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# CESNUR Center for Studies on New Religions

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## Minority Religions, Social Change, and Freedom of Conscience

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### RELIGIOUS MINORITIES IN SPAIN. A NEW MODEL OF RELATIONSHIPS? <sup>[1]</sup>

#### MINORITY RELIGIONS, SOCIAL CHANGE, AND FREEDOM OF CONSCIENCE.

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**SUMMARY:** The enactment of the Spanish Constitution of 1978 supposed a new model of relationships between the State and the Religious Groups, abandoning the traditional model of interactions between the Catholic Church and the State.

The new model, at least from a theoretical perspective, is characterized by the neutrality of the State. In our study we will approach the principal deficiencies of our legal system, especially in ordinary legislation, attempting to point out the insufficiencies of the model drawn up in the Organic Law 7/1980, of July 5, of Religious Freedom, [2] from a double perspective: 1) The *neutrality* of the State, proclaimed in the article 16.3 Spanish Constitution. 2) The *equality* of individuals, proclaimed in the article 14 Spanish Constitution, with special reference to those not integrated into the majority religious group.

#### **I. AN HISTORICAL INTRODUCTION.**

On April 14, 1931, the leftist parties won in the Spanish municipal elections. The king of Spain, Alfonso XIII relinquished power and left Spain. [3] This was the political price of his support of General Primo de Rivera's dictatorship.

The Second Spanish Republic was proclaimed. Spain went from a monarchy to a republic overnight.

On December 6, 1931, a new Constitution was passed by democratic referendum. This Constitution proclaimed religious freedom and separation between Church and State. But it also prohibited teaching by religious orders, and the Jesuit Company was dissolved.

During the Second Spanish Republic, the relationship between the leftist governments and the Catholic Church was bad. A great political instability was caused by the radical positions of the most intransigent Catholics and the anti-Catholic parties.

On July 18, 1936, General Franco organized a coup d'État. It was the begin of the Spanish Civil War. After the Spanish Civil War of 1936-1939, Spain abandoned the democratic model of the Second Spanish Republic, established by the Constitution of 1931. The new dictatorship was enforced by the Spanish Army. It was open a period of excellent relationship between the Catholic Church and the State.

The Concordat of 1953 gave a lot of privileges to the Catholic Church. The Catholic priests were paid by the State, Catholic Church had a special tax regime, Catholic marriage was compulsory for all baptized citizens, [4] the divorce was outlawed, and all books, magazines and newspapers were censored by the Catholic Church. The Catholic Church also controlled the cinema, television, and radio industries, and all the educational system. [5]

On November 20, 1975, General Franco died in his bed. Four decades of dictatorship died with him. When Franco died, the long tradition of interaction between Church and State suffered a crisis with the Constitution of 1978.

King Juan Carlos I [6] was more intelligent than his grandfather. He called democratic elections with all parties, [7] and a new democratic Constitution was passed by referendum, in December 6<sup>th</sup>, 1978.

Article 16.3 of the Spanish Constitution declares that *no religion will be established* and that Church and State must remain separate.

The article 16.1 of the Spanish Constitution recognizes the freedom of conscience and religion, and article 14 recognizes the equality principle among all Spaniards.

## **II. THE LEGAL DEVELOPMENT OF CONSTITUTIONAL PRINCIPLES: THE ORGANIC LAW OF RELIGIOUS FREEDOM AND THE SYSTEM OF AGREEMENTS.**

In spite of the clear definition of the equality principle contained in article 14 of the Spanish Constitution, religion discrimination remains an issue.

Some religious groups enjoy privileged statutory frameworks, protected by an Agreement with the Spanish State, for example the Catholic Church, and the Protestants, Jews and Moslems. Other Religious Groups are not covered by these agreements.

The legitimacy of the provision contained at the first paragraph of article 7 of the Organic Law 7/1980, July 5, of Religious Freedom, is seriously questioned. This article demands of the Religious Group a *notorious establishment* in function of its area and number of believers, if these Religious Groups want to sign an agreement with the State.

This guarantees them access to a particular statute. This access is denied to minority Religious Groups, which lack such *notorious establishment*.

These legal agreements, product of a conventional regulation, are configured in the privilege note. This situation is not far away from institutionalized religious discrimination.

For this reason the current agreements system merits closer scrutiny.

Therefore it would be more useful to opt for a model of *common rights*, that would be applicable to *all* Religious Groups.

### **III. THE DISTORTION BETWEEN CONSTITUTIONAL THEORY AND LEGAL PRACTICE.**

#### **III. 1 THE INDIVIDUAL RIGHTS OF THE RELIGIOUS MINORITIES IN SPAIN.**

Theoretically, the principle of non-discrimination for religious motivations is in effect in Spain. This is a consequence of the article 14 of the Spanish Constitution.

