



2013

Church-State Cooperation Does Not Violate a Guarantee of Religious Freedom: A Study of the 1978 Spanish Constitution and 1979 Concordat with the Catholic Church

Melissa Curvino

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CHURCH-STATE COOPERATION DOES NOT VIOLATE A GUARANTEE OF RELIGIOUS FREEDOM: A STUDY OF THE 1978 SPANISH CONSTITUTION AND 1979 CONCORDAT WITH THE CATHOLIC CHURCH

ABSTRACT

For much of Spanish history, to be a Spaniard and to be a Catholic were understood as equivalent. Spain had seven different constitutions in a span of 150 years and the question of religion was one of the main issues in each new constitution. From the early 1800s until the Constitution of 1978 Spain oscillated between two extremes: on one side, complete identification of the Church with the state; and on the other, state discouragement and restriction of the Church. Neither extreme provided for religious freedom. The Constitution of 1978 was different. It struck a workable balance in church-state relations by embracing the historical and social importance of the Catholic Church while at the same time protecting the rights of minority religions.

One of the interesting ways the constitution protects the rights of minority religions is by requiring the state to cooperate with religions. Recognizing that church and state are not fundamentally opposed to one another, and that religion is a positive social phenomenon, the constitution ensures that the church and the state will work together to achieve their mutual goals. To date, Spain has negotiated cooperation agreements with four religious denominations: the Catholic Church, the Evangelical Federation, the Islamic Federation, and the Jewish Federation. This Comment analyzes Spain's cooperation agreements and its recent religious liberty case law and argues that this system of cooperation agreements provide real and effective religious liberty.

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INTRODUCTION

For much of Spanish history, “[t]o be a Spaniard and to be a Catholic were understood as equivalent; they were two sides of a single national identity.”¹ In 1812, Spain’s first written constitution declared, “[T]he religion of the Spanish nation is, and will forever be, the one true Roman, Catholic, and Apostolic Church.”² Two centuries later, Catholicism remains an important social and political force in Spain. Pope Benedict XVI made three visits to Spain in a six-year span³—more than any other country in that same time period.⁴ Spain also remains a religiously homogenous society. In a 2010 study, seventy-three percent of Spaniards (roughly 34.3 million) declared they were Catholic.⁵

Despite the historic ties between Spain and the Catholic Church, the country is becoming more religiously diverse. Due to a recent influx of immigrants, Spain is now home to approximately 1.4 million Protestants, 1.5 million Muslims, and hundreds of thousands of Buddhists, Hindus, Jews, Jehovah’s Witnesses, Mormons, and Orthodox Christians.⁶ In total, non-

¹ Javier Martínez-Torrón, *Religious Freedom and Democratic Change in Spain*, 2006 BYU L. REV. 777, 780; see also Zoila Combalía & María Roca, *Religion and the Secular State of Spain*, in RELIGION AND THE SECULAR STATE : NATIONAL REPORTS 629, 630 (Javier Martínez-Torrón & W. Cole Durham, Jr. eds., 2010) (noting that from the expulsion of Muslims and Jews in the fifteenth century until the recent increase in immigration, Catholicism was de facto the only religion in Spain).

² CONSTITUCIÓN POLÍTICA DE LA MONARQUÍA ESPAÑOLA art. 12, Mar. 19, 1812 (Spain) (translated from Spanish) (“La religión de la Nación [sic] Española es y será perpetuamente la Católica, apostólica, romana, única [sic] verdadera. La Nación [sic] la protege por leyes sabias y justas, y prohíbe [sic] el ejercicio [sic] de qualquiera [sic] otra.”).

³ In 2007, the Pope traveled to Valencia for the World Meeting of the Family and, in 2010, he made a pastoral visit to Santiago de Compostela and Barcelona. MINISTERIO DE ASUNTOS EXTERIORES Y DE COOPERACIÓN, DIRECCIÓN GENERAL DE COMUNICACIÓN EXTERIOR, ESTADO DE LA CIUDAD DEL VATICANO (SANTA SEDE) 38 (2010). In 2011, the Pope visited Madrid for World Youth Day. FROM HIS HEART TO YOURS: THE WORDS OF POPE BENEDICT XVI: WORLD YOUTH DAY MADRID (2011), available at <http://worldyouthday.com/wp-content/uploads/2011/09/Pontifical-Messages-of-WYD-2011.pdf>.

⁴ *Benedict XVI: Apostolic Voyages Outside Italy*, HOLY SEE, http://www.vatican.va/holy_father/benedict_xvi/travels/index_outside-italy_en.htm (last visited May 9, 2013).

⁵ Bureau of Democracy, Human Rights, & Labor, *International Religious Freedom Report 2010: Spain*, U.S. DEP’T ST. (Nov. 17, 2010), <http://www.state.gov/j/drl/rls/irf/2010/148986.htm> [hereinafter *International Religious Freedom Report 2010*]. In a 2009 study by the Centro de Investigaciones Sociológicas, seventy-six percent of the nearly 2500 Spaniards surveyed identified themselves as Catholic. CENTRO DE INVESTIGACIONES SOCIOLOGICAS, ESTUDIO NO. 2.811, at 18 (2009) (Pregunta 24).

⁶ Spain has no official government census to measure religion because its constitution provides that no individual is required to answer questions about his or her religious beliefs. *International Religious Freedom Report 2010*, *supra* note 5.

Catholic religious groups claim about two percent of Spain's population,⁷ and non-believers and Atheists claim roughly twenty percent.⁸

The Spanish Constitution, which was enacted in 1978, protects the rights of both the Catholic majority and the minority religions. It professes the importance of freedom of religion and provides that no religion shall be preferred by the state.⁹ However, the Constitution also requires all public authorities to "take into account the beliefs of Spanish society" and to maintain a cooperative relationship with the Catholic Church and the rest of Spain's religious denominations.¹⁰ Spain maintains a cooperative relationship with the Catholic Church through four treaties with the Holy See that regulate the economic, political, and social rights of the Catholic Church, and which together constitute a concordat.¹¹ These agreements call for a partnership of church and state.¹² This partnership is permissible because Spanish lawmakers have not interpreted the Constitution's requirement of state neutrality as a means of disestablishment. The Spanish constitutional system understands that state neutrality does not require a strict separation of church and state; the state can cooperate with religious organizations and still achieve full religious freedom for all.¹³

The coexistence of disestablishment on the one hand and church-state cooperation on the other might seem to be a contradiction in terms to an American audience. The American protection of religious freedom has two elements: disestablishment and free exercise.¹⁴ Although much of American

⁷ CENTRO DE INVESTIGACIONES SOCOLÓGICAS, *supra* note 5, at 18 (Pregunta 24).

⁸ *Id.*

⁹ CONSTITUCIÓN ESPAÑOLA art. 16, B.O.E. n. 311, Dec. 29, 1978 (Spain) ("Los poderes públicos tendrán en cuenta las creencias religiosas de la sociedad española y mantendrán las consiguientes relaciones de cooperación con la Iglesia Católica y las demás confesiones.").

¹⁰ *Id.* (translated from Spanish).

¹¹ A concordat is "a treaty concluded between the papal see and the government of a Catholic nation, to regulate . . . the relations between the Catholic church and the state." Gaston de Bourge, *Concordat*, CYCLOPÆDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND THE POLITICAL HISTORY OF THE UNITED STATES 555, 555 (John J. Lalor ed., N.Y., Charles E. Merrill & Co. 1890). The Holy See negotiated concordats with twenty-eight nations, mostly in Europe and Latin America, between 1107 and 2009. *See Agreements of the Holy See*, HOLY SEE, www.vatican.va/roman_curia/secretariat_state/index_concordati-accordi_en.htm (last visited Mar. 4, 2013). Because a concordat typically regulates the entire legal situation of the Catholic Church in a country, the four separate agreements forged between the Holy See and Spain in 1979 are commonly read together as one cohesive instrument. Martínez-Torrón, *supra* note 1, at 794.

¹² De Bourge, *supra* note 11, 555–56.

¹³ Martínez-Torrón, *supra* note 1, at 790.

¹⁴ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I; *see also* Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 49 MCGILL L.J. 635, 652 (2004).

First Amendment jurisprudence has enforced a rigid separation of church and state, the United States Supreme Court has recently indicated that this separation is not always necessary.¹⁵ European models of church-state relations show that a movement toward the establishment of one religion does not necessarily infringe upon the religious freedom of another.¹⁶ In particular, Spain's experience shows that cooperation with religious denominations is a good thing because it helps them use their religious freedom more effectively.

This Comment will show that the Spanish model of church-state relations adequately protects freedom of religion and is consistent with European standards. Part I will present background information on the history of church-state relations in Spain from the early 1800s to the present. Part II will discuss how the government applied constitutional principles of religious liberty in the 1979 Concordat. It will analyze specific provisions of the Concordat and argue that they are permissible under the Spanish model of church-state relations. In Part III, this Comment will analyze the Concordat of 1979 in light of European religious liberty standards. Although the Concordat establishes state preference for the Catholic Church, Part III will argue that a mild form of state preference does not violate the European Convention for the Protection of Human Rights and Fundamental Freedoms. Finally, this Comment will conclude that the Spanish model of church-state relations adequately protects freedom of religion. The 1979 Concordat with the Catholic Church does not infringe on the rights of other religions and does not violate constitutional principles of equality and neutrality toward religion. Additionally, in light of both Catholic and secular philosophy, the Spanish government's commitment to cooperating with all religious organizations is a good model for the protection of religious liberty.

I. BACKGROUND

Throughout its history, Spain has struggled to find a balance between civil and canonical authority. Catholic monarchs, believing in the divine right of

¹⁵ The Supreme Court has abandoned much of its strict separatism and allows religious parties to engage in public activities. John Witte, Jr. & Nina-Louisa Arold, *Lift High the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government Property*, 25 *EMORY INT'L L. REV.* 5, 53–54 (2011).

¹⁶ *Id.* The European Court of Human Rights has recently allowed the state to reflect the traditional religious views of its majority. *Id.* at 53.

kings,¹⁷ sought unity between these two forces, with God's king and God's church governing together.¹⁸ Unfortunately, this led to intolerance of the non-Catholic population.¹⁹ As democratic regimes developed in European countries in the nineteenth century, Spanish liberals became increasingly unhappy with the government's conflation of church and state.²⁰ They questioned the merit of having a strong church-state identification and favored a regime where the state maintained no relations with religious groups.²¹ The church condemned the growing tide of democracy and its notions of separation of church and state.²² Secular and religious forces became embroiled in a bitter power struggle.²³

It was against this backdrop that Spain tried to define the relationship between the church and the state. As an attempt to provide freedom for believers of all religions, Spain's early constitutions fared no better than its monarchs. This Part will discuss how the constitutions followed the whims of the dominant political party and did not serve the entire Spanish people.²⁴ From 1812 to 1963, political power alternated between regimes that favored an established church and regimes that favored strict separation. Subpart A will find that neither establishment nor strict separation provided adequate protection of religious freedom. Subpart B will outline the church-state relations model developed by the current Spanish Constitution in 1978, including its provisions for religious freedom, religious equality, state neutrality, and state cooperation.

¹⁷ The divine right of kings is embodied in the book of Psalms, which says "I have installed my king on Zion, my holy hill." *Psalms* 2:6.

¹⁸ St. Thomas Aquinas said all law derives from eternal law, which is created by God. 2 SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA* 1003–08 (Fathers of the English Dominican Province trans., Benziger Bros. ed., 1948) (c. 1265–1274 CE). Therefore, kings should follow the teachings of the church. St. Augustine said of kings, "[T]hey rule not from a love of power, but from a sense of the duty they owe to others." 2 SAINT AUGUSTINE, *THE CITY OF GOD*, bk. XIX, ch. 14, at 322–23 (Marcus Dods trans., 1948) (c. 413–426 CE).

¹⁹ The sacred texts were also legal texts, and those who were not Catholic were considered second-class vassals. Evaldo Xavier Gomes, *Church-State Relations from a Catholic Perspective: General Considerations on Nicolas Sarkozy's New Concept of Laïcité Positive*, 48 J. CATH. LEGAL STUD. 201, 204 (2009). This brings to mind the examples of the Inquisition from the twelfth to sixteenth centuries and the expulsion of Jews and Muslims in 1492. See generally Daniel Basterra Montserrat, *The Constitutional Development of Religious Freedom in Spain: An Historical Analysis*, 4 J. TRANSNAT'L L. & POL'Y 27 (1995).

