first modality, the material element is composed of conduct impeding “a member or members of a religion, from practicing acts pertaining to the beliefs which they profess, or attending the same”. The second modality is constituted by the acts of forcing “another or others to practice or coincide with worship or rites, or to carry out acts of professing or not a religion or to change the beliefs which they profess”.
- Other crimes punish discrimination based on religion, or abuse of a corpse or desecration of a tomb or grave.

As already noted, religious fundamentalism could also be considered a threat to the ideological freedom of individuals. So this is punished in the Spanish Penal Code. Article 522.2 penalizes the conduct described within the framework of so-called illicit proselytizing; this is qualified – it must be carried out by a means of commission meant to restrict the free will of individuals: violence, intimidation, use of force or any other illegitimate pressure. The offence extends to associations seeking to alter or control the personality of an individual; in accordance with Article 515.3, groups may be convicted for utilizing these means if they are illicit associations whose activities are those which may be attributed to so-called sects.

In **educational** matters, the Agreement on Education and Cultural Affairs of 3 January 1979 between the Spanish State and the Holy See, establishes the obligatory subject of “Catholic Religion” in the curricula of Primary Education, Compulsory Secondary Teaching, Senior High School and Professional Education. This subject is obligatory in all schools, but it is voluntary for the students. It is to be considered of the same importance as other basic disciplines.¹⁷ The Church hierarchy establishes the contents of the courses and suggests the textbooks to be used.¹⁸ The Spanish Episcopal Conference has assumed this task. The Ministry of Education approves the contents, makes them public by ministerial decree,¹⁹ and approves the textbooks on this subject to be used every year. The Spanish Constitutional Court has declared that the system of teaching the Catholic religion in the educational system is a manifestation of the cooperation of the public administration with different religions in order to make it possible for parents to give their children a religious and moral education which corresponds to their convictions – Article 27.3 of the Spanish Constitution.²⁰ Regarding the legal status of teachers of the Catholic religion in public schools, the Agreement on education provides that it is the educational authorities who select the people who are to teach this subject from among those proposed by the bishop of each diocese.²¹ The State undertakes to pay the teachers of Catholic religion the same salary as that of assistant teachers with temporary contracts.²²

The faiths or denominations that have signed an agreement with the Spanish State, the Evangelical, Jewish and Islamic Federations, approved by the respective laws of 10 November 1992, are authorized to teach religion classes in public and chartered schools – but, in the latter, only if they are not contrary to the philosophy of the school. These different Federations have the right to approve the contents and the textbooks which must also have been previous-

17 Article 2 of the Agreement.

18 Article 4 of the Agreement.

19 This was established in the Decrees of 5 October 1993, for Bachillerato and Professional Education, and of 6 June 2007 for Nursery School, Primary School and OSE.

20 Sentence 38/2007 of the Constitutional Court, fifth juridical principle.

21 Article 3 of the Agreement.

22 This was accorded in the agreements signed between the Spanish Episcopal Conference and the Ministry of Education on 20 May 1993 and 26 February 1999.

ly authorized by the Administration. The State undertakes to provide suitable spaces where religious instruction may take place.²³ However, unlike the teaching of the Catholic religion, the subjects of the Evangelical, Jewish or Islamic religions are not taught during school hours. The teachers are nominated by the Federations. Ever since the signing of the Agreements between the Ministry of Education and the Evangelical Federation and the Islamic Commission of 1 March 1996,²⁴ if there happen to be more than ten students in the course or educational level who wish to receive religious instruction, the State undertakes to hire a teacher. In this case, the legal situation of these Evangelical or Islamic teachers will be the same as that described for the Catholic religion teachers. Their situation will also be regulated by the above-mentioned Royal Decree 696/2007 of 1 June.

The Agreement on Economic Affairs with the Roman Catholic Church regulates substituting **direct financial** support to this denomination through the General Budget with a “percentage of the yield from income taxes (...). To do this, each taxpayer must, on the relevant tax form, expressly declare his decision concerning the use he wishes to make of the money concerned” (Article 2.2). This represents a partial allocation of Income Tax to a specific aim; i.e. to bring resources to the Catholic Church. Since 2007 it has been fixed at 0.7 % of the Income Tax liability of each taxpayer who expressly decides to give a part of his/her taxes to the Church.²⁵

Denominations with a “well-known influence in Spanish society” and, of course, those which have an Agreement with the State – Evangelicals, Jews and Muslims – could obtain money from the State through a public Foundation created for this purpose, so-called “Pluralism and Co-existence Foundation”.²⁶ With an annual budget of around six million Euros, it finances social and cultural projects presented by religious denominations.

23 See Article 8 in each of the Agreements.

24 Approved by the Resolutions of 23 April 1996.

25 State General Budget for year 2007, approved by the Act 42/2006, of 28 December. The Church receives 12,501,051,76 euros monthly. At the end of the year, the State liquidates with the Church depending on the amount of money obtained through the percentage of Income Tax system (EHA/2760/2008 Order of 25 September).

26 The Foundation was created in 25 January 2005 within the Spanish Minister of Justice.

As to **tax exemption**, denominations with a co-operation Agreement with the State benefit from the better of two different regimes: the system contemplated in the Agreement, or the general scheme for non-profit entities. Since 2002, they have been able to enjoy exemptions recognized in the Law for non-profit organizations.²⁷

Amongst the many examples of this type in Spanish Law, we might mention finally the civil effects of Catholic, Evangelical, Jewish and Islamic marriage; the canonical annulment of Catholic marriages (Article 6.2 of the Agreement on Legal Affairs); facilities to commemorate the religious festivals of denominations with an Agreement with the State; the special protection of cemeteries and places of worship; religious chaplaincy in public institutions; or the right of religious denominations to access public mass media.

Court decisions reflecting State ideas on the role and value of religion

The following refers to the decisions of the Spanish Constitutional Court, the highest court for the interpretation of constitutional texts.

The Spanish Constitution binds all public authorities, so the State must comply with all of its provisions.²⁸ As has been stated by the Court, there are some basic principles in Spanish constitutional Law which define the attitude of the State in ideological and religious matters. With regard to, “religious phenomena and the relationship between denominations and the State, the very first of these principles is that of religious freedom”.²⁹ Certainly, as there is only “one legal system inspired by the same principles”,³⁰ so religious freedom is a consequence of the general legal principle of liberty. Nevertheless, the Constitutional Court had underlined the

27 See 49/2002 Act, 23 December, of tax benefits to non-profit entities.

28 Sentence 208/1984, 14 December, justifies the Government’s propaganda in favour of workers participation in trade union elections because this enforced Article 9.2 of the Constitution which obliges public authorities to promote citizen participation in social, economical and political life.

29 Sentence 24/1982, 13 May, of the Constitutional Court, first juridical principle.

30 Sentence 20/1990, 15 February, of the Constitutional Court, fourth juridical principle.

importance of religion in a democratic and pluralistic society: “respect for religious beliefs belongs to the core of democratic co-existence”.³¹ Other principles applicable to religious issues are dependent on the principle and right of religious freedom. Equality, as a consequence of religious freedom, occupies a second rank; it means “the equal enjoyment of religious freedom for all citizens”.³²

The basic content of the principle of religious freedom is “to safeguard the beliefs and intimate cloister and, thus, an intellectual self-determined space on religious matters which entails individual dignity and one’s own personality”.³³ The essential nature of the right and principle of religious freedom is a right to autonomy for individuals and groups, guaranteed by the State. But this does not exclude public actions in order to safeguard the effective exercise of the right. The Constitutional Court Ruling 46/2001, 15 February, stated: “a positive attitude is demanded to the State, from a perspective that we could call assistance”.³⁴

The latter is reflected in the collective sphere of the right to religious freedom: as we have said, the Spanish Constitution talks about co-operative relationships between denominations and public authorities.

Broadly speaking, the Spanish Constitutional Court declares that the right of freedom of religion, as with other constitutional rights, could be exercised by both individuals and groups.³⁵ Moreover, religious denominations have a specific entitlement independent of the general right of association: “Constitutional consideration of the communities with a religious aim does not necessarily identify [exclusively] with associations (...). A believers’ community does not have to formalise its existence as an association [in

31 Resolution 180/1986, 21 January, of the Constitutional Court, first juridical principle.

32 Sentence 24/1982, 13 May, of the Constitutional Court, first juridical principle.

33 Sentence 177/1996, 11 November, of the Constitutional Court, ninth juridical principle (In the same sense, see Sentence 19/1985, second juridical principle; 120/1990, tenth juridical principle; 137/1990, eighth juridical principle; and Resolution 359/1985, second juridical principle).

34 Fourth juridical principle.

35 Regarding religious denominations, see Sentence 64/1988, of the Constitutional Court, first juridical principle.

order] to exercise the fundamental right to profess a certain creed”.³⁶

The Constitutional ruling about religious denominations gives them a special autonomy against interference from the State. Moreover, they have a singular relationship with public authorities characterised by co-operation. The Constitutional Court has linked the State’s duty to co-operate with the denominations by attributing an assistance dimension to the right to religious freedom. Sentence 340/1993, 16 November, justifies the special regime enjoyed by Catholic clergy with regard to State religious assistance to individuals: “regarding Church and State co-operation, the exercise of clerical functions must be favoured (...) the State finds in them a justifiable interest in order to facilitate the religious chaplaincy [work] of each denomination to citizens.”³⁷ The civil effects of canonical decisions about the nullity of Catholic marriages and agreements with the other denominations are also examples of the co-operative relationships with the State, as the Constitutional Court has pointed out.³⁸ Such a positive attitude to the collective practice of freedom of religion has led the Court to qualify Spanish Church and State relations as “positive laicism”.³⁹

Another guarantee of the collective and individual rights of religious freedom is to be found in the Constitutional provision that “no faith shall have a State character” (Article 16.3) – this means State neutrality on religious matters. This represents – in the jurisprudence of the Court – a foundation for peaceful co-existence in a democratic and pluralistic society.⁴⁰ As a result, relations between religious denominations and the State have limits: “no religious confession should go beyond its own aims, nor should it be treated

36 Sentence 46/2001, 15 February, of the Constitutional Court, fifth juridical principle.

37 Second juridical principle. The links between co-operation with the denominations and religious freedom principle are also stated in Sentence 53/1985, 11 April, of the Constitutional Court, fourth juridical principle and 109/1988, 8 June, of the Constitutional Court, second juridical principle.

38 Sentences 66/1982, 12 November, of the Constitutional Court, second juridical principle; and 265/1988, 22 December, fourth juridical principle.

39 Sentence 46/2001, 15 February, of the Constitutional Court, fourth juridical principle.

40 Sentences 24/1982, 13 May, of the Constitutional Court, first juridical principle; and 177/1996, 11 November, ninth juridical principle.

as a public institution before the Law”.⁴¹ As Sentence 24/1982, 13 May, stated, “Article 16.3 of the Constitution prohibits any confusion between religious and State functions, and prevents religious interests and values from becoming standards of fairness for public authorities’ acts and laws”.⁴²

To sum up, the Spanish Constitution overcomes the old attitudes of “*religiophobia*” present, for example, in the Second Spanish Republic. It does so by balancing State neutrality with a concept of assistance to citizens’ rights in a modern social and democratic State ruled by law.

The response of religious denominations to the understanding of the State on the role and value of religion

The position of the Roman Catholic Church on moral and/or religious matters varies depending on the Government and/or legislation in question. Nevertheless, it must be stressed that Church doctrines about democracy and political parties have been constant since the introduction of the present democratic system. We could define this as strict neutrality towards specific political options. After Franco’s death, Cardinal Tarancón, then President of the Spanish Bishops Conference (SBC),⁴³ clearly referred to the Church’s political neutrality in his speech during the King’s Coronation Mass: “it is not the aim of the Church to present and support concrete government options or solutions (...) the Church does not give patronage to any political ideology and if someone uses the name of the Church to do so, he or she is indeed usurping [that name]”.⁴⁴ During the transition to democracy the SBC⁴⁵ underlined

41 Sentence 340/1993, 16 November, of the Constitutional Court, ninth juridical principle.

42 First juridical principle.

43 The first Assembly of the SBC was held in 1966. The SCB replaced the Metropolitan Conference which only congregated archbishops under the presidency of the Archbishop of Toledo.

44 See Cardinal Tarancón’s statement in I. C. Ibán, *Factor religioso y sociedad civil en España* (El camino hacia la libertad religiosa), (Jerez, 1985) p. 51. This position, reflecting Second Vatican doctrine, was also held in the Collective Declaration of the SBC, in 1972, “The Church and the Political Community”.

45 We will mainly use the documents issued by the Bishop Conference as an entity which represents the Spanish Catholic Church. Certainly, they follow the Roman papal magisterium. See the documents at the SBC, http://www.conferenciaepiscopopal.nom.es/archivodoc/jsp/system/win_main.jsp.

and developed the principle of Church neutrality: “the Church neither wishes for political power nor for support in its pastoral mission. Therefore, the Church does not enter into the arena of the political parties. Furthermore, the Church wants independence and autonomy from political parties, following the doctrine of the Second Vatican Council”.⁴⁶ As a result, “Christians have the freedom to choose the doctrines they consider more suitable with their own values”.⁴⁷ The Conference has always encouraged citizen participation in democratic elections. However, it must be remembered that certain limits apply to that participation, which, in the Conference’s view, are a consequence of the Evangelical message: Christians should not support parties or ideologies, the doctrines of which involve suppression of human rights, the use of violence or hatred as a means to achieve their aims, or consider private property as an absolute right.⁴⁸

Without doubt, the Bishops’ Conference has been much more critical of Socialist Governments than Popular Party Governments. We must stress particularly the Episcopal position during the years of Rodríguez Zapatero’s premiership.⁴⁹ In the Pastoral Letter “Moral Orientations on Spain’s Situation” (approved by LXXXVIII Plenary Assembly of the SBC) the bishops condemned what they called “a strong wave of laicism”,⁵⁰ as a consequence of the legislation stimulated by the Government and the Socialist Party’s attitude toward the Church. These sought to discard Catholic values in the public space and substitute them with secular values. As it is stated in the Bishops’ Letter, the Government’s policy was against the

Part of the documents are published in the book *Moral Política. Magisterio de la Conferencia Episcopal Española 1972-2002* (ed. F. Fuentes Alcántara), Edice, Madrid 2006.

46 *Nota sobre la participación política de los Cristianos*, SBC Information Office, 2 February 1977.

47 *Comunicado de la XXIII Asamblea Plenaria de la CEE*, 27 December 1975.

48 The limits of Christian’s participation in democratic elections are developed in the Pastoral Letter *Los católicos en la vida pública*, SBC Permanent Committee, 22 April 1986.

49 As we will see, before that the Conference was critical of several laws promoted by González Márquez’s Government and its economical policy which, it argued, did not achieve social justice (See *Sobre la situación sociopolítica de España*, LVI Plenary Assembly, 22 May 1992).

50 See also M. J. Villa, *La Instrucción Pastoral de la Conferencia Episcopal Española de 23 de noviembre de 2006, desde la óptica del Derecho Eclesiástico del Estado*, “*Anuario de Derecho Eclesiástico del Estado*”, vol. XXIV (2008), pp. 201-219.

consensus underlying and the spirit of the Spanish democratic transition as well as State neutrality. Examples of laicism in State legislation are homosexual marriage, divorce without cause and following brief marital separation, free abortion before a certain term, and “Citizenship Education” as a compulsory subject. The content of “Citizenship Education” is, according to the SBC, an expression of secular values – most of all on gender ideology – and, therefore, an illegitimate interference in the morals of students. In the last part of the Document the bishops called on Christians to defend Church values by democratic means and participation in public life.

The Bishops’ confrontation with Socialist Governments has mainly focused on three issues of special significance to ecclesial doctrine: education, marriage and abortion.

Regarding education, the Church was openly critical following the first Acts on the right of education in the era of Felipe Gonzalez’s Governments.⁵¹ Criticism was particularly severe on the alternatives to the teaching of Catholic Religion.⁵²

Marriage, defined by the bishops as “life’s sanctuary and society’s hope”,⁵³ was threatened by two legal changes which were understood to be contrary to Natural Law: divorce renders marriage a private and rescindable contract;⁵⁴ and homosexual marriages destroy the traditional concept of marriage and harm a child’s right to have a father and a mother.⁵⁵ These developments represent an

51 See the following Documents of the SBC: *Sobre la Ley orgánica del derecho a la educación (LODE)*, Bishop Commission of Education, 14 March 1984; *Sobre la Ley orgánica de ordenación general del sistema educativo (LOGSE)*, SBC Permanent Commission, 28 September 1990; *La Ley orgánica de educación no cumple los Acuerdos con la Santa Sede*, SBC Executive Committee, 10 March 2006.

52 *Regulación de la enseñanza de la Religión y Moral católicas en los Reales Decretos sobre enseñanzas mínimas en Educación Primaria y Educación Secundaria*, SBC Permanent Commission, 27 June 1991; *Sobre el Real Decreto que regula la enseñanza de la Religión*, SBC Executive Committee, 16 December 1994.

53 See General Assembly Conclusions, session held on 27 April 2001.

54 *Sobre el matrimonio y el divorcio*, SBC Permanent Commission, 27 June 1981; *Ante la aprobación del anteproyecto de Ley por el que se modifica el Código Civil en materia de separación y divorcio*, SBC Information Office, 17 September 2004; *Ante la eliminación del matrimonio en el Código Civil en cuanto unión de hombre y mujer, y su reducción a contrato rescindible unilateralmente*, SBC Information Office, 30 June 2005.

55 *Matrimonio, familia y uniones homosexuales*, SBC Permanent Commission, 24 June 2004; *Ante la aprobación del anteproyecto de Ley que equipararía las uniones homosexuales al matrimonio*, SBC Information Office, 1 October 2004; *Ante la eliminación del matrimonio en el Código Civil en cuanto unión de hombre y*

important loss of the essential elements of matrimony as an institution. The Church stressed the heterosexual and binding nature of marriage.

The non-criminalisation of abortion in all cases is one of the Spanish legal reforms most condemned by the Church; in the three cases allowed by the 1985 Law,⁵⁶ and in the Sexual and Reproductive Health and Voluntary Disruption of Pregnancy Act, enacted in 2010. The Conference considers the latter Act to be “a serious step backwards in the protection of the unborn, a serious abandonment of pregnant mothers and, certainly, deeply harmful to the common good”.⁵⁷

We cannot find equivalents to the Spanish bishops’ teaching on secular issues in that of other religious groups, such as those with an Agreement with the State (Evangelical, Jewish and Muslim). There may be two different reasons for this. First, the total number of their followers is between 1 and 1.5 % of the Spanish population – as a result, access to the mass media for their leaders is less frequent or more difficult. Secondly, the Agreements were established with Federations and not single denominations. The different beliefs represented in the Federations (for example, within the Evangelical Federation are Baptists, Anglicans, Lutherans, Salvation Army, Mennonites, Methodists, Presbyterians, Adventists and Greek Orthodox) might mean that Federation leaders only have administrative competencies and do not represent the doctrine of any single denomination.

Nevertheless, some guidelines regarding Evangelical and Islamic opinion about the State’s concept of the role and value of religion could be established – the Jewish population, which is only about 15,000 believers, is not significant.

mujer, y su reducción a contrato rescindible unilateralmente, SBC Information Office, 30 June 2005.

56 Organic Law 9/1985, 5 July: pregnancy resulting from, malformation of the unborn, and serious risk to the mother’s life or health. See SBC position on abortion, *La despenalización del aborto*, XXXVIII SBC Plenary Assembly, 25 June 1983; *Despenalización del aborto y conciencia moral*, SBC Permanent Commission, 10 May 1985.

57 *Declaración sobre el anteproyecto de “Ley del aborto”*: *atentar contra la vida de los que van a nacer convertido en “derecho”*, SBC Permanent Commission, 17 June 2009. In the same sense, see *Ante la entrada en vigor de la nueva Ley del aborto*, SBC Information Office, 5 July 2010.

Some representatives of the Evangelical Federation⁵⁸ expressed disappointment with the absence of Government action against “Catholic confessional practices already enforced and consented to by public authorities, such as State representation at Catholic acts of worship, Christian symbols in public institutions, etc.” In their view, such practices are discriminatory against other religions and go against State neutrality. In any case, they often emphasize issues closer to their own interests: the enjoyment of a percentage of Income Tax, chosen by taxpayers, similar to that enjoyed by the Roman Catholic Church;⁵⁹ retirement pensions for those pastors who do not benefit from Social Security because for political reasons; State legislation protecting places of worship; and the civil status of Evangelical theological studies.

The Muslim position is different.⁶⁰ After the terrorist attacks in Madrid on 11 March 2004, Muslim leaders were concerned that Spanish society and political parties should not identify Islam with terrorism. They underlined the fact that most of the Muslim population in Spain rejects violence.⁶¹ Regarding State relationships with the majority denomination, the Roman Catholic Church, there are fewer critics than amongst the Evangelicals. That might be because they came from Islamic countries where a favourable official treatment of the majority religion is regarded as normal. Nevertheless, Muslim leaders’ complaints are not about the legal framework – they consider it sufficient to enable Muslims to practice their

58 See declarations of Mariano Blázquez, Executive Secretary of FEREDE, October 2006, June and November 2010, <http://www.ferede.org>.

59 Actually, the Baptist Church “El Salvador”, associated to FEREDE, sued the State because of the Income Tax percentage enjoyed by the Roman Catholic Church. It constitutes, as the Baptist Church alleged, discrimination against other beliefs. Both the Spanish Supreme Court and the European Court of Human Rights (case *Iglesia Bautista de El Salvador y José Aquilino Ortega Moratilla contra España*, 11 January 1992) considered the Spanish ruling justified because of the number of Catholics in the country and the Catholic Church’s contributions to society.

60 For news items, see e.g. The Government’s enquiry into Muslim immigrants (El País Digital: <http://elpais.com/diario>, 12 December 2007); Riay Tatary, President of the Islamic Community Union of Spain – one of the two Islamic Federations forming the Islamic Council of Spain which signed the Agreement of 1992 – declarations to the press or interventions in public acts (El País Digital: <http://elpais.com/diario>, 23 December 2004; Diario ABC: <http://abc.es/hemeroteca>, 16 March 2004; Fundación Siglo Futuro: fundacionsiglofuturo.org, 24 August 2011).

61 The size of the Muslim population is not clear. Some sources estimate they are between one million and one and a half million individuals.

right of religious freedom – but about administrative obstacles in applying the law: the delays experienced in seeking permission from the public authorities of certain Councils or Spanish Regions (the so-called “Autonomous Communities”) to construct mosques or other Islamic places of worship; the allocation of land in civil cemeteries to Muslims for burial in accordance with the religious prescriptions; failure to honour the wishes of Muslim fathers who ask for Islamic religious teaching in public schools in order to avoid hiring their own teachers; or police harassment of imams suspected of hate speech or incitement to violence. Furthermore, they ask the Government to recognize civil effects for Islamic theology studies, and they demand that employers allow employees to carry out religious services during Islamic religious festivals.

THE MUTUAL ROLES OF RELIGION AND STATE IN SWEDEN

LARS FRIEDNER

If you regard Sweden from the outside – and probably also if you ask a Swede to describe his country from the point of religion and state – Sweden would be seen as a secular country, perhaps one of the most secular in the world.¹ Historically, it was not, of course, always like this. During the seventeenth century, the Swedish state was strongly linked to the Lutheran Church.

Depending on where you have your historical starting-point, it is true that the strong ties between religion and state have eventually loosened. In any event, you could, even today, find elements which show that the state still appreciates religion as a positive factor in society. You may argue that these elements are to be seen as reminiscences – not yet abolished – of an old church-state system. However, some of the elements have been introduced or confirmed only relatively recently.

Important elements of the State's view on religions were disclosed as Sweden, in the year 2000, changed its church-state relations. Since then the Lutheran Church is no longer the state church.² But, even after the changing of church-state relations, the law reflects a somewhat positive state point-of-view *vis-à-vis* Swedish religious communities. Although the decision cannot be categorized as proof of an expressly positive view of religion, nor is the changing of church-state relations an effect of a negative view of religion.

With effect from the year 2000, the Constitution was changed.³ The current Form of Government from 1973, at the time when it was created, contained a number of transitional provisions regarding the State Church, the Church of Sweden.⁴ The reason for hav-

1 www.worldvaluessurvey.org.

2 Church of Sweden Act (1998:1591; Sw. *lag om Svenska kyrkan*).

3 The Swedish Constitution consists of several acts, i.e. Form of Government (Sw. *regeringsformen*) and Act of Succession (Sw. *successionsordningen*).