But in our legal classification, we can distinguish perfectly between those Religious Groups regulated by the *common right* of associations, and those who enjoy a special legislation, with a more favorable legal status

We can distinguish three categories:

- 1) The regime of the Catholic Church, which enjoys joint privileges recognized in the Agreements of 1979.
- 2) The situation of the religious groups that signed the Agreements of 1992: Evangelicals, Jews and Moslems.
- 3) The remaining groups which have no agreements with the State.

#### **III 2. THE EDUCATION AND THE RELIGIOUS GROUPS.**

The educational system will perhaps be, one of the most important vehicles of social influence of the Catholic Church, the majority religious group in Spain.

From this perspective two elements call our attention:

- 1) The huge weight of the Catholic Church in Spain on the control of private education in Spain, which puts in ecclesiastic hands the management of 1.000 million dollars every year.

The Catholic Church receives 1.000 million dollars every year for the economical support of the State of the private Catholic schools. And this happens in a country where the Church and the State are separate. We can say: *separate but with economic support of the State*, of course.

- 2) The extraordinary weight that Catholic religion teaching in Spain has traditionally had.

#### **III. 3. THE ECONOMIC RELATIONSHIPS BETWEEN THE STATE AND THE MINORITY RELIGIOUS GROUPS.**

##### **III. 3. A. DIRECT ECONOMIC COOPERATION.**

There is a special direct economic cooperation between the State and the Catholic Church. In this field, the fundamental distinction between the Catholic Church and the religious groups in the Spanish Income Tax is that every tax payer can give 0,52% of his income taxes to the Catholic Church, only to the Catholic Church.

The privilege conceded to the Catholic Church finds a very difficult justification from the constitutional perspective, because according to article 16.3 of the Spanish Constitution, no group has *state character* in Spain. This makes this privilege unacceptable.

The Religious Groups that signed the Agreements of 1992 [8] do not enjoy this privilege.

##### **III. 3. B. INDIRECT ECONOMIC COOPERATION.**

There is also a strong indirect economic cooperation between the State and the Catholic Church. Here we again find a diversity of systems. This violates constitutional principles, and it only can be explained from the inertia of history.

Nowadays, it is abolished the old privilege of article XX of the Concordat of 1953. This article established the fiscal immunity of the money that the State gave to the Catholic Church. Any another solution would be unconstitutional, because it would be against articles 14, 16 and 31 of the Spanish Constitution.

But there are nowadays many tax privileges, many of them impossible to justify under constitutional principles.

For example, the following:

1) In the matter of consumption taxes (V.T.A.): no taxes are paid by ... the consumption, [9] of objects pertaining to -Catholic- worship, as long as the goods acquired for -Catholic- worship, the financial support of the -Catholic- clergy, the sacred -Catholic- apostolate or the exercise of charity -by Catholics-.

On my personal opinion, this conflicts with the European Community regulation on fiscal harmonization on V.T.A., [10] and more concretely the VI Directive of the European Union, which established a closed list of exemptions on indirect taxes, which does not include this.

The Commission of the European Communities directed a letter of complaint to the Permanent Representation of Spain in the Community, in November 23, 1989.

The Commission of the European Communities considered that the fiscal benefits of the Minister of the Treasury Order February 29, 1988, and the Resolution of the Taxes General Director of March 14, 1988, were not included in the VI Directive of the Council of the European Communities of May 17, 1977, of harmonization of the legislation of the state members in matter of indirect taxes.

The response of the Spanish Government was that this tax privilege was a previous obligation of Spain in an International Agreement with the Vatican in 1979. This response compels us to question the appropriateness of these *agreements*, between the Church and the State.

Another problem is the tax exemption of the sale of priests' residences. These sales were declared exempt by the Agreement with the Catholic Church. This is a privilege not enjoyed by public officials which plays an important role in the exercise of other fundamental rights, such as education or freedom of information.

The remaining of religious groups not covered by any agreements enjoy none of these privileges attributed to the Catholic Church, in a country that claims to be secular, neutral and separate from the Church, where all citizens are equal under Law.

The problem would not be solved by granting this benefit to the minority groups (since this would simply perpetuate the violation of the principle of *non establishment*). The problem only would be resolved by suppressing this privilege given to the Catholic Church.

2) Other special points of dubious constitutionality are as follows:

a) The exemption of the payment of the Real Property Tax, [11] on the residences of Catholics, Protestants and Moslems priests. This is a privilege which even the vast majority of the public servants do not enjoy.

b) The exemption in the Property Tax of the orchards and religious gardens of those groups which have

signed an agreement with the State. [12] Are they necessary to protect the fundamental right of religious freedom? I can not find any justification.

I can find only an explanation: the inertia of history has perpetuated a privilege dating from the National Budget Law of 1845. [13] This Law established a special exception for the Catholic Church regards to this matter.