²⁰ For a discussion of the impact of French laïcism on Spanish church-state relations, see José Antonio Souto Paz, *Perspectives on Religious Freedom in Spain*, 2001 BYU L. REV. 669.

²¹ *Id.*

²² See Pope Pius IX, *Quanta Cura* (Dec. 8, 1864), in *THE PAPAL ENCYCLICALS 1740–1878*, at 382–83 (Claudia Carlen Ihm ed., 1981).

²³ See *infra* Section I.A.

²⁴ Montserrat, *supra* note 19, at 33 (quoting D. BASTERRA, *CONCIENCIA Y LIBERTAD* 16–20 (1978)).

A. *Church-State Relations before the Constitution of 1978*

From the early 1800s until the Constitution of 1978, Spanish public policy oscillated between two extremes: complete identification of the church with the state, and state discouragement and restriction of the church.²⁵ Neither extreme provided religious freedom.²⁶ From 1812 to 1978, political power in Spain changed hands seven times, and the Spanish people were subject to seven different constitutions. The regimes differed in their approach to church-state identification but they did not grant religious freedom.

Spain's first written constitution, created in 1812, was issued "in the name of the Father, Son, and Holy Spirit."²⁷ It proclaimed that Catholicism was the only permissible religion and prohibited the practice of any other religion.²⁸ That this document exhibited religious intolerance and conflated the church and the state reflects the deep entrenchment of Catholicism in Spanish political and social life at the time.²⁹ Further evidence of the entrenchment can be found in the concordats negotiated by the Spanish monarch and the Holy See. Nineteenth-century concordats provided that public education had to conform to Catholic doctrine, the state could not interfere in a bishop's performance of his religious duties, the state would provide an income to the clergy, and any dispute between the state and the church would be settled with reference to the Catholic Church's canon law.³⁰

Not everyone was happy with the deep entrenchment of the Church. Secularist factions, growing in military and political strength, wanted to disestablish the Catholic Church. A military revolt in 1820 gave rise to a liberal government whose first actions were to spurn the constitution's

²⁵ See generally George R. Ryskamp, *The Spanish Experience in Church-State Relations: A Comparative Study of the Interrelationship Between Church-State Identification and Religious Liberty*, 1980 BYU L. REV. 616.

²⁶ Religious freedom is defined as the right to be free from societal and governmental coercion in religious matters. *Id.* at 617.

²⁷ CONSTITUCIÓN POLÍTICA DE LA MONARQUÍA ESPAÑOLA pmb.l., Mar. 19, 1812 (Spain) (translated from Spanish) ("En el nombre de Dios todopoderoso, Padre, Hijo, y Espíritu Santo, autor y supremo legislador de la sociedad.").

²⁸ *Id.* art. 12 ("La religión de la Nación Española es y será perpetuamente la Católica, apostólica, romana, única [sic] verdadera. La Nación [sic] la protege por leyes sabias y justas, y prohíbe [sic] el ejercicio [sic] de cualquiera [sic] otra.").

²⁹ Ryskamp, *supra* note 25, at 621. It is especially interesting to note the conflation of church and state in a document that was intended to be a liberal declaration of the rights of the people, and was one of the first liberal Constitutions in Europe. *Id.*

³⁰ De Bourge, *supra* note 11, at 565.

protection of the Church.³¹ The government expelled bishops, restricted religious orders, and seized Church property.³² The liberal legislature drafted a new constitution in 1837, but because it did not have the political capital to disestablish the Church completely, the new constitution maintained Catholicism as the state religion.³³ Meanwhile, the authorities continued to violently remove bishops and priests from office.³⁴

When the conservatives regained power in 1844, they again redrafted the constitution and required the state to maintain and uphold the Catholic religion.³⁵ The Penal Code of 1848 penalized public acts against the Church, including imposing a minimum prison sentence of twelve years for public worship of a non-Catholic religion.³⁶ The Conservative rule stifled minorities and incited a revolution.³⁷ During the revolution of 1868, liberal forces confiscated Church lands and expelled bishops and priests, all in the name of religious freedom.³⁸

The Constitution of 1869 marked the government's first strides toward religious freedom for all. It guaranteed public and private observance of any religion, even though the state would continue to maintain and uphold the Catholic Church.³⁹ This constitution struck a compromise by recognizing the state's obligation to support the Catholic Church without outlawing all other religions. When the conservatives retook power in 1876, they drafted yet another new constitution. But unlike conservative constitutions past, the Constitution of 1876 continued the strides toward religious freedom, providing that no person could be persecuted for his or her religious opinions.⁴⁰

³¹ Ryskamp, *supra* note 25, at 621–22.

³² *Id.*

³³ CONSTITUCIÓN DE LA MONARQUÍA ESPAÑOLA DE 1837 art. 11, June 18, 1837 (Spain) (“La Nación se obliga a mantener el culto y los ministros de la religión católica que profesan los españoles.”).

³⁴ Ryskamp, *supra* note 25, at 622.

³⁵ *Id.* at 623.

³⁶ *Id.*

³⁷ *Id.* at 623–25.

³⁸ *Id.* at 625.

³⁹ CONSTITUCIÓN DEMOCRÁTICA DE LA NACIÓN ESPAÑOLA art. 21, June 6, 1869 (Spain) (“La Nación se obliga a mantener el culto y los ministros de la religión católica. El ejercicio público o privado de cualquier otro culto queda garantido a todos los extranjeros residentes en España, sin más limitaciones que las reglas universales de la moral y del derecho. Si algunos españoles profesaren otra religión que la católica, es aplicable a los mismos todo lo dispuesto en el párrafo anterior.”).

⁴⁰ CONSTITUCIÓN DE LA MONARQUÍA ESPAÑOLA DE 1876 art. 11, June 30, 1876 (Spain) (“La religión católica, apostólica, romana, es la del Estado. La Nación se obliga a mantener el culto y sus ministros. Nadie será molestado en el territorio español por sus opiniones religiosas ni por el ejercicio de su respectivo culto,

However, the 1876 Constitution did not provide complete protection of religious freedom: It prohibited minority religions from worshiping publicly.⁴¹

The compromises struck by conservatives and liberals in the 1860s and 1870s did not provide lasting stability. Democracy deteriorated in the early 1900s, and, in 1923, Miguel Primo de Rivera declared himself dictator.⁴² Primo de Rivera criminalized public manifestation of a non-Catholic faith, eliminating the government's strides toward religious tolerance.⁴³ In 1931, Primo de Rivera's government fell and a republic formed.⁴⁴ The liberal Constitution of 1931 stated "the Spanish state has no official religion."⁴⁵ Although the republic achieved disestablishment, it did not foster religious liberty. The constitution required public acts of worship to be authorized by the government (and did not elaborate criteria for denial, allowing for arbitrary decisions); it prohibited religious institutions from engaging in activities with a "political character,"—and in the heated social climate—political character was a superficial requirement that allowed the state to easily close religious institutions; it dissolved the Jesuit Order and severely restricted the other religious orders; it prohibited religious orders from running schools; and it prohibited priests and other religious from teaching the faith publicly.⁴⁶ In practice, religious intolerance was even worse: the government fuelled public expressions of hatred and violence against both the clergy and lay religious.⁴⁷ Rather than building a democratic state based on individual freedom, the

salvo el respeto debido a la moral cristiana. No se permitirán, sin embargo, otras ceremonias ni manifestaciones públicas que las de la religión del Estado.”).

⁴¹ *Id.*

⁴² Ryskamp, *supra* note 25, at 629.

⁴³ *Id.*

⁴⁴ *Id.* at 630.

⁴⁵ C.E. art. 3, B.O.E., n. 344, Dec. 10, 1931 (Spain) (translated from Spanish) (“El Estado español no tiene religión oficial.”). The Second Republic intended to use the changing political landscape to change the course of religious politics by replacing the entrenched religiosity of the people with agnosticism or atheism. Javier Martínez-Torrón, *Derecho de Asociación y Confesiones en la Constitución de 1931*, 3 CUESTIONES CONSTITUCIONALES 91, 95 (2000) (Mex.).

⁴⁶ C.E. art. 26, B.O.E., n. 344, Dec. 10, 1931 (Spain); see also Javier Martínez-Torrón, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, 2001 BYU L. REV. 711, 716 n.8 [hereinafter Martínez-Torrón, *Freedom of Religion*]; Combalá & Roca, *supra* note 1, at 630; Martínez-Torrón, *supra* note 45, at 115.

⁴⁷ Martínez-Torrón, *supra* note 45, at 95. For example, local and national authorities did nothing when churches and other religious buildings were burned. *Id.* at 102. For an in-depth look at religious persecution during the Second Republic, see VICENTE CÁRCEL ORTÍ, *LA PERSECUCIÓN RELIGIOSA EN ESPAÑA DURANTE LA SEGUNDA REPÚBLICA, 1931–1939*, 109 (Sebastián Elcano ed., 2d ed. 1990).

Second Republic actually severed one of the most important freedoms: freedom of religion.⁴⁸

Complete separation of church and state proved too liberal for the mostly Catholic nation.⁴⁹ A 1936 coup and ensuing three-year civil war led to the thirty-six-year dictatorship of General Francisco Franco, who again declared that Spain was a Catholic state and tasked all branches of the government with protecting the church.⁵⁰ The Concordat between Spain and the Vatican in 1953 gave the head of state the power to select three candidates for bishop, out of which the Pope would make the final selection, and reincorporated the long-existing exemption of church hierarchy from criminal prosecution.⁵¹ Early in his dictatorship Franco closed Protestant churches and required all children to study Catholicism in school.⁵² He later moderated his policies, allowing Protestants to reopen their churches, but still forbidding Protestants to operate religious schools and engage in other forms of evangelization.⁵³

⁴⁸ Javier Martínez-Torrón, *Transición Democrática y Libertad Religiosa en España*, 53 PERSONA Y DERECHO 183, 189 (2005) (Spain).

⁴⁹ Ryskamp, *supra* note 25, at 630. The Church called the constitution “an attack on the Catholic conscience of the nation, a challenge, an invitation to war.” Souto Paz, *supra* note 20, at 684 (quoting 28 EXTRACTO OFICIAL SESIONES CORTES CONSTITUYENTES [OFFICIAL EXTRACT OF PARLIAMENTARY SESSIONS] 21 (Aug. 27, 1931) (Spain)) (translation in Souto Paz). Even José Ortega y Gasset, one of Spain’s leading intellectuals and a proponent of separating church and state, thought the Constitution of 1931 went too far. *Id.* (quoting 33 OFFICIAL EXTRACT OF PARLIAMENTARY SESSIONS 24 (Sept. 4, 1931) (Spain)).

⁵⁰ Martínez-Torrón, *supra* note 1, at 782–83. The way the Second Republic dealt with the Church was a big part of its downfall—it “created enemies where none existed” by creating sympathy for the fallen monarchy. Martínez-Torrón, *supra* note 45, at 102 (translated from Spanish). This resulted in a return to a confessional state. Martínez-Torrón, *supra* note 48, at 190.

⁵¹ Concordat Between the Holy See and Spain, Spain-Vatican, Aug. 27, 1953, 1219 U.N.T.S. 50 (“Los Prelados . . . no podrán ser emplazados ante un juez laico sin que haya obtenido previamente la necesaria licencia de la Santa Sede. . . . La Santa Sede consiste en que las causas criminales contra los clérigos o religiosos por los demás delitos . . . sean juzgadas por los Tribunales del Estado. Sin embargo, la Autoridad judicial, antes de proceder, deberá solicitar, sin perjuicio de las medidas precautorias del caso, y con la debida reserva, el consentimiento del Ordinario del lugar en que se instruye el proceso.”); Convenio entre la Santa Sede y el Gobierno Español acerca del modo de ejercicio del privilegio de presentación [Agreement Relating to the Mode of Exercise of the Privilege of Presentation], Spain-Vatican, June 7, 1941, 1222 U.N.T.S. 364.

⁵² *A Brief Historical and Legal Description of Religious Liberty*, RUTHERFORD INST., <http://religiousfreedom.lib.virginia.edu/rihand/Spain.html> (last visited March 4, 2013).