4 SFS 1974:152, transitional provisions sect. 9.

ing the provisions regarding church matters as transitional ones was that, when the Form of Government was approved originally, it was in the minds of its creators that the state-church system in due time would be abolished.⁵ The turn-of-the-millennium decisions resulted in replacing these transitional provisions with some short ordinary provisions regarding the Church of Sweden and other Religious Communities.⁶ As a relief to those amendments of the Constitution, no changes were made in the provisions regarding the position of the King or the Heirs to the Throne; they are still obliged to remain Lutheran.⁷

The change in church-state relations also included the Church of Sweden Act and Act on Religious Communities.⁸ These Acts gave the Church of Sweden a legal capacity of its own,⁹ which it had not had before, and other Swedish religious communities the possibility of registering and thus becoming legal entities as religious communities.¹⁰ The creation of these Acts expresses a positive view on religions from the State's side, although what was mentioned in the *travaux préparatoires* was that the State wanted to gain better equality between the Church of Sweden and the other religious communities.¹¹ It must be pointed out that the State, when registering religious communities, neither scrutinizes the doctrines of the communities nor controls them. As soon as a community claims that it has a religious aim and that it delivers sermons, it will be registered.¹²

At the time of the church-state reform, there was some political debate on the matter. The reform was criticized by liberal as well as left-wing politicians for not being radical enough.¹³ Those who opposed the reform were against the signs of a state-church system that still remained. In addition, in the years to follow, private bills have appeared in Parliament regarding the matter.¹⁴ Initially, before

5 Prop. 1973:90 p. 473 f., bil. 3 p. 295.

6 After amendments in 2010, 8:2 it. 4 Form of Government.

7 2 § Form of Government of 1809 (still valid) and 4 § Act of Succession.

8 Sw. *lag om trossamfund* (1998:1592).

9 3 § Church of Sweden Act.

10 9 § Act on Religious Communities.

11 Prop. 1995/96:80 p. 13.

12 2 and 7 §§ Act on Religious Communities.

13 M 1995/96:K6, K7.

14 i.e. M 2010/11:K244.

the Government Bill was presented to Parliament, the Centre Party (in important aspects representing the rural areas of the country) was against the reform. The party was in favour of letting the state-church system remain.¹⁵ Later on, the Centre Party changed its mind and agreed.

Bearing in mind that Sweden at that time still had a state church, a system of economic support to the religious communities,¹⁶ was launched already in the 1970s.¹⁷ The system was confirmed and expanded as a result of the changes to church-state relations. Parliament decided on a new Act on Support to Religious Communities.¹⁸ The Act contains provisions regarding economic support to religious communities,¹⁹ but also the possibilities for religious communities to use the tax system for collecting their membership fees.²⁰ The arrangements *per se* indicate a positive view towards religion, but it was also said by the Government, when drafting the act, that the State has good reasons to have such a view.²¹ The opinion of the Government was that religious life would help to build a stable society.²²

Not every religious community is granted the right to state support.²³ One of the conditions is that the religious community “contributes to the maintaining and strengthening of the basic values on which society is based”.²⁴ There has been some case law regarding this provision as Jehovah’s Witnesses applied for support but were denied by the Government with the argument that Jehovah’s Witnesses recommend their members not to vote in general elections. In a second attempt to receive the State’s economic support, the religious community made complaints to the Supreme Administrative Court,²⁵ which sent the case back to the Government.²⁶ The

15 SOU 1994:42 p. 186 ff.

16 I.e. other than the Church of Sweden.

17 Announcement (1972:242) on State Subsidies to Free Christian Congregations, etc.

18 Sw. lag om stöd till trossamfund (1999:932).

19 4 § Act on Support to Religious Communities.

20 16 § Act on Religious Communities and 5 § Act on Support to Religious Communities.

21 Prop. 1998/99:124 p. 60.

22 Ibid.

23 To be compared to the possibility of being registered which is open to every religious community.

24 16 § Act on Religious Communities.

25 Sw. Högsta förvaltningsdomstolen.

reason for the Court's judgment was that the Government had not clearly presented the reasons for its (second) decision.

Although what has happened in the world since 2000, i.e. 11 September 2001, has also had its effect on remote Sweden, no significant changes have appeared in the legal system. On the basis of a secular and religiously neutral view, the Swedish State remains supportive of religious communities.²⁷

A sign of the secular but still cautiously positive view is the recent statement of the Swedish National Agency for Education (*Skolverket*) on pupils' garments at school – and the background to this is discussion on the wearing of the *burqa* and *niqab* in schools. It states that it is principally for the pupil to choose which clothes to wear at school. The Agency mentions, though, some occasions when the use of all-covering clothes may be banned. One such occasion is when the teacher has to identify the pupil or when it is necessary for the teacher to see that the pupil has understood what the teacher has said. Other opportunities may be lessons when the pupil is supposed to do laboratory work, e.g. in chemistry, or in technical subjects. Limitations may also appear when a pupil works as an intern in e.g. industry.²⁸

Other examples of the State's view on religious communities are burial grounds which in most parts of Sweden are owned and administered by the Church of Sweden,²⁹ or that most religious communities have the right to officiate marriages on behalf of the State.³⁰ The State also supports the maintenance of culturally worthy church buildings, as a part of the national cultural heritage.³¹

During the last decade, there has been a strong debate in Sweden regarding entrepreneurship for different welfare institutions, i.e. hospitals and schools. Some in debate have expressed the hope that religious communities would take a greater responsibility in

26 HFD 2011 ref. 10.

27 It is notable that the atheist organizations of Sweden, although remarkably small, do not get any state support.

28 Swedish National Agency for Education, PM Jan 11, 2012.

29 2:1 Funeral Act (*begravningslagen*, 1990:1144); note that the Church of Sweden, where it is responsible for the burial-grounds also has to take care technically of funerals regarding members of other religious communities as well as atheists.

30 Act (1993:305) on the Right to Officiate Marriages within Religious Communities (*lag om rätt att förrätta vigsel inom trossamfund*).

31 4:16 Cultural Heritage Act (*lag om kulturminnen m.m.*, 1998:950).

these matters. In fact, there has been only a minor interest from the religious communities to engage in this field. The relatively new system of free schools, which are granted, in principle, the same economic support as schools of the municipalities,³² has led to a number of religious schools,³³ especially schools with a Muslim alignment.

With regard to Swedish case law on religion, it is possible to say that the courts seem to protect religion, especially religious minorities. One example is the lawsuit against a pastor in the Pentecostal Church, who in his sermon talked disrespectfully of homosexuals. Although he, through his utterances, committed the crime of agitation against minorities, he was freed by the Supreme Court, which concluded that he was exercising his right to religious freedom.³⁴ However, people belonging to neo-Nazi groups, wearing clothes with a swastika or handing out leaflets, were sentenced for the same crime.³⁵

The opinion of religious communities regarding the State's views has been mostly positive. The Church of Sweden has been in favour of the changing of state-church relations, although not in every detail. An example of this is the Church of Sweden opposing the State's decision not to change the position of the King and the Heirs to the Throne *vis-à-vis* the church³⁶. Other religious communities considered that the changes did not go far enough.³⁷ Within the smaller religious communities, which in the 1970s obtained the possibility of economic state support, there was discussion at that time as to whether state support affected the freedom of religious communities. The critical voices, which were part of that discussion, are no longer heard. On the other hand, it is a matter of fact today that some religious communities, Orthodox and Muslim, abstain on principle from applying to use the tax system in collecting membership fees. It seems, though, as if this aversion is also

32 I.e. 10:37-38 School Act (*skollag*, 2010:800).

33 L. Friedner, in: G. Robbers (ed.), *Religion in Public Education* (Trier, 2011), p. 494.

34 NJA 2005, p. 805.

35 NJA 1996, p. 577.

36 Prop. 1997/98:49, p. 18.

37 Ibid.

now vanishing, as the Syrian Orthodox Church has now applied for – and has been granted – this right.³⁸

³⁸ <http://www.skatteverket.se>.

THE MUTUAL ROLES OF RELIGION AND STATE IN UNITED KINGDOM

DAVID MCCLEAN

All too often writers, both within and outside the country, use 'England' when they really mean the United Kingdom.¹ That the UK's Olympic competitors were described as 'Team GB', the GB referring to that part of the UK which is Great Britain (England, Wales and Scotland), is just one more example of the confusion caused by the composite nature of the UK. In that case, it is Northern Ireland that is denied its proper place, but in terms of the present subject-matter, we must deal separately with the component parts.

I. POLITICAL PERSPECTIVES

For different reasons, it is not easy to describe the political perspectives of the parts of the United Kingdom other than England. To deal with the other parts first:

Northern Ireland

Northern Ireland consists of six of Ireland's 32 counties, and about 30 % of Ireland's population. Those six counties, part of the Province of Ulster, opted out of the Irish Free State when it was formed in 1922. Northern Ireland has its own legal system and an Assembly with devolved powers and a carefully-crafted system which ensures power-sharing between those wishing to remain part of the UK ('unionists' and very largely Protestant²) and those wishing to see the re-unification of Ireland ('nationalists' or 'republicans' and very largely Catholic).

1 E.g., 'the Queen of England' which is admittedly less cumbersome than 'of the United Kingdom of Great Britain and Northern Ireland'.

2 In the Irish context the (Anglican) Church of Ireland is regarded as a Protestant church, a description many Anglicans resist.

It is almost impossible to answer in the Northern Ireland context questions on the State's understanding of the role and value of religion. The 'State' was for 50 years dominated by unionists, in a Parliament that increasingly lacked legitimacy; more recently, the Assembly has had several periods of suspension with direct rule from London. But the overwhelming consideration is that of the violent and unhappy history of Northern Ireland; many would say that religion is at the heart of the problem. In a valuable survey, Clayton writes:³

There is certainly evidence for this assertion. Church attendance figures are very high by international standards: about 90 % of Catholics claim to go to church at least once a week and 50-60 % of Protestants at least once a month. Churches also have a wide range of ancillary social functions. The Orange Order, open to Protestants of all denominations but closed to Catholics, and influential in Unionist politics particularly in the period of Unionist government, has often insisted that it is a purely or primarily religious organisation. The best indicator for voting behaviour in respect to nationalist and unionist parties is religious denomination; and Northern Ireland is remarkable both in the close correlation between religion and voting and in the stability of this pattern over time. Inter-marriage across the Protestant-Catholic divide, discouraged from the first by all the churches, is still extremely low today; [a 1971 study] found that only 4 % married across the religious lines and a number of later studies support this low level although the incidence of inter-marriage varies from place to place. This degree of endogamy arises partly out from the particularly hostile attitude of the Roman Catholic Church to marriage with non-Catholics and partly from the limited chance to meet people of the 'opposing' religion, due in part to residential segregation where it exists but mainly to educational segregation. Since nearly all schools are either state-supported (with Protestant clergymen on the board of governors) or Catholic, the majority of people (over 95 % of Catholics and nearly all Protestants) receive their primary and the bulk of their secondary education at uni-denominational schools or schools with a very small percentage of 'the other sort'.

3 P. Clayton, 'Religion, ethnicity and colonialism as explanations of the Northern Ireland conflict', in: D. Miller (ed.), *Rethinking Northern Ireland: culture, ideology and colonialism* (London, 1998), pp. 40-54 [Citations omitted].

The reference to ‘residential segregation’ is primarily to the situation in Belfast, where different areas are entirely Catholic or entirely Protestant.

Clayton’s own conclusion, which many sociologists would support, is that economic and ‘racial’ factors, with dominant and subordinated groups similar to those found in ‘settler societies’, are more important than purely religious ones. It is certainly true that the settlement of many Scottish Presbyterians in Ulster in the seventeenth century is a crucial part of the story and even today one hears terms such as ‘the Ulster Scots’.⁴

Moderate churchmen, notably Robin Eames, Church of Ireland Archbishop of Armagh 1986-2006, had an important role as statesmen through the Troubles, and the various churches are often witnesses before Assembly committees on social issues. The Roman Catholic Church in Ireland has lost a great deal of prestige in the recent child abuse scandals and its attempts to conceal them, and the North is affected along with the rest of Ireland.

Scotland

In Scotland it is also difficult to trace a political perspective on the role of the church for, although Scotland had its own legal system and Established Church, there was no separate Scottish Parliament or government from 1707 to 1999. The annual General Assembly of the Church of Scotland was the nearest equivalent to a parliamentary assembly, which gave it added status. The Assembly debates on the report of its Church and Society Council still attract attention. In 2012 it addressed issues concerning Sunday sporting events; climate change; neurobiology and its perceived relationship with freedom and responsibility; sustainable agriculture; poverty; domestic abuse; human trafficking; sectarianism; homelessness; the possible referendum on Scottish independence; literacy; nuclear weapons; and Gaza.

When the Scottish Parliament was restored there was discussion as to whether there should be prayers as is the custom in the Westminster parliament. It was eventually agreed (by 91 votes to 7) that a

4 My family lived in Northern Ireland for generations. In 2011, I visited a street in Dublin in which my grandfather had lived; a neighbour said he remembered that a ‘Scottish Presbyterian family’ had lived there.

‘Time for Reflection’ would be held in the Chamber at a meeting of the Parliament, normally as the first item of business each week. It would follow a pattern based on ‘the balance of beliefs in Scotland’; an attempt to replace those last words by ‘the traditional Christian culture and faith of Scotland’ was lost by 9 votes to 99.

The place of religion in Scotland is recognised by Government in a number of ways. A Faith Liaison advisory Group (FLaG) was set up to enable closer working and consultation with church and faith groups, allowing for equality of access to policy and decision makers, open and transparent dialogue between Government and church and faith groups, a vehicle for collating and disseminating information and as an early alert mechanism for issues of concern that members might wish to raise. It seems to meet at irregular intervals and not to have a full agenda.

The Scottish Government took an initiative on inter-faith relations in 2008. A Scottish Working Group on Religion and Belief Relations (the Working Group) was established by the Minister for Community Safety, to promote dialogue between religious and non-religious belief communities. The original plan was to develop a strategic framework on religion and belief relations, but consultation showed that what was needed was practical guidance; a manual was prepared and published in 2011. Its preface notes:

Modern Scottish society is secular, a description which is often misunderstood. And so it is worth considering what this actually means and how it impacts on the individual rights of people to follow their beliefs. Secularism is often defined as a doctrine that rejects religion and religious considerations and accepts the complete separation of religion from government. This is not the case in Scotland.

Secularism in modern Scotland is about creating a society of equals regardless of the beliefs of those within it. Laws created in Scotland, and by the Westminster and European Parliaments, support this by seeking to eliminate discrimination and protect the rights of individuals to express and practise their beliefs.

Most religious movements accept and support a secular, democratic society which allows them the freedom to practise their religious beliefs openly and without fear or recrimination from the state or any organisation, such as the police, working on behalf of the state. Within a secular society it is of course open to all organisations and groups to seek to influence political decisions and engage in civic

processes. In this sense religious organisations are no different from other lobbying groups and it is the job of government to balance the needs and wishes of all members of society when taking decisions.

As in Ireland there has been some discussion of the Catholic Church's record in child abuse cases, but there seems to have been no significant debate in recent years on more general questions of the role of religion in Scotland.

Wales

There is now a National Assembly for Wales and a Welsh Assembly Government, created in 1999 but with relatively limited legislative powers. As in other parts of the United Kingdom, churches give evidence to Assembly committees and are signatories to petitions, but there seems to have been no general debate on religious issues. Some members of the Assembly have formed a cross-party Group on Faith 'to highlight the positive contribution of faith groups to communities across Wales'. This is not a sufficient basis for a discussion of political perspectives on the role of the churches.

England

Much more can be said about the position in England and in relation to the United Kingdom Parliament and Government generally.

As is well known, the nature of the establishment of the Church of England means that it has a special role in relation to the State, anointing and crowning the Sovereign and having 26 members in the House of Lords. Those members (the 2 archbishops and 24 other bishops) play a very active role, speaking on legislation as well as in the general debates in that House. Each week a bishop is on duty to read prayers at the start of business and that 'prayers bishop' will often intervene to speak on behalf of the church in matters discussed during that week. Other bishops will attend when there is business on which they have expertise, for example in respect of church schools or the employment situation in their diocese.⁵ In the first session of the present Parliament (2010-2012), the

5 They are the only members of the House of Lords who can be said to have a geographical constituency.

Archbishop of Canterbury initiated a debate on the plight of Christians in the Middle East, and other bishops initiated discussion (often a short debate on a specific question) on such matters as support for marriage, child abuse, social policy generally, aspects of criminal justice (prisoner transfer scheme and the future of the Youth Justice Board), child poverty, the care of members of the armed forces, and developments in Burundi.

There is little doubt that the State is well-disposed towards religion. So the Queen, whose annual Christmas broadcasts make her own Christian faith very clear, spoke with unusual force about the place of religion in society at the first engagement of her Diamond Jubilee year. She began her address to the leaders of Britain's nine main faith traditions by paying tribute to 'the particular mission of Christianity and the general value of faith in this country'. She continued:

'We should remind ourselves of the significant position of the Church of England in our nation's life. The concept of our established Church is occasionally misunderstood and, I believe, commonly under-appreciated. (...) Its role is not to defend Anglicanism to the exclusion of other religions. Instead, the Church has a duty to protect the free practice of all faiths in this country. The Church of England certainly provides an identity and spiritual dimension for its own many adherents, but it has also created an environment for other faith communities and indeed people of no faith to live freely. Woven into the fabric of this country, the Church has helped to build a better society, more and more in active co-operation for the common good with those of other faiths. Faith created and sustained communities all over Britain, playing a key role in the identity of millions, provided a system of belief as well as belonging, and acted as a spur for social action.'

Although Tony Blair seldom spoke of his faith during his time in office (his Director of Communications said famously that they 'did not do God') he has been more forthcoming since his retirement. David Cameron, the present Prime Minister, in a speech in Oxford in 2011 said:

'We are a Christian country. And we should not be afraid to say so. Let me be clear: I am not in any way saying that to have another faith – or no faith – is somehow wrong. I know and fully respect that many people in this country do not have a religion. And I am also incredibly proud that Britain is home to many different faith

communities, who do so much to make our country stronger. But what I am saying is that the Bible has helped to give Britain a set of values and morals which make Britain what it is today.’

The Secretary of State for Education, Michael Gove, commenting in the House of Commons on a report on the future of Church of England schools,⁶ said that

‘Education on both sides of the border was driven in the first instance by the vigorous missionary activity of Churches, and we praise and cherish the role of the Church of England in making sure that children have an outstanding and inclusive education. I welcome the report, and I look forward to working with Bishop John Pritchard [the chair of the Church of England Board for Education] to extend the role of the Church in the provision of schools.’

Perhaps most interestingly, a frequent speaker on the place of faith in society is a Muslim government Minister, Baroness Warsi. Soon after the present Government took office in 2010, she commented on an observation by the Archbishop of Canterbury that ‘*the trouble with a lot of government initiatives about faith is that they assume it is a problem, it is an eccentricity, [and that] it is practised by oddities, foreigners and minorities*’. Her response was:

The fact is that our world is more religious than ever. Faith is here to stay. It is part of the fabric of human experience. And in Britain faith is very much alive and kicking. Deny it and you deny the ability of a huge part of society to articulate where they have come from, what they are working for, and who they are. Nowhere is this better demonstrated than when you consider the social action of millions of British believers and the work of the almost 30,000 faith-based charities. (...) We have to come to a deeper understanding about the contribution of these faith communities to our society. In other words, why they do the good things they do. Unless we understand what drives people of faith to contribute to society, we cannot hope to help them on their way.

More recently, in a speech in Rome to the Pontifical Ecclesiastical Academy, she said:

‘In order to ensure faith has a proper space in the public sphere, in order to encourage social harmony, people need to feel stronger in their religious identities, more confident in their beliefs. In practice

6 *The Church School of the Future Review* (Archbishops’ Council, 2012).

this means individuals not diluting their faith and nations not denying their religious heritage. (...) Europe needs to become more confident in its Christianity. Let us be honest: Too often there is a suspicion of faith in our continent where signs of religion cannot be displayed or worn in government buildings; where states won't fund faith schools; and where faith is sidelined, marginalised and downgraded. It all hinges on a basic misconception: that somehow to create equality and space for minority faiths and cultures we need to erase our majority religious heritage. But it is my belief that the societies we are, the cultures we've created, the values we hold and the things we fight for stem from something we've argued over, dissented from, discussed and built up: centuries of Christianity.'

Of course, politicians are less happy when the Church speaks with a critical voice. In 1985, Margaret Thatcher was very displeased at the Church of England report, *Faith in the City*, which looked at the state of the church and of society in 'urban priority areas', inner city districts and large housing estates and other areas of social deprivation. It looked at the reality of poverty, unemployment, bad housing, lower than average life expectancy, problems in the schools and with law and order. There were shrill complaints from right-wing Members of Parliament, but a huge response to the Church's decision to establish a Church Urban Fund which by 2010 had exhausted its initial capital but was able to give, from voluntary donations, some £ 2 million to projects designed to improve the quality of life in urban areas.

It is not possible to draw from these quotations, or the many others that could have been selected, any clear priority in terms of the value of religion to the State, society or the individual. As a national church, the Church of England is closely identified with the nation and with the local communities which it serves. The same could no doubt be said, in a rather different way, of the Church of Scotland. The members of both churches are very active in local and national charities, as school governors, as volunteers in all sorts of projects. In the pragmatic tradition of English thought, little time is spent on analysis: the Church is there and it does good things.

A quotation from a Church source may illuminate the position. In their recent book *The State of the Church and the Church of the State*⁷ Bishop Michael Turnbull and Donald McFadyen write:

‘The Church of England has a relationship with the State that is different from that of the other churches. As the national church it is not separate from the State but overlaps with it, through its shared aim: the good of the nation under the Sovereign. So when the Sovereign’s government talks about wanting to build a ‘Big Society’⁸ the church is implicated, being part of the society of which the government speaks. Moreover, as a society-maker itself – its *raison d’être* is to bring people together in communion before God – the church senses that it has a role to play in working towards such a goal. But in the Anglican tradition, it will never be a bossy church assuming that it has all the answers ‘preformed’ which enables it to tell society what it should or should not do. Yes, it has deep and reliable foundations on which it stands, but that gives it confidence to improvise, to be on a journey with society, discovering the work of God happening in their midst.’

If asked, the State would emphatically *not* see itself as the ‘controller’ of religion. It does, as the legal material examined below makes clear, facilitate religion in many ways. But the overlap between Church and State and the ‘non-bossy’ style of Anglicanism mean that the State may not readily think in terms of having a role in relation to that church: the question assumes a separate identity of Church and State which does not entirely fit English realities.

All these things are certainly open to challenge and are the subject of public debate, though that seldom surfaces in the political context. So, many would see religion as an irrelevance. The National Secular Society is a very vocal critic of the role of the church in society, taking a very individualistic view, so that the exercise of faith is seen as a threat to the freedom of others; it must be banished to the private sphere. A number of books have given recent prominence to atheist positions, notably Richard Dawkins’s *The God Delusion*.⁹ The Church of England is criticised as being too feeble, to go along with every fad in society; and at the same time is criticised for having views on gay marriage out of step with soci-

7 Darton, Longman and Todd, 2012, pp. 34-35.

8 A policy of the present Government, though it is far from clear what the slogan means.

9 London: Transworld Publishers, 2006.

ety. It has a ‘bad press’, not least because two of the more serious newspapers have religious correspondents who are Roman Catholics.¹⁰ Within the Church of England, some call for disestablishment.¹¹ There has been some discussion of the retention by the Sovereign of the title ‘Defender of the Faith’ (on all British coins as ‘FD’, *Fidei Defensor*) or a subtle change to ‘Defender of Faith’.¹² A public opinion poll in 2012 found that most people in England supported the role of the Queen in faith. Almost three quarters gave their backing to the continued link between the Church and State, while 79 % agreed the Queen still had an important faith role. But a quarter felt the Queen and future monarchs should not have any faith role or title at all. More widely, worries about immigration and terrorism have become identified with the growth of the Islamic population, but only by fringe groups.

II. LEGAL PERSPECTIVES

As in the political context, account must be taken of the distinct legal systems in Northern Ireland, Scotland, and England and Wales.

Northern Ireland

For the reasons already set out, some aspects of religious activity are seen as a problem. An extraordinary feature of life in Northern Ireland is the number of ‘parades’, many of which are religious/political in nature. The insistence of Protestant groups, such as the Orange Order, in parading with their flags and bands through Catholic areas has caused both controversy and actual disorder. There is a ‘marching season’ each year and there are traditional songs which, to put it mildly, do not express Christian love towards

10 Ruth Gledhill of *The Times* famously predicted that whole dioceses, even a whole Province, of the Church of England would join the Personal Ordinariate erected by Pope Benedict, so leading to the Catholic Church regaining its position as the main church in England. About one thousand folk in fact joined, and the main result of the Ordinariate was a cooling of ecumenical relations.

11 See Bishop Colin Buchanan’s *Cut the Connection: Disestablishment and the Church of England* (Darton, Longman and Todd, 1994).

12 It seems to have been the heir to the Throne, the Prince of Wales, who made this suggestion; it would require legislation and is very unlikely to happen.

other sections of the community. Under legislation, the Public Processions (Northern Ireland) Act 1998, there is a Parades Commission which seeks to regulate the practice. Some extracts from its 2011 report indicate the scale and nature of the problem:

The Parades Commission received notification of 3,962 parades in the year from 1 April 2010 to 31 March 2011. Only 195 of those required detailed consideration by the Commission and of those only 146 required the imposition of conditions, including on the proposed route. In making its decisions the Commission faced the difficult task of upholding the rights of not just one group, but also of seeking to balance the conflicting rights of different groups within the statutory criteria laid down in the legislation. (...) The number (2,629) of parades organised by the Loyal Orders and broad Unionist tradition represents 66 % of the overall total. The number (123) of parades organised by Nationalist groups was a further decrease from the previous year (134) and remains very low at 3 % of the overall total. There was a substantial number of “Other” parades; this category includes charity, civic, rural and sporting events, as well as church parades. These made up 31 % of the overall total number of parades (29 % in 2009-10). (...) The number of parades deemed to be contentious fell for the third successive year to 195 from 212 in 2009-10. This represents just under 5 % of the total number of parades notified, which is a further small but welcome reduction from the previous year (5 % in 2009-10). Fifty-two of the parades deemed to be contentious related to the weekly notification by Portadown Loyal Orange Lodge No. 1 in respect of the Garvaghy Road.¹³ Contentious parades are those that are considered as having the potential of raising concerns and community tensions, and which consequently are considered in more detail by the Parades Commission. The vast majority of contentious parades continued to be Loyalist/Unionist parades, which accounted for c. 92 %, the same as in 2009-10. The proportion of contentious Nationalist parades remained as last year at just under 8 %. Other parades accounted for less than 1 % of the total.