### III. 4. THE MARRIAGE MODEL.

The Catholic Church wants to defend its power of control and social influence. But the influence capacity of the Catholic Church on the Spanish society has experienced a setback.

The first great crisis was the authorization of the divorce in 1981. The divorce caused a revolution in the Spanish society. The divorce was the most clear demonstration of the difficulty than the Law has to go against the prevailing feelings in the society in which it must be applied.

However the principal fracture that suffers the catholic matrimonial system in Spain from the perspective of its civil repercussion, was produced a little before, with the Agreement between Church and State on Legal Matters of 1979. Its article IV contains *the adjustment clause* to the Law of the State, of the ecclesiastic decisions on marriage process.

This decisions will have efficiency in the civil order, if their *adjustment* to the civil Law had been verified by the competent civil Court. The canonical jurisdiction in this matter remains empty of a big part of its content. The Church loses one of their more important social influence instruments.

But the canonical law has exercised traditionally an excessive influence on the civil configuration of the marriage. By this reason the civil law does not give enough legal coverage to *atypical formulations of social coexistence*, that the praxis presented.

I am thinking especially on the legal regulation of:

#### 1) *Atypical subjective formulation:*

a) The homosexuals. The corset of the legal definition (union of a man with a woman, perhaps too rigid), seems not to give a perfect solution in order to protect consequences that would seem unquestionable from the perspective of the legal safety and the most elemental equity rules.

There is a *gap* in the matter of the coverage of the social security, in the inheritance right, in the definition of the relationships between father and soon, and in the minors adoption.

b) The polygamy. The Spanish scientific doctrine has a concept of marriage perhaps excessively imbued by a concept of the Judeo-Christian tradition, in which the polygamy does not has content, and that it is built ignoring other religious and cultural point of views as the Muslims perspective, perhaps by their minority presence.

2) *Atypical formal formulation:* We can think on this kind of couples which were constituted without any formalisms. There is an insufficient legal coverage from the perspective of material welfare and legal safety.

### III. 5. LEGAL REGULATION OF GIVEN SUPPOSED OF CONSCIENCE OBJECTION.

#### III. 5. A. - THE WEEKLY REST.

The Constitutional Court, in its Case 19/1985, [14] resolved the case of a worker converted to the

Adventist Church of the Seventh Day, who had a conscience objection to the weekly rest day. This Spanish Constitutional Court into its First Legal Basis, pointed out the impossibility of the invocation by the employee of the right of freedom of religion and conscience, in order to impose some modifications of the contractual relationship with the employer.

I criticize this by this reasons:

- 1) The apparent collision is presented between rights with different level of constitutional protection:
  - a) The worker alleges the exercise of the *fundamental right* of religious freedom contained in the article 16.1 of the Spanish Constitution.
  - b) The employer argue his power of organization of the labor force, contained in the article 38 of the Spanish Constitution. This right lacks the nature to fundamental right that the worker right has.
- 2) The Constitutional Court ignores that article 2.1.a) of the Organic Law 7/1980, of Religious Freedom, includes within the content of the religious freedom right, the right to change and abandon the own Religious Group.

The solution of the Constitutional Court presents a centered perspective only in contractual terms, when this problem only can be solved from a non-contractual approach. We have two different rights, one of those has a *fundamental* level, while the other has only a *constitutional* rank.

The Constitutional Court should have followed the following criteria:

- 1) To preserve so much as possible the substantial content of both rights.
- 2) To apply the criterion of proportion, when we are making a *balancing test* between the fundamental right of freedom of conscience of the employee and the organization right of the employer.

### **III. 5. B. - MEDICAL TREATMENTS.**

There are special problems with the conscience objection to certain medical treatments. Every Jehovah's Witness reject the blood transfusions.

The jurisprudence of the Spanish Supreme Court and the Constitutional Court has discarded the possibility of requesting the refund of the medical expenses caused by the patient's option for alternative medical techniques, which are not covered by the free public sanitary system. This alternative medical techniques are costlier, but they are necessary in order to avoid the resource to blood transfusions, rejected by conscience motives.

CASTRO JOVER [15] and LLAMAZARES [16] have criticized this lack of legal and jurisprudence sensibility. They suggest a refund of the medical expenses. At least in a proportional quantity to the cost of the operation in a public medical center. This solution is fair from the perspective of the principle of equality and religious freedom.

### **III. 6. REGULATION OF THE RELIGIOUS ASSISTANCE IN PUBLIC CENTERS.**

The entry into force of the Constitution compelled to redefine the model of the religious assistance in public centers, inducing the disappearance of the old system of catholic *integrated* assistance during the regime of General Franco.

### **III. 7. REGISTRAL REGIME OF THE ECCLESIASTICAL REAL ESTATE.**

The article 5.4 of the Law of Mortgage, excluded the temples destined to the catholic worship from the Land Registry.