⁵³ *Id.* This moderation was driven by the Church itself. In 1965, the Second Vatican Council declared that religious freedom was a personal right that states should recognize. Augustín Motilla, *Religious Pluralism in Spain: Striking the Balance Between Religious Freedom and Constitutional Rights*, 2004 B.Y.U. L. REV. 575, 578. In response, Franco enacted the Law of Religious Freedom in 1967. *Id.*; see also Ley de Libertad Religiosa cap. 1, art. 1 (B.O.E. 1967, 44) (Spain) (“El Estado Español reconoce el derecho de libertad religiosa fundado en la dignidad de la persona humana y asegura a esa, con la protección necesaria, la inmunidad de toda coacción en el ejercicio legítimo de tal derecho.”).

When Franco's death brought the end of the dictatorship, the emerging democracy was tasked with striking a workable balance in church-state relations. A new constitution needed to be strong enough to effectively protect religious liberty but not so rigid as to incite a coup. It needed to embrace the enormous historical and social importance of the Catholic Church but also respect the rights of minority religions. Additionally, because Spain had a history of politicians disregarding its constitution, the country needed a mechanism to enforce the rule of law. The drafters of the new constitution created a parliamentary monarchy in Spain,⁵⁴ with the King as the head of state,⁵⁵ an elected Prime Minister as the head of government,⁵⁶ and a democratically elected bicameral parliament as the legislature.⁵⁷ The drafters also created a Constitutional Court that is the only body that can comment on the constitutionality of a law.⁵⁸

⁵⁴ C.E. art. 1.3, B.O.E. n. 311, Dec. 29, 1978 (Spain).

⁵⁵ *Id.* art. 56 ("El Rey es el Jefe del Estado, símbolo de su unidad y permanencia, arbitra y modera el funcionamiento regular de las instituciones, asume la más alta representación del Estado español en las relaciones internacionales . . .").

⁵⁶ *Id.* art. 96.

⁵⁷ *Id.* art. 66. The Parliament is divided into two chambers, the Congress (*Congreso de los Diputados*), and the Senate (*Senado*). *Id.*

⁵⁸ *Id.* arts. 159–65; Ley Orgánica del Tribunal Constitucional art. 1 (B.O.E. 1979, 2) (Spain) (amended in 2010 as B.O.E. 2010, 1); *see also* S.T.C., Feb. 13, 1981, No. 189, *in* B.O.E. n. 47 (supp.), Feb. 24, 1981, p. 16, FJ 6, at 19 (Spain) ("El Tribunal Constitucional es intérprete supremo de la Constitución, no legislador, y sólo cabe solicitar de él el pronunciamiento sobre adecuación o inadecuación de los preceptos a la Constitución."). Decisions of the Constitutional Court are binding on all public authorities. Ley Orgánica del Tribunal Constitucional art. 38 (B.O.E. 1979, 2). When the Court declares a law or act unconstitutional, the law is immediately null and void. *Id.* art. 39. When the Court declares that a law or act is constitutional, this has preclusive effect on subsequent litigation. *Id.* art. 38.

The Constitutional Court has personal jurisdiction over the entire Spanish territory. It has subject matter jurisdiction in three ways. First, the Constitutional Court has subject matter jurisdiction over questions of the constitutionality of a law, including the constitution of each Autonomous Community, provincial and national statutes, organic laws, executive orders, international treaties, and rulings of the lower courts. *Id.* art. 27. Second, the Court has subject matter jurisdiction over violations of the fundamental liberties granted in the constitution. *Id.* art. 41. The fundamental liberties include: article 14, all Spaniards are equal under the law, to be free from discrimination on the basis of birth, race, sex, religion, opinion, or other personal or social condition; article 15, the right to life, bodily integrity, freedom from torture, inhuman treatment, and the death penalty; article 16, freedom of religion; article 17, due process of law; article 18, freedom from search and seizure without a warrant; article 19, rights of free entry and exit for citizens; article 20, freedom of expression; articles 21 and 22, freedom of peaceful assembly; article 23, the right to participate in public life, directly or through a representative; article 24, access to the ordinary court; article 25, no ex post facto laws; article 26, no honor courts; article 27, right to free elementary education; article 28, the right to form labor unions and to strike; article 29, the right to petition the government. *Id.*; *see also* C.E., B.O.E. n. 311, Dec. 29, 1978 (Spain). Third, the court has subject matter jurisdiction over conflicts between the State and the Autonomous Communities. Ley Orgánica del Tribunal Constitucional art. 59 (B.O.E. 1979, 2).

B. *Constitution of 1978*

After the death of Franco in 1975, the Spanish government began a transition to democracy. The nation elected a provisional parliament tasked with writing a new constitution.⁵⁹ One of the most hotly-contested tasks of the provisional parliament was to negotiate a new model of church-state relations.⁶⁰ The first draft, which unequivocally stated, “The Spanish state is not confessional,”⁶¹ was immediately denounced by Spain’s most influential bishops.⁶²

The second draft guaranteed freedom of religion and worship to all individuals as long as it would not disturb the public order, and, although it reiterated that the state would not be confessional, it required public authorities to maintain cooperative relationships with all religious groups.⁶³ By charging civic authorities to take into account the beliefs of Spanish society, the draft constitution shifted the secular state from a policy of indifference to one of cooperation.⁶⁴ This is important because it shows that the parliament recognized that freedom of religion cannot be limited to freedom of conscience, but must include freedom to worship publically.⁶⁵ However

A case may come to the Constitutional Court through three channels. First is an “appeal of unconstitutionality,” which alleges facial unconstitutionality of acts and statutes. Ley Orgánica del Tribunal Constitucional arts. 29, 31 (B.O.E. 1979, 2); C.E. art. 162, B.O.E. n. 311, Dec. 29, 1978 (Spain) (translated from Spanish). An appeal of unconstitutionality may be initiated by the President, the Ombudsman, a coalition of fifty Congressmen, a coalition of fifty Senators, or the executive branch of an Autonomous Community. *Id.* Second is a “question of unconstitutionality,” which allows a lower court to seek an advisory opinion from the Constitutional Court about a statute implicated in a case before the lower court. Ley Orgánica del Tribunal Constitucional arts. 29, 35 (B.O.E. 1979, 2) (translated from Spanish). Third is a petition for protection against violations of fundamental rights and liberties, which may be brought against the state by a person with standing. C.E. art. 162, B.O.E. n. 311, Dec. 29, 1978 (Spain).

To determine whether a challenged law or action conforms to the Constitution, the Court may consider the text of the Constitution and prior judicial interpretation of the Constitution. Ley Orgánica del Tribunal Constitucional art. 28 (B.O.E. 1979, 2). For more information about the Constitutional Court, see Enrique Guillén López, *Judicial Review in Spain: The Constitutional Court*, 41 LOY. L.A. L. REV. 529 (2008).

⁵⁹ James M. Markham, *Spain’s Constitution To Put Democracy on Firmer Footing*, N.Y. TIMES, Nov. 9, 1978, at A2.

⁶⁰ James M. Markham, *Dispute Erupts in Spain over Move To Separate Church and State*, N.Y. TIMES, Dec. 1, 1977, at A11.

⁶¹ *Minuta de los Acuerdos de la Ponencia de Constitución en su Sesión del Día 30 de Agosto de 1977*, 2 REVISTA DE LAS CORTES GENERALES, 257, 259 (1984) (Spain).

⁶² Markham, *supra* note 60. Religious leaders demanded the state protect the rights of Catholics in all areas of social and political life. See Souto Paz, *supra* note 20, at 695.

⁶³ *Minuta de la Ponencia de Constitución del Día 6 de Septiembre de 1977*, 2 REVISTA DE LAS CORTES GENERALES, 262, 265 (1984) (Spain).

⁶⁴ Souto Paz, *supra* note 20, at 692.

⁶⁵ See *id.*

socialist factions opposed this cooperation of church and state, and Church officials argued that it didn't go far enough to protect the religiosity of the Spanish people.⁶⁶

Revisions to the second draft constitution proposed a number of changes: from “the state will not profess a preference for any religion;”⁶⁷ to “no one will be obliged to declare their religious beliefs;”⁶⁸ to “no one will be obliged to declare their ideological opinions;”⁶⁹ to “the state will maintain a cooperative relationship with the Catholic Church in recognition of the service it provides the majority-Catholic society.”⁷⁰ Each proposal had one thing in common: They all aimed to put an end to the confessional state without leading to the religious hostility characteristic of the preceding two centuries.

On December 29, 1978, Spain enacted its current constitution.⁷¹ The Constitution's purpose, as described in the preamble, was to guarantee democracy and “protect all Spaniards in the exercise of human rights, culture, traditions, languages, and institutions.”⁷² In accordance with emerging international norms of human rights,⁷³ Article 10.2 states that the fundamental rights recognized by the Constitution shall be construed in conformity with the

⁶⁶ “*El Estado Laico no Daría Respuesta Suficiente a la Realidad Religiosa Española*,” EL PAÍS, Nov. 27, 1977, at 9 (Spain).

⁶⁷ COMISIÓN DE ASUNTOS CONSTITUCIONALES Y LIBERTADES PÚBLICAS, CORTES GENERALES, ANTEPROYECTO DE CONSTITUCION: ENMIENDAS 278 (1978) (proposed by Don Laureano López Rodó of the Alianza Popular).

⁶⁸ *Id.* at 367 (translated from Spanish) (proposed by the Unión de Centro Democrático).

⁶⁹ *Id.* at 297 (translated from Spanish) (proposed by Don Ramón Tamames Gómez of the Communist Party).

⁷⁰ *Id.* at 62 (translated from Spanish) (proposed by Don Federico Silva Muñoz of the Alianza Popular).

⁷¹ The constitution was approved by parliament on October 31, 1978, ratified by the Spanish people in a referendum passed on December 6, 1978, and sanctioned by the King on December 27, 1978. It became effective upon its publication in the official gazette, the Boletín Oficial del Estado, on December 29, 1978. C.E., B.O.E. n. 311, Dec. 29, 1978 (Spain).

⁷² *Id.* p.mbl. (translated from Spanish) (“Garantizar la convivencia democrática” and “proteger a todos los españoles y pueblos de España en el ejercicio de los derechos humanos, sus culturas y tradiciones, lenguas e instituciones.”).

⁷³ The Universal Declaration of Human Rights, which entered into force in 1948, provided the foundation for religious freedom as a human right. G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). It was followed by a series of international instruments that established the framework for state protection of religious freedom, including: Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), Nov. 4, 1950, 213 U.N.T.S. 221, which was opened for signature in 1950 and entered into force in 1953; the International Covenant on Civil and Political Rights (“ICCPR”), Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171, which entered into force in 1966; and the International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, which was opened for signature in 1966 and which entered into force in 1976. For a good discussion of the international documents that protect religious freedom, see John Witte, Jr. & M. Christian Green, *Religious Freedom, Democracy, and International Human Rights*, 23 EMORY INT'L L. REV. 583 (2009).

Universal Declaration of Human Rights and the international treaties ratified by Spain.⁷⁴ Article 81 of the Constitution establishes that fundamental rights will be implemented through Organic Acts.⁷⁵ The most important organic act concerning freedom of religion was the Ley Orgánica de Libertad Religiosa (“LOLR”), passed on July 5, 1980.⁷⁶ Together the Constitution and the LOLR extend rights of religious freedom to all citizens.

A citizen’s free exercise of religion may be limited under the Spanish Constitution “if necessary to maintain public order as protected by law.”⁷⁷ Article 3.1 of the LOLR further limits the exercise of religion if it infringes on the fundamental rights of others or if it compromises national security, public health, or public morality, as protected by the rule of law in a democratic society.⁷⁸ Although the constitution does not explicitly include limitations for public order, morals, health, and security, the Constitutional Court has held that limitations not explicitly mentioned by the Constitution must be allowed if they are implicit in the Constitution’s definition.⁷⁹ The Court has held that the limitations outlined in organic laws, such as the LOLR, are implicit in the

⁷⁴ C.E. art. 10.2, B.O.E. n. 311, Dec. 29, 1978 (Spain) (“Las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre las mismas materias ratificadas por España.”). By 1978 Spain had ratified the ICCPR. International Covenant on Civil and Political Rights: Status, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last updated May 6, 2013).