There have been a number of legal challenges to the decisions of the Commission. It has been held compatible with Article 9 of ECHR on the ground that the restrictions it imposes are justified as being necessary in a democratic society.¹⁴

13 This was the site of serious disturbances in 1995, which led to the setting up of the Parades Commission, but there were earlier incidents too.

14 *Re Tweed* [2007] NIQB 69.

One shocking consequence of the residential segregation in Belfast is seen in the facts of *Re E's Application for Judicial Review*:¹⁵

In 2001 there were 230 pupils attending Holy Cross Girls' Primary School, which is on Ardoyne Road in North Belfast. They were all aged between 3 and 11 years. For many of these pupils the usual route from home to the school was along Ardoyne Road. As they went along Ardoyne Road they passed through an area bounded by Glen Bryn Housing Estate. The residents of this estate and some of the adjoining streets are mostly Protestant and regarded as being 'Loyalist' in outlook. It is an enclave in the district of Ardoyne where the religion of the residents is predominantly Catholic and many of them are regarded as being 'Nationalists'. Between 19 June and the end of November 2001 during the school terms the pupils and parents accompanying them on the journey to the school faced a vociferous protest as they passed Glen Bryn Estate. They were subjected to attacks with missiles and to insults and intimidation. At the time it was claimed that this was in protest against a failure on the part of the Government to provide local services. Other causes have also been advanced but none of these explain why the protest was aimed at young children going to school nor could possibly justify it. In his judgment in the court at first instance, Kerr J described the events as "one of the most shameful and disgraceful episodes in the recent history of Northern Ireland".

The applicant sought judicial review of the actions of the police in the form of a declaration that the Chief Constable of the Royal Ulster Constabulary and the Secretary of State for Northern Ireland had failed to secure the effective implementation of the criminal law and to ensure safe passage for her and for her daughter to the school. On the facts, the application failed.

The Royal Ulster Constabulary was seen as dominated by Unionist and therefore Protestant members. Under Police (Northern Ireland) Act 2000, it was dissolved and replaced by the Police Service of Northern Ireland. Section 46(1) of the Act provides that 'in making appointments (...) on any occasion, the Chief Constable shall appoint from the pool of qualified applicants formed for that purpose (...) an even number of persons of whom (a) one half shall be persons who are treated as Roman Catholic; and (b) one half shall be persons who are not so treated.' This is an extraordinary

15 [2006] NICA 37.

example of the criterion of religion being used to minimise the danger religion presents. It was challenged in the courts, but it was held that it was not incompatible with the appellant's rights under article 9(1) of the European Convention on Human Rights.¹⁶

Scotland

There is very little case law on church matters in Scotland apart from some cases on discrimination and some disputes about property between churches. This is due to the remarkable autonomy of the Church of Scotland guaranteed by article IV in the Schedule to the Church of Scotland Act 1921:

This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers. Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church alone, or give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.

On a number of relevant matters, the law in Scotland is substantially the same as that in England; for example the Charities and Trustee Investment (Scotland) Act 2005 applies similar principles to those in the English Act mentioned below.

England and Wales

In one context, the State preserves a careful neutrality in matters of religion. In a recent case, the Court of Appeal confirmed the long-

¹⁶ *Re Parsons' Application for Judicial Review* [2003] NICA 20.

established reluctance of the courts to enter into religious controversies.¹⁷ Mummery LJ said:

The courts abstain from adjudicating on the truth, merits or sincerity of differences in religious doctrine or belief and on the correctness or accuracy of religious practice, custom or tradition. The courts also exercise caution in adjudicating on the fitness or otherwise of a particular individual to carry out the spiritual duties of a religious office, although there are some employment rights cases in which jurisdiction has been exercised on the basis of the existence of a contract of employment and of statutory rights not to be unfairly dismissed or discriminated against on a prohibited ground.

Perhaps the clearest sign of the support given to religion by the State is in the law of charities. Charities enjoy a range of tax exemptions and form the major part of the ‘voluntary sector’. The Charities Act 2011, which consolidated a number of earlier statutes, lists a number of ‘charitable purposes’, the first three of which are the prevention or relief of poverty; the advancement of education; and the advancement of religion.¹⁸ A charity must also be ‘for the public benefit’¹⁹ and the Act declares that in determining whether the public benefit requirement is satisfied in relation to any purpose, it is not to be presumed that a purpose of a particular description is for the public benefit. In other words, ‘religion’ does not pass the charitable test by mere assertion; the public benefit must be demonstrated. In fact, the guidance issued by the Charity Commission,²⁰ the regulatory body, offers a broad understanding of

17 *Shergill v Khaira* [2012] EWCA Civ 983. The Court of Appeal accepted the arguments advanced by Mark Hill QC, citing *R v Archbishops of Canterbury and York ex parte Williamson* (CA, 1994 re ordination of women priests); *R v Chief Rabbi ex parte Wachmann* [1992] 1 WLR 1036 (Jewish law); *R v Imam of Bury Park Mosque, Luton ex parte Sulaiman* [1993] EWCA Civ 36 (eligibility to vote in a Mosque election for membership); *R v Provincial Court of the Church in Wales ex parte Williams* (19980 (decision of a court of the disestablished Church in Wales); *Varsani v Jesani* [1999] Ch 219 (doctrinal questions in a Hindu religious sect); *Blake v Associated Newspapers* [2003] EWHC 1960 (QB) (whether the claimant was a validly consecrated bishop); *His Holiness Sant Baba Jeet Singh Ji Maharaj v Eastern Media Group Ltd* [2010] EWHC 1294 (QB) (issues of Sikh doctrine and practice).

18 Charities Act 2011, s 3. ‘Religion’ includes (i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god: Charities Act 2011, s 3(2)(a).

19 Charities Act 2011, ss 2(b), 4.

20 Charity Commission: *The Advancement of Religion for the Public Benefit*. See F. Cranmer, ‘Religion and Public Benefit’ (2009) 11 EccLJ 203.

public benefit. It gives as examples of the ways a charity can advance religion: seeking new followers, encouraging the practice of religion by existing followers (eg providing places of worship), raising awareness and understanding of religious practices, and missionary and outreach activities. Of course were these things to be done for material gain, ie *private* benefit, the test would not be passed. Similarly, it probably remains the case, as under the common law, that an enclosed religious order could not be charitable; its intercessory prayers would not for this purpose give any public benefit.²¹

The emphasis on public benefit does not mean that religion is valued solely for its value to society at large as opposed to the individual; nor that it is not valued in its own right. So, the State requires schools not only to give religious education in accordance with a locally agreed syllabus or, in the case of schools with a religious character, the requirements of the religious authorities concerned²² and for regular acts of worship in schools, in State schools to be ‘mainly’ of a Christian character.²³ That religious faith is important to a child’s development is recognised in a number of statutory provisions concerning the decisions that courts or local authority social workers may have to make. So, for example, section 22 of the Children Act 1989 in describing the general duty of a local authority in respect of children in its care provides that before making any decision with respect to a child whom they are looking after, an authority must give due consideration to the child’s religious persuasion, racial origin and cultural and linguistic background.²⁴

Religious freedom is of course protected by the ECHR and the Human Rights Act 1998. The Act contains the unusual provision in section 13 that:

If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its

21 *Gilmour v Coats* [1949] AC 426. In 2012 the Charity Commission refused to grant charitable status to a body controlling a number of halls of the Exclusive Brethren as public benefit had not been established; an appeal is pending.

22 Education Act 1996, s 375.

23 School Standards and Frameworks Act 1996, s 70.

24 See the similar provision in relation to adoption agencies in s 1(5) of the Adoption and Children Act 2002.

members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

This does not apply to individuals or to church-related societies, and that has given rise to some controversy in respect of religious objections to the Equality Act (Sexual Orientation) Regulations 2007.²⁵ In *Hall v Bull* [2012] EWCA Civ 83, the defendants were hoteliers but because of their religious views would let double-bedded rooms to married couples only. The claimants, a homosexual couple, had booked a room but when they arrived they were turned away. The Court of Appeal held that this was direct discrimination on grounds of sexual orientation. The court did observe that it would be unfortunate to replace legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the defendants' beliefs). But the defendants did not face any difficulty in manifesting their religious beliefs, they were merely prohibited from so doing in the commercial context they had chosen.

*R (on the application of Johns) v Derby City Council*²⁶ the applicants sought approval from the city council to act as foster carers. They were Pentecostals and considered same-sex relationships to be sinful. The council refused their application on the ground that those views did not comply with the National Minimum Standards for Fostering Services, which required carers to value individuals equally and to promote diversity. The council's decision was upheld by the court which noted that article 9 of the Convention only provided a qualified right to manifest religious belief, and interferences with that right were readily found to be justified in the sphere of employment and analogous spheres, even where the members of a particular religious group would find it difficult in practice to comply.

The Regulations caused particular difficulty for Catholic adoption agencies who were required to consider same-sex couples as potential adopters. The Catholic Church campaigned against this, without success. Many of the agencies accepted the regulations and removed themselves from the church structures. One which refused

25 SI 2007/1263.

26 [2011] EWHC 375 (Admin), [2011] 1 F.L.R. 2094.

to do so brought a case, *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales*²⁷, which led to the original decision of the Charity Commission being set aside. However, on further consideration in the light of the judgment the Commission in effect reached the same decision and did not allow the charity to limit its work to heterosexual applicants.

Religious feelings are also protected by the notion of ‘religiously aggravated offences’. Certain offences, for example that of causing alarm or distress under s 5(1) (b) of the Public Order Act 1986, are ‘aggravated’ by later enactments²⁸ when they are ‘racially or religiously aggravated’. This means that the offence is ‘motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group’, a religious group meaning simply ‘a group of persons defined by reference to religious belief or lack of religious belief’. An example is *Norwood v Director of Public Prosecutions*,²⁹ a case involving the British National Party, and a poster described by the Divisional Court in upholding the conviction as a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people. It could not, on any reasonable basis, be dismissed as merely an intemperate criticism or protest against the tenets of the Muslim religion, as distinct from an unpleasant and insulting attack on its followers generally.

The ‘danger’ of religion is perhaps illustrated by the complex history of the restrictions on broadcasting by religious bodies. In the last 1980s there was some concern about the nature of religious broadcasting, probably a reflection of distaste for US-style ‘televangelists’. The Broadcasting Act 1990, which regulated all non-BBC broadcasting, made all religious bodies ‘disqualified persons’, unable to hold a licence to broadcast, though the regulatory body was given a discretion to grant licences, notably for satellite and cable broadcasting. The disqualifications were extended to digital

27 [2010] EWHC 520 (Ch), [2010] 4 All E.R. 1041.

28 Crime and Disorder Act 1998 ss 28 and 31 (as amended by the Anti-terrorism, Crime and Security Act 2001, s 39).

29 [2002] EWCH 1564 (Admin).

broadcasts in the Broadcasting Act 1996 and are maintained in the Communications Act 2003 which now regulates broadcasting in the United Kingdom. Religious broadcasters may apply to Ofcom, the regulator, for digital programme service licences and there is now a considerable number of radio and television channels of a Christian or Muslim character. The Ofcom Code of Conduct provides:

4.1 Broadcasters must exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes. [A religious programme is a programme which deals with matters of religion as the central subject, or as a significant part, of the programme.]

4.2 The religious views and beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment.

4.3 Where a religion or religious denomination is the subject, or one of the subjects, of a religious programme, then the identity of the religion and/or denomination must be clear to the audience.

4.4 Religious programmes must not seek to promote religious views or beliefs by stealth.

4.5 Religious programmes on television services must not seek recruits. This does not apply to specialist religious television services. Religious programmes on radio services may seek recruits. [Seek recruits means directly appealing to audience members to join a religion or religious denomination.]

4.6 Religious programmes must not improperly exploit any susceptibilities of the audience.

4.7 Religious programmes that contain claims that a living person (or group) has special powers or abilities must treat such claims with due objectivity and must not broadcast such claims when significant numbers of children may be expected to be watching (in the case of television), or when children are particularly likely to be listening (in the case of radio).

It has sometimes been argued that the practices of particular religious groups pose a danger in themselves. Several of these cases have involved Jehovah's Witnesses. In a rather extreme case, *T v T*,³⁰ a mother described as 'obsessed by the Jehovah Witnesses'

30 (1974) 4 Fam Law 190.

faith' felt it her duty to indoctrinate her children in the faith; she showed signs of mental instability evidenced in her belief that she was being persecuted by the Scientologists. She was deprived of the care and control of children. In *Re T (Minors) (Custody: Religious Upbringing)*³¹ Scarman LJ said:

'We live in a tolerant society. There is no reason at all why the mother should not espouse the beliefs and practice of Jehovah's Witnesses. It is conceded that there is nothing immoral or socially obnoxious in the beliefs and practices of this sect. (...) It is as reasonable on the part of the mother that she should wish to teach her children the beliefs and practice of the Jehovah's Witnesses as it is reasonable on the part of the father that they should not be taught those practices and beliefs.'

The religious issue was to be considered alongside all the other issues in the case. Finally in *Re N (a child) (religion: Jehovah's Witness)*³² the court did make orders restricting the right of parents, one Anglican and the other a Jehovah's Witness, to teach the doctrines of their respective faiths; but the report is unclear as to what those orders actually were.

The courts will not intervene when an adult patient refuses a blood transfusion or other treatment on religious grounds, provided the patient has the capacity to make an informed decision³³. But, where a child is concerned the court may intervene.³⁴

In *Newcastle City Council v Z*³⁵ a mother objected to the adoption of her child because her Muslim beliefs forbade it. The court held that her consent to adoption was unreasonably withheld. Munby J said:

31 [1981] 2 FLR 239.

32 [2011] EWHC 3737 (Fam).

33 *Re T (Adult: refusal of medical treatment)* [1993] Fam 95; *Re C (Adult: refusal of medical treatment)* [1994] 1 WLR 290; *Re MB (Medical treatment)* [1997] 2 FLR 426; *St George's Healthcare NHS Trust v S* [1999] Fam 26.

34 *Re S (A Minor) (Refusal of Medical Treatment)* [1995] 1 FCR 604; *An NHS Trust v MB (a child represented by CAFCASS as guardian ad litem)* [2006] EWHC 507 (Fam), [2006] 2 FLR 319; *NHS Trust v A* [2007] EWHC 1696 (Fam). *Cf Re S (a minor) (adoption order: conditions)* [1995] 2 All ER 122 (court in making adoption order would not impose condition on the adoptive parents, Jehovah's Witnesses, about medical treatment of the child).

35 [2005] EWHC 1490 (Fam). See also *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* [2000] 1 FLR 571.

‘There have been enormous changes in the social and religious life of our country. We live in a secular and pluralistic society. But we also live in a multicultural community of many faiths. Our society includes men and women from every corner of the globe and of every creed and colour under the sun. We live in a society which on many social, ethical and religious topics no longer either thinks or speaks with one voice. These are topics on which men and woman of different faiths or no faith at all hold starkly differing views. All of those views are entitled to the greatest respect but it is not for a judge to choose between them. The days are past when the business of the judges was the enforcement of morals or religious belief, for we live, or strive to live, in a tolerant society increasingly alive to the need to guard against the tyranny which majority opinion may impose on those who, for whatever reason, comprise a weak or voiceless minority. And although historically this country is part of the Christian west, and although it has an established church which is Christian, we sit as secular judges serving a multicultural community of many faiths in which all of us can now take pride. We are sworn to do justice “to all manner of people”. Religion – whatever the particular believer’s faith – is no doubt something to be encouraged but it is not the business of government or of the secular courts, though the courts will, of course, pay every respect and give great weight to a family’s religious principles. Article 9 of the Convention, after all, demands no less. So the starting point of the law is a tolerant indulgence to cultural and religious diversity and an essentially agnostic view of religious beliefs. A secular judge must be wary of straying across the well-recognised divide between church and state. It is not for a judge to weigh one religion against another. The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect, whether in times of peace or, as at present, amidst the clash of arms.

But however much respect one pays to religion or to any particular religion, and whatever the religion and the nature of the religious beliefs in issue in the particular case, a parental view based on religious belief, however profound, can never be determinative when it comes to considering what is to be done in relation to a child. The mother’s religious beliefs are in themselves reasonable – that I entirely accept – but she is nonetheless, in all the circumstances of this particular case, acting unreasonably in relying upon them as a justification for refusing consent to her son’s adoption.’

The whole category of cases involving children, in which the welfare of the individual child is the paramount consideration, is a

special one. The churches and other faith groups broadly support that.

In other contexts, there is some anxiety that some decisions seem to undervalue the Christian tradition and it was that concern that prompted some of the political statements quoted at the start of this paper. In general, there is a recognition that, as Munby J said, in the passage just quoted, there is now a multicultural and multi-faith society. In it, religion has actually gained a new prominence and a renewed recognition of its importance on the part of the State.

THE STATE FROM THE PERSPECTIVE OF
RELIGIOUS LAWS:
A GLOBAL APPROACH
WITH PARTICULAR REFERENCE
TO CHRISTIANITY

NORMAN DOE

The regulatory instruments of religious organisations commonly address their external relations with wider society. This is particularly the case with the ecclesiastical traditions of Christianity, namely, the twenty-two ‘church families’ globally (to use a category of the World Council of Churches). The laws and other regulatory instruments of the fifty or so churches studied here, from ten of these church families worldwide,¹ regulate their relations with ecclesial bodies outside its own tradition as part of the ecumenical movement, the availability to wider society of rituals such as marriage, the public dimensions of profession of the faith and worship, and civil law applicable to church property and finance. The rules of churches also address external relations with the State and wider civil society, a matter upon which denominations have historically differed in terms of the neutrality that they require from the State in its legal own posture towards religion and the position of Christian churches under civil constitutions. This paper examines: (1) the theological stance of each church towards the State, its nature and its functions, and the working out of this stance in ecclesiastical regulatory instruments; (2) the juridical approaches of churches to human rights and religious freedom in society; (3) the formal structures which churches have, under their own ecclesiastical regulatory instruments, particularly their institutions, to engage with the wider society in terms of social responsibility and charitable activity. It draws conclusions about the degree to which church rules facilitate or hinder their engagement with the State and society. It proposes that whilst there are profound differences, the similarities between their regulatory instruments indicate principles of Chris-

¹ Namely: Catholic, Orthodox, Anglican, Lutheran, Methodist, Reformed, Presbyterian, United and Baptist.

tian law common to all churches with regard to church and state relations, human rights and religious freedom, social responsibility, and Christian ministry in the public institutions of the State. The approach to State and society in other religious laws (e.g. Jewish and Islamic) is beyond the scope of this study.²

I. CHURCH AND STATE

As a general pattern, the juridical instruments of the churches address: the nature and purpose of the State; the distinct identity and functions of the church as against those of the State; the need for cooperation between church and State; the recognition and applicability of civil law to the church; Christian involvement in politics; disobedience by the faithful to unjust laws; and the avoidance in disputes amongst the faithful of recourse to the courts of the State. The regulatory instruments of each of the ecclesiastical traditions are dealt with here *seriatim*.

The Catholic Church teaches that: there is no authority except from God; every human community needs an authority to endure and develop; the ‘political community and public authority are based on human nature and therefore...belong to an order established by God’; the diversity of political regimes is legitimate; political authority must be exercised within the limits of the moral order; and it is ‘the role of the State to defend and promote the common good of civil society’, namely: ‘the sum total of social conditions which allow people, either as groups or individuals, to reach their fulfilment more fully and more easily’. However, ‘in their own domain, the political community and the church are independent from one another and autonomous’ but they should develop a ‘mutual cooperation’ in favour of the welfare of all human

2 See e.g. J. Neusner, *Judaism in Modern Times* (Blackwell, 1995) 12, 26-28; S.J. Schaffer, ‘Dina demalkhuta dina’, in: B.S. Jackson (ed.), *Jewish Law Association Studies 1 – The Touro Conference* (Scholars Press, 1985) 121-124; disobedience to State law; B. Jackson, ‘Transformative accommodation and religious law’ (2009) *Ecclesiastical Law Journal* 131; K. Ferdinand and Mehdi Mozaffari (eds.), *Islam: State and Society* (London, 1988); M.A. Baderin, *International Human Rights and Islamic Law* Oxford, 2003); A. Sharma, *Hindus and Human Rights* (Oxford, 2003) 107-108; separation; I am grateful to Wendy de Ruiter and Margaret Dunning, undergraduates at Cardiff Law School, for assistance in identifying these studies.

beings.³ Indeed, the Latin Code recognises the qualified applicability of the law of the State to the church: ‘When the law of the Church remits some issue to the civil law, the latter is to be observed with the same effects in canon law, in so far as it is not contrary to divine law, and provided it is not otherwise stipulated in canon law’.⁴ In other words, for the faithful, ‘unjust laws...would not be binding in conscience’.⁵ Moreover, Catholic canon law provides for the appointment of papal legates to States,⁶ forbids clerics ‘to assume public office whenever it means sharing in the exercise of civil power’,⁷ asserts that ‘no rights or privileges of election, appointment, presentation or designation of bishops are conceded to civil authorities’,⁸ and enables an ecclesiastical tribunal to re-

3 Catechism of the Catholic Church (CCC), pars. 1918-1924, 1927; GS 26, 74, 76; Rom. 13.1: all authority is from God; [t]he political community and public authority are based on human nature and therefore...belong to an order established by God’.

4 CIC, c. 22; the Code often refers to the operation of civil law on a particular matter: see e.g. c. 98.2: ‘In regard to the appointment of guardians [of minors] and...their powers, the provisions of civil law are to be observed, unless it is otherwise prescribed in canon law or unless, in specific cases and for a just reason, the diocesan bishop has decided that the matter is to be catered for by the appointment of another guardian’; c. 110: ‘Children who have been adopted in accordance with the civil law are considered the children of that person or those persons who have adopted them’; c. 197: ‘Prescription, as a means of acquiring or of losing a subjective right, or as a means of freeing oneself from obligations, is...accepted in the Church in the manner in which it is adopted in the civil legislation of each country’; 1059: ‘The marriage of Catholics, even if only one party is a Catholic, is governed not only by divine law but also by canon law, without prejudice to the competence of civil authority in respect of the merely civil effects of the marriage’; 1062.1: ‘A promise of marriage, whether unilateral or bilateral, called an engagement, is governed by the particular law which the Bishops’ Conference has enacted after consideration of such custom and civil laws as may exist’; c. 1254.1: ‘The Catholic Church has the inherent right, independently of any secular power, to acquire’ etc. property; c. 1284.2: administrators of temporal goods must ‘ensure that the ownership of ecclesiastical goods is safeguarded in the ways which are valid in civil law’; c. 1290: the civil law on contracts is to be observed ‘provided that the civil law is not contrary to divine law, and that canon law does not provide otherwise’.

5 CCC, pars. 1897-1942; *Lumen Gentium*, 1965, 31.

6 CIC, c. 362: ‘The Roman Pontiff has an inherent and independent right to appoint legates and to send them either to particular churches in various countries or regions, or at the same time to States and to public authorities’ and recall such ‘representatives accredited to States’; cc. 363-367 deal with their functions.

7 CIC, c. 285.3; *Letter and Spirit*, par. 593: ‘However, is a Bishop judged that it would serve a spiritual purpose, he could, in virtue of Can. 87.1, dispense from the norm of this canon [285.3] in a particular case’ provided there was a ‘just and reasonable cause’ as demanded by c. 90.

8 CIC, c. 377; *Christus Dominus*, 20: Vatican II asked that such authorities ‘initiate discussions with the Holy See with the object of waiving the aforesaid rights and

frain from imposing a penalty if the offender has been or will be ‘sufficiently punished by the civil authority’.⁹ Similar ideas and norms are to be found in the Code of Canons 1990 of the Oriental Catholic Churches.¹⁰

The Orthodox canonical tradition proposes that Church and State derive their authority from one and the same divine source: ‘The Church was founded by God, the birth of the State is a product of the will of Divine Providence for the world’ but each is ‘self-sufficient and independent in the sphere of its jurisdiction’ – the Church is not limited in space and time, but States are; the Church is one, but States are many; the Church seeks the salvation of souls, the State, peace and order; and the Church has at its disposal spiritual means, the State, material.¹¹ The Church should not be subject to the State, nor should the State be subject to the Church, but they should co-exist in harmonious cooperation – ‘the *symphonia* of the sacred and secular power’.¹² In turn, the juridical instruments of Orthodox churches deal with, typically, cooperation with the State and its authorities,¹³ the applicability of civil law to the church,¹⁴

privileges which they at present enjoy by agreement or custom’ – e.g. Peru, Monaco and Haiti have accepted this invitation: see Letter and Spirit, par. 781.