The recent reform operated in the Law of Mortgage, by the Royal Decree 1867/1998, [17] has suppressed the exception contained in the cited article 5.4. This exception was considered unconstitutional by this Royal Decree. But it was a delay of twenty years from the entry into force of the Spanish Constitution of 1978 to this reform.

The new drafting of articles 4 and 5 of the Mortgage Regulations, were given by article 1 of the cited Real Decree. Nowadays it is possible the access to the Land Registry Office of all the ecclesiastical real estate.

However, it was forgotten the modification of the articles 206 of the Law of Mortgage, and 304 of its Regulations, in which the Catholic Church has the same *status* that the State, the Province, the Municipal Councils and the Public Law Corporations. This regulations allow the first inscription in the Land Registry Office of the ecclesiastical real estate, if there is a Bishop certification. So the Bishops are assimilated to public officials.

LOPEZ ALARCON defended a hypothetical clause of *most favored group*. He defended the extension of this catholic privilege to the other religious groups. However I do not believe that the solution consists in an unlimited expansion of the constitutional equality principle contained in article 14 of the Constitution. I think so because it would persists the problem of the incompatibility of this provision with the principle of *non establishment* contents in article 16.3 of our Spanish Constitution. This article asserts specifically that any Religious Group will have *state character*. This formulation is not the best definition of a *secularized state*, but provides the parameters to establish this rule: if no group has *state character*, we can not give to the bishops the character of *civil servant*.

The Constitutional Court, in the Case 340/1993, [18] declared unconstitutional the old article 76.1 of the Law of Urban Renting of 1964, that assimilated the Catholic Church with the State, the Province, the Municipal Councils and the Public Law Corporations.

### **III. 8. ROYAL APPOINTMENT OF THE GENERAL MILITARY ARCHBISHOP OF THE SPANISH ARMY.**

During a lot of centuries, the bishops of the Catholic Church were appointed by the Kings of Spain.

In 1976 the Spanish king renounced to this privilege. But there is an exception: the General Military Archbishop of the Spanish Army is appointed by the Spanish King between a list of three candidates, made by the Spanish Foreign Office and the Catholic Nuncio.

### **IV. CONCLUSIONS.**

We can not disregard the high content of guarantees of the Spanish regulation about recognition and protection of the religious minorities, and we can not forget the huge step that supposed the Agreements of 1992. But we can not forget the situation of the religious minorities without an Agreement with the State.

We can not forget the clear advantages that would present the adoption of a *common right* regime for all the religious groups. With this solution, it would remain fully safeguarded the equality principle between all the citizens and the neutrality of the State on this matter.

### **NOTES**

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Ecclesiastical Law Department of the Complutense University of Madrid, Spain. [\[back\]](#)

2. According to our Constitution of 1978, religious freedom is a *fundamental right*, and all the fundamental rights must be regulated by *Organic Law*. And Organic Law is a Law that must be passed by the House of Representatives by absolute majority: 50% + 1 of the votes. Thus our fundamental rights are strongly protected. [\[back\]](#)
  3. He was the grandfather of our king Juan Carlos I. [\[back\]](#)
  4. Believer or unbeliever. [\[back\]](#)
  5. From the primary school to the University. [\[back\]](#)
  6. The successor of General Franco. [\[back\]](#)
  7. Including socialist and communist parties, which were illegal under General Franco dictatorship. [\[back\]](#)
  8. Protestants, jews and muslims. [\[back\]](#)
  9. The tax on consumption, the Spanish I.V.A.: *Impuesto sobre el Valor Añadido*. [\[back\]](#)
  10. The tax on consumption, the Spanish I.V.A.: *Impuesto sobre el Valor Añadido*. [\[back\]](#)
  11. The Spanish I.B.I.: *Impuesto sobre Bienes Inmuebles*. [\[back\]](#)
  12. The rest, the merely registered do not enjoy this benefit. [\[back\]](#)
  13. Dating on May 23, 1845. [\[back\]](#)
  14. Dating on February 13, 1985. [\[back\]](#)
  15. CASTRO JOVER, ADORACION. *La libertad de conciencia y la objeción de conciencia individual en la jurisprudencia constitucional española*. In: *La libertad religiosa y de conciencia ante la jurisprudencia constitucional. Actas del VIII Congreso Internacional de Derecho Eclesiástico del Estado. Granada, 13-16 de mayo de 1997*. Comares. Granada. 1998. [\[back\]](#)
  16. LLAMAZARES FERNANDEZ, DIONIOSIO. *Derecho de la Libertad de Conciencia II. Libertad de conciencia, identidad personal y derecho de asociación*. Civitas. Madrid. 1999. Page 311. [\[back\]](#)
  17. Dating on September 4, 1998. [\[back\]](#)
- Dating on May 13, 1993. [\[back\]](#)

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