⁷⁵ C.E. art. 81.1, B.O.E. n. 311, Dec. 29, 1978 (Spain) (“Son leyes orgánicas las relativas al desarrollo de los derechos fundamentales y de las libertades públicas, las que aprueben los Estatutos de Autonomía y el régimen electoral general y las demás previstas en la Constitución.”).

⁷⁶ Ley Orgánica de Libertad Religiosa (B.O.E., 1980, 7) (Spain); see also María J. Villa Robledo, *Reflexiones en Torno al Concepto de “Notorio Arraigo” en el art. 7 de la Ley Orgánica de Libertad Religiosa*, I ANUARIO DE DERECHO ECLESIASTICO DEL ESTADO 143 (1985) (Spain).

⁷⁷ C.E. art. 16.1, B.O.E. n. 311, Dec. 29, 1978 (Spain) (translated from Spanish) (“Se garantiza la libertad ideológica, religiosa y de culto de los individuos y las comunidades sin más limitación en sus manifestaciones, que la necesaria para el mantenimiento del orden público protegido por la ley.”).

⁷⁸ Ley Orgánica de Libertad Religiosa art. 3.1 (B.O.E., 1980, 7) (“El ejercicio de los derechos dimanantes de la libertad religiosa y de culto tiene como único límite la protección del derecho de los demás al ejercicio de sus libertades públicas y derechos fundamentales, así como la salvaguardia de la seguridad, de la salud y de la moralidad pública, elementos constitutivos del orden público protegido por la Ley en el ámbito de una sociedad democrática.”); see also S.T.C., Feb. 15, 2001, No. 46, in B.O.E. n. 65 (supp.), Mar. 16, 2001, p. 83, FJ 11, at 90 (Spain) (“Tiene como único límite la protección del derecho de los demás al ejercicio de sus libertades públicas y derechos fundamentales, así como la salvaguarda de la seguridad, de la salud y de la moralidad pública . . .”).

⁷⁹ José M. González del Valle, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Spain*, 19 EMORY INT’L L. REV. 1033, 1045 (2005); see also S.T.C., Mar. 11, 1996, No. 34, in B.O.E. n. 93 (supp.), Apr. 17, 1996, p. 3, FJ 4, at 7) (Spain) (“El ejercicio de este derecho no tiene otros límites que los fijados explícita o implícitamente en la Constitución . . .”).

Constitution's definition.⁸⁰ Therefore the LOLR's limitations on freedom of religion are carved out of the Constitution's protective grant.

These limitations on freedom of religion are compatible with international norms. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") limits public expression of religious beliefs when "prescribed by law and . . . necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."⁸¹ Two important definitions are inherent in the ECHR limitation. First, the fact that the limitations must be "prescribed by law" indicates that they must comport with due process.⁸² Second, the fact that the protection of public order, health, morals, or security must be "necessary in a democratic society" is important because it limits the limitation.⁸³ Laws created for the protection of public order and public morals might look very different in a democracy than in a dictatorship.⁸⁴ The ECHR was careful to ensure that a law prohibiting the practice of a minority religion could not be justified as upholding the public's Catholic morals, for instance.

In addition to providing a generic grant of freedom of religion, the Spanish Constitution follows the example of the ICCPR and ECHR and creates specific provisions to guide the state in providing real and effective freedom. The Spanish Constitution outlines four such provisions: (1) provisions protecting religious freedom; (2) provisions providing for equality of all religions in the eyes of the law; (3) provisions mandating state neutrality on questions of religion; and (4) provisions requiring cooperation between the state and religions. The first provision, protecting religious freedom, is the ultimate goal of the Constitution's protections and it provides a framework for interpreting and applying the other three provisions.⁸⁵ For example, when the state

⁸⁰ González del Valle, *supra* note 79, at 1046; *see* S.T.C., Feb. 13, 1981, No. 189, in B.O.E. n. 47 (supp.), Feb. 24, 1981, p. 16, FJ 22, at 22 (Spain) ("En materia de derechos fundamentales la Constitución no se ha limitado a reservar su desarrollo normativo a Leyes orgánicas, sino que ha dispuesto además que todos los españoles tienen los mismos derechos y obligaciones en cualquier parte del territorio del Estado . . .").

⁸¹ ECHR, *supra* note 73, art. 9; *see also* Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587 (2005).

⁸² González del Valle, *supra* note 79, at 1038–39 (quoting Carolyn Evans, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 138 (2001)) (internal quotation marks omitted).

⁸³ *Id.* at 1036.

⁸⁴ *Id.* at 1038.

⁸⁵ Martínez-Torrón, *supra* note 48, at 193; *see also* J. Ferrer Ortiz, *Los Principios Constitucionales del Derecho Eclesiástico como Sistema*, in LAS RELACIONES ENTRE LA IGLESIA Y EL ESTADO: ESTUDIOS EN MEMORIA DEL PROFESOR PEDRO LOMBARDÍA 309 (Eduardo Molano et al. eds., 1989).

cooperates with the Catholic Church it must be careful not to undermine the freedom of other religions. In this way, each provision adds a layer of protection to the fundamental goal of religious freedom.

1. *Religious Freedom*

First, the Spanish Constitution protects individuals' and groups' right to worship in whatever manner they choose. The religious freedom provision is akin to what the Universal Declaration of Human Rights calls "freedom of thought, conscience, and religion."⁸⁶ It is the right to private and public manifestations of religious belief. The Spanish Constitution provides for freedom of conscience in Article 16.1 and Article 9.2. This Subpart will discuss Article 16.1 first because it contains the Constitution's primary method of protecting freedom of conscience. The other freedom of religion protections define and cement the protections of Article 16.1.

a. *Article 16.1*

Article 16.1 protects freedom of conscience by stating: "Freedom of ideology, religion, and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law."⁸⁷ Article 1.2 of the LOLR expands on this protection, stating that "religious beliefs are not reason for inequality or discrimination under the law, and cannot be used prevent anyone from work, activity or public service."⁸⁸ Specifically, the LOLR protects the right to: (1) profess religious beliefs or choose to profess no belief;⁸⁹ (2) commemorate religious festivals, marital rites, and burial without discrimination, and not be obliged to worship in a way contrary to personal convictions;⁹⁰ (3) receive and

⁸⁶ Universal Declaration of Human Rights, *supra* note 73, art. 18.

⁸⁷ C.E. art. 16.1, B.O.E. n. 311, Dec. 39, 1978 (Spain) (translated from Spanish) ("Se garantiza la libertad ideológica, religiosa y de culto de los individuos y las comunidades sin más limitación, en sus manifestaciones, que la necesaria para el mantenimiento del orden público protegido por la ley.").

⁸⁸ Ley Orgánica de Libertad Religiosa art. 1.2 (B.O.E., 1980, 7) (Spain) (translated from Spanish) ("Las creencias religiosas no constituirán motivo de desigualdad o discriminación ante la ley. No podrán alegarse motivos religiosos para impedir a nadie el ejercicio de cualquier trabajo o actividad o el desempeño de cargos o funciones públicos.").

⁸⁹ *Id.* art. 2.1(a) ("Profesar las creencias religiosas que libremente elija o no profesar ninguna; cambiar de confesión o abandonar la que tenía; manifestar libremente sus propias creencias religiosas o la ausencia de las mismas, o abstenerse de declarar sobre ellas.").

⁹⁰ *Id.* art. 2.1(b) ("Practicar los actos de culto y recibir asistencia religiosa de su propia confesión; conmemorar sus festividades; celebrar sus ritos matrimoniales; recibir sepultura digna, sin discriminación por

pass on religious teachings and information and to choose for yourself and your children moral and religious education;⁹¹ and (4) gather publically to profess religion.⁹² All four of these rights must be protected from coercion.⁹³

The rights outlined in the LOLR are broad and therefore open to interpretation by the Constitutional Court. For example, the right to pass on religious teachings to children does not address how to resolve a dispute between parents who hold different religious views. In S.T.C. 141/2000, the Court held that both parents may teach religion to their children as long as they do not attempt to force the children to become believers.⁹⁴ In that case, the father converted to Gnostic Christianity and wanted to sell all his assets and move the family to live in community with other Gnostics.⁹⁵ The mother, who disagreed with the tenets of this fringe religion, obtained a divorce and attempted to prevent the father from seeing his children.⁹⁶ She argued that his lifestyle was aimed at forcing the children to accept Gnostic Christianity.⁹⁷ The lower court agreed with the mother and restricted the father's visitation rights.⁹⁸ On appeal the Constitutional Court found no evidence of proselytism and held that because the father did not intend to influence his children's religious beliefs, the restriction on his visitation rights was an impermissible restriction on religious liberty.⁹⁹ The Court affirmed that Article 16.1 of the Constitution protects against state action that impedes or sanctions a person's beliefs,¹⁰⁰ but clarified that the state may constrain external manifestations of

motivos religiosos, y no ser obligado a practicar actos de culto o a recibir asistencia religiosa contraria a sus convicciones personales.”).

⁹¹ *Id.* art. 2.1(c) (“Recibir e impartir enseñanza e información religiosa de toda índole, ya sea oralmente, por escrito o por cualquier otro procedimiento; elegir para sí, y para los menores no emancipados e incapacitados, bajo su dependencia, dentro y fuera del ámbito escolar, la educación religiosa y moral que esté de acuerdo con sus propias convicciones.”).

⁹² *Id.* art. 2.1(d) (“Reunirse o manifestarse públicamente con fines religiosos y asociarse para desarrollar comunitariamente sus actividades religiosas de conformidad con el ordenamiento jurídico general y lo establecido en la presente Ley Orgánica.”).

⁹³ *Id.* art. 2.1 (“La libertad religiosa y de culto garantizada por la Constitución comprende, con la consiguiente inmunidad de coacción . . .”).

⁹⁴ S.T.C., May 29, 2000, No. 141, *in* B.O.E. n. 156 (supp.), June 30, 2000, p. 40 (Spain).

⁹⁵ *Id.* A 2(a), at 40.

⁹⁶ *Id.*

⁹⁷ *Id.* A 2(b), at 40.

⁹⁸ *Id.* (“[L]a relación de los niños con [su padre] tendría un potencial efecto negativo en su desarrollo, por lo que se estima debería evitarse dicho contacto excluyéndolo, explícitamente, en la regulación del régimen de visitas.”); *Id.* FJ 1, at 43 (“[L]a Audiencia Provincial ha presumido de su pertenencia a dicho movimiento la existencia de graves riesgos para el desarrollo personal de sus hijos . . .”).

⁹⁹ *Id.* FJ 3, at 43–44.

¹⁰⁰ *Id.* FJ 2, at 43.

religious belief to protect the rights of others.¹⁰¹ Thus, if the father was forcing his children to adopt Gnostic Christianity, the state could prohibit this coercion to protect the rights of the children.

The Court has found a difference between personal exercise of religion¹⁰² and public exercise of religion.¹⁰³ When Article 16.1 is invoked for the protection of personal conduct, freedom of religion may be limited only to the extent it infringes on other constitutional rights.¹⁰⁴ But when Article 16.1 is invoked for the protection of public conduct, for example, religious propaganda, then the public conduct may be regulated if it infringes on the rights of others, or compromises national security, public health, or public morality.¹⁰⁵

b. Article 9.2

Article 9.2 of the Spanish Constitution protects freedom of conscience by requiring the state to actively ensure that Spaniards can freely practice their religion. Article 9.2 states: “It is the responsibility of public authorities to promote conditions for a real and effective liberty and equality of individuals and of groups formed by them; they shall remove obstacles that impede their operations and shall facilitate the participation of all citizens in the political, economic, cultural, and social life.”¹⁰⁶ The LOLR explains the need for state

¹⁰¹ *Id.* FJ 4, at 44 (“[E]l derecho a manifestar sus creencias frente a terceros mediante su profesión pública, y el proselitismo de las mismas, suma a los primeros los límites indispensables para mantener el orden público protegido por la Ley. Los poderes públicos conculcarán dicha libertad . . .”).

¹⁰² Personal exercise is defined as conduct that does not impact a third party. *Id.*

¹⁰³ Luis Castillo Córdova, *La Internacionalización de los Derechos Fundamentales de la Constitución Española* 11 ANUARIO DA FACULDADE DE DEREITO DA UNIVERSIDADE DA CORUÑA 131, 147 (2007), available at <http://ruc.udc.es/dspace/bitstream/2183/2486/1/AD-11-10.pdf>.