9 CIC, c. 1344.2.

10 See e.g. CCEO, c. 1504: applicability of civil law; c. 616: church teaching on civil society; cc. 98 and 100: the power of the patriarch in affairs which touch civil affairs; c. 910: civil law to be observed as to guardianship.

11 P. Rodopoulos, *An Overview of Orthodox Canon Law* (2007), 205-210 (citing Matt. 22.21): ‘Render unto God that which is God’s and unto Caesar that which is Caesar’s’; the church was founded directly by God (Matt. 16.18) and equipped with its particular organisation (Matt. 18.20; Acts 15.28); States were founded by God indirectly, ‘by inculcating in people the propensity for cohabitation and union, whence sprang each of the states, which were organized through human laws’.

12 See also R. Potz, ‘State and church in European countries with an Orthodox tradition’, *Derecho y Religion*, III (2008) 33. Rodopoulos, op cit., 206: the subjection of the Church to the State (Caesaro-Papism), and the subjection of the State to the Church (Papo-Caesarism, hierocracy, theocracy), and cooperation (mutualism). L. Patsavos, ‘The canonical tradition of the Orthodox Church’, F.K. Litsas (ed.), *A Companion to the Greek orthodox Church* (Greek Orthodox Archdiocese, New York, 1984) 137 at 137: canon and civil law.

13 See e.g. Romanian Orthodox Church (ROMOC): Statutes, Art. 4.2: the church ‘establishes relations of dialogue and cooperation with the State’ to accomplish its ‘pastoral, spiritual-cultural, educational and social-charitable mission’.

14 Standing Conference of Orthodox Bishops in the Americas (SCOBA): Const., Art. VII: in its religious, charitable, and educational purposes, SCOBA may fund organizations that qualify under section 501(c)(3) of the Internal Revenue Code’; Syrian Orthodox Church of Antioch (SOCA): Const., Art. 18: the Patriarch is to notify where appropriate ‘civilian authorities’ about prescribed ministerial appoint-

the registration of a church as a legal entity in civil law,¹⁵ determination of church-state relations by a church assembly,¹⁶ and representation of a church in relations with the State and its institutions by bishops at national and diocesan level,¹⁷ and by clergy at local level.¹⁸ Orthodox laws also deal with recourse to civil courts and engagement in politics. For instance, the ordained and lay members of the Russian Orthodox Church 'cannot apply to the authorities of the State or to the civil courts on matters which pertain to the inter-

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- ments; Greek Orthodox Archdiocese of America (GOAA): Charter, Art. 5(b): 'All legal issues which affect the Archdiocese as a whole and its Metropolises are within the exclusive jurisdiction of the Eparchial Synod'; Ukrainian Orthodox Church in America (UOCIA): Practical Instructions for Diocesan Faithful, Policy on Marriages, 2: 'A civil marriage licence must be obtained from the appropriate civil authorities' prior to celebration of a marriage; Code of Pastoral Conduct, 2.1: 'Information obtained in the course of [counselling] shall be confidential, except for compelling professional reasons or as required by law'; Sexual Abuse Policy, I: reporting to civil authorities; Russian Orthodox Church (ROC): Statutes XI.13: brotherhoods are regulated e.g. by 'the civil statutes' of the church, diocese and parish by which they are 'registered as legal entities'; XI.45: a person may be dismissed by the bishop from the Parish Council if in breach of 'the civil statute of the parish'; GOAA: Regs., Art. 16: a parish hold its property in its corporate name 'except as otherwise required by any applicable civil law'.
- 15 ROC: Statute I.5; see also e.g. Diocese of Sourouz: Statutes, I.4: 'The diocese may in its own name...sue and be sued in court'; II.11: 'The Diocese may, with the...consent of [its] Hierarchy, incorporate legal entities...to carry out charitable, cultural, educational, publishing, social and other activities'.
- 16 ROC: Statute II.5(g): the Local Council is to 'determine and adjust the principles of relations between the Church and the State'; III.4(h): the Bishops' Council is to determine 'the nature of relations with State bodies'; IV.4(h): the Patriarch has the same function; see also Dioc. of Sourouz: Statutes, I.7: 'The Diocese shall have the right to liaise with local authorities with respect to the matters which may affect its activities'; II.12: 'The Diocese may request financial and other assistance from government bodies for the restoration, maintenance and protection of buildings and other facilities of cultural and historic value'.
- 17 GOAA: Charter, Art. 6.9: the Archbishop '[r]epresents the Archdiocese and the Ecumenical Patriarchate in their dealings with all...civil authorities' in the USA; UOCIA: Statutes Art. IV.1: the major Archbishops in each country represent the church in relations with 'secular authorities'; ROMOC: Statutes, Art. 26(c): the Patriarch represents the church 'in the relations with the public central and local authorities'; ROC: Statute X.17: the bishop is the 'representative of the [ROC] before the appropriate bodies of State authority and administration in matters which concern his diocese'; see also X.18.(z): the bishop is to petition State authorities for the restitution of church property confiscated under communism; ROMOC: Statutes, Art. 88: the bishop must administer the eparchy in accordance with State law and represents it in relations with the State and its authorities.
- 18 ROC: Statute XI.20(i); see also XI.46(k): the Parish Council must maintain contact with public authorities; XI.48: the churchwarden represent the parish in court proceedings; XI.59: the parish meeting 'is entitled to bring an action in court with the prior consent of the Diocesan Bishop'.

nal life of the church, including canonical governance, church order, liturgical or pastoral activities’; also: ‘The canonical units of the [Church] shall not engage in political activities and shall not rent their premises for political events’.¹⁹ One of the dioceses of the Russian Orthodox Church provides that: ‘The Diocese shall not participate in political parties and movements, and shall not provide them with financial or any other assistance and support’.²⁰ Similarly, the Standing Conference of Orthodox Bishops in the Americas ‘shall not participate in, or intervene in (including the publication or distribution of statements), any political campaign on behalf of any candidate for public office’.²¹ Clergy must not seek political office.²² This stance is shared broadly by Anglican churches globally in terms of how they view the State,²³ cooperation with it, the applicability of civil law, political activity,²⁴ recourse to the courts of the State in disputes between the faithful,²⁵ and deference to the State in its domain.²⁶

¹⁹ ROC: Statute I.9-10; see also V.25(m) and (o): the Holy Synod is to ‘maintain proper relations between the Church and the State’ and adopt ‘the civil statutes’ of the church; GOAA: Regs., Addendum B, Dispute Resolution Procedures: the faithful should not resort to secular courts to resolve disputes; this cites 1 Cor. 6.1,7.

²⁰ ROC: Diocese of Sourozh: Statutes, I.6.

²¹ SCOBA: Const., Art. VII; see also the Internal Revenue Code s. 501(c)(3).

²² Orthodox Church in America (OCIA): GC., A Selection of Clergy Discipline, 8: ‘Clergy must not run for political office (Carthage, c. 16; Holy Apostles, cc. 81, 83; Chalcedon, c. 7)’.

²³ For the classical Anglican position, see Thirty-Nine Articles of Religion, Art. XXXVII: Of the Civil Magistrates: the monarch has ‘the chief power in this Realm of England, and other his Dominions, unto whom the chief Government of all estates of this realm, whether they be Ecclesiastical or Civil, in all causes doth appertain’; ‘we give not to our Princes the ministering either of God’s Word, or of the Sacraments...but that only prerogative, which we see to have been given always to all godly Princes in holy Scriptures by God himself; that is, that they should rule all estates and degrees committed to their charge by God, whether they be Ecclesiastical or temporal, and restrain with the civil sword the stubborn and evildoers’. See below for the use by churches of civil law and for the Anglican exception, that of the established Church of England.

²⁴ Principles of Canon Law Common to the Churches of the Anglican Communion (Anglican Communion Office, London, 2008) (PCLCCAC), Principle 46.2-3: processing data is subject to civil law; 71.1-3: ministers and parties must comply with civil law as to the formation of marriage; 72.5-6: civil marriage; 74.1 and 3: civil nullity of marriage; 75: no recourse immediate to civil courts on breakdown and civil dissolution of marriage; 77.5-7: the civil law on disclosure of information in breach of the seal of the confessional; 80.1-2: a church and its trustees must satisfy civil law as to the acquisition, administration and disposal of property.

²⁵ The Episcopal Church (USA) (TEC): Cans. IV.14.2: ‘No Member of the Clergy...may resort to the secular courts for the purpose of delaying, hindering or re-

The Protestant Reformation in northern Europe saw the development of the principle that subjects should follow the religion of their ruler: *cuius regio eius religio*.²⁷ Today, the juridical instruments of Lutheran churches refer to the doctrine of the ‘two kingdoms’ – earthly and heavenly – designed *inter alia* ‘to guide the church in its relations with the world, especially government’. First, the doctrine ‘does not call for a separation of church and state but for a proper distinction between them’: God rules ‘all people, Christians and non-Christians, in his earthly kingdom through the agency of secular government [and] law’ and ‘he rules all Christians in his spiritual kingdom...through the gospel [and] grace’.²⁸ Secondly, Christians are ‘citizens of two kingdoms’: ‘The two reigns of God are also mutually dependent’; the church needs the State to ensure freedom of religion and the State needs ‘the prayers and intercessions of the church (whether it realises it or not)’ to fulfil its tasks properly.²⁹ Thirdly, whilst the church ‘is not called to develop and implement policies for a more just and equitable society’, the church has ‘every right’ to be ‘the conscience of society’ and ‘hold governments...accountable to the public, and ultimately to God’. Fourthly: ‘church and state must be clearly distinguished but not separated’ though ‘each has its own area of competence and

viewing any proceeding’ of the church’s tribunals; [n]o secular court shall have authority to review, annul, reverse, restrain or otherwise delay any proceeding’ of these tribunals; United Church of North India: Const., II.V.VII: ‘No bishop, presbyter or any other member...should go to a civil court, for enforcing any of his spiritual and religious rights under the [church] Constitution’ or the rules made under it.

26 Church of Ireland: Const. VIII.26.4: the Court of General Synod must not determine ‘any matter...which, in the opinion of the lay judges, is within the jurisdiction and more proper to be submitted to the...decision of a civil tribunal’.

27 J. Witte, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (CUP, Cambridge, 1990).

28 Lutheran Church of Australia (LCA): Statement on the Two Kingdoms, 1-2 Rom. 13:

1-5 and 1 Peter 2:13, 14 are cited. See also Evangelical Lutheran Church of Southern Africa (ELCSA): G., 12.4: ‘The Two Regiments of God: God is the Lord of this world. In His Church He works through Word and Sacrament, in the worldly sphere through worldly orders. Both...are clearly...distinguished, yet may not be separated...The state does not rule over the Church nor the Church over the state: God rules over both. It is only with the Word of God that the Christian may stand and defend faith and Gospel and not by means of force’.

29 LCA: *ibid*: ‘God alone has absolute claim on us (Matt 6:24), and when the state becomes tyrannical...it exceeds its God-given bounds. Then we are freed from our obligation to obey it’ (1 Peter 2:13; 1 Tim 2:1-2).

responsibility': secular government must not interfere with the proclamation of the gospel, and...the church must not use the agency of the state...to promote the gospel or Christianise society. Thus: 'The Church...ought not to interfere...in the affairs of the State: but it must bear witness to the truth...and may therefore, for the instruction of its members and as a public testimony, have to condemn or approve acts of the State' even if the consequence is 'oppression and persecution on the part of the State'.³⁰ As such, unlike Catholics, Lutherans may assume political office and participate in the exercise of civil power.³¹ Fifthly, whilst Lutherans are subject to 'the laws of the land', 'Obedience to all forms of human government is never absolute but always limited and conditional. If it means disobedience to God, our allegiance to God must come first'.³² In turn, whilst there is a fundamental separation of church and State: both need to cooperate in matters of common concern;³³ church bodies may have personality under civil law;³⁴ central assemblies are to '[d]etermine and implement policy for this church's

³⁰ LCA: Theses on the Church, par. 16: 'The Church must act according to the instruction of her Lord and Head: "Render unto Caesar the things which are Caesar's, and unto God the things that are God's" (Matt. 22:21) and...the example of the apostles... "We must obey God rather than men" (Acts 5:29). By saying: 'My kingdom is not of this world' (John 18:36), the Lord has removed the Church from the sphere of earthly dominion, political activity, and the like, and assigned to it the spiritual sphere, with the Word as its only weapon'.

³¹ Augsburg Confession, Art. XVI: 'all government and all established rule and laws were instituted by God for the sake of good order, and that Christians may without sin occupy civil offices and engage in all manner of civil affairs'; also: 'the gospel does not overthrow civil authority, the state, and marriage but requires that all these be kept as true divine orders' (or 'orders of creation'), unless to do so would mean disobeying God (Acts 5:29); Art. XXVIII: ecclesiastical and civil powers are not to be confused but each has its own mandate.

³² LCA: Statement on the Two Kingdoms, 3: this cites Acts 5:29.

³³ Evangelical Lutheran Church in America (ELCA): Const., Ch. 4.03: the church must e.g. 'work with civil authorities in areas of mutual endeavour, maintaining institutional separation of church and state in a relation of functional interaction', and institute processes to 'foster mutuality and interdependence' to involve people 'in making decisions that affect them'.

³⁴ Evangelical Lutheran Church in Canada (ELCIC): Const., Art. I: Evangelical Lutheran Church in Canada Act; ELCA: Articles of Incorporation, Art. II: incorporation under 'the laws of the State of Minnesota'; see also Const., 5.01(c): incorporated congregations, synods, and churchwide bodies; LCA: Const., Art. I: the church is 'An association incorporated under the Associations Incorporation Acts 1956-1965 of the State of South Australia'; Evangelical Lutheran Church in Ireland (ELCIRE): Const., 1(1): the church is registered as a charity in accordance with the Taxes Consolidation Act 1997, s. 207.

relationship to governments’;³⁵ civil laws apply to the church;³⁶ ministers must obey State law unless there are grounds in conscience for civil disobedience to ‘unjust law’;³⁷ and recourse should not generally be made to secular courts: ‘It is the policy of this church not to resort to the civil courts...until all internal procedures and appeals have been exhausted, except for emergency situations involving a significant imminent risk of physical injury or severe loss or damage to property’.³⁸

The Methodist position on Church and State is similar to the Lutheran. A particularly full treatment of the subject is found in the United Methodist Church. First: ‘civil government derives its just powers from the sovereign God’, is a ‘servant of God and human beings’, and should ‘based on, and be responsible for, the recognition of human rights under God’.³⁹ Secondly: ‘Separation of church

³⁵ ELCA: Const., 11.20-21.

³⁶ ELCA: Const., 17.60-61: the Board of Pensions must ‘comply with federal and state law’; Model Const. for Congregations, 12.01: ‘Consistent with the laws of the state’, a congregation may adopt procedures to remove members of its Council; Lutheran Church Missouri Synod (LCMS): Bylaws (BL), 1.4.4: ‘Any issues relative to the applicability of the laws of the State of Missouri shall be resolved in accord with...the Constitution and Bylaws of the Synod’; Lutheran Church in Great Britain (LCGB): Rules and Regulations (RAR), Congregations, 3: ‘Each Congregation...shall structure and govern itself in such a way as to comply with legal requirements, for example those concerned with charity, employment and taxation law’.

³⁷ North American Lutheran Church (NALC): Standards for Pastoral Ministry (SFPM, 2001), B.7: ‘The society in which the Church ministers, has placed a high premium on the rule of law in regulating the rights and duties of individuals to promote the common good’; thus: ‘being convicted ...is grounds for discipline as conduct incompatible with...ministerial office but may not be grounds for discipline...where the violation of law was to protest or to test a perceived unjust law or as an expression of civil disobedience’; ELCA: Const., 7.43: call to ordained ministry ‘does not imply any employment relationship or contractual obligation in regard to employment on the part of the Synod Council or Church Council’.

³⁸ ELCA: Const., Ch. 20.16; 5.01: the composition and validity of the actions of each church assembly, council, and committee must not ‘be challenged in a court of law’; LCA: Const., Art. IV.1: in property disputes a congregation must ‘in keeping with I Corinthians 6 make every effort to avoid action in the civil courts’; 21: indemnification of church officers who are parties in proceedings in the secular courts; LCMS: BL, 1.10.1-1.10.3: ‘Christians are encouraged to seek to resolve all their disputes without resorting to secular courts’, e.g. in ‘theological, doctrinal, or ecclesiastical issues’.

³⁹ United Methodist Church in Northern Europe and Eurasia (UMCNEAE): Book of Discipline (BOD), par. 103, Confession of Faith, Art. XVI; par. 164: the State as servant of God; par. 103, Articles of Religion, Art. XXIII: Rulers of the USA: ‘The President, the Congress [etc.], as the delegates of the people, are the rulers of the [USA], according to the division of power made to them by the Constitution of the

and state means no organic union of the two, but it does permit interaction. The state should not use its authority to promote particular religious beliefs' nor 'attempt to control the church, nor should the church seek to dominate the state'; rather: 'The rightful and vital separation of church and state, which has served the cause of religious liberty, should not be misconstrued as the abolition of all religious expression from public life'.⁴⁰ Thirdly, the strength of a political system depends upon the participation of its citizens; as such: 'The church should continually exert a strong ethical influence upon the state, supporting policies and programs deemed to be just and opposing policies and programs that are unjust'.⁴¹ Fourthly, Christians must obey the law of the State: 'It is the duty of all Christians, and especially of all Christian ministers, to observe and obey the laws and commands of the governing or supreme authority of the country of which they are citizens or subjects or in which they reside, and...to encourage and enjoin obedience' to them.⁴² However, fifthly: 'governments, no less than individuals, are subject to the judgment of God'; the church recognises therefore 'the right of individuals to dissent when acting under the constraint of conscience and, after having exhausted all legal recourse, to resist or disobey laws that they deem to be unjust or that are discriminately enforced' – but this requires 'refraining from violence' and

[US] and by the constitutions of their respective states' – the 'states are a sovereign and independent nation, and ought not to be subject to any foreign jurisdiction'. See also Free Methodist Church in North America (FMCNA): BOD, par. 159: the State is a 'God-ordained institution'; par. 3331: 'God has established the state to reward right and punish evil (1 Peter 2.14)'; par. 3330: members must be 'responsible citizens'; par. 3331: the church recognizes 'the sovereign authority of government and

⁴⁰ [the] duty to obey the law (Matthew 22.21; Romans 13.1-7)'.
 UMCNEAE: BOD, par. 164. Compare: Methodist Church in Ireland (MCI): Regulations, Discipline and Government (RDG), 10.75-10.76: 'in harmony with the non-political character of the Methodist Church, which does not exist for the purposes of party, all party political questions shall be strictly excluded from the consideration of the [Circuit Advisory] Council'.

⁴¹ UMCNEAE: BOD, par. 164. See also FMCNA: BOD, par. 3331: church members may 'actively participate in civic life by involvement in efforts for the improvement of social, cultural and educational conditions' and should exercise 'the responsibility to vote'.

⁴² UMCNEAE: BOD, par. 103, Articles of Religion, XXVI: the Duty of Christians to Civil Authority CHECK; Confession of Faith Art. XVI: 'Christian citizens [are] to give moral strength and purpose to their respective governments through sober, righteous and godly living'.

‘being willing to accept the costs of disobedience’.⁴³ Some ministers make the declaration: ‘While respecting the law, I will act to change unjust laws’.⁴⁴

Methodist churches also enjoy the protection of their trusts by State law devoted specially to them.⁴⁵ In turn, Methodist laws recognise the general applicability of civil law to the church,⁴⁶ though not the status of ministers as employees under secular employment law,⁴⁷ and they assign functions to prescribed church bodies to

⁴³ UMCNEAE: BOD, par. 164: the norm, however, is that ‘Citizens have a duty to abide by laws duly adopted by orderly and just process of government’; ‘We offer our prayers for those in rightful authority who serve the public, and we support their efforts to afford justice and equal opportunity for all people. We assert the duty of churches to support those who suffer because of their stands of conscience represented by nonviolent beliefs or acts. We urge governments to ensure civil rights, as defined by the International Covenant on Civil and Political Rights, to persons in legal jeopardy because of those nonviolent acts’.

⁴⁴ Methodist Church of New Zealand (MCNZ): Laws and Regulations (LAR), Introductory Documents, III Ethical Standards for Ministry, Responsibilities to the Wider Community, 2.

⁴⁵ Methodist Church in Great Britain (MCGB): Constitutional Practice and Discipline (CPD), Bk. I, Methodist Church Act 1979 (esp. Sched. 2, Model Trusts), Methodist Church Act 1939, Methodist Church Funds Act 1960; MCI: Const., s. 7: the Methodist Church in Ireland Act (Northern Ireland) 1928 and the Methodist Church in Ireland Act (*Saorstát Éireann*) 1928: under these e.g. it is lawful for the Conference to amend the Constitution by special resolution; the Conference may make, vary and revoke such rules regulations as may be deemed expedient for the general conduct and control of its proceedings and the management by committees of its business; Conference can authorise vesting of property in statutory trustees; MCNZ: LAR, 3.13: trustees administer property under the Methodist Church Property Act 1887 (as amended).

⁴⁶ UMCNEAE: BOD, par. 258.3: the local church committee (as pastor-parish relations ‘shall keep themselves informed of personnel matters in relationship to the Church’s policy, professional standards, liability issues, and civil law’; see also BOD, par. 2532: trust funds of a local church must be invested ‘in conformity with laws of the country, state or like political unit in which the local church is located’. See also MCI: RDG, 4H/01-03: contracts on employment for lay employees. See also MCGB: CPD, SO 018: on the employment of lay persons, every church body must comply with the civil legislation in force and implement an equal opportunities policy. Church of the Nazarene (COTN): Manual., par. 113.4: ‘In all cases where the civil law requires a specific course of procedure in calling and conducting church meetings, that course should be strictly followed’; par. 142: ‘In all cases where the civil law requires a specific mode of election of church trustees, that mode shall be strictly followed’.

⁴⁷ UMCNEAE: BOD, par. 142: ‘United Methodist clergy appointed to local churches are not employees of the local church, the district, or the annual conference. It is recognized that for certain limited purposes such as taxation, benefits, and insurance, governments and other entities may classify clergy as employees. Such classifications are not to be construed as affecting or defining United Methodist polity, including the historic covenants that bind annual conferences, clergy, and congregations, episcopal appointive powers and procedures, or other principles set forth in

engage in dialogue with civil government.⁴⁸ Some Methodist churches permit ministers to participate in the work of political parties,⁴⁹ and to stand for local civil office, subject to e.g. consideration of the effects of this on ministry and discipline, consultation with the District Superintendent (who must consult e.g. the Circuit officials) and the approval of the District Advisory Committee.⁵⁰ Similar rules apply with regard to parliamentary elections.⁵¹ As a general principle, however: ‘In no circumstances shall church or manse property be used for any kind or form of political electioneering’.⁵² The Methodist Church in Great Britain has several rules on the subject: ‘Managing trustees may not sponsor meetings in

the Constitution or the Book of Discipline (see e.g. BOD, paras. 301; 328-329; 333-334; 338; 340). In addition, any such classifications should be accepted, if at all, only for limited purposes, as set forth above, and with the full recognition and acknowledgment that it is the responsibility of the clergy to be God’s servants. See also MCNZ: LAR, 2.1: ‘A Minister is not an employee of the Church. Ministers are persons in a special relationship with and appointed by the Conference of the Church, with powers, duties, rights and functions as set out in this Law Book, and entitled to such living allowance (a stipend) and other allowances as from time to time determined by the Conference’; that a minister is not an employee has been upheld by the Court of Appeal in *Mabon v Methodist Church of New Zealand* (July 1998).

48 MCI: RDG, 8.10: ‘In public ceremonies in which the Church should be represented, or in connection with appointments of a public character, or in the presentation of addresses, or in regard to matters in which the legal rights of the Methodist people are involved, either in Northern Ireland, or in the Republic of Ireland, the General Committee shall act on behalf of the Church. The Committee may delegate to those of its members living in certain areas full powers in relation to such matters’.

49 MCI: RDG, 4D.19: ‘In view of the deep divisions in Irish politics it believes that ministers can most effectively bear their witness by the wise and enlightened application of Biblical insights to political issues and by the encouragement and enabling of Christian laypersons to enter party politics’.

50 MCI: RDG, 4D.20-24.

51 MCI: RDG, 4D.25: this deals with the election of a minister to the Parliament of the UK, Dail Eireann, Northern Ireland Assembly or European Parliament; see also MCNZ: LAR, s. 2.10: ‘No minister, or student for ministry, shall consent to nomination for any Parliamentary, Civic, or Public Office, or for any employment for which payment is received, or which will involve such measure of service as to interfere with ministerial duties except with the consent’ of the Parish Meeting, Board and the President and President’s Committee of Advice; if either or both of these authorities withhold consent and the candidate decides to proceed, the President may: (a) require the minister or student for ministry to tender his/her resignation as a minister of the Church; and/or (b) consult as to the action that should be taken to ensure the continuity of ministry within the Parish or Board, and the welfare of the minister and family; and/or (c) refer the matter to the *Hui Poari* or *Tauivi* Strategy and Stationing; and/or (d) refer the matter for adjudication under the Church’s Disciplinary Procedures.

52 MCI: RDG, 4D.20-24.

support of political parties, nor may such meetings be held in the name of any other Methodist body’; however, they may permit occasional use of Methodist property for political meetings by non-Methodist bodies and sponsor meetings to promote discussion of public issues in the context of Christian theology and ethics, provided this does not have a ‘detrimental effect on the peace and unity of the Church and its witness’. Moreover: ‘It is not permitted to submit resolutions, or take votes, on political matters during any Methodist meeting for public religious worship, or while the congregation is assembling or dispersing’; nor ‘to invite signatures for petitions on political matters during any Methodist meeting for public religious worship, or while the congregation is assembling or dispersing, except with the consent of the Church Council or of some person or persons to whom the council has delegated authority for that purpose’.⁵³ However, Methodist laws are generally more permissive when it comes to proceedings in the courts of the State; for example: ‘No lawsuit relating to churches, schools or other Trust property shall be commenced without the consent of the General Committee through the Property Board, except by direction of the Conference’; without such consent or direction, ‘the parties proceeding shall be held responsible for all expenses incurred by such lawsuit’.⁵⁴ Some churches make express provision for the authority with capacity in legal proceedings.⁵⁵

The Lutheran and Methodist approaches are broadly replicated in the Presbyterian tradition. The classical Presbyterian position is stated in the Book of Church Order of the Presbyterian Church in America: ‘The power of the Church is exclusively spiritual; that of

⁵³ MCGB: CPD, SO 921: before agreeing to such use, the managing trustees shall consider, in the light of any advice which the Connexional Team may issue from time to time, the extent, if any, to which the granting of such permission would have a detrimental effect on the peace and unity of the Church and its witness.

⁵⁴ MCI: RDG, 29.20.

⁵⁵ MCNZ: LAR, 9.12: ‘when the Church is a party to a dispute or litigation under civil or criminal law the General Secretary as the Church’s Authorised Representative has, in consultation with the Chairperson of the Board of Administration, the responsibility for: (a) engaging suitably qualified counsel to act on behalf of the church; (b) taking such steps to obtain legal opinion; (c) carrying out those tasks and responsibilities set out in the Code of Disciplinary Procedures; (d) carrying out such other tasks of a legal nature as are required by the LAR; 12.4: In the matter of property transactions a Parish, Board, Committee or other entity requiring legal advice or action, shall employ such professionally qualified person(s) as they may themselves choose’.

the State includes the exercise of force. The constitution of the Church derives from divine revelation; [that] of the State must be determined by human reason and the course of providential events. The Church has no right to construct or modify a government for the State, and the State has no right to frame a creed or polity for the Church'.⁵⁶ Therefore: 'No religious constitution should be supported by the civil power further than may be necessary for the protection and security equal and common to all others'.⁵⁷ However, the church must comply with the law of the State (particularly in matters of property and finance);⁵⁸ but: 'although civil rulers are bound to render obedience to Christ in their own province, yet they ought not to attempt in any way to constrain anyone's religious beliefs, or invade the rights of conscience'.⁵⁹ Some Presbyterian churches have State law devoted exclusively to them.⁶⁰ Presbyterian laws also sometimes assign to the Moderator the function of representing the church in public affairs.⁶¹

Similar provisions are found Reformed, United, Congregational and Baptist regulatory instruments. For the Reformed churches, 'Christ, the only ruler and head of the Church, has therein appointed a government distinct from civil government and in things spir-

⁵⁶ Presbyterian Church in America (PCA): Book of Church Order (BCO) 3.4: 'They are as planets moving in concentric orbits: "Render unto Caesar the things that are Caesar's and unto God the things that are God's"' (Matt. 22.21)'; 11.1: church assemblies are 'altogether distinct from the civil magistracy, and have no jurisdiction in political or civil affairs'; Presbyterian Church in Ireland (PCI): Code I.IV.15: Christ 'has appointed [in the church] a government distinct from civil authority'; 'The Kingdom of Christ is not of this world, its laws are founded on His authority' and are 'directed to the conscience'; 'their sanctions are spiritual'.

⁵⁷ PCA: BCO, Preface I.1-3; Preamble, II.1; II.8: ecclesiastical discipline is 'not attended with any civil effects'.

⁵⁸ PCA: BCO 59.1: 'It is proper that every commonwealth, for the good of society, make laws to regulate marriage, which all citizens are bound to obey'; Presbyterian Church of Wales (PCW): Const. for a Local Church, 9.17: the trustees may let or dispose of property 'in accordance with the restrictions imposed by the Charities Act 1993' (as amended).

⁵⁹ PCI: Code, I.III.13; this cites the Act of the Church of Scotland 1647.

⁶⁰ PCI: Irish Presbyterian Church Act 1871 and Union Theological College of the Presbyterian Church in Ireland Act 1978 (which prescribes the college constitution); Presbyterian Church of Aotearoa New Zealand (PCANZ): Presbyterian Church Property Act 1885.

⁶¹ PCANZ: BO 14.17(4): the moderator may also make 'statements' on behalf of the church; see also PCA: BCO 59.1: 'It is proper that every commonwealth, for the good of society, make laws to regulate marriage, which all citizens are bound to obey'.

itual not subordinate thereto, and that civil authorities, being always subject to the rule of God, ought to respect the rights of conscience and of religious belief and to serve God's will of justice and peace for all humankind'.⁶² The church should therefore exercise no authority over the State nor does the State over the church.⁶³ Some Reformed churches have State law devoted exclusively to them.⁶⁴ Though they assert that their ministers are not employees under civil law,⁶⁵ generally churches must comply with State law.⁶⁶ United and Congregational Churches also distinguish themselves from the State,⁶⁷ but seek 'to uphold the just authority of the State'.⁶⁸ United churches may be legal entities under civil law,⁶⁹ but their members should not approach the courts of the 'civil power' in order to resolve their disputes.⁷⁰

⁶² United Reformed Church (Great Britain) (URC): Man, Basis of Union (BU) A, Schedule D, Version I, 8.

⁶³ Reformed Church in America (RCA): BCO, Preamble: 'The church shall not exercise authority over the state, nor should the state usurp authority over the church' – Christ is 'the only Head of the Church'.

⁶⁴ URC: United Reformed Church Acts 1972, 1981 and 2000: these set out *inter alia* the trusts for places of worship and ministers' residences. See also RCA: the General Synod of the Reformed Protestant Dutch Church was incorporated 'by an Act of the Legislature of the State of New York...1819', and an Act of 1920 changed the name to the General Synod of the Reformed Church in America.

⁶⁵ URC: Man., M.

⁶⁶ RCA: BCO, Ch. I, Pt. II, Art. 14.5: pastors must perform marriages 'subject to state and provincial law'.

⁶⁷ United Congregational Church of Southern Africa (UCCSA): Const., Preamble: the church 'calls all people, society and states to repent and to accept and obey Jesus Christ as Lord and Liberator'.

⁶⁸ United Church of Canada (UCC): Man., BU 2.20. See also United Church of North India: Const., Appendix XIV: 'While the Church is autonomous, and has its own marriage laws, yet is it recognised that these must be carried out with due regard to the laws of the State, so that Christian marriages, solemnized under the laws of the Church may also be recognized by the State'.

⁶⁹ UCCSA: Const., 2.2: 'The legal status of the Church is that of a corporate body'; American Baptist Churches in the USA (ABC-USA): BL Art. XIII.6: 'The General Board shall determine appropriate Denominations Functions for each corporation managed by a national board, in the light of such corporation's charter or act of incorporation'.

⁷⁰ United Free Church of Scotland (UFCS): Const., V.II.8: 'Application by office-bearers or members to the civil power or Courts for reduction, restraint, review, alteration, or control of the procedure in the congregations or Courts of the Church, or of their decisions, is excluded. Parties in causes before the Church Courts, or affected by their decisions, are accordingly precluded from recourse to the civil Courts in regard to these'. Compare United Church of Christ in the Philippines (UCCP): Const., Art. VIII.5: 'All questions of state policies and those involving the public justice of the State are beyond the jurisdiction of the [National] Commission

Baptist instruments also propose the separation of church and state. For example, the Baptist Union of Southern Africa affirms ‘the principle of separation of church and state, in that, in the providence of God, the two differ in their respective natures and functions’. Thus: ‘The Church is not to be identified with the State nor is it, in its faith or practice, to be directed or controlled by the State. The State is responsible for administering justice, ensuring an orderly community, and promoting the welfare of its citizens. The Church is responsible for preaching the Gospel and for demonstrating and making known God’s will and care for all mankind’.⁷¹ Similarly, for the Canadian National Baptist Convention: ‘Church and state should be separate’; moreover: ‘The state owes every church protection and full freedom in the pursuit of its spiritual ends. In providing for such freedom no ecclesiastical group or denomination should be favoured by the state more than others. Civil government being ordained of God, it is the duty of Christians to render loyal obedience thereto in all things not contrary to the revealed will of God. The church should not resort to the civil power to carry out its work’.⁷² A Baptist Union is sometimes the subject of State law exclusively devoted to it,⁷³ but some Baptist churches refuse submission to State laws as to matters properly pertaining to the autonomy of the church.⁷⁴ Sometimes instruments also forbid re-

[on Discipline and Conflict Resolution]’; BL Art. VI.4: ‘No member of the Church who is party to any controversy with another member or with the Church may institute any suit or proceeding or apply for remedy before any civil court...without...exhausting all intrachurch remedies’.

71 Baptist Union of Southern Africa (BUSA): BL 4.2.7. See also e.g. North American Baptist Conference (NABC): Statement of Beliefs, 7: ‘Church and state exist by the will of God. Each has distinctive concerns and responsibilities, free from control by the other (Matthew 22.21)’.

72 Canadian National Baptist Convention (CNBC): Const., 3, Statement of Faith, Art. XVII: ‘The state has no right to impose taxes for the support of any form of religion. A free church in a free state is the Christian ideal, and this implies the right of free and unhindered access to God on the part of all men, and the right to form and propagate opinions in the sphere of religion without interference by the civil power’.

73 Baptist Union of Great Britain (BUGB): Baptist and Congregational Trusts Act 1961. Compare e.g. Jamaica Baptist Union (JBU): Const., Art. VII.6: the Union acts through e.g. a Statutory Corporation established by Act 16 of 1969.

74 Bethel Baptist Church, Choctaw, Oklahoma, USA: Const., Art. XI: ‘While Bethel Baptist Church recognizes the authority of the state over members of the church in those areas in which God has specifically granted the state authority in His Word (the Bible), the church maintains it is not subject to the state or any of its officers in its doctrines, offices, government, discipline, property, and practices. The state has

course to the civil courts.⁷⁵ They also provide for civil disobedience: a minister should undertake to be a ‘good citizen’ and ‘to obey the laws of [the] government unless they require disobedience to the law of God’ (New Zealand);⁷⁶ ‘God alone is Lord of the conscience, and He has left it free from the doctrines and commandments of men, which are contrary to His Word or not contained in it’ (Canada);⁷⁷ again: ‘Christians should pray for civil leaders, and obey and support [the] government in matters not contrary to Scripture’ (North America).⁷⁸

In sum, according to the principles of Christian law which emerge from the similarities between the regulatory instruments of churches: the State is instituted by God; its function is to promote and protect the temporal and common good of society; the functions of the State are fundamentally different from those of the church; there should be a basic separation between church and State; church and State should cooperate in matters of common concern; the faithful may participate in politics to the extent per-

no business in the affairs of the church other than what pertains to property, buildings, and codes affecting the same. Bethel Baptist Church asserts its rights as guaranteed by the First Amendment to the Constitution of the United States of America. Therefore, Bethel Baptist Church refuses to incorporate as a corporation under the laws of the State of Oklahoma, since such an incorporation subjects the Church of Jesus Christ to the laws of the state’.

⁷⁵ NBC-USA: Const., Art. IV.8: ‘Under no circumstances shall a member [church] or group of members have the right to litigate, adjudicate, or arbitrate disputes and questions regarding membership rights, privileges, and procedures of this Body in the secular courts or any other forum other than that prescribed by this constitution’; Nigerian Baptist Convention (NBC): Principles and Practices, Court Cases: ‘Crises within the Baptist family should be resolved in accordance with the Convention Constitution...All cases in Court instituted by individuals, churches, associations or conference or group of persons against the Convention or any of its components should be withdrawn from Court’, otherwise exclusion follows until ‘the conduct is purged’; BUSA: BL 2(b): ‘It shall be a condition for ministry that every Minister...shall accept without resort to a Court of Law the decision of the Executive and the Assembly’.

⁷⁶ Baptist union of New Zealand (BUNZ): Ethical Principle and Guidelines for Pastors (EPGP), 6: ‘I will be a good citizen’; 6.1: ‘I will endeavour to obey the laws of my government unless they require disobedience to the law of God’; NABC: Code of Ministerial Ethics: ‘I will obey the laws of my government as long as they do not conflict with the laws of God and will practice Christian citizenship without engaging in partisan or political activities that would discredit the integrity of the ministry’.

⁷⁷ CNBC: Const., 3, Statement of Faith, XVII.

⁷⁸ NABC: Statement of Belief, 7: this cites 1 Timothy 2.1-4; Romans 13.1-7; 1 Peter 13-16.

mitted by church law; the church should comply with State law but disobedience by the faithful to unjust laws is permitted; and the faithful should not resort to State courts unless all ecclesiastical process is exhausted.

As we have seen, churches across the Christian traditions studied here accept that Church and State are distinct in their own spheres and that they should be institutionally separate. Equally, however, they all agree that there should be cooperation between Church and State in matters of common concern. Cooperation is no better illustrated than by State laws which deal with the position under civil law of the churches themselves. There is ample evidence from State laws to indicate the preparedness of churches for cooperation on this matter. However, the degree of cooperation may vary as between the Christian traditions. What follows examines the position of churches under the national laws of States in Europe. In broad terms, at least at the level of constitutional law, there are three European approaches to this subject: the state-church model (such as Denmark and Malta); the separation model (such as France and Slovenia); and the cooperation model (such as Italy and Spain).⁷⁹ All of the traditions studied here participate directly or indirectly in one or other of these models.

II. HUMAN RIGHTS AND RELIGIOUS FREEDOM

The principle that freedom is an essential characteristic of faith is a key tenet of Christianity. The principle is one claimed by Christians as a fundamental of social existence. It has also been recognised by the World Council of Churches: ‘God’s redemptive dealing with men is not coercive. Accordingly, human attempts by a legal enactment or by pressure of social custom to coerce or eliminate faith are violations of the fundamental ways of God with men. The freedom which God has given...implies free response to God’s love’.⁸⁰ This section addresses the treatment of human rights in general and

⁷⁹ See generally N. Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford, 2011).

⁸⁰ ‘Statement on Religious Liberty’, in the New Delhi Report: The Third Assembly of the World Council of Churches 1961 (New York, 1962) 159; see N. Doe and AS. Jeremy, ‘Justifications for religious autonomy’, in: R. O’Dair and A. Lewis (eds.), *Law and Religion, Current Legal Issues Vol. 4* (Oxford, 2001) 421.

religious freedom in particular in the teaching and juridical instruments of churches across the Christian traditions studied here. To varying degrees, these instruments deal with the nature of human rights, the corporate duty of a church to promote them in civil society, the establishment of institutions to work in the human rights field, and the obligation of the faithful as individuals to respect human rights.

The Catholic Church teaches that the role of the State is ‘to defend and protect the common good of civil society’ which consists of ‘respect for and promotion of the fundamental rights of the person, prosperity, or the development of the spiritual and temporal goods of society, and the peace and security of the community and its members’.⁸¹ Moreover, the Church claims for itself a right ‘to true freedom to preach the faith, to proclaim its teaching about society, to carry out its task among people without hindrance, and to pass moral judgments even in matter relating to politics, whenever the fundamental rights of man or the salvation of souls requires it’; and its canon law also recognises the inherent right of the church to own and administer property ‘independently of any secular power’.⁸² Indeed, the rights and duties of the faithful, as enumerated in the Code of Canon Law, derive from the fundamental dignity of the individual as a human person and are inalienable and inviolable human rights.⁸³ The religious freedom of the Catholic Church itself is sometimes explicitly recognised and protected in States by, variously, a concordat, constitution, sub-constitutional law, and decisions of State courts. For example, in agreements between the Holy See and Spain, Spain recognises that ‘the freedom of the Church is an essential principle of the relationship between the church and public authority’; moreover: ‘The Spanish state recognizes the right of the Catholic Church to carry out its apostolic mission and guarantees the church free and public exercise of those activities inherent to it, especially worship, jurisdiction and teaching’.⁸⁴ However, the Catholic Church has been criti-

81 CCC, pars. 1925-1927; GS 26, 84.

82 *Gaudium et Spes* (GS) 76; CIC, c. 1254.1: property; see also cc. 1311, 1401 on the right to discipline and conduct trials.

83 CIC, c. 204: dignity and equality.

84 Agreement 19 Aug. 1979, Preamble; Agreement on Legal Affairs 3 Jan. 1979, Art. I.

cised in recent years in several cases, for instance on the applicability of human rights to the processes of its own tribunals (and fair trial standards),⁸⁵ and the dismissal of an organist (separated from his wife) on grounds of adultery and bigamy (in relation to the right to family and private life).⁸⁶

Whereas the juridical instruments of some Orthodox churches expressly assert their right to freedom of religion or institutional autonomy,⁸⁷ those of global Anglicanism generally do not. However, there is a large body of Anglican teaching and quasi-legislation on the promotion of human rights in the Anglican encounter with the wider world; much of it is found in resolutions of the Lambeth Conference.⁸⁸ Five basic themes emerge. First, the Conference recognizes the existence of human rights and regards them as of ‘capital and fundamental importance’ not least in the context of the effects of their abuse and attacks upon human dignity.⁸⁹ Moreover, it calls upon ‘all the Churches to press upon governments and communities their duty to promote fundamental human rights and freedoms among all their peoples.’⁹⁰ Secondly, for the Conference, human rights involve freedom to enable humankind to develop its relationship with God, to ensure that ‘the divine dignity of every human being is respected and...justice is pursued’.⁹¹ The Conference commonly attacks breaches of human right on the basis that such breaches are contrary to ‘the teaching of Christ’.⁹² Thirdly, it classifies human rights in terms of political rights, which include ‘a

85 *Pellegrini v Italy*, 20 July 2001, Appl. No. 30882/96: a breach of ECHR Art. 6 occurred when an Italian court did not ensure fair process in the Roman Rota before allowing enforcement of its judgment in a marriage case.

86 *Schüth v Germany*, App. No. 1620/03 (23 Sept. 2010): his contract with the church ‘could not be interpreted as an unequivocal undertaking to live a life of abstinence in the event of separation or divorce’.

87 ROMOC: Statutes, Art. 4.1: the church is ‘autonomous in regard to the State and other institutions’; ROC: Diocese of Sourozh: Statutes, II.10: ‘In order to promote the right to freedom of religion and to advance the Orthodox Christian faith, the Diocese carries out’ listed activities.

88 See generally N. Doe, ‘Canonical approaches to human rights in Anglican churches’, in: M. Hill (ed.), *Religious Liberty and Human Rights* (University of Wales Press, Cardiff, 2002) 185.

89 See e.g. Lambeth Conference (LC) 1998, res. 1.1: the Conference affirmed and adopted the UN Declaration of Human Rights.

90 LC 1968, res. 16.

91 *The Official Report of the Lambeth Conference 1998* (Harrisburg, PA, Morehouse Publishing, 1999) 77.

92 LC 1978, Res. 3.

fair and just share' for people in government, and economic rights, in so far as 'human rights must include economic fairness and equity, and enable local economies to gain greater control over their own affairs'.⁹³ Thirdly, fundamental to the Anglican approach is the idea that all humans are created in the image of God.⁹⁴ Consequently, "[t]he Christian must...judge every social system by its effect on human personality".⁹⁵ Fourthly, member churches are 'to speak out' against breaches of human rights, 'support all who are working for [the] implementation of human rights instruments',⁹⁶ and 'urge compliance with the United Nations Declaration of Human Rights by the nations in which our various member Churches are located, and [by] all others over whom we may exercise any influence'.⁹⁷ Individual Anglicans also have a responsibility to promote and protect human rights.⁹⁸

The juridical instruments of churches of the Anglican Communion also promote human rights in civil society through the establishment and work of institutions of the church such as in the Philippines where the church has a National Commission on Social Justice and Human Rights or the West Indies where the Provincial Synod has a Standing Commission on Social Justice and Human Rights.⁹⁹ The Lambeth Conference call to the individual members of Anglican churches to promote human rights finds no direct echo in the actual laws of churches – for this reason the constitution of the church in South India is exceptional; it requires 'members...[to] contribute to the total ministry of the Church...by responsible participation in secular organizations, legislative bodies...and in other areas of public life', so that 'the decisions which are made in these areas may be controlled by the mind of Christ and the structures of society transformed according to His will'.¹⁰⁰ More commonly,

93 LC 1920, Res. 75; 1920, Res. 78; 1958, Res. 110; *Called to Full Humanity*, LC

94 1998, *Official Report*, 79.

95 LC 1958, Res. 110; and LC 1968, Res. 16.

96 LC 1948, Res. 5.

97 LC 1988, Res. 33.

98 LC 1998, Res. 1.1(a).

99 LC 1920, Res. 77; however, "the Church is not to be identified with any particular political or social system": LC 1958, Res. 104.

E.g. Philippines: *Social Concerns Resolutions and Statements of the Philippine Episcopal Church* (1988); West Indies, Can. 33.1.C.

100 E.g. South India: Const., VI.2.

catechetical instruments encourage individuals to contribute to the promotion of human rights in their work for ‘justice and reconciliation’ in civil society.¹⁰¹ The principles of canon law common to Anglican churches also state that: ‘All persons are equal in dignity before God’; and that: ‘All persons have inherent rights and duties inseparable from their dignity as human beings created in the image and likeness of God and called to salvation through Jesus Christ’.¹⁰²

Promotion of human rights and religious liberty is also pivotal in the doctrinal and juridical instruments of Protestants. At international level, one function of the Lutheran World Federation is to further ‘worldwide among the churches diaconic action, alleviation of human need, promotion of peace and human rights, social and economic justice, care for God’s creation and sharing of resources’.¹⁰³ At national level, typically: ‘This Church affirms the God-given human dignity of all people, rejoicing in the diversity of God’s creation’ and commits itself to ‘struggle for justice, peace and the integrity of creation’.¹⁰⁴ The Lutheran Church in Australia has a particularly full treatment of the subject: ‘The concept of human rights is based on two convictions: that certain actions against other human beings are wrong no matter what; and that in all circumstances all people are entitled to respect and proper treatment as human beings’. The preservation of ordered human society belongs to the earthly kingdom in which God rules the world through the law: governments, as ‘ministers of God’, have the duty to preserve the life, liberties, property, prosperity, and honour of each citizen. Christian citizens have the duty to urge their governments to honour human rights, and to protest where they are either ignored or violated; and the foundation for Christian involvement in human rights are the fundamental dignity of all human beings as creatures of God and the divine command to love neighbour. Consequently, in accordance with the following ‘guidelines’, Christians should *inter alia*: (1) become informed about situations, at home and abroad, where people’s human rights are

¹⁰¹ E.g. Southern Africa: Prayer Book 1989, 434.

¹⁰² PCLCCAC, Principle 26.1 and 2.

¹⁰³ LWF: Const., Art. III.

¹⁰⁴ LCGB: RAR, Statement of Faith, 9.

being threatened or human rights abuses are taking place; (2) develop an attitude of concern and compassion toward victims; (3) increase community awareness of the need to safeguard human dignity; (4) intercede for those who suffer, especially those who cannot pray for themselves; (5) investigate particular situations, study human-rights questions, contact politicians and embassies, organise petitions, distribute information, and support or join human-rights organisations.¹⁰⁵

The United Methodist Church has a similarly robust approach to human rights. First, as ‘all persons as equally valuable in the sight of God’, governments should respect ‘human rights under God’.¹⁰⁶ Civil government is ‘a principal vehicle for the ordering of society’, and it is responsible for ‘the protection of the rights of the people’ to e.g. free and fair elections, free speech and assembly, redress of grievances without fear of reprisal, privacy, adequate food, clothing, shelter, education, and health care’.¹⁰⁷ Secondly, recognising the ‘inherent dignity of all persons’, the church should: ‘transform social structures’;¹⁰⁸ support ‘the basic rights of all persons to equal access to housing, education, communication, employment, medical care, legal redress for grievances, and physical protection’; combat acts of hate or violence against groups or persons based on race, ethnicity, gender, sexual orientation, religious affiliation, or economic status’; and work for ‘the recognition, protection, and implementation of the principles of the Universal Declaration of Human Rights so that communities and individuals may claim and enjoy their universal, indivisible, and inalienable

¹⁰⁵ LCA: Human Rights, adopted by the CTIR, April 1994, edited September 2001, Introduction: this sets out the history of international human rights instruments; this cites Rom. 13:1-7 and 1 Peter 2:13-14; Christian Perspectives: ‘Although the human rights movement has secular origins, “justice” and “right” are concepts which have a biblical basis’; Practical Considerations: these contain the ‘guidelines’.

¹⁰⁶ UMCNEAE: BOD, par. 103, Confession of Faith, Art. XVI; par. 161: the equality of humans and genders.

¹⁰⁷ UMCNEAE: BOD, par. 164: e.g. detention and imprisonment ‘for the harassment and elimination of political opponents or other dissidents violates fundamental human rights’, as are ‘torture, and other cruel, inhumane, and degrading treatment or punishment of persons by governments for any purpose violates Christian teaching and must be condemned and/or opposed by Christians and churches wherever and whenever it occurs’.