¹⁰⁴ S.T.C., May 29, 2000, No. 141, in B.O.E. n. 156 (supp.), June 30, 2000, p. 40, FJ 4, at 44 (“[P]ara el amparo de la propia conducta, sin incidencia directa sobre el ajena, la libertad de creencias dispensa una protección plena que únicamente vendrá delimitada por la coexistencia de dicha libertad con otros derechos fundamentales y bienes jurídicos constitucionalmente protegidos.”).

¹⁰⁵ *Id.* (“[E]l derecho a manifestar sus creencias frente a terceros mediante su profesión pública, y el proselitismo de las mismas, suma a los primeros los límites indispensables para mantener el orden público protegido por la Ley.”); see also Ley Orgánica de Libertad Religiosa art. 3.1 (B.O.E., 1980, 7) (Spain) (“El ejercicio de los derechos dimanantes de la libertad religiosa y de culto tiene como único límite la protección del derecho de los demás al ejercicio de sus libertades públicas y derechos fundamentales, así como la salvaguardia de la seguridad, de la salud y de la moralidad pública, elementos constitutivos del orden público protegido por la Ley en el ámbito de una sociedad democrática.”).

¹⁰⁶ C.E. art. 9.2, B.O.E. n. 311, Dec. 29, 1978 (Spain) (“Corresponde a los poderes públicos promover las condiciones para que la libertad y la igualdad del individuo y de los grupos en que se integra sean reales y efectivas; remover los obstáculos que impidan o dificulten su plenitud y facilitar la participación de todos los ciudadanos en la vida política, económica, cultural y social.”).

action to protect freedom of religion, saying: “For the real and effective application of religious rights, the state must adopt the means necessary to facilitate religious assistance for persons under its care, such as people in the military, in hospitals, and prisons, as well as provide for religious formation in public schools.”¹⁰⁷

The requirement that the state take action to promote religious freedom, in addition to passively enforcing it, is important because it shows that the state accepts religion as a normal element of public life.¹⁰⁸ The manifestation of religious belief, in any form, is appreciated as a positive social phenomenon.¹⁰⁹ The church and the state are not opposed to each other; both serve the people, so there must be dialogue and cooperation between them.¹¹⁰ By requiring the state to cooperate with religious organizations, the Constitution ensures that Spaniards actually have the ability to worship as they wish.

Both Articles 16.1 and 9.2 provide for freedom of conscience. They provide a high degree of freedom for the religious and non-religious alike. The protections apply to the actions of individuals and to religious communities in private and in public, and are therefore compatible with international standards.¹¹¹

2. *Religious Equality*

Second, the Constitution requires equality of all citizens. Article 14 states: “Spaniards are equal before the law and may not be discriminated against because of their . . . religion”¹¹² The Constitutional Court has interpreted this provision to mean that different religions cannot receive different treatment under the law,¹¹³ unless there is a reasonable and objective justification.¹¹⁴

¹⁰⁷ Ley Orgánica de Libertad Religiosa art. 2.3 (B.O.E., 1980, 7) (“Para la aplicación real y efectiva de estos derechos, los poderes públicos adoptarán las medidas necesarias para facilitar la asistencia religiosa en los establecimientos públicos militares, hospitalarios, asistenciales, penitenciarios y otros bajo su dependencia, así como la formación religiosa en centros docentes públicos.”).

¹⁰⁸ Martínez-Torrón, *supra* note 1, at 791.

¹⁰⁹ *Id.* at 790–91.

¹¹⁰ Gomes, *supra* note 19, at 210–11.

¹¹¹ Compare ECHR, *supra* note 73, art. 9, and ICCPR, *supra* note 73, art. 18, with ICESCR, *supra* note 73.

¹¹² C.E. art. 14, B.O.E. n. 311, Dec. 29, 1978 (Spain) (translated from Spanish) (“Los españoles son iguales ante la ley, sin que pueda prevalecer discriminación alguna por razón de . . . religión . . .”).

¹¹³ S.T.C., May 29, 2000, No. 141, in B.O.E. n. 156 (supp.), June 30, 2000, p. 40, FJ 4, at 44 (Spain) (citing S.T.C., Jan. 26, 1981, No. 65, in B.O.E. n. 47 (supp.), p. 1, FJ 5, at 3) (Spain) (“[La libertad de

One example of a reasonable and objective justification for discrimination on the basis of religion is that the discrimination is necessary in a democratic society.¹¹⁵ Although this justification is analogous to Article 9 of the ECHR, which limits freedom of religion when necessary in a democratic society to ensure public safety, health, and morality,¹¹⁶ it is broad and subject to abuse. The European Court of Human Rights interprets the term “necessary” as a pressing social need.¹¹⁷ The Spanish Constitutional Court has indicated that it will follow this stringent interpretation.¹¹⁸

The Spanish Constitutional Court overturned a denial of religious freedom in STC 46/2001, finding that the discrimination was not necessary in a democratic society.¹¹⁹ When the state denied inscription in the national Register of Religious Entities to the Church of Unification, the Church of Unification brought a constitutional challenge.¹²⁰ The state argued that a group must have certain religious characteristics to be registered as a religious entity, including belief in the existence of a supreme being, doctrinal truths, moral standards, and ritual actions for individual or collective worship.¹²¹ Further, the Church of Unification had been condemned by the European Parliament as a dangerous cult.¹²² Although there were no reported illegal activities of the Church of Unification in Spain, the lower court upheld the state action, stating that discrimination against the Church of Unification was necessary to preserve order in a democratic society.¹²³ However, because registration involves the state’s recognition of a religion as a juridical person, identifies a group of

conciencia y religión] tiene una particular manifestación en el derecho a no ser discriminado por razón de credo o religión, de modo que las diferentes creencias no pueden sustentar diferencias de trato jurídico.”).

¹¹⁴ See, e.g., S.T.C., Nov. 16, 1993, No. 340, in B.O.E. n. 295 (supp.), Dec. 10, 1993, p. 81 (Spain); Martínez-Torrón, *supra* note 1, at 786.

¹¹⁵ González del Valle, *supra* note 79, at 1049 n.46.

¹¹⁶ ECHR, *supra* note 73, art. 9.

¹¹⁷ See, e.g., *X v. the United Kingdom*, App. No. 7992/77, 14 Eur. Comm’n H.R. Dec. & Rep. 234 (1978) (holding that a law requiring all motorcycle drivers to wear helmets was justified even though it infringed on the rights of Sikhs).

¹¹⁸ See S.T.C., Feb. 15, 2001, No. 46, in B.O.E. n. 65 (supp.), Mar. 16, 2001, p. 83, FJ 11, at 90 (Spain) (“[N]o puede considerarse contraria a la Constitución la excepcional utilización preventiva de la citada cláusula de orden público, siempre que se oriente directamente a la salvaguardia de la seguridad, de la salud y de la moralidad públicas propias de una sociedad democrática, que queden debidamente acreditados los elementos de riesgo y que, además, la medida adoptada sea proporcionada y adecuada a los fines perseguidos.”).

¹¹⁹ *Id.*

¹²⁰ *Id.* For a discussion of the Register of Religious Entities, see *infra* Part I.B.4.

¹²¹ S.T.C., Feb. 15, 2001, No. 46, in B.O.E. n. 65 (supp.), Mar. 16, 2001, p. 83, A 2(b), at 83–84 (Spain).

¹²² *Id.* A 2(c), at 84.

¹²³ *Id.*

individuals who intend to worship publically without coercion, and facilitates state cooperation, the Constitutional Court held that registration is an important part of the Constitution's grant of freedom of religion.¹²⁴ Therefore, registration may only be refused when the group fails to report its name, address, representatives, and religious purposes.¹²⁵ The state may not use other criteria to refuse registration to a religious group.¹²⁶ The state's refusal to register the Church of Unification infringed on the right to religious liberty.¹²⁷

The principle of religious equality applies to state treatment of religion.¹²⁸ Individuals may treat other individuals differently due to their religion as long as they do not infringe on freedom of conscience and worship in violation of Article 16.1.¹²⁹ For example, in STC 19/1985 a convert to Seventh Day Adventism was fired when she refused to work on Saturday, the day of her Sabbath.¹³⁰ The petitioner challenged her firing, the employment contract that required her to work on Saturday but permitted rest on Sundays, and the state labor law which established Sunday as a day of rest.¹³¹

First, the employment contract and firing of the petitioner were not state actions.¹³² This means that they were constitutionally permissible as long as they did not violate Article 16.1's protection of freedom of conscience and worship. The petitioner argued that when the employer required her to work on Saturdays it infringed on her freedom of worship because she was unable to

¹²⁴ *Id.* FJ 7, at 88 (“[E]l Registro de Entidades Religiosas . . . se inserta en un ordenamiento en el que cobran especial vigor los derechos y libertades públicas, y de modo singular, la libertad más íntima y personal, como la libertad religiosa y de culto, cuya garantía proclama el art. 16.1 de la Constitución.”). For example, the Spanish Criminal Code gives special protection to registered religions: the code criminalizes violence, intimidation, or force used to prevent the profession of any religious belief, but makes it an aggravated offense to impede, interrupt, or disturb the ceremonies of registered religious groups. *Id.* Similarly, the Civil Code gives special preference to registered religions: the code allows religious marriages (as opposed to secular marriages) only in the manner provided by a registered religion. *Id.*

¹²⁵ *Id.* FJ 8, at 88–89.

¹²⁶ *Id.*

¹²⁷ *Id.* FJ 9, at 89.

¹²⁸ *See, e.g.,* S.T.C., Feb. 13, 1985, No. 98, in B.O.E. n. 55 (supp.), Mar. 5, 1985, p. 25, at 26 (Spain) (stating that the Constitution's grant of freedom of religion cannot be used to impose changes on a contractual relationship between a private company and its employee).

¹²⁹ *See* S.T.C., May 29, 2000, No. 141, in B.O.E. n. 156 (supp.), June 30, 2000, p. 40, FJ 4, at 44 (Spain); *see also supra* Part I.B.1.

¹³⁰ S.T.C., Feb. 13, 1985, No. 98, in B.O.E. n. 55 (supp.), Mar. 5, 1985, p. 25 (Spain). The petitioner began working for the company in 1971 and converted to Seventh Day Adventism in 1981. *Id.* A 1(c), at 25. She requested a shift change or absence without pay to allow her to attend Saturday religious services, but the company refused to accommodate her. *Id.*

¹³¹ *Id.* A 1, at 25.

¹³² *Id.* at 26.

attend religious services.¹³³ The Court disagreed, stating that although the contract did not allow the petitioner to fulfill her religious duties, it was not a coercive impediment to religious practice.¹³⁴ At first blush this holding seems incongruous—an employment contract that does not allow an employee to attend religious services appears to be coercive. The Court explained that although the contract produced a bad result for the petitioner, it was not coercive because it treated every worker the same: everyone was allowed to rest on Sunday.¹³⁵ Requiring the employer to grant an exception for the petitioner in this case would mean the employer would have to grant an exception to all workers who wish to attend religious services during normal working hours.¹³⁶

Second, the Court examined the constitutionality of the state labor law, which established Sunday as a day of rest. The labor law in question provides that all workers must receive at least one day off per week, and that day will be Sunday unless the employee and employer negotiate otherwise.¹³⁷ It permits, but does not require, the employer to negotiate a different day of rest for minority religions.¹³⁸ Examining the evolution of the Sunday rest, the Court found that it stemmed from the Christian Bible's creation of Sunday as a day for rest and worship.¹³⁹ However, the Court went on to say that because the Sunday rest has been incorporated in labor laws since 1904, it had surpassed its religious roots and become a secular tradition.¹⁴⁰ The Court held that secular tradition was a reasonable and objective justification for the Sunday rest, and therefore the labor law was a permissible limitation on the petitioner's freedom of religion.¹⁴¹

The Constitution provides for freedom of religion by requiring that all religions be treated equally under the law. This grant of equality is limited to

¹³³ *Id.* A 1(c), at 25; *see also id.* at 26–27.

¹³⁴ *Id.* at 26–27.

¹³⁵ *Id.*

¹³⁶ *Id.* at 26 (“[L]o que ésta pretende no es la anulación total o parcial del contrato, sino que se le dispense del cumplimiento de las obligaciones que libremente aceptó y que considera ajustadas a derecho. . .”).