¹⁰⁸ UMCNEAE: BOD, par. 121.

rights'.¹⁰⁹ Thirdly, the church should support 'policies and practices that ensure the right of every religious group to exercise its faith free from legal, political, or economic restrictions' and condemn 'all overt and covert forms of religious intolerance'. The church asserts 'the right of all religions and their adherents to freedom from legal, economic, and social discrimination',¹¹⁰ and should 'defend religious freedom' and other freedoms;¹¹¹ indeed: 'the rightful and vital separation of church and state, which has served the cause of religious liberty, should not be misconstrued as the abolition of all religious expression from public life'.¹¹² These principles are echoed in other Methodist laws which rest human rights on the equality of all,¹¹³ promote human rights in society,¹¹⁴ forbid discrimination,¹¹⁵ and advocate freedom of belief and conscience.¹¹⁶

¹⁰⁹ UMCNEAE: BOD, par. 162: it also rejects 'inequalities and discriminatory practices [in] Church and society'.

¹¹⁰ UMCNEAE: BOD, par. 162.

¹¹¹ UMCNEAE: BOD, par. 121.

¹¹² UMCNEAE: BOD, par. 164. Compare: MCI: RDG, 10.75-10.76: 'in harmony with the non-political character of the Methodist Church, which does not exist for the purposes of party, all party political questions shall be strictly excluded from the consideration of the [Circuit Advisory] Council'.

¹¹³ FMCNA: BOD, par. 111: 'God created human beings in His own image, innocent, morally free and responsible to choose between good and evil, right and wrong' but 'humans are corrupted in their very nature so that from birth they are inclined to sin' though by 'God's grace and help people are enabled to do good works with a free will'; par. 112: under the law of God humans 'should strive to secure to everyone respect for their person, their rights and their greatest happiness in the possession and exercise of the right within the moral law'.

¹¹⁴ MCNZ: LAR, Introductory Documents, V: Some Social Principles of the Methodist Church, which affirms the 'right to freedom of conscience, constitutional liberty, secrecy of the ballot and access to the Courts'; Christians should influence 'the politics of human rights'; COTN: Man., par. 903.7: 'political and religious freedom rest upon biblical concepts of the dignity of humankind as God's creation and the sanctity of one's own individual conscience'; members should actively support these and be vigilant against threats to them.

¹¹⁵ MCNZ: LAR, Introductory Documents, II, Pastoral Resolutions: the pledge to 'breaking down all racial, political and religious barriers, and of confronting all people' with fullness of life in Christ; III, Ethical Standards for Ministry, 3: human dignity and a prohibition against discrimination of grounds of 'race, colour, gender, sexual orientation, socio-economic group, disability, age, religious, theological or political belief'; COTN: Man., Appendix, par. 903.2: the church promotes equality and prohibits discrimination.

¹¹⁶ COTN: Man., par. 903.8: the church does not 'bind the conscience of its members relative to participation in military service...although...the individual Christian as a citizen is bound to give service...in all ways that are compatible with the Christian faith and...way of life'; the church claims for 'conscientious objectors within its

Like the Lutheran World Federation, the World Communion of Reformed Churches is to work for justice and promote ‘the full and just partnership of men and women in church and society’, ‘diacanal service in church and society’ and it is to engage in ‘promoting and defending religious, civil, and all other human rights wherever threatened throughout the world’.¹¹⁷ Similar functions are assumed by individual churches at the national level. For instance, in relation to religious freedom, the United Reformed Church in Great Britain declares that ‘civil authorities, being always subject to the rule of God, ought to respect the rights of conscience and of religious belief and to serve God’s will of justice and peace for all humankind’.¹¹⁸ Similarly, Presbyterian churches hold that (typically): ‘although civil rulers are bound to render obedience to Christ in their own province, yet they ought not to attempt in any way to constrain anyone’s religious beliefs, or invade the rights of conscience’.¹¹⁹ Thus: ‘the rights of private judgment in all matters that respect religion are universal and inalienable’.¹²⁰ In like fashion, the United Church of Christ in the Philippines ‘affirms and upholds the inviolability of the rights of persons as reflected in the Universal Declaration of Human Rights and other agreements on human rights, the international covenants on economic, social and cultural rights and on civil and political rights’.¹²¹ As the World Baptist Alliance is to defend human rights at global level,¹²² so too at national level Baptist Conventions and Unions recognise fundamental

membership the same exemptions and considerations regarding military service as are accorded members of recognized non-combatant religious organizations’; FMCNA: BOD, par. 3331: ‘It is our firm conviction that the consciences of our members be respected (Acts 4.19-20; 5.29). Therefore, we claim exemption from all military service for those who register officially with the church as conscientious objectors to war’.

¹¹⁷ WCRC: Const., Art. V; see also Art. IV: its values include ‘the dignity of every person’.

¹¹⁸ URC: Man, BU A, Schedule D, Version I, 8; see also Man., G: the Equal Opportunities Committee of the General Assembly; Man., I: the Equal Opportunities Policy affirms the commitment of the URC to ‘the same openness to all people in today’s world’ and forbids discrimination in the church.

¹¹⁹ PCI: Code, I.III.13; this cites the Act of the Church of Scotland 1647.

¹²⁰ PCA: BCO, Preamble II.1.

¹²¹ UCCP: Const., Art. II.11.

¹²² WBA: Const., Art. II. See also R.V. Pierard (ed.), *Baptists Together in Christ 1905-2005: A Hundred Year History of the Baptist World Alliance* (BWA, Falls Church, Virginia, I=USA, 2005) 281: 18th Congress, Melbourne: ‘human rights are God-given and that violations of human rights are violations of the laws of God’.

human rights and are ‘to maintain religious liberty’.¹²³ For instance, for the Baptist Union of Southern Africa: ‘The principle of religious liberty, namely, that no individual should be coerced either by the State or by any secular, ecclesiastical or religious group in matters of faith. The right of private conscience is to be respected. For each believer this means the right to interpret the Scriptures responsibly and to act in the light of his conscience’.¹²⁴ Again, for the North American Baptist Conference religious freedom is an ‘inalienable right’; and: ‘The state should guarantee religious liberty to all persons and groups regardless of their religious preferences, consistent with the common good’;¹²⁵ it has ‘no right to impose penalties for religious opinions of any kind’.¹²⁶

From the similarities between the normative instruments of churches across the Christian churches studied here, the principles of Christian law provide that all humans are created in the image of God and as such share a fundamental equality of dignity and fundamental rights; the State should recognise, respect and protect these basic human rights; the church should promote and defend human rights in society, and, like the church, the State and society should not discriminate against individuals on grounds of for example, race, gender, and religion; the State should also recognise, promote and protect the religious freedom of churches corporately and of the faithful individually, as well as freedom of conscience.

¹²³ BUSA: Const., Art. 5.3; NBC: PAP, Ethical Behaviour of Baptists in Public Life: ‘it is the inalienable right of every citizen to take part in the government of the country through...his civic rights’; church members may enter ‘fulltime politics’ but are ‘under divine obligation to influence [their] party to embrace principles of morality and righteousness’; if a political party acts ‘in a way displeasing to God and contrary to Christian teaching’ the member should dissociate himself ‘until the policies and practices are made right’.

¹²⁴ BUSA: BL 4.2.7.

¹²⁵ NABC: Statement of Beliefs, 7: ‘religious liberty, rooted in Scripture, is the inalienable right of all individuals to freedom of conscience with ultimate accountability to God (Genesis 1.27; John 8.32; II Corinthians 3.37; Romans 8.21; Acts 5.29)’; Riverside Baptist Church, Baltimore, USA: Const., Preamble: the constitution is designed in part for ‘preserving the liberties inherent in each individual member of the church’.

¹²⁶ CNBC: Const., 3, Statement of Faith, Art. XVII.

III. THE CHURCH AND SOCIAL RESPONSIBILITY

In view of the provisions outlined above on the obligation of churches and the faithful to be active in the political arena for the promotion and defence of the teaching of Christ and of human rights, it is not surprising that the juridical instruments of churches place great emphasis on the pursuit of philanthropic activities in society. Christians use laws primarily to require or permit the establishment of institutions to advance social work and sometimes they oblige or exhort social work on the part of the faithful individually. The convergence of rules on this subject indicates that Christians, regardless of denomination, are engaged in common action for the advancement of charitable and associated forms of social activity. Needless to say, this section does not describe the actual activities of Christians in the social field. The purpose of the section is merely to elucidate the laws which stimulate these activities.

The Catholic Church teaches that ‘the human person needs to live in society’. This is not ‘an extraneous addition but a requirement of his nature’ in which persons develop their potential and thus respond to their vocation and end: God himself. A society is ‘a group of persons bound together organically by a principle of unity that goes beyond each one of them’ and ‘[e]ach community is defined by its purpose and consequently obeys specific rules’; but “the human person...is and ought to be the principle, the subject and the end of every social organization”.¹²⁷ Moreover: ‘[t]o promote the participation of the greatest number in the life of a society, the creation of voluntary associations and institutions must be encouraged “on both national and international levels, which relate to economic and social goals, to cultural and recreational activities, to sport, to various professions, and to political affairs”’.¹²⁸ In society, persons must engage in charity, ‘the greatest social commandment’, and promote the common good; and social justice requires

¹²⁷ CCC, pars. 1878-1881; GS 25.1.

¹²⁸ CCC, par. 1881; 1883: subsidiarity means ‘a community of a higher order should not interfere in the internal life of a community of a lower order’ but ‘support it’ and ‘co-ordinate its activity with [those] of the rest of society’ for the common good: *Centesimus annus*, Pope John Paul II 1991; 1894: neither the state nor any larger society should substitute itself for ‘the initiative and responsibility of individuals and intermediary bodies’.

them to respect the human person, equality and no discrimination, human solidarity and the exercise of ‘social charity’.¹²⁹ In turn, according to Catholic canon law, the church carries out its sanctifying office in part through works of charity, and temporal goods are held for such works, ‘especially for the needy’.¹³⁰ All the faithful must promote social justice and help the poor and they may establish associations for charitable purposes,¹³¹ in order to ‘permeate and perfect the temporal order of things with the spirit of the gospel’ and in this way, ‘particularly in conducting secular business and exercising secular functions, they are to give witness to Christ’.¹³² Furthermore, the parish priest is ‘to help the sick and especially the dying in great charity’ and he is ‘to endeavour to ensure that the faithful are concerned for the community of the parish’, and ‘to foster works which promote the spirit of the gospel, including its relevance to social justice’.¹³³

Social responsibility is a key value in Orthodox law. By way of illustration, several institutions in the Russian Orthodox Church are to ‘express, if need be, concern for contemporary problems’ and ‘pastoral concern for social problems’;¹³⁴ and the Holy Synod may establish commissions on ‘works of charity and social ministry’.¹³⁵ The bishops should promote (and establish) charitable institutions and dioceses must have departments for the promotion of social

¹²⁹ CCC, pars. 1897-1942; see above for the common good; 1928: ‘Society ensures social justice when it provides the conditions that allow associations or individuals to obtain what is their due, according to their nature and their vocation. Social justice is linked to the common good and the exercise of authority’; GS 29-31.

¹³⁰ CIC, c. 839.1 and c. 1254.2.

¹³¹ CIC, c. 215: the faithful; c. 222.2: social justice.

¹³² CIC, cc. 224-231: the laity is entitled to ‘insurance, social security and medical benefits duly safeguarded’.

¹³³ CIC, cc. 528-529; also c. 394.1: the diocesan bishop must foster and oversee works of the apostolate.

¹³⁴ ROC: Statute II.5(h): Local Council; III.4(g): Bishops’ Council; IV.4(g). See also GOAA: Charter, Art. 10: the Archdiocesan Clergy-Laity Congress may address ‘the philanthropic concerns of the Archdiocese’; Art. 11: Local Clergy-Laity Assembly; ROMOC: Statutes, Art. 14(i): the Holy Synod represents the church ‘in matters of general interest in society’; (t): the Holy Synod also establishes norms on ‘social-charitable assistance’.

¹³⁵ ROC: Statute V.28(i)-(j); see also VI.7: the Patriarchate has a Department for Charity and Social Ministry, an Education Committee, and a Department on Relations with the Armed Forces and Law Enforcement Agencies. See also ROMOC: Statutes, Art. 37.1(b),(d): Social Charitable Dept; (d): Cultural Patrimony Dept.

and charitable activity.¹³⁶ At parish level, the rector has a responsibility for ‘organizing activities in the public domain’ including the ‘charitable and educational activities of the parish’;¹³⁷ and property may be put to social, charitable and cultural uses.¹³⁸ Similar norms are found in the Greek Orthodox Archdiocese of America: ‘the Parish shall establish such educational and philanthropic activities to foster the aims and mission of the Parish and to edify its parishioners in the Faith and ethos of the Church’.¹³⁹ The Standing Conference of Orthodox Bishops in America applies the same obligation to individuals: ‘Individual Orthodox Christians...are obliged to assist in every effort or activity which embodies justice, the principles of brotherhood, and...provides more favourable conditions for the spiritual development of both personality and community. Whilst the Church cannot always endorse social systems, movements and programs, it is up to Christians enlightened by their conscience and the Christian ideal to commit themselves to social change in morally acceptable ways’; as to e.g. ‘social justice, racial

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- ¹³⁶ ROC: X. 48; see e.g. Dioc. of Sourozh: Statutes, II.10: the Diocese may engage in ‘charitable activity, including the area of social care of orphans and abandoned children, old and disabled people’; VIII.38: it may also ‘use its funds to make charitable donations...individuals in need’. See also e.g. UOCIA: Statutes Art. IV.2(i) and V.4: Major Archbishops and the Prime Bishops’ Council are to provide ‘for the establishment and maintenance of institutions of charity and education’; VII.4: the bishop must provide for ‘[t]he establishment of charitable organizations’ to solicit financial assistance for diocesan needs; VIII.3: the Diocesan Assembly approves measures to strengthen the ‘charities of the Diocese’; IX.5(l): the Diocesan Council is ‘[t]o provide for the establishment and maintenance of institutions of charity...within the diocese’; ROMOC: Statutes, Art. 92: the Eparchial Assembly must
- ¹³⁷ sustain the cultural and social-philanthropic institutions of the eparchy.
ROC: Statute XI.20(e). See also MOSC: Const., Art. 22: the Parish Assembly must
- ¹³⁸ provide for the expenses for e.g. ‘Charitable Hospitals’ and Orphanages.
ROC: Statute XV:4, 5, 10, 17, 18, 23. See also GOAA: Regs., Art. 16.1: parish property must be used to serve e.g. the ‘cultural and philanthropic ministries of the Parish’.
- ¹³⁹ GOAA: Regs., Art. 15.4. See also ROMOC: Statutes, Art. 50(d): the parish priest implements the parish ‘social-charitable’ programme; Art. 55(f): the Parish Assembly is ‘to initiate fund raising for church, cultural or social-charitable purposes’; Art. 67.2: a parish has a Social Department to e.g. collaborate with medical units, the poor, orphans, widows and the elderly; Art. 71: the archpriest oversees the ‘social-philanthropic activity of priests’; Arts. 137: the church provides ‘social services, accredited in accordance with the [State] legislation in force, through her local and central components (Parish, Monastery, Deanery, Vicarage, Eparchy, Metropolitan See and Patriarchy), as well as through the NGOs functioning with the approval of the competent church authorities’; 138: the strategy for such assistance is designed by the Holy Synod.

tensions, human development and moral issues'.¹⁴⁰ Orthodox may also cooperate with ecumenical partners in such areas as 'morality, responsible citizenship, Christian charity, [and] social services'.¹⁴¹ State funding may be employed to advance these objectives. For example, in Greece, the State provides funding for the charitable work of the Orthodox Church's *Apostoliki Diakonia*, and the sum is determined jointly by the Minister of Education and Cults and Minister of Finance.¹⁴²

The regulatory instruments of Anglicanism also generate interaction between church and society. This is the case at all sorts of ecclesial levels and in relation to all sorts of activities. A common understanding in global Anglicanism is that each autonomous church exists to 'promote within each of their territories a national expression of Christian faith, life and worship'; and both clergy and the laity are under a duty 'to take part in the mission of the Church'.¹⁴³ In turn, the laws of churches sometimes spell out the mission of the church in wider society – these may include the duty to contribute to the 'moral and spiritual' welfare of society,¹⁴⁴ promote justice in the world,¹⁴⁵ 'to transform unjust structures of society, caring for God's creation, and establishing the values of the Kingdom',¹⁴⁶ and to engage in 'educational, medical, social, agricultural and other service'.¹⁴⁷ Consequently, social service is a key function which provincial laws and other regulatory instruments assign to the assemblies of the church.¹⁴⁸ Typically, the governing body of each parish must 'promote the whole mission of the

¹⁴⁰ SCOBA: Guidelines for Orthodox Christians in Ecumenical Relations (GOCER), Pt. I, Secular Ecumenism, 4. See also ROMOC: Statutes, Art. 45: the faithful of the parish have a right to 'charitable assistance' and they must 'fulfil acts of Christian mercy'.

¹⁴¹ OCIA: Guidelines for Clergy (GC), Ecumenical Witness, A.2.

¹⁴² Greece: Law 1155/1981.

¹⁴³ LC 1930, Res. 48 and 49; LC 1958, Res. 58.

¹⁴⁴ Anglican Church in Venezuela: Const., II.

¹⁴⁵ See e.g. Episcopal Church in the Philippines: Const., Art. 1.1; Canons 1.2.2(d): one of the functions of the Provincial Synod's Commission on Social Concerns is 'to study the nature and root causes of poverty and underdevelopment in the country and review the participation of the Church in the development process'.

¹⁴⁶ Anglican Church in Aotearoa New Zealand: Const., Preamble.

¹⁴⁷ North India: Const., II.I.II; see also Anglican Church in Chile, Statutes, Art. 2.

¹⁴⁸ For a comparative study of national mission, see N. Doe, 'The notion of a national church: a juridical framework', 149 *Law and Justice* (2002) 77.

church, pastoral, evangelistic, social and ecumenical'.¹⁴⁹ Similarly, diocesan assemblies (synod, councils and conferences) stimulate service.¹⁵⁰ Indeed, in its treatment of mission, the Anglican Communion Covenant commits the churches 'to respond to human need by loving service' and 'to seek to transform unjust structures of society', and 'to strive to safeguard the integrity of creation and to sustain and renew the life of the earth'.¹⁵¹

Social action is contemplated in various forms by Protestant laws. The Evangelical Lutheran Church in America typifies the Lutheran approach to social responsibility. One objective of the church is 'to meet human needs, caring for the sick and the aged, advocating dignity and justice for all people, working for peace and reconciliation among the nations, and standing with the poor and powerless and committing itself to their needs'.¹⁵² Moreover, the church 'shall seek to meet human needs through encouragement of its people to individual and corporate action, and through establishing, developing, recognizing, and supporting institutions and agencies that minister to people in their spiritual and temporal needs'; through affiliated social ministry organizations, it must also 'establish affiliations and alliances within this church and within society, and carry out a comprehensive social ministry witness'.¹⁵³ As such, its central organisation must therefore respond to 'human need, caring for the sick and suffering, working for justice and peace, and providing guidance to members on social matters',¹⁵⁴ and its Church Council 'shall have responsibility for the corporate social responsibility of this church'.¹⁵⁵ Toward this end, the church must study 'social issues and trends, work to discover the causes of oppression and injustice, and develop programs of ministry and advocacy to further human dignity, freedom, justice, and peace in the

¹⁴⁹ PCLCCAC, Principle 21.6.

¹⁵⁰ See e.g. New Zealand: Cans. B.XXII: on the duties of the inter-diocesan synod (which include mission).

¹⁵¹ The Anglican Communion Covenant 2009 (TACC), 2.2.2; the Anglican Communion has various networks and other bodies to assist in these tasks.

¹⁵² ELCA: Const., 4.02. See also ELCIRE: Const., 2(1)(d): the church is to provide testimony in public.

¹⁵³ ELCA: Const., Ch. 8.33.

¹⁵⁴ ELCA: Const., 11.20-21.

¹⁵⁵ ELCA: Const., 14.21.10-16.

world'.¹⁵⁶ At regional and local level too, the synod and congregation must engage in 'service to the world' and '[r]espond to human need, work for justice and peace, care for the sick and the suffering, and participate responsibly in society'.¹⁵⁷ The Lutheran Churches in Australia, Canada, and Southern Africa exhort similar institutional engagement in social action at national, regional and local level,¹⁵⁸ not least by means of the study of and statements on social problems.¹⁵⁹ The faithful individually must also engage directly in 'diaconic service', especially towards 'the sick, the aged, the needy, the disabled and the troubled' – this is because: 'The Christian acts according to a conscience bound to the Word of God' and 'works for justice for all, especially for the disadvantaged and bears witness of the will of God, even if one has to suffer'.¹⁶⁰ Bishops and pastors must 'speak publicly to the world in solidarity with the poor and oppressed, calling for justice and proclaiming God's love for the world'.¹⁶¹ In short: Christian faith must be manifested in 'public life': 'The Christian is available...for cultural, social and political tasks. In the congregation, the Word of God is expressed for the specific situations and thus bears witness of the will of God in concrete circumstances. Church and congregation assist the

¹⁵⁶ ELCA: Const., 4.03(1); see also 10.20-21: the 'interpretation of social statements' by the regional Synod.

¹⁵⁷ ELCA: Const., 9.10-11, 9.41: congregation; 10.20-21: synod.

¹⁵⁸ LCA: BL VIII.G and H: there are boards on e.g. care for the aged, education, and commissions on social and bioethical questions; ELCIC: Const., Art. IV.2: the church may 'establish and maintain, or otherwise recognize and support, institutions and agencies to minister to human need and in the name of Christ; study issues in contemporary society in the light of the Word of God and respond publicly to social and moral issues as an advocate for justice and as an agent for reconciliation'; Administrative Bylaws, V.5: the regional synod may develop programmes and provide resources for 'social ministry'; ELCSA: G., 10.10; 11.1: 'Christ uses His Church with...its service' and is 'to live a life of charity'.

¹⁵⁹ LCA: BL VIII.F: the College of Presidents has a duty to study developments in 'church and society' and give guidance to pastors and members accordingly.

¹⁶⁰ ELCSA: G., 11.4: they must visit these. See also ELCIC: Administrative Bylaws, Pt. II.2: a congregation must encourage members 'in works of mercy'; ELCIRE: Const., 6(1): church members 'should testify...through words and deeds in public as in private life' to the faith and (3) undertake 'diaconal tasks'.

¹⁶¹ ELCIC: Const., Art. XIII.5: the bishop is to '[s]peak publicly and witness for the gospel on behalf of this church'; ELCA: Const., 7.31.12: pastors; 7.51.05: deacons must be 'responsive to needs in a changing world'.

bearers of public responsibility in [the] economy, administration, politics, law, education and other spheres with advice and deed'.¹⁶²

It is a fundamental principle of Methodist social responsibility that the church has a duty 'to apply the Christian vision of righteousness to social, economic and political issues'.¹⁶³ The promotion of 'benevolent interests', 'social concern' or similar object is listed, typically, in the functions of a church assembly.¹⁶⁴ Regional assemblies may have a similar role,¹⁶⁵ circuits may have advisory councils on 'social welfare',¹⁶⁶ the local church is 'to defend God's creation and live as an ecologically responsible community',¹⁶⁷ and its church council is to 'give attention to local and larger community ministries of compassion, justice and advocacy' including 'church and society', 'campus ministry', 'health and welfare', 'religion and race, and the status and role of women'.¹⁶⁸ Moreover, the faithful individually should engage in 'healing the sick, feeding the hungry, caring for the stranger, freeing the oppressed, being and becoming a compassionate caring presence, and working to devel-

¹⁶² ELCSA: G., 11.7.

¹⁶³ UMCNEAE: BOD, par. 101. See also MCNZ: LAR, The Nature of New Zealand Methodism: 'Methodism particularly emphasises both personal spirituality and a concern for social action as responses to the gospel'; MCGB: CPD, SO 351: advocacy for and financial assistance to the poor.

¹⁶⁴ UMCUSA: Const., Divs. 2.4, Art. V: jurisdictional conference; Div. 2.5, Art. IV: central conference; see also UMCNEAE: BOD, par. 27 and 31; par. 127: 'human needs'; par. 716: 'socially responsible investments'; COTN: Man. II, Const., Articles of Faith, XI.15: a church function is 'working for justice'; App., par. 903.4: as 'God identifies with and assists the poor', so too the church's ministry includes 'acts of charity as well as the struggle to provide opportunity, equality, and justice for the poor'; FMCNA: BOD, par. 5250: 'The annual conference may elect a social issues and ministries committee to assist churches in seeking justice for all, showing mercy to the poor, empowering the disenfranchised and maintaining openness and sensitivity to the social problems of all ages, race and gender'; the committee recommends resolutions for General Conference and organises Conference resources (human, material) 'to assist the local church in seeking justice for all'.

¹⁶⁵ MCNZ: LAR, 4.2: a regional synod must encourage engagement in 'community concerns and social justice'.

¹⁶⁶ MCI: RDG, 10.75-10.76: however: 'in harmony with the non-political character of the Methodist Church... all party political questions shall be strictly excluded from the consideration of the [Circuit Advisory] Council'.

¹⁶⁷ UMCNEAE: BOD, par. 202; FMCNA: BOD, par. 6010: 'the local church corporately cares for the needs of its own and others'.

¹⁶⁸ UMCNEAE: BOD, par. 252; see also par. 254: the charge conference may appoint annually a coordinator for e.g. advocacy for persons with special needs; MCNZ: LAR 3.4: the local Leaders are to 'initiate, research and promote dialogue and action on matters of community concern and social justice'.

op social structures that are consistent with the gospel'.¹⁶⁹ They are to carry out this service in, *inter alia*, 'daily work, recreation and social activities, and responsible citizenship'.¹⁷⁰ Social responsibility is also a function of ministers. Deacons have a special ministry to the poor and needy.¹⁷¹ Bishops must seek to equip the faithful to serve 'in the world' and offer a 'prophetic voice for justice in a suffering and conflicted world through the tradition of social holiness'.¹⁷² Ministers must participate 'in the shaping of social policies advocating the promotion of social justice, improved social conditions and a fair sharing of the community's resources'.¹⁷³ Methodist instruments sometimes present an agenda for social action,¹⁷⁴ and their 'social principles' of aim 'to speak to the human issues in the contemporary world from a biblical and theological foundation' and are intended to stimulate a 'dialogue of faith and practice'.¹⁷⁵ Engagement in social ministry is carried out by a host

¹⁶⁹ UMCNEAE: BOD, par. 122.

¹⁷⁰ UMCNEAE: BOD, par. 220; see also par. 253: specialist ministries to the disabled; par. 256: the local Mission and Ministry Groups allow the faithful to 'participate in small groups to serve the needs of the poor and marginalized' and e.g. 'advocate for social justice'; MCNZ: LAR, Introductory Documents, IV, General Standards for the Guidance of Members: 'we are called both to active participation in civic and national affairs and to service directed towards the attainment of world peace and justice'; MCGB: CPD, SO 604: a local church must help 'those in need'; SO 651: its Church Council maintains a Benevolence Fund for the relief of poverty.

¹⁷¹ UMCNEAE: BOD, par. 328: a ministry of 'love, justice, and service' and of 'connecting the church with the most needy, neglected, and marginalized among the children of God'; par. 337: elders and 'social services'.

¹⁷² UMCNEAE: BOD, pars. 401 and 403; MCNZ: LAR, 7.5: the Conference President, as chief pastor, is to exercise 'a prophetic voice in its pursuit of justice'.

¹⁷³ MCNZ: LAR, Introductory Documents, III Ethical Standards for Ministry, Responsibilities to the Wider Community, 2; MCGB: CPD, SO Book VI, Pt. I, Resolutions on Pastoral Work (1971): ministers are 'to encourage and train members of our Church to be representatives of Christ in the world, that by their faith and deeds of service they may show Christ's compassion and Lordship' and must 'seek every opportunity to minister... to those who work in industry, local government, and other sectors of the life of community'.

¹⁷⁴ MCNZ: LAR, Introductory Documents, V, Some Social Principles of the Methodist Church: the sacredness of human personality and the equal value of all in the sight of God; adequate opportunities for employment, and reasonable standards of living for those unable to work; the right to a just return for services, good housing, and a healthy environment; and promoting social and industrial reforms by lawful means.

¹⁷⁵ UMCNEAE: BOD, Pt. IV, Social Principles; BOD, pars. 1001-1011: the General Board of Church and Society must seek to implement the principles, 'provide forthright...action on issues of human well-being, justice, peace, and the integrity of creation' to the goal of 'personal, social, and civic righteousness', and work on a 'strategy and methodology for social change'.

of institutions at the various levels of a Methodist church.¹⁷⁶ The Methodist Church in Ireland is typical.¹⁷⁷ Its Council on Social Responsibility must undertake, on behalf of the Connexion, ‘informed study and analysis of social, economic, political and international issues...with theological insight...in a manner which effectively both represents and resources the Church’; the Council must report annually to Conference: ‘In connection with any of the issues being addressed, the Council or its Executive Committees are authorised to take action in harmony with existing declarations or resolutions of the Conference, and to communicate regarding these matters with the Governments of each jurisdiction in Ireland’. Areas of interest included in its work are: Environmental Issues; Health and Well-being; Medical Ethics and Bio-Ethics; EU and International Affairs; Political Developments and Parliamentary Business; Age, Gender and Inter-cultural Issues; and Social Justice and Equality.¹⁷⁸

The normative instruments the Reformed traditions have equally explicit treatment of the social responsibilities of Christians. The World Communion of Reformed Churches is to promote ‘economic and ecological justice, global peace, and reconciliation in the world’, relief and sustainable development, and the eradication of poverty.¹⁷⁹ Within this, the United Reformed Church in Great Britain is typical. At national level, the General Assembly is take action in the interests of ‘the well-being of the community in which

¹⁷⁶ MCNZ: LAR, s. 5.7.10: the Churches Agency on Social Issues seeks, on ‘social, economic, ecological and political matters’ e.g. to: resource and encourage church at national, regional, local and individual levels to discuss such matters; advocate on such issues from the Christian perspective ‘as promptly, clearly, publicly, and effectively as possible’; be ‘agents for peace, justice and the integrity of creation, in accordance with the transforming love of God’; the agency is a joint venture of MCNZ, PCANZ, Churches of Christ NZ, and Society of Friends.; see also s. 5.7.12: the Wesley Com Aotearoa is ‘to provide oversight on behalf of the Conference to the social service ministry of the Church’ as to e.g. planning and implementation of strategies, general oversight of the community and social services in the Methodist Church through audit of service delivery, and national advocacy through the monitoring of social policy.

¹⁷⁷ MCI: RDG, 7, 35: the objects of the Methodist Church Child Care Society (MCI) are ‘to provide financial assistance in the maintenance, welfare and safety of children in need who are connected with the Methodist Church’; the management of the

¹⁷⁸ Society is under the Department of Youth and Children’s Work Executive.

¹⁷⁹ MCI: RDG, 34.01.

¹⁷⁹ WCRC: Const., Art. V.

the Church is placed',¹⁸⁰ the regional synod is 'to encourage in the local churches concern for youth work and social service',¹⁸¹ and the local elders' meeting is 'to foster in the congregation concern for witness and service to the community'.¹⁸² Ministers should have 'an informed and passionate involvement in the issues of the contemporary world',¹⁸³ church-related community workers work for peace and justice in society,¹⁸⁴ and deacons have a special responsibility to the poor and needy.¹⁸⁵ Similarly, in Presbyterianism, the General Assembly may take action for 'the well-being of the community',¹⁸⁶ and it has commissions to assist in this task, such as the Church and Society Department of the Presbyterian Church of Wales which is 'to consider the Connexion's response to social, national and international issues'.¹⁸⁷ The Presbytery must provide for pastoral care 'within the wider community'.¹⁸⁸ The Kirk Session must seek to further Christian witness and service in the local community may raise funds for prescribed 'philanthropic objects'.¹⁸⁹ Ruling elders are responsible for 'practical witness', in-

¹⁸⁰ URC: Man., B., 2(6). See also CA: BCO, Ch. I, Pt. IV.2: the General Synod oversees 'benevolent work'.

¹⁸¹ URC: Man., B., 2(5).

¹⁸² URC: Man. B., 2(2).

¹⁸³ URC: Man., K, 3.

¹⁸⁴ URC: Man., BU, A, Confessional Statement, 22: these are commissioned 'to care for, to challenge and to pray for the community, to discern with others God's will for the well-being of the community, and to endeavour to enable the church to live out its calling...through working with others in both church and community for peace and justice in the world'; Man., G: the Church-Related Community Work Management Sub-Committee.

¹⁸⁵ RCA: BCO Ch. I, Pt. I., Arts. 1.10, 6: the Board of Deacons ministers to 'the sick, the hurt, and the helpless'.

¹⁸⁶ PCI: Code VII.II.104; PCW: HOR 3.4.2: social issues; PCA: BCO: the General Assembly is 'to recommend measures for the promotion of charity...through all the churches under its care'.

¹⁸⁷ PCI: Code XVII.I, par. 281: the Board of Social Witness of the General Assembly must 'concern itself with all questions affecting the social welfare of the members of the Church and the community, and all questions affecting Church and industry'; PCW: HOR 2.12.1.2.

¹⁸⁸ PCANZ: BO 8.4(4).

¹⁸⁹ PCI: Code, II.II.35 and 38: provided the philanthropic objects do not include 'ballooning, raffling, or lottery causes'; see also III.I.46: the Congregational Meeting may raise funds for 'charitable objects'; PCW: HOR I.1: one object of the church is 'serving our communities and our country through practical activity', 'taking a stand for justice and peace in our world', and 'safeguarding our environment in every possible way'; PCA: BCO: 4.4: the local church must make offerings 'for the

cluding in ‘the wider world’,¹⁹⁰ ministers must visit the sick and provide leadership in the humanitarian activity of the local church,¹⁹¹ and church members must themselves witness to society.¹⁹²

Much the same arrangements are required or permitted by United, Congregational, and Baptist regulatory instruments. In the United and Congregational churches, one function of a central assembly is to ‘issue or approve statements on important public issues and concerns’.¹⁹³ Similarly, the functions of a regional council include bringing ‘the influence of the churches to bear upon such public and general questions as may demand their collective action’,¹⁹⁴ initiating and exercising ‘oversight of Church-related educational, medical, welfare and other work within its bounds’ and, though its Mission Council, engaging in ‘Justice and Social Responsibility’.¹⁹⁵ Designated ministries may also engage directly with social justice,¹⁹⁶ the local church and its members are to care

relief of the poor’; PCANZ: BO 5.2(2): the congregation is to ‘play its role in God’s mission to the world’.

¹⁹⁰ PCI: Code II.I.30.

¹⁹¹ PCI: Code, IV.73: the Presbytery must ensure that visits to the sick are carried out; PCW: HOR 4.2: humanitarian activity in ‘the local community, nation and world; PCA: BCO 8.4: pastors; 9.2: deacons; PCANZ: BO 6.6: a minister must provide are and support for ‘the wider community’.

¹⁹² PCW: HOR 2.2: members must ‘give freely of their service to society’; PCANZ: BO 6.1(3): the commitment of baptism takes shape in a range ‘of activities in society’.

¹⁹³ UCCP: Const., Art. VII.3(a): this is a function of the General Assembly. See also UCA: Const., 4: one purpose of the church is ‘to assist in human development and toward the improvement of human relationships, [and] to meet human need through charitable and other services’; UCNI: Const., II.II: the church is to provide ‘educational, medical, social, agricultural and other services’ for e.g. ‘social justice’.

¹⁹⁴ UCCSA: Const., 4.5.3 and 4.7.3. See also UCCP: Const., Art. II.5: ‘The fundamental values of love, justice, truth and compassion are at the heart of our witness to the world and our service to the Church’; 8: the church has a ‘prophetic witness in the life and culture of the Filipino people’; see also Art. II.12: the church is to ‘protect, promote and enhance the ecological balance and the integrity of creation’; UCA: Const., 26: the Presbytery is to strengthen congregations in the ‘wider aspects of the work of the Church’.

¹⁹⁵ UCCSA: Const., 5.7.4 and 5.9.3.1.

¹⁹⁶ UCOC: Const., par. 66: the Justice and Witness Ministries are to encourage local churches, associations, conferences and national expressions of the church ‘to engage in God’s mission by direct action for the integrity of creation, justice and peace’. UCA: Regs., 2.4.2: the minister must ‘equip [members] for their ministry in the community’; 2.12: community workers; UCC: ESMP, 2: in ‘a church committed to social justice’, ministers must ‘encourage and support the development and pursuit of social justice’ and ‘lay leadership on social justice issues’; BL App. II,

for the poor.¹⁹⁷ Like the Baptist World Alliance globally,¹⁹⁸ a national Baptist Union or Convention may be called to be ‘a prophetic community, confronting injustice and challenging human concepts of power, wealth, status and security’ and engage in ‘simpler, greener, fairer living’.¹⁹⁹ For example, for the North American Baptist Conference: ‘Christians, individually and collectively...[must] promote truth, justice and peace...[and] aid the needy and preserve the dignity of all races and conditions’;²⁰⁰ and the American Baptist Churches in the USA is to seek the mind of Christ on ‘political, economic, [and] social’ matters and express this ‘to the rest of society’.²⁰¹ In similar vein, a Baptist pastor must ‘support biblical morality in the community through prophetic witness and social action’,²⁰² and (for the Canadian National Baptist Convention): ‘Every Christian is under obligation to seek to make the will of Christ supreme in his own life and in human society’; thus: ‘Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth and brotherly love without ‘compromising their loyalty to Christ and His truth’.²⁰³ Increasingly, Christian churches are developing rules on interfaith relations as to their engagement

Schedule B: Model Trust Deed: property may be used for charitable and social purposes; Community Ministry Standards and Best Practices: Administrative Standards for Community and Social Justice Ministries; UCNI: Const., I.VIII.14: deacons

- 197 must serve ‘the poor and needy’.
 UFCS: Const., I.III.22: the Kirk Session its ‘care for the poor’; II.III.1: the Deacons’ Court has a special responsibility for ‘the temporal wants of poor persons connected with the congregation’; UCCP: Const., Art. V.4: the congregation must ‘respond to the life and concerns of society’; UCA: Regs., 3.1.1: the congregation must equip members for ‘service in the world’; UCC: BL 153: the Session is responsible for ‘the care of the poor, and the visiting of the sick’; UCNI: Const., I.VII.2: the faithful are to offer to engage in ‘social welfare’.
- 198 WBA: Const., Art. II and BL 6: the Alliance must respond to human need. See also
- 199 ABF: Const., III.5.
 BUGB: Mission Executive: A Vision for the Environment; BUS: Const., IV.4: the member churches must act together in matters of common concern which relate to
- 200 e.g. ‘the state of the nation’.
 NABC: Statement of beliefs, 8: this cites e.g. Matthew 5.13-16, Hebrews 13.5, Luke 9.23, Titus 2.12.
- 201 ABC-USA: BL, Statement of Purpose.
- 202 BUNZ: EPGP, 6.4.
- 203 CNBC: Const., 3, Statement of Faith, XV; BMPP, 216, App. III, Suggested Const. for Baptist Churches, Type A: Art. II: the church must minister ‘to human need in the name of Christ’; Art. VI.5: the Benevolence Treasurer is administers funds for ‘the benevolent purposes’; Art. VII: Committee on Christian Social Concern.

with other major world religions represented in wider society.²⁰⁴ So: the principles of Christian law which emerge from the similarities of the regulatory instruments of the churches studied here provide: a church must promote social justice; it should have institutions to guide, initiate, and implement programmes for action in wider society; its ministers are to lead by example in this field; and the faithful are to engage directly in the promotion of social justice and charitable work: this is a requirement of the Christian faith. Further research is needed to determine how and in what ways these legal provisions are actually implemented in practice and to study the constitutions etc. of each Christian charity.

IV. CONCLUSION

The regulatory instruments of churches across the Christian traditions studied here indicate formally the willingness of Christians to engage in cooperation with the State, compliance with its laws, political activity for the common good, the promotion of human rights, and the advancement of social justice. From the similarities between the laws of churches emerge clear principles of Christian law: the State is instituted by God; church and State are distinct and discharge separate functions; church and State must cooperate with each other in matters of common concern; the church must comply with State law to the extent that this is just and conscionable. Christian churches may enjoy under State law the position of State churches, statutory churches and covenantal churches. All humans are created in the image of God; they are therefore equal and bear-

204 See e.g. CIC, c. 1086: interfaith marriages; CCC, pars. 839-856; GOAA: Charter, Art. 2: in 'inter-religious activities' the church must follow the guidance of Constantinople; ROC: Statutes, V.25(h); ROMOC: Statutes, Art. 14(s): the Holy Synod governs 'inter-religious cooperation'; Art. 37(f): the Department for Interreligious Relations; LC 2008, Reflections, Section F: Relations with Other World Religions: mutual respect, dialogue and cooperation; the Anglican Communion's Network for Inter-Faith Concerns (NIFCON) is to e.g. develop relations with other faiths; ELCA: Const., 4.03(f), 8.60, 11.20-21, 15.12.B10: the church should have a 'policy' towards other faiths and 'interfaith activities'; ELCI: Const., 3(4): the church is to engage in 'interreligious dialogue'; UMCNEAE: BOD, pars. 121, 252, 340, 2001-2008: 'respect for persons of all religious faiths'; addressing 'inter-religious concerns and the Committee on Christian Unity and Interreligious Concerns; MCGB: CPD, Bk VI, s. 10: Guidelines for Inter-Faith Marriages; UCC: BL 385, 570: Inter-Faith Committee.

ers of fundamental or human rights; the State should uphold human rights; the church corporately and the faithful individually should promote human rights. A key function of the church is to engage directly in social justice; a church should have institutions devoted to the study and advancement of social justice; the church, at each of its levels, must engage directly in works of charity; the faithful must do likewise, and the ordained ministers must lead in this matter. Further study is needed to determine the extent to which these Christian laws are similar to or differ from the laws of Judaism and Islam.

THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

MARCO VENTURA*

The processes of European integration and globalisation have made for the interaction of state and religion in Europe to be understood in an increasingly broader context. Nevertheless, national histories and specificities still have a distinctive salience and weight. The emergence of common regulatory standards as well as that of a pan-European church and state vocabulary are testimony of a convergence which is often more apparent than real. This is true for legal developments – and even more so for the political dynamic underlying the state of the law. As we endeavour to discern European patterns and factors, we need to achieve a better knowledge of the domestic picture.

Drawing on the national reports submitted to the 2012 Budapest Conference of the European Consortium for Church and State, on the Mutual roles of religion and state in Europe, with specific regard to the political perspectives, I will devote the first part of this study to the role of history, the second part to the grounds allowing the state to protect and value religion, the third to the grounds on which the state interferes with and restricts religion, and the fourth to political actors, institutions and dynamics. I will conclude with some critical remarks. From a methodological perspective, I will point to the lack of dialogue with political scientists and sociologists, which leads church and state experts to only a partial understanding of the political dimension of their object of study. On a number of issues, which range from regional politics to the populist exploitation of religion, church and state research risks being far too disconnected from reality and from the social sciences. Secondly, on a substantive note, I will attempt to link the state's approach to religion, and the underlying political dynamism, to the

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current debate on “multiple modernities” and the “post-secular society”.

I. THE ROLE OF HISTORY

In her report on France, *Brigitte Basdevant-Gaudemet* makes clear from the outset that the relation of the state to religion ‘est étroitement liée au contexte social général dans lequel s’inscrivent les religions et l’histoire religieuse du pays.’ Accordingly, ‘l’étude de la situation actuelle impose (...) une prise en compte de l’histoire des relations entre religions et États.’ Several authors reiterate the concept and indeed apply it to their own overview, with a concern at the same time for the specificity of their country and for the accuracy of the picture.

The role of history in the state’s understanding of religion can be seen as fourfold.

First, history has shaped the very meaning of what in a national context ‘state’ and ‘religion’ stand for. Very pertinently, *Blaž Ivanc* proposes that the expression ‘the state’s understanding’ is itself ‘ambiguous,’ since ‘the state is (...) not a person with its own perception and will.’ Not only the constitutional meaning, but also the political and cultural assumptions determining what ‘the state’ is for a country, are a construct of history undergoing continuous change. This also applies to religion. Countries developing under the monopoly of one church tend to understand Christianity as synonymous of their uni-denominational perception of it, as opposed to multi-denominational countries, where ‘Christian’ is precisely indicative of a cross-denominational multi-church experience.

Secondly, history is a source of tensions and divisions, which have not been overcome and still impact on the political process and the making of the law. *Balázs Schanda* explains that in Hungary ‘a more turbulent relation to religion’ can be found amongst those centre-to-left and liberal forces ‘who have not yet overcome the communist legacy.’ Past conflicts explain the extreme polarization between Catholics and anti-clericals in Italy and Spain, as *Agustín Motilla* and *Francesco Margiotta Broglio* argue.

Thirdly, historical developments can also provide the reason why religion is valued in a given country. For the Czech Republic, *Jiří Rajmund Tretera and Záboj Horák* refer to the role of 'notable opposition against both totalitarian regimes that ruled over the country in the past (Nazism 1939-1945, Communism 1948-1989),' the religious opposition against tyranny being 'considered as a factor promoting democracy in the Czech Republic,' to explain the generally positive attitude of the state towards religion in present times. In post-communist countries, in general, there is a clear connection between resistance to the atheist project and homage paid to churches by the state. The Polish struggle with religious symbols, as illustrated by *Michał Rynkowski*, is precisely about the passage from the age of *Solidarność* and John Paul II, and the glorious opposition to communist rule, to the age of the dispute over the crucifix in the Sejm and the Smoleńsk-Cross.

A fourth role of history can be identified in the political mobilization of the religious past for the sake of stigmatising new, alien and threatening religions, and Islam in particular. This is witnessed for Austria by the author of the report who suggests that from time to time 'a non-specific Christian identity is mobilized for Islam-critical political positions.' The same strategy can apply against the religious majorities and notably against the Catholic Church, whenever the latter is understood, according to 'history,' as a backward and repressive agent.

II. WHEN THE STATE VALUES, PROTECTS AND FACILITATES RELIGION

All European states value, protect and facilitate religion, although to a different degree and in different ways. Such an attitude can be explained in two ways. First of all, it is possible to opt for a principle-based approach. Religion is valued, and therefore protected and facilitated, because this is what the Constitution requires under the various principles of religious freedom, recognition, cooperation and even neutrality, secularity and separation, when these are understood (see the Scottish or the Italian example) as religion-friendly. The constitutional understanding of church and state relations has priority here. Secondly, the state's attitude can be ex-

plained by reference to the goals and grounds which make for religion to be valued, protected and facilitated. Four different grounds can be identified, with a varying degree of beneficial impact on the different kinds of religious actors (see table 1 at the end of his paragraph): the historical legacy, which also implies a reference to tradition, identity and culture; social cohesion; social welfare; and human rights.

A state's favourable approach based on historical legacy, tradition, identity and culture is likely to benefit especially established and mainstream churches and religions. In certain countries, historical minorities can also be included. However, new religious actors are likely to be excluded. Exceptions to this pattern are possible. On her Diamond Jubilee speech, the Queen suggested that the role of the Church of England 'is not to defend Anglicanism to the exclusion of other religions. Instead, the Church has a duty to protect the free practice of all faiths in this country.'

Brigitte Basdevant-Gaudemet points to the historical shift from the state's support of religion as the provider of social values to the state's support of religion because of its social utility: in France, and in different terms in many other European countries, 'les valeurs des religions – ou de la religion dominante qu'était l'Église catholique – étaient (...) supplantées par leur utilité publique.' Since the nineteenth century the language and concept has evolved, but religion is still valued for its contribution to the public sphere. The basis of the Swedish Act on Support to Religious Communities, *Lars Friedner* recalls, was 'the opinion of the Government (...) that religious life would help to build a stable society.' The ground of social cohesion can be seen as a further development of the concept of the public function of religion. Social cohesion is a concept highly valued in the construction of Europe, with a public opinion anxious for increasingly unstable and divided societies. The ground of social cohesion is usually favourable to historical minorities and historical majorities alike. As far as 'new' minorities are concerned, the debate is open and the picture is contrasted. Many in Europe, across the different countries, praise the role of non-indigenous religious communities and even defend their right to organisational autonomy as a condition enabling them to bridge the gap between alienated individuals and society at large. Archbishop Rowan Williams' speech on religious laws in 2008 went in

this direction. Of course, the opposite conviction is also strongly held, based on the fear of communitarian exclusivism and sectarianism.

The most consensual ground for the state's favour towards religion is the role of church and faith communities in the domain of social welfare. In this specific field, the difference between the various kinds of religious actors is less relevant. A problem here could derive from the credit crunch and the related risk for mainstream churches to lose the financial support of the state, upon which they rely heavily in many European countries for their action as welfare supplier. The transformation of the public sector is also likely to endanger the consensus on the beneficial role of religious welfare, in so far as in some countries the social action of faith communities will increasingly clash with an equality-driven and financially impoverished public sector. The Catholic adoption agencies' struggle in Britain and the debate on cuts to state funding of the dominant churches in Italy and Greece can be taken as significant examples of this trend. This ground is consistent with the ambition of traditional, mainstream churches, as they address internal divisions and the decline in numbers of the faithful, to re-legitimize themselves in social and cultural terms. Such a process, which involves the 'secularisation' of the church's language and presence in society, creates internal tensions, especially in the Catholic Church, because of the clash between the call for discipline and theological consistency on the one hand (based on the assumption that a church taking part in societal debate needs to build on its internal solidarity) and the call for internal democratisation and differentiation on the other.

In her report on the Netherlands, *Sophie van Bijsterveld* points to a major shift recently from the three above-mentioned grounds to favour religion (history/tradition, social cohesion, social welfare) to an emerging one, namely, human rights: over recent years, she observes, 'the trend has moved away from valuing religion per se towards seeing religion as a fundamental right.' Such a ground for protection of religion is likely to benefit minorities in general, and newcomers and outsiders in particular. And again, this is likely to expose the contradiction of mainstream churches arguing for their religious distinctiveness while advancing their claim to be a social

and political actor amongst the others in a free and pluralistic public sphere.