¹³⁷ *Id.* at 27.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (“Que el descanso semanal corresponda en España, como en los pueblos de civilización cristiana, al domingo, obedece a que tal día es el que por mandato religioso y por tradición se ha acogido en estos pueblos; esto no puede llevar a la creencia de que se trata del mantenimiento de una institución con origen causal único religioso, pues . . . si comprende el ‘domingo’ como regla general de descanso semanal es porque este día de la semana es el consagrado por la tradición.”).

¹⁴¹ González del Valle, *supra* note 79, at 1049 n.46.

state action, and may be further constrained when the state can prove a reasonable and objective justification. In this way, Spain provides adequate protection for all religions.

3. *State Neutrality*

The Constitution's third protection of religious freedom is a provision guaranteeing state neutrality. Article 16.3 abolishes the confessional state, saying "no religion shall have state character."¹⁴² This disestablishment means that the state cannot make religious pronouncements; it does not mean that the Spanish state will profess atheism or agnosticism. A state profession of atheism, for example, would also be contrary to state neutrality because it would give state character to a negative declaration of faith.¹⁴³ The Spanish Constitution does not promote a secular order that opposes religion in public life.¹⁴⁴ Competing religions can engage in public discourse as long as the state does not make value judgments or exhibit a preference for any one religion.¹⁴⁵ When the state takes any action involving religion or religious rights, that action will be closely scrutinized to ensure that it was motivated by the social effects of the religious activity, not the religious characteristics.¹⁴⁶ The Spanish concept of neutrality does not require civil authorities to be indifferent toward religion, but does require that they work to provide a neutral framework capable of accommodating a broad range of beliefs.

In S.T.C. 154/2002, for example, a thirteen year-old boy in need of a blood transfusion refused the procedure because it was against the teachings of his religion.¹⁴⁷ Despite the hospital's urging, the boy's parents did not force him to have the transfusion.¹⁴⁸ When the boy fell into a coma, the hospital got a court order and administered the transfusion.¹⁴⁹ Unfortunately, the transfusion was too late, the boy died, and the lower court found his parents guilty of

¹⁴² C.E. art. 16.3, B.O.E. n. 311, Dec. 29, 1978 (Spain) (translated from Spanish) ("Ninguna confesión tendrá carácter estatal."). This is echoed word-for word by the Ley Orgánica de Libertad Religiosa ("LOLR"). Ley Orgánica de Libertad Religiosa art. 1.3, (B.O.E., 1980, 7) (Spain).

¹⁴³ Brett G. Scharffs, *Four Views of the Citadel: The Consequential Distinction Between Secularity and Secularism*, 6 RELIGION & HUM. RTS. 109, 111 (2011). For a discussion of the difference between a state policy of secularism and a state that avoids identification with any particular religion, see *id.*

¹⁴⁴ *Id.* at 110–11; Martínez-Torrón, *supra* note 1, at 786–88.

¹⁴⁵ Martínez-Torrón, *supra* note 1, at 786–87.

¹⁴⁶ *Id.* at 787.

¹⁴⁷ S.T.C., July 18, 2002, No. 154, in B.O.E. n. 188 (supp.), Aug. 7, 2002, p. 51, A 2, at 51–53) (Spain).

¹⁴⁸ *Id.* A 2(b), at 51–52.

¹⁴⁹ *Id.* A 2(b), at 51–53.

homicide.¹⁵⁰ On appeal, the Constitutional Court held that the court-ordered transfusion violated the boy's right to freedom of conscience.¹⁵¹ The Constitution's protection of freedom of religion includes both freedom of belief and freedom to act in accordance with those beliefs.¹⁵² The state cannot infringe on the manifestation of religious beliefs when it does not like the results.¹⁵³

When the hospital ignored the boy's wishes, it made a value judgment with respect to his religious beliefs. When the lower court found the parents guilty of homicide, it affirmed the hospital's value judgment. In so doing, the state violated the principle of neutrality, which requires that the state not comment on the validity of any religion's teachings.

The Constitution's requirement of state neutrality protects minority religions from unequal treatment at the hands of the state. But, rather than requiring strict separation of church and state, Spain allows religions to engage in public discourse.¹⁵⁴ Religious groups may express their ideas in every sphere of human activity, including public education.¹⁵⁵ State officials may not comment on the validity of any one religion, but may work with religions when necessary in a democratic society. In this way, Spain recognizes the strong social and historical importance of the Catholic Church while providing strong freedoms for minority religions.

4. *State Cooperation*

The Constitution's fourth protection of religious freedom is a requirement that the state cooperate with religious organizations. Article 16.3 states: "The state must take into account the religious beliefs of Spanish society and maintain cooperative relations with the Catholic Church and the other

¹⁵⁰ *Id.* A 2(b)-(c), at 53.

¹⁵¹ *Id.* FJ 2, at 56 (La acción del hospital "resulta evidente la violación de los derechos que al menor Marcos garantizan [el artículo] 16.1.").

¹⁵² *Id.* FJ 6, at 59 ("[L]a libertad religiosa tiene una doble dimensión, interna y externa . . . incluye también una dimensión externa de *agere licere* que faculta a los ciudadanos para actuar con arreglo a sus propias convicciones y mantenerlas frente a terceros.").

¹⁵³ *Id.* FJ 11, at 61 ("[L]os órganos judiciales no pueden configurar el contenido de los deberes de garante haciendo abstracción de los derechos fundamentales . . .").

¹⁵⁴ Martínez-Torrón, *supra* note 1, at 791.

¹⁵⁵ See *infra* part II.C. See generally Javier Martínez-Torrón, *School and Religion in Spain*, 47 J. CHURCH & ST. 133 (2005).

religions.”¹⁵⁶ Unlike the U.S. Constitution, the Spanish Constitution does not aim to separate politics and religion completely. Recognizing that the church and the state are not fundamentally opposed to one another, and that religion is a positive social phenomenon, Article 16.3 ensures they will work together to achieve their mutual goals.¹⁵⁷

Spain cooperates with religious organizations in two ways: through registration in the public registry and through bilateral cooperation agreements.

a. Registration in the Registry of Religious Entities

Registration in the Registry of Religious Entities creates a broad juridical framework for the State to work with religious groups. Article 5 of the LOLR gives legal personality to any religion that is inscribed in the public registry of religions.¹⁵⁸ Any religion that can prove it has a legitimate group of followers who adhere to a common set of religious beliefs will be recorded in the public registry.¹⁵⁹ In 2001, the Constitutional Court held that the authorities in charge of the public registry must approve the application of all religious groups, without discretion; only non-religious groups can be excluded from registration (for instance, as the LOLR explicitly mentions, groups involved in the study of paranormal activity).¹⁶⁰ The Court further held that authorities in charge of the registry cannot impose their own notion of religion as a prerequisite for registration.¹⁶¹ The right to inscription in the public registry is part of the

¹⁵⁶ C.E. art. 16.3, B.O.E. n. 311, Dec. 29, 1978 (Spain) (translated from Spanish) (“Los poderes públicos tendrán en cuenta las creencias religiosas de la sociedad española y mantendrán las consiguientes relaciones de cooperación con la Iglesia Católica y las demás confesiones.”). This is the Constitution’s only reference to the Catholic Church, and it probably helped avoid negative backlash to the Constitution by Spain’s most conservative circles. Martínez-Torrón, *supra* note 46, at 718 n.12 (citing JOSÉ JAVIER AMORÓS AZPILICUETA, *LA LIBERTAD RELIGIOSA EN LA CONSTITUCIÓN ESPAÑOLA DE 1978* (1984)).

¹⁵⁷ Combalá & Roca, *supra* note 1, at 630.

¹⁵⁸ Ley Orgánica de Libertad Religiosa art. 5.1 (B.O.E., 1980, 7) (Spain) (“Las Iglesias, Confesiones y Comunidades religiosas y sus Federaciones gozarán de personalidad jurídica una vez inscritas en el correspondiente Registro público, que se crea, a tal efecto, en el Ministerio de Justicia.”).

¹⁵⁹ *Id.* art. 5.2 (“La inscripción se practicará en virtud de solicitud, acompañada de documento fehaciente en el que consten su fundación o establecimiento en España, expresión de sus fines religiosos, denominación y demás datos de identificación, régimen de funcionamiento y órganos representativos, con expresión de sus facultades y de los requisitos para su válida designación.”).

¹⁶⁰ Martínez-Torrón, *supra* note 46, at 743 (citing S.T.C., Feb. 15, 2001, No. 46, *in* B.O.E. n. 65 (supp.), Mar. 16, 2001, p. 83, FJ 8, at 88–89 (Spain)); *see also* Ley Orgánica de Libertad Religiosa art. 3.2 (B.O.E., 1980, 7) (“Quedan fuera del ámbito de protección de la presente Ley las actividades, finalidades y Entidades relacionadas con el estudio y experimentación de los fenómenos psíquicos o parapsicológicos o la difusión de valores humanísticos o espiritualistas u otros fines análogos ajenos a los religiosos.”).

¹⁶¹ The definition of “religion” has been controversial. S.T.C 24/2001 held that inscription can only be denied if a group will endanger individual rights and freedoms of others. Otherwise, the state must accept an

constitutional right of religious freedom because it facilitates the collective exercise of this right.¹⁶² The effect of this ruling is that every group claiming to be religious will be accepted into the registry.¹⁶³ Once recorded in the public registry a religion will enjoy legal personality.¹⁶⁴

According to the European Court of Human Rights, a State may legitimately require religious organizations to register before instilling them with legal personality.¹⁶⁵ However, “the State must be careful to maintain a position of strict neutrality and demonstrate it has proper grounds for refusing recognition.”¹⁶⁶ For example, in *Church of Scientology Moscow v. Russia*, the state allowed the Church of Scientology to register as a religious entity in 1994, but in 1997, a new law changed the definition of religious entity and required registered religions to prove their religious character and re-register.¹⁶⁷ Among other things, the 1997 law required organizations seeking registration to disclose the founder of the organization, information on the basic tenets of creed and religious practices, documentation of the religion’s existence in Russia for at least fifteen years, and the permanent address of the organization.¹⁶⁸ Registration could be refused if the aims and activities of the religion contradict Russian law and if the organization does not have a religious purpose.¹⁶⁹ If a church was unable to register by the year 2000, the court had the option to dissolve the association.¹⁷⁰ When the Church of Scientology attempted to re-register, the state refused, asserting that the purpose and activities of the Church of Scientology contradicted Russian law and that the registration materials were incomplete; the Church of Scientology resubmitted its materials numerous times but was unable to register before the

organization as a “religion” if it does not practice black magic or study paranormal activity, as criminalized by LOLR Article 3.2. Motilla, *supra* note 53, at 589–90; *see also* Martínez-Torrón, *supra* note 46, at 744. For a discussion of the difficulties of providing a legal definition of religion, *see* RAFAEL PALOMINO LOZANO, RELIGIÓN Y DERECHO COMPARADO (2006).

¹⁶² S.T.C., Feb. 15, 2001, No. 46, *in* B.O.E. n. 65 (supp.), Mar. 16, 2001, p. 83, FJ 8, at 88–89.

¹⁶³ Martínez-Torrón, *supra* note 46, at 744.

¹⁶⁴ Ley Orgánica de Libertad Religiosa art. 5 (B.O.E., 1980, 7) (“Las Iglesias, Confesiones y Comunidades religiosas y sus federaciones gozarán de personalidad jurídica una vez inscritas en el correspondiente Registro público, que se crea, a tal efecto en el Ministerio de Justicia.”).

¹⁶⁵ JIM MURDOCH, FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 45 (2007).

¹⁶⁶ *Id.*

¹⁶⁷ *Church of Scientology Moscow v. Russia*, App. No. 18147/02, Eur. Ct. H.R. paras. 6–11 (Apr. 5, 2007), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80038>.

¹⁶⁸ *Id.* para. 58.

¹⁶⁹ *Id.* para. 59.

¹⁷⁰ *Id.* para. 60.

year 2000.¹⁷¹ Fearing judicial dissolution, the church appealed to the European Court of Human Rights and argued that Russia violated Articles 9, 10, and 11 of the ECHR.¹⁷² Interpreting Article 9's grant of religious freedom in light of Article 11's grant of free association, the court held that the public order exception must be construed strictly when it implicates association and must correspond to a pressing social need.¹⁷³ Although the state may refuse to register a religion that fails to present information on its basic tenets and creed, the Church of Scientology did provide information on its basic tenets.¹⁷⁴ Furthermore, because the Church of Scientology had lawfully existed and operated in Russia for three years prior to the 1997 law and because the state could not prove that the community or its individual members had breached any domestic law, the state's refusal to re-register the church had no legal basis.¹⁷⁵

The registration requirements in *Church of Scientology Moscow* are very similar to the registration requirements in Spanish law. Both Spain and Russia require a religious entity to prove it has a legitimate group of followers who adhere to a common set of religious beliefs. But unlike the 1997 law in *Church of Scientology Moscow*, the Spanish Constitution requires state neutrality with respect to religion.

The European Court of Human Rights also found that the state did not have proper grounds for refusing recognition in *Metropolitan Church of Bessarabia v. Moldova*. In that case the Metropolitan Church of Bessarabia, which is a local autonomous Orthodox church in Moldova, applied for recognition five times between 1992 and 1997.¹⁷⁶ Each time the state refused to recognize the church, arguing that it was a schismatic group within the Metropolitan Church of Moldova, and that recognition of the Church of Bessarabia would create a conflict with the Church of Moldova.¹⁷⁷ The church challenged the refusal in the European Court of Human Rights, arguing that the refusal violated Articles 9 and 11 of the ECHR because state recognition is necessary to practice religion in Moldova, and that the state action was not protected by the public order exception because it was not required in a democratic society.¹⁷⁸ The

¹⁷¹ *Id.* paras. 8–20.

¹⁷² *Id.* paras. 64, 68–70.

¹⁷³ *Id.* paras. 74–75, 86.

¹⁷⁴ *Id.* para. 93.

¹⁷⁵ *Id.* paras. 96–97.

¹⁷⁶ *Metro. Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 81, paras. 11, 13–22, at 89–91.

¹⁷⁷ *Id.* paras. 97–98, at 108–09.

¹⁷⁸ *Id.* para. 95, at 107–08.

court agreed, holding that because Moldovan law allowed only registered religions to practice, the state's refusal to recognize the Metropolitan Church of Bessarabia violated its adherent's freedom of religion.¹⁷⁹ Further, the refusal was not exempted by Article 9(2) of the ECHR because, although the state may limit the freedom of one religion in order to prevent conflict between several religions or to reconcile the conflicting beliefs of various religions, it must do this in a way that is neutral.¹⁸⁰ Neutrality means the state cannot assess the legitimacy of religious beliefs.¹⁸¹ When the state argued that the Church of Bessarabia was merely a schism of the Church of Moldova, it made a value judgment about the legitimacy of the tenets of the Church of Bessarabia, and therefore violated its duty of neutrality.¹⁸²

The case of the *Church of Bessarabia* is distinguishable from the Spanish registration requirement because in Spain all people may form communities to practice their faith without interference by the state, even if they have not officially registered as a religious organization.¹⁸³ A legal personality is not required for a religion to realize the full panoply of constitutional protections. All religions are guaranteed religious freedom under Article 16 of the constitution, regardless of whether they are officially recognized. Furthermore, although registration in the Registry of Religious Entities is important because it is the state's way to recognize a religion as a juridical person, non-registration does not impair a religion's constitutional rights. Article 16.1 guarantees religious freedom "with no other restriction than may be necessary to maintain public order."¹⁸⁴ Legal personality is not a condition for the exercise of religious freedom in Spain; the state must protect the religious rights of individuals and groups from all religions, not merely registered religions. Additionally, a religious group that is not allowed to register as a religious entity can obtain legal personality through registration in the Registry of Associations.¹⁸⁵

¹⁷⁹ *Id.* para. 105, at 110.

¹⁸⁰ *Id.* paras. 115–16, at 113.

¹⁸¹ *Id.* para. 123, 116–17.

¹⁸² *Id.*

¹⁸³ See C.E. art. 16.1, B.O.E. n.311, Dec. 29, 1978.

¹⁸⁴ *Id.* (translated from Spanish).

¹⁸⁵ Martínez-Torrón, *supra* note 45, at 741 n.97.

b. *Bilateral Cooperation Agreements*

The second way the state cooperates with religious organizations is by signing bilateral agreements outlining areas for cooperation. Article 7 of the LOLR provides that the state may establish agreements of cooperation with the religions that are deeply rooted in Spanish society.¹⁸⁶ Cooperation agreements are very important because they are a concrete mechanism through which a religion can negotiate for specific protections from the state. Through a cooperation agreement the state can extend fiscal benefits to a religious organization,¹⁸⁷ can recognize feast days,¹⁸⁸ and can provide religious services for Spaniards in prisons, institutions, and other public facilities.¹⁸⁹

To date, the Spanish government has created cooperation agreements with four religious denominations: the Catholic Church, the Protestant Federation, the Islamic Federation, and the Jewish Federation.¹⁹⁰ Four other religions were found to be deeply rooted in Spanish society: the Church of Jesus Christ of Latter-day Saints, the Jehovah's Witnesses, the Buddhist Federation, and the Orthodox Churches.¹⁹¹ The Orthodox Church was accepted into the Protestant

¹⁸⁶ The LOLR uses the term of art "notorio arraigo" to describe religions that are deeply rooted in Spanish society. Ley Orgánica de Libertad Religiosa art. 7 (B.O.E., 1980, 7) (Spain). The term "notorio arraigo" does not have an English translation. The Spanish Department of Religious Affairs translates it as "notorious influence." SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 44 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998). But, the word "notorious" has a negative connotation and does not adequately express the fact that the religion must be deeply-rooted. Therefore, this Comment translates the term "notorio arraigo" to "deeply rooted in Spanish society."

Article 7 of the LOLR measures the roots of a religion by the area and number of believers. Ley Orgánica de Libertad Religiosa art. 7.1 (B.O.E., 1980, 7) ("El Estado, teniendo en cuenta las creencias religiosas existente en la sociedad española, establecerá en su caso, Acuerdos o Convenios de cooperación con las Iglesias, Confesiones y Comunidades religiosas inscritas en el registro que por su ámbito y número de creyentes hayan alcanzado notorio arraigo en España. En todo caso, estos Acuerdos se aprobarán por ley de las Cortes Generales.").

¹⁸⁷ Ley Orgánica de Libertad Religiosa art. 7.2 (B.O.E., 1980, 7) ("En los Acuerdos o Convenios, y respetando siempre el principio de igualdad, se podrá extendida a dichas Iglesias, Confesiones y Comunidades los beneficios fiscales previstos en el ordenamiento jurídico general para las entidades sin fin de lucro y demás de carácter benéfico.").

¹⁸⁸ *Id.* art. 2.

¹⁸⁹ *Id.* arts. 8, 9.1.

¹⁹⁰ See Acuerdo entre el estado español y la santa sede sobre asuntos jurídicos (B.O.E. 1976, 300) (Spain) [hereinafter 1979 Concordat II]; Protestant Federation Cooperation Agreement (B.O.E. 1992, 24) (Spain) [hereinafter FEREDE Agreement]; Jewish Federation Cooperation Agreement (B.O.E. 1992, 25) (Spain) [hereinafter Jewish Agreement]; Islamic Federation Cooperation Agreement (B.O.E. 1992, 26) (Spain) [hereinafter Islamic Agreement]. See *infra* Part II for discussion of the Concordat of 1979.

¹⁹¹ *International Religious Freedom Report 2010*, *supra* note 5; *Notorio Arraigo*, FUNDACIÓN PLURALISMO Y CONVIVENCIA, www.pluralismoyconvivencia.es/materiales_didacticos/glosario/notorio_arraigo (last visited May 6, 2013); see also Martínez-Torrón, *supra* note 1, at 796 n.51.

Federation and now receives the benefits of the Protestant cooperation agreement.¹⁹² The other three do not have bilateral agreements with the state.

Because cooperation agreements are only available for religions that are deeply-rooted in Spanish society, the mechanism by which the Spanish state interacts with religions favors those religions. Formal cooperation agreements make it easier for Catholics, Jews, Muslims, and Protestants to negotiate with the state. Further, the state has not identified objective criteria to determine whether a denomination is deeply rooted in Spanish society and reserves the right to refuse to negotiate with any religious group regardless of whether it is deeply rooted in Spanish society.¹⁹³ For example, although the Church of Jesus Christ of Latter-day Saints has more members than the entire Jewish Federation and scholars argue that the Latter-day Saints are deeply rooted in Spanish society, the state has refused to negotiate a cooperation agreement with them.¹⁹⁴ This might be a violation of the constitutional requirement of equality.

The European Court of Human Rights has held that mild forms of state preference for one religion over another do not violate the Convention. For example, in *Otto-Preminger Institut v. Austria*, Austrian authorities banned a film that was offensive to Roman Catholics.¹⁹⁵ The court upheld the ban in light of the clear Roman Catholic majority in the region.¹⁹⁶ Additionally, a state may treat different religious groups differently without violating the ECHR, as long as there is a reasonable and objective justification for the different treatment. In *Alujer Fernández and Caballero García v. Spain*, the Court held that arrangements which favor particular religious communities do not, in principle, “contravene the requirements of [Article 9], provided that there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other [c]hurches willing to do so.”¹⁹⁷

The European Court found no objective and reasonable justification for a Spanish law that provided a pension plan for Catholic priests but not for

¹⁹² *Ortodoxos y Orientales*, FUNDACIÓN PLURALISMO Y CONVIVENCIA, www.pluralismoyconvivencia.es/materiales_didacticos/glosario/ortodoxos_y_orientales (last visited May 6, 2013); see also Combalá & Roca, *supra* note 1, at 633.

¹⁹³ Motilla, *supra* note 53, at 584.

¹⁹⁴ Martínez-Torrón, *supra* note 1, at 777 n.75; Martínez-Torrón, *supra* note 46, at 718 n.13.

¹⁹⁵ *Otto-Preminger Institut v. Austria*, 19 Eur. Ct. H.R. 34, 52 (1994).

¹⁹⁶ *Id.*

¹⁹⁷ *Alujer Fernández & Caballero García v. Spain*, 2001-VI Eur. Ct. H.R. 487.

Evangelical ministers.¹⁹⁸ In *Manzanas Martín v. Spain*, the petitioner worked as an Evangelical minister for forty years but when he retired in 1991 and applied to receive social security benefits the department of social security refused to grant a pension, stating that work as a minister for the Evangelical Church did not qualify as pensionable service.¹⁹⁹ Spanish social security law in 1991 did provide pensions for Catholic priests, but protestant ministers were not granted pensions until the 1992 cooperation agreement with the Protestant Federation.²⁰⁰ The petitioner challenged the department's decision in the Barcelona Labor Court; the court ruled that the social security law gave preferential treatment to Catholic priests.²⁰¹ On appeal, the superior court of Catalonia reversed the lower court's decision, holding that because the petitioner retired before the Protestant Federation negotiated pension rights the action of the social security department was lawful.²⁰² The petitioner then challenged the constitutionality of the social security law, but the Constitutional Court upheld the law.²⁰³ He appealed to the European Court of Human Rights, asserting that Spain had violated Article 14 of the ECHR.²⁰⁴ Spain argued that it had not reached an agreement with regard to social security rights for protestant ministers until 1992.²⁰⁵ The European Court did not find this argument convincing, noting that Spain had the forethought to incorporate Catholic priests into the social security scheme in 1977 and it should have revised this in 1978 after granting equality to all religions.²⁰⁶

¹⁹⁸ *Manzanas Martín v. Spain*, App. No. 17966/10, Eur. Ct. H.R. (2012), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110885#{"itemid":\["001-110885"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110885#{).

¹⁹⁹ *Id.* paras. 5–8.

²⁰⁰ Catholic priests were included in the social security regime by Royal Decree in 1977. Royal Decree 2398/1977 which regulates the Clergy Social Security, art. 1 (B.O.E. 1977, 224) (“Los Clérigos de la Iglesia Católica y demás Ministros de otras Iglesias y Confesiones Religiosas debidamente inscritas en el correspondiente Registro del Ministerio de Justicia quedarán incluidos en el ámbito de aplicación del Régimen General de la Seguridad Social, en las condiciones que reglamentariamente se determinen Quedan asimilados a trabajadores por cuenta ajena, a efectos de su inclusión en el Régimen General de la Seguridad Social.”). Protestant ministers and preachers were incorporated to the regime by the FEREDE Agreement in 1992 and in 1999 by Royal Decree 369/1999. FEREDE Agreement, *supra* note 190; Royal Decree 369/1999 on terms and conditions for inclusion in the General System of Social Security for religious ministers of the churches belonging to the Federation of Evangelical Religious Entities of Spain (B.O.E. 1999, 64).

²⁰¹ *Manzanas Martín*, App. No. 17966/10, para. 11.

²⁰² *Id.* para. 13 (stating that because the petitioner retired in 1991, he was therefore not incorporated into the social security scheme, either by the Royal Decree or by the FEREDE Agreement).

²⁰³ *Id.*

²⁰⁴ *Id.* para. 44.

²⁰⁵ *Id.* para. 53.

²⁰⁶ *Id.*

Therefore the Court held that there was no reasonable justification for the state's refusal to grant pensions to protestant ministers.²⁰⁷

The European Court's requirement of a reasonable and objective justification for state discrimination on the basis of religion accords with Spain's provision for religious equality.²⁰⁸ Spain's system of bilateral cooperation agreements stems from its Constitutional obligation to cooperate with "the Catholic Church and the other religions."²⁰⁹ Article 16.3 is prefaced by the statement "there will be no state religion."²¹⁰ The requirement to cooperate with all religions, therefore, is a way to guarantee that the state does not become confessional. It does not give a right to individuals.²¹¹ The state's decision to limit bilateral cooperation agreements to religions that are deeply rooted in society is a reasonable limitation to a vague provision in the constitution.

The requirement that the state cooperate with religions is also in line with European norms of religious freedom because it does not permit the state to violate the Constitution's provisions for state neutrality (Article 16.3) or equality (Article 14). For example, the Court has held that when state cooperation with a religious group works to the disadvantage of other religious groups, difference in treatment must be supported by a reasonable and objective determination.²¹² For example, in STC 340/1993 the Court held that eminent domain laws which were more favorable to the Catholic Church than to other religious organizations were not necessary in a democratic society.²¹³ The Law of Urban Leasing in effect in 1993 gave a landlord the right to break a lease and reclaim his property when the landlord could prove he needed the property for personal use.²¹⁴ The Law exempted certain groups from the proof requirement, including national, provincial, and municipal governments, and the Catholic Church.²¹⁵ This meant that when the Catholic Church acted as landlord it could break the lease and reclaim the property without

²⁰⁷ *Id.* paras. 55–57.

²⁰⁸ *See supra* Part I.B.2.

²⁰⁹ C.E. art. 16.3, B.O.E. n. 311, Dec. 29, 1978 (Spain) (translated from Spanish).

²¹⁰ *Id.* (translated from Spanish).

²¹¹ *See, e.g.*, S.T.C., Nov. 8, 1983, No. 93, *in* B.O.E. n. 288 (supp.), Dec. 2, 1983, p. 18 (Spain).

²¹² *See supra* Part I.B.2.

²¹³ S.T.C., Nov. 16, 1993, No. 340, *in* B.O.E. n. 295 (supp.), Dec. 10, 1993, p. 81 (Spain).

²¹⁴ Ley de Arrendamientos Urbanos arts. 70–75 (B.O.E. 1964, 312) (Spain) (replaced by B.O.E. 1994, 282).

²¹⁵ *Id.* art. 76.1 ("Cuando el Estado, la Provincia, el Municipio, la Iglesia Católica y las Corporaciones de Derecho Público tengan que ocupar sus propias fincas para establecer sus oficinas o servicios, no vendrán obligados a justificar la necesidad.").

justification.²¹⁶ Other religions, however, did need to provide justification for a taking.²¹⁷ The Court held that when the law exempted the Catholic Church from having to prove that it needed to occupy the property for personal use, this treatment violated the constitutional principle of equality because religious organizations in identical situations were not treated equally under the law.²¹⁸ Although the Constitution requires state cooperation with the Catholic Church, the Court held that this is not a reasonable justification for treating the Catholic Church differently from other religions.²¹⁹

The principle of state cooperation recognizes that the church and the state seek many of the same goals, and therefore ensures that they will work together. It provides an interesting corollary to both the neutrality and equality principles, but does not contradict them. Although the state must cooperate with the Catholic Church, it must also cooperate with every other religion as necessary in a democratic society. Because cooperation is not limited to one church, the cooperation principle does not violate the earlier principles of neutrality and equality. The state cannot use its cooperation to uphold one religion as more worthy than the others. Therefore, the cooperation principle does not infringe on the rights of minority religions.

II. THE 1979 CONCORDATS ARE CONSTITUTIONAL

One week after guaranteeing freedom of religion to all citizens and mandating that the state cooperate with religions, Spain entered an agreement with the Catholic Church to carve out specific applications of that cooperation. State and religious officials agreed that a new concordat was necessary because the previous concordat was not compatible with the new constitution.²²⁰ Notably, the government did not question whether a concordat should govern

²¹⁶ *See id.*

²¹⁷ S.T.C., Nov. 8, 1983, No. 93, *in* B.O.E. n. 288 (supp.), Dec. 2, 1983, p. 18.

²¹⁸ *Id.* FJ 4(a), at 91.

²¹⁹ *Id.*

²²⁰ The preamble to the 1976 Concordat reads “in view of the profound transformation that Spain has experienced in the last years . . . Spain and the Vatican judge it necessary to regulate through specific agreements matters of common interest . . .” *Acuerdo sobre renuncia a la presentación de obispos y al privilegio del fuero* (B.O.E. 1976, 18294) (Spain) (translated from Spanish) (“A la vista del profundo proceso de transformación que la sociedad española ha experimentado en estos últimos años . . . juzgan necesario regular mediante Acuerdos específicos las materias de interés común . . .”). The 1976 concordat was limited to a discussion of the state’s ability to select bishops and to prosecute a member of the clergy. The 1979 Concordats set forth a much more detailed description of the rights and responsibilities of the Spanish State and the Catholic Church, and therefore it is the agreement on which this Comment will focus. *See* Martínez-Torrón, *supra* note 1, at 794.

church-state relations.²²¹ Given the numerous changes enacted by the 1978 Constitution, state officials could have dispensed with concordats altogether. Perhaps afraid of backlash similar to the reaction to the 1931 Constitution,²²² politicians used the new concordat to curry favor among Spain's most influential bishops, who then presented the transition to democracy to their congregations as a positive change for Spain.²²³

Before analyzing the particular provisions of the Concordats of 1979, it is important to understand how the Concordat fits into the Spanish legal scheme. A concordat is an instrument of international law for two reasons: (1) it is a bilateral treaty between two subjects of international law, each sovereign in its own sphere; and (2) it is negotiated, signed, and ratified according to the norms of international practice.²²⁴ The Concordat of 1979 is a bilateral agreement between the Spanish state and the Holy See, which is the sovereign entity of the Catholic Church.²²⁵ It was negotiated, signed, and ratified by Spanish Parliament, as required by Article 94 of the Constitution.²²⁶ Therefore, it is a treaty.

In Spain, treaties are superior to the internal law of the state and are equal in rank to the constitution.²²⁷ If the concordat conflicts with the constitution,

²²¹ Martínez-Torrón, *supra* note 1, at 794.

²²² In the 1930s Republican legislators, who were determined to reduce the Church's social influence, declared invalid all previous agreements with the Catholic Church. But because they made no attempt to reconcile the entrenched position of the Church, they alienated many politically influential Catholics, including high-ranking military officers, and provided the spark that ignited the Spanish Civil War. *See id.* at 788–89.

²²³ *Id.* at 789.

²²⁴ Roland Minnerath, *The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective*, 47 CATH. U. L. REV. 467, 468 (1998); *see also* Willibald M. Plöchl, *Reflections on the Nature and Status of Concordats*, 7 JURIST 10 (1947).

²²⁵ The Church claims for herself the right to conclude treaties, create legislation, and deal with states in the field of international law. 1983 CODE C.3, 255, 265–67 (Catholic Church).

²²⁶ MARÍA JOSÉ CIÁURRIZ, LA LIBERTAD RELIGIOSA EN EL DERECHO ESPAÑOL: LA LEY ORGÁNICA DE LIBERTAD RELIGIOSA 96 (1984); *see also* C.E. art. 94, B.O.E. n. 311, Dec. 29, 1978 (Spain) (“La prestación del consentimiento del Estado para obligarse por medio de tratados o convenios requerirá la previa autorización de las Cortes Generales, en los siguientes casos . . . (e) [t]ratados o convenios que supongan modificación o derogación de alguna ley o exijan medidas legislativas para su ejecución.”).

²²⁷ CIÁURRIZ, *supra* note 226, at 96–97. A first draft of the Constitution stated that international treaties have a higher place in the Spanish legal system than the domestic law. *Id.* at 97 n.11. The final version of the constitution was not as clear about the superiority of treaties over domestic law, instead saying “treaties may only be modified or suspended in the form contemplated by the treaty or in accordance with international law.” C.E. art. 96.1, B.O.E. n. 311, Dec. 29, 1978 (Spain) (translated from Spanish) (“Los tratados internacionales válidamente celebrados, una vez publicados oficialmente en España, formarán parte del ordenamiento interno. Sus disposiciones sólo podrán ser derogadas, modificadas o suspendidas en la forma prevista en los propios tratados o de acuerdo con las normas generales del Derecho internacional.”).

the Constitutional Court must review it.²²⁸ Because the concordat is a treaty, it can only be amended or suspended by consent of the Spanish government and the Holy See, as provided by the concordat's terms.²²⁹ Therefore, it is important that the concordat is compatible with the constitution.²³⁰

The Concordat of 1979 comports with the constitution's principles of neutrality and equality, and is a legitimate use of the doctrine of state cooperation with religion. This Section will outline the main points of the 1979 Concordat below: (A) state recognition of Catholic rites; (B) foreign sovereignty of the Catholic Church; (C) Catholic religious education in public schools; and (D) state economic support for the Catholic Church. It will analyze each provision in light of the previously-outlined Constitutional framework for religious freedom, and will argue that the Concordat is consistent with the rights afforded by the Constitution and by the LOLR.

A. *State Recognition of Catholic Rites*

First, the concordat recognizes the Catholic Church's right to free and public exercise of religious activities.²³¹ Sundays are recognized as holy days,²³² Catholic marriage rites are civilly valid,²³³ and all people have the right to attend Catholic mass, even the people in public institutions, such as hospitals and prisons.²³⁴

²²⁸ C.E. art. 95, B.O.E. n. 311, Dec. 29, 1978 (Spain) ("La celebración de un tratado internacional que contenga estipulaciones contrarias a la Constitución exigirá la previa revisión constitucional.").

²²⁹ International treaties can only be modified or suspended in the form contemplated by the treaty. *Id.* art. 96.1 ("Los tratados internacionales válidamente celebrados, una vez publicados oficialmente en España, formarán parte del ordenamiento interno. Sus disposiciones sólo podrán ser derogadas, modificadas o suspendidas en la forma prevista en los propios tratados o de acuerdo con las normas generales del Derecho internacional."). The 1979 Concordat contemplates that the Holy See and the Spanish government will work together to resolve any problems that arise in the interpretation or application of the Concordat. 1979 Concordat I, *supra* note 190, art. 4.2.

²³⁰ E.U. Network of Indep. Experts on Fundamental Rights, *The Right to Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See*, at 6 (Opinion No. 4-2005, Dec. 14, 2005).

²³¹ 1979 Concordat I, *supra* note 190, art. 1.1 ("El Estado Español reconoce a la Iglesia Católica el derecho de ejercer su misión apostólica y le garantiza el libre y público ejercicio de las actividades que le son propias y en especial las de culto, jurisdicción y magisterio.").

²³² *Id.* art. 3 ("El Estado reconoce como días festivos todos los domingos.").

²³³ *Id.* art. 6 ("El Estado reconoce los efectos civiles al matrimonio celebrado según las normas del Derecho Canónico.").

²³⁴ *Id.* art. 4.1 ("El Estado reconoce y garantiza el ejercicio del derecho a la asistencia religiosa de los ciudadanos internados en establecimientos penitenciarios, hospitales . . . tanto privados como