Table 1:

Grounds for the state’s valuation and protection of religion, and diversified impact on different categories of religious actors

Grounds for the state’s valuation and protection of religion Categories of religious actors	Historical legacy Tradition Identity Culture	Social Cohesion	Welfare	Human Rights
Established Churches / Religions Mainstream Churches / Religions	++	+	++	-
Historical Minorities	+	+	++	++
New Churches / Religions	-	?	?	+
Index: ++ = strong benefit + = medium benefit - = no benefit				

III. WHEN THE STATE INTERFERES WITH AND RESTRICTS RELIGION

Also widespread in Europe is the opposite state’s attitude, which results in interference with and restriction of religion, although after the collapse of communism no European state can be described as being deliberately hostile to religion per se. In this case, similarly, both the general constitutional principles and the specific grounds can be looked at in order to understand what drives a state to be unfriendly towards certain religious expressions. General principles of separation, neutrality and secularity can be mentioned here, but also fundamental rights (see below for equality). If one looks instead at grounds justifying state interference and restriction, the following appear to be the most common: endorsement of state principles and national values; the project of a secular society;

security; equality; political stability; human rights. Also these grounds are likely to impact differently on the various categories of religious actors across Europe (see table 2 at the end of his paragraph):

Endorsement of state principles and national values looks particularly strong in France, as *Brigitte Basdevant-Gaudemet* emphasizes: 'Le "vivre ensemble" républicain de la laïcité accepte, voire favorise, toutes les religions qui, elles-mêmes, adhèrent à cette philosophie. Il y a alors correspondance entre les valeurs de la laïcité et les valeurs communes à l'ensemble des grandes religions, en France. Les religions, par leur adhésion à la laïcité, renforcent la cohésion de la communauté nationale'. The decision of 6 December 2012 by the Belgian Constitutional Court upholding the 2011 ban on the burqa also draws heavily on 'la sécurité publique, l'égalité entre l'homme et la femme et une certaine conception du "vivre ensemble" dans la société' as well as on the 'patrimoine commun de valeurs fondamentales que sont le droit à la vie, le droit à la liberté de conscience, la démocratie, l'égalité de l'homme et de la femme ou encore la séparation de l'Église et de l'État.' In Italy in 2007, the Ministry of the Interior issued a 'Charter of values of citizenship and integration', aimed at introducing immigrants to Italian constitutional principles. Although officially addressing immigrants in general, the Charter had originated from the Ministry's concern for the integration of Muslims and from the project of bringing all religious minorities to endorse Italy as a secular state, based on the 'Jewish-Christian tradition' of Italy.

The project of a secular society can take different forms and is likely to aim at different targets. *Agustín Motilla* recalls the Spanish Socialist Party's Manifestoes of 2004, on defence of a lay society, and 2006, Constitution, Laicism and Citizenship Education, in which 'the Socialist Party shares with other leftist groups a kind of negative conception of religious phenomena. The Manifestoes refer to them as "fundamentalism, monotheistic or religious". They stress the idea of a certain radicalization because of migratory movements, but somehow these documents included within this category the attitudes of the Roman Catholic Church hierarchy. Their moral and ideological conceptions "spread division amongst the citizens" and impede "the new citizenship rights".' In England,

David McClean explains, ‘The National Secular Society is a very vocal critic of the role of the church in society, taking a very individualistic view, so that the exercise of faith is seen as a threat to the freedom of others; it must be banished to the private sphere.’ In post-communist countries, the project of a secular society is inevitably reminiscent of the past state’s atheism. The Ruch Palikota (‘Movement of Mr. Janusz Palikot’) in Poland, as reported by *Michał Rynkowski*, has a distinctive flavour.

Security is a ground easily agitated by populist parties against Islam. In the 1990s especially, security was also a ground upon which to attack new religious movements. In this regard, what *Merilin Kiviorg* argues in relation to Estonia can be applied to other European countries with a less differentiated religious picture: on the one hand, she notes, stigmatisation of new religious movements ‘was related to ignorance about different religious beliefs generally,’ and on the other, ‘it showed that Estonian society was not used to active proselytizing. The activities of traditional religious communities known to Estonians were simply very different.’

Based on equality, the state might interfere with the autonomy of faith communities (by forcing non-discriminatory labour law on them), sanction acts based on their values and traditions (ranging variously from paternal moral violence on girls to honour killing) and revise arrangements providing for advantageous treatment of one or a few denominations (like the ‘redefinition’ paradigm invoked in relation to Slovenia). In Sweden and Estonia, but likewise in Catholic countries, equality is also a ground for challenging the legal status of majority churches and improving that of minorities.

Political stability has the potential for being an ambivalent ground. It can justify the repression of minorities, especially Islam, but it can also lead to aggressive policies against majorities. If France, particularly under the Sarkozy presidency, illustrates a proactive policy to control ‘sects’ and bring Islam into the fold, Spain can be taken as an example of both a centre-right soft approach to religion, based on the need to appease religion-driven social tensions for the sake of political stability, and a leftist project countering an allegedly divisive Catholic initiative, again for the sake of political stability.

Finally, human rights may also be a ground resulting in a very diverse range of political projects and state visions. The debate

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after the Cologne ruling on male circumcision and children's rights is a very telling example.

Table 2:

Grounds for state's valuation and protection of religion, and diversified impact on different categories of religious actors

Grounds for the state's valuation and protection of religion Categories of religious actors	Endorsement of State principles	Project of a Secular Society	Security
Established Churches / Religions Mainstream Churches / Religions	+	++	-
Historical Minorities	+	++	-
New Churches / Religions	++	++	++

Grounds for the state's valuation and protection of religion Categories of religious actors	Equality	Political stability	Human Rights
Established Churches / Religions Mainstream Churches / Religions	++	+	+
Historical Minorities	+	-	+
New Churches / Religions	-	-	?
Index: ++ = strong impact + = medium impact - = no impact			

IV. POLITICAL VARIABLES

If one turns to the political process, five main features can be highlighted, with varying degrees of impact according to the different political forces involved (see table 3 at the end of his paragraph).

First, Christian political parties are still present in Europe (through the European People's Party) and in several countries (Italy being a remarkable exception after the demise of Democrazia Cristiana in 1994), but they have lost salience, as remarkably witnessed in the Netherlands and in Belgium. It is worth underlining the increasing gap between the experience of Christian democrats in Western Europe and the trajectory of parties with a Christian allegiance in post-communist countries. What is remarkable in this regard is the example of *Latvijas Pirmā Partija* (Latvia's First Party – LFP), which explicitly endorsed Christian values as the basis for public policies. During the parliamentary elections of 2002, LFP gained the support of the major churches (Lutherans, Roman Catholics and Orthodox), which resulted in nickname 'the clergy party.' *Ringolds Balodis* emphasises the sharp contrast between the rise of LFP in 2002 and its inglorious decline: 'In 2011 the Parliament of Latvia was dissolved and early elections were held. LFP was not re-elected in the new parliament, and it can be confidently said that Christian values are not represented in the current parliament. Interestingly, that party which in its infancy positioned itself as the party which fights against oligarchy, was forced to leave politics (...) labelled as a party of oligarchs.'

A second feature of the political landscape is the social-democrat struggle to find a balance between an increasing interest in religious politics (just think of Tony Blair's initiatives) and the project of equality and secularity (like in Spain), shared with Greens and leftist movements.

A third feature is represented by populist movements and parties, which in many countries are tightly linked to the fourth feature, regional politics. In some contexts, like Spain (e.g. with Basque bishops' politics) and the United Kingdom, this is a structural aspect. In others, like Italy (with Lega Nord) and Belgium (with Flemish chauvinism), it is a relatively new and emerging phenomenon.

Finally, national reports suggest a fifth feature, namely, personal politics. With President Sarkozy, Prime Ministers Blair, Zapatero, Prodi and Berlusconi, not to mention the Kaczyński brothers and less well-known but emerging figures like Muslim UK Minister Baroness Warsi, religious politics in first decade of the 2000s have been first and foremost a matter of individual inventive strategy and discourse.

Table 3:

Grounds for political interference (both pro and anti) with religion, and diversified impact according with different political forces

Grounds for political interference (both pro and anti) with religion Main European political parties	Historical legacy Tradition Identity Culture	Social Cohesion	Welfare	Human Rights
European People's Party	++	++	++	?
Progressive Alliance of Socialists and Democrats	+	++	++	+
Liberal and Democrats	-	-	-	-
Green and Left	-	+	-	++
Populist Parties	++	+	+	++

Grounds for political interference (both pro and anti) with religion Main European political parties	Endorsement of State's Principles	Project of Secular Society	Security	Equality
European People's Party	+	+	-	-
Progressive Alliance of Socialists and Democrats	+	+	+	+
Liberal and Democrats	+	+	+	+
Green and Left	+	+	+	++
Populist Parties	+	?	?	+
Index: ++ = strong impact + = medium impact - = no impact				

V. CONCLUSION

The political dimension of the state's approach to religion challenges the methodology of church and state research in the different national contexts as well as on the European scale. The poor conversation with political scientists and sociologists is often conducive to a partial vision of the object of study, church and state. Accordingly, research in the field of church and state risks being auto-referential and disconnected from reality. Hence, the difficulty to get a solid grasp on a number of decisive issues for the interaction between politics, law and religion, ranging from regional politics to populist exploitation of religion, from the new political discourse of religious leaders to institutional creativity (witnessed in Estonia with the Council of Churches established in 2002 and in Scotland with the Scottish Working Group on Religion and Belief Relations, established in 2008).

On a substantive note, it will be necessary to link the state's approach to religion, and the underlying political dynamism, to the current debate on 'multiple modernities' and the 'post-secular society'. The politics of religion affecting church and state arrangements are the result of a complex process of modernisation which has gone well beyond the project of a universalistic Western secular modernity spreading worldwide from Europe. According to the pattern of 'multiple modernities' suggested in 2000 by Shmuel Eisenstadt, peculiar ways of accessing the modern world in India and Russia, in Turkey and Northern Africa, are likely to challenge Europe, and its model of religious neutrality and religious freedom. This is coterminous with the political challenge inherent in the 'secular age' (in Charles Taylor's terminology), and even better in the paradigm of the post-secular society suggested by Habermas and Casanova and enriched by a vast panoply of contributions. As Massimo Rosati and Kristina Stoeckl show in their edited book *Multiple Modernities and Postsecular Societies* (Ashgate, 2012), the post-secular global society features five dimensions: reflectivity of both secular modernities and religious traditions; co-existence of secular and religious worldviews and practices; de-privatization of religions; religious pluralism as opposed to religious monopoly; and the sacred understood as a heteronomous transcendent force as

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opposed merely to an immanent understanding of it. Each of these dimensions is at the heart of the struggle of the European state with religion and each of them is likely to affect most powerfully the politics of religion as well.

THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

RICHARD POTZ

Law on Religion in the European countries is like no other legal sphere the result of different historical experiences. On the one hand, these experiences of course do contain a number of similarities, which are emphasized in recent years in the context of European unification in order to find a common European pattern. On the other hand, the role and value of religion in the European countries are not understandable without considering the specific and differing historical experiences.

The first formative aspect in this context is the fact that with a few exceptions the European countries show a common Christian tradition, which means there are some common grounds. However, European Christianity has undergone denominational differentiations, which also had effects not only on the law on religion, but had influenced the whole legal system of the single European countries.

I. RELIGION AND NATIONAL IDENTITY ON THE CONSTITUTIONAL LEVEL

In many European countries, particular religion or confession traditionally has played an important part for the national identity which therefore is reflected in the legal order. In some countries, religion is part of historic experiences where the preservation of the national identity against oppression was closely connected with religion.

In Poland, Ireland and Croatia such an identity marker was and even is Catholicism; in countries, which have been under Ottoman rule for centuries, like Greece, Bulgaria and Serbia the same role plays Orthodoxy. This historical experience of course has a remarkable influence on the legal field up to now.

Religious formulas in the preambles of constitutions refer mostly to such historical experiences. These preambles sometimes

go beyond a general vocation of God, referring even to a special dogmatic concept. Thus, the constitutions of Ireland and Greece include an appeal to the Holy Trinity.

Another reason for the vocation of God in preambles are the traumatic experiences with totalitarian criminal political systems in the twentieth Century which also have consequences for the role and value of religion in the constitutional order. Grounding in an ethics of responsibility based on religious or philosophical reasonings the limits of feasibility of law are expressed. We can find examples in the *Grundgesetz* of Germany, in Constitutions of German *Länder* and in Constitutions of former communist countries.

Although these references to religion sometimes reflect historical experiences with a very high memory value, religion must not serve as basis for the legitimacy of political acting and for the legal order. There is, however, the risk that new challenges, such as the pluralization of society through immigration and the fear of religious-fundamentalist terrorism lead to the mobilization and instrumentalization of traditional identities. This religious conservative attitude sometimes is entering into an alliance with secular anti-religious positions, with consequences also on the level of law on religion. An actual example presents the discussion of the legality of the ritual circumcision of Jewish and Muslim boys.

II. RELIGION, MINORITY LAW AND INTEGRATION

Another aspect is that the traditional religious minority in each country played an important role in shaping minority rights and in particular rights of religious minorities. The famous theory of Georg Jellinek, that freedom of religion was the historical origin of human rights is mostly rejected today. But this should not obscure the fact that modern European minority rights are essentially determined by the historical experiences in dealing with religious minorities in most of the European countries. In the Habsburgian Monarchy for instance the paradigmatic model for all other minorities was the Protestant minority. Even the concept for the Statute of the Islamic Community of Bosnia refers to this model and is relevant in Bosnia up to present times.

Historical experiences with religious minorities get a new dimension through the migration of recent times. Migrants often bring with them religious concepts for their position in state and society unfamiliar to the immigration State, challenging and testing the respective established system in dealing with religion in general and religious minorities in particular.

Thus, all European countries do not only have a well-established profile of law on religion, they also have a specific immigration-profile due to the origin of the majority of immigrants. The Muslim immigrants in Britain are predominantly from the Indian Sub-continent, in France from the Maghreb and in the German speaking countries from Turkey and Southeast-Europe. They are bringing with them quite different experiences regarding the relation of religion and politics.

In this context, one has to consider the role of the religious organisations of immigrants. Because of the special legal forms for religious organisations, they get more and more the position of representative institutions of the immigrants with quite different consequences. Religious organisations partially support the inclusion of immigrants in civil society. They become partners in more than a rather symbolic way in the public sphere, and beyond that they are involved in opinion-making processes. To give an example: Whenever immigrants from Muslim countries are concerned in Austria, the Islamic Religious Community will be consulted.

Although law on religion can play an important positive role for integration law in such a way, this approach sometimes is criticized because of the danger of an essentialistic reduction of the immigrants to their religious identity.

Another often raised question is, if these religious organizations instead of serving the inclusion, on the contrary become instruments for social exclusion producing the often complained parallel societies.

III. RELIGION AND DEMOCRATIC SOCIETY

With the reference to the preamble discussion and to legal issues resulting from the diversification of the religious landscape by migration, our subject is far from being dealt exhaustively. Three

years ago in a booklet with the title “Religion and Civil Society” the historian Paul Nolte asked in the subtitle the following question: “Do we need a state friendly to religion?” He rightly observes: “The overlapping areas of religion and modern society extend deeper into the core of the Western societies.” Thereby he points to the fact, that in the meantime it has become a commonplace that even in Europe as a special case, modernization processes are not necessarily connected with an extensive secularization and with the privatization of religion.

Coming from different theoretical starting points we can find several famous concepts arguing in the same direction. They include for instance the frequently cited “*Böckenförde-Theorem*”, after which the liberal secular state lives on conditions that it cannot guarantee itself. Among these conditions, religion plays a special role.

Religion in principle belongs to the ligatures of a society. According to Ralf Dahrendorf the goal of any society is to strike a balance between options and ligatures in a way that optimizes life chances. And Dahrendorf adds: “Ligatures without options are oppressive whereas options without bonds are meaningless.” It is remarkable that in this sense religions in a pluralistic society are producing not only ligatures but increasingly also are providing for options.

Even Jürgen Habermas – while criticizing Böckenförde – nevertheless is more and more stressing the social and political function of religion.

If religion is socially effective, and – spoken utilitarian – is of great benefit to state and society, then this must inevitably have consequences also on the legal level. It must therefore be ensured by the legal order that religion is not banned from the public space. The secularization process has brought a functional differentiation in society comprising also religion. Religion cannot be reduced to spiritual practice against its self-understanding. The more the states are organizing fields where religious communities traditionally have been active for instance as social networkers, legal questions about the role of religion in society are at stake.

IV. RELIGIOUS PLURALISM AND DEMOCRATIC SOCIETY

The case-law of the ECHR consistently holds that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. The special feature of this formulation is the interpretation of Article 9 but the link between democracy and religious pluralism is quite complex. It is undisputed that a democratic society without the diversity of political parties and movements is unthinkable. But is this also true for religious diversity?

One thing is obvious: The state and its institutions cannot bring about the existence of religious pluralism, but must enable and facilitate legally and actually existing religious diversity in a strictly neutral manner.

Against the background of the globally increasing religious pluralism the frequently asked question, whether a society consisting entirely of adherents of one religion or exclusively of agnostics can organize a “perfect” democracy, is purely academic and pointless. Therefore, starting from the most probably irreversible fact of religious plurality, the constant statement of the ECHR goes beyond the perspective that the right of believers to freedom of religion encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention.

The formulation in the decision of the ECHR is also to be understood in the way that the state has to ensure religious pluralism for democratic political reasons, because of the importance of religious beliefs for individuals and of the contribution of religious groups to the activities within the civil society. The ECHR has underlined that freedom of thought, conscience and religion is “one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”

In this context, a development has to be taking into account which Grace Davie characterizes as a “change from a culture of

obligation or duty to a culture of consumption or choice” and Peter Berger calls a “Heretical Imperative”, including those who wish to adhere to their respective original faith. Even remaining in the traditional religion is more and more the result of an individual decision.

This has consequences for the significance of the opinions of religious communities given to current problems or relevant law drafts. If, therefore, churches and religious communities raise their voices in the opinion-forming political processes, they do not speak any longer on behalf of a traditional counterpart of the state but in the name of citizens who have chosen their religion grounding on a free decision – a choice however, which is not necessarily final and may change again. Both sides the state and the religious communities as civil society actors have to realize that, in modern societies, affiliations are more and more subject to a process of liquifaction.

This raises the question whether we are currently experiencing a paradigm shift in the relationship between church and state in Europe, in which the religiously neutral state, although very late in modern times, succeeds in getting free from the conditions determined by the Gregorian era scenarios.

By this, I mean the phase of our history starting in the Middle Ages, in which church and state confronted each other as institutions with comprehensive claims. The question if one can speak with Harold Berman of a papal revolution, which was the mother of all European revolutions, must here be left aside. In any case, it can be taken for granted that as a result of the medieval confrontation an institutional pluralism has begun, in which the Church was identified definitely as autonomous entity responsible for the spiritual sphere.

The expulsion of the secular power from the single sacred order nevertheless led first to a confrontation between the leadership claims of the spiritual and the temporal power, with differentiated organizations and legal systems. The attempts to enforce hierocratic or state-church concepts were followed by establishing separation and coordination systems after the end of the *anciens régimes*. In any case, church and state, as we are perceiving them today, are understandable only against this historic background.

The logic of Gregorian scenarios includes not only the “*Kulturkämpfe*”, which took place in Europe in the nineteenth Century,

and partly in the twentieth Century, but is also responsible for an attitude towards religion that José Casanova has described as “Europe’s fear of religion.” In fact, in Europe the laicistic fear of the Churches as institutional competitors of the state is still as present as the fear of the Churches of an overpowering state.

V. CIVIL SOCIETY AND LAW ON RELIGION

Against this background of a post-Gregorian understanding of state and church relationship perhaps more than ever the question arises: In which sectors of civil society the activities of religious institutions must be taken into account by considering also their specific features? I will briefly highlight the most important areas, some of them are traditional, some of them are the result of recent social and scientific developments.

First of all, it has to be emphasized that religion is one of the social forces that promote solidarity. This is an essential service for the community in a time in which – rightly or wrongly – an increasing erosion of solidarity is complained. Everywhere in Europe, Churches and religious communities operate social and charitable networks.

The states’ legislation but also European law are therefore faced with the need to recognize this contribution likewise considering the peculiarities of the contributing religious organizations.

Another traditional field is education and teaching. In this context, it has to be referred in particular to Article 2 of the first Additional Protocol to the ECHR, whereby the State has to respect the right of parents to ensure an education in conformity with their religious and philosophical convictions. One consequence is the guarantee of pluralism in education implying in principle the establishment of denominational private schools.

The growth of ethics requirements often is deemed a kind of “crisis” phenomenon, which occurred with the erosion of uniform, universally binding moral standards especially in view of the development of modern medicine and life sciences. Whether or not one regrets this phenomenon, it confronts the legal systems with new and enormous challenges in trying to find a democratic consensus.

This is not only true for the establishment of institutional bodies in the fields of bio-and medical ethics, but also concerning fundamental rights and with regard to the role of ethics councils in the business sector.

Pastoral care in hospitals, prisons and military service has primarily the function to ensure the exercise of religion even under difficult existential circumstances. Nevertheless, this is not only a question of guaranteeing fundamental rights under the aspect of the State's duty to protect religious practise. With pastoral care in special situations of life, Churches and religious communities also provide an important task in the interest of the whole society.

In this context, another example should be mentioned. In March 1995, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) called for the establishment of an advisory board for prisoners. In the corresponding Austrian provision there is explicitly stated that this board has "to monitor the entire activities of security agencies in terms of human rights." Of course, Representatives of the Churches naturally have been appointed as members of this human rights board.

This special board points to another important function of the religious communities in the civil society. Assessing the role and value of religion in State and society one has to consider also the criticism of social developments and public policies not only in human rights issues. Regarding the religion's potential for dissent and dissidence religion has become an important factor in a pluralist democratic system.

In this context for the development of the law on religion in the European states, it is not without significance that the confessional parties, emerging in the nineteenth Century in response to the democratization process, have changed considerably their attitude in the course of the twentieth Century. While Catholic confessional parties not at least because of the anti-clerical attitude of liberalism often were oriented democracy-critical, after the Second World War they became important supporters of the further democratization process.

VI. CONCLUSION

On the occasion of the circumcision debate, Jürgen Habermas has formulated in the NZZ remarkable sentences concerning our subject: "As long as religious communities play a vital role in civil society, they must not be banished from the political public to privacy because a deliberative politics of public use of reason depends on religious as well as on non-religious citizens." That is a precise description of a post-Gregorian understanding of the role of religion in state and society.

From the standpoint of the state's obligation to neutrality in religious matters it is not only permitted, but even necessary, to give all the forces in society an appropriate space for their activities. Among them religious interests are also to be considered in a fair balance between positive and negative religious freedom and strictly bound to the principle of equality.

Thus, religion has to be involved in an "overlapping consensus" and the religious communities are to be enabled to participate in public spaces with their activities.

Here the characteristics of the religious dimension should be taken into account in a reasonable manner and without unilateral privileging or discriminating against.

The irreversible progress of secularization must not be abandoned. It is not about a re-sacralisation of society, a resuming of pre-modern religious attributes by the State, or an establishment of a modern "civil religion", but – I use again formulations of the historian Paul Nolte – to secure an essential resource of civil society. The loss of religion as resource for reflecting on transcendence could hardly be compensated by any other institution.

ANNEX: *GRILLE THÉMATIQUE*

I. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: POLITICAL PERSPECTIVES

From extra-legal documents (e.g. government statements, ministerial circulars, parliamentary reports, records of debates in the legislative process):

- (1) What does the State see as the role of religion and its value to (a) the State; (b) society; and (c) the individual?
- (2) What criteria are used politically to determine the value of religion in these areas? In what areas does the State see religion as contributing to, or as a threat to, society, the individual and the State (e.g. social cohesion, nationhood, the national conscience, the promotion of democracy, assisting the functions of the State, culture, and charitable work)? What was your government's view on the EU Directives 2000/43/EC and 2000/78/EC when they were in draft form? What national debate (including debate in your national legislature) was there prior to implementation of the Directives in your law? What role did religions play in this debate?
- (3) What does the State see as its own role in relation to the contribution of religion to society, the individual and the State in these areas? Does the State see itself as for example facilitator, controller, or both?
- (4) What reasons are given in these extra-legal documents for the political views on the role and value of religion to society, the individual and the State as expressed in those documents? That is: how does the State justify its position on the role and value of religion?
- (5) Are the State's views on the role and value of religion, and the reasons underlying these, the subject of political debate? If yes, what are the principal lines of this debate?

II. THE STATE'S UNDERSTANDING OF THE ROLE AND VALUE OF RELIGION: LEGAL PERSPECTIVES

From State legal instruments (the constitution, sub-constitutional legislation, and particularly case law):

- (1) To what extent and in what ways does State law reflect and promote the State's political understandings of the role of religion and its value to society, the individual and the State?
- (2) In what legal fields is the State's recognition of the value (and the danger) of religion most evident (e.g. religious freedom, protection of religious sentiments, religion public and social festivals, hate speech, schools, and public symbols)?
- (3) Are these areas of law really illustrations of (a) the proposition that the State values religion *per se* or (b) the proposition that the State recognizes the value of religion to others?
- (4) What reasons are advanced by the Courts in their statements that religion is valuable (or not) to the individual, society and the State?
- (5) What is the response of religions to these views in State legislation and case law on the State's understanding of the role and value of religion? Do religions agree with them or disagree with them? What are the reasons given by religions in relation to their position on this matter?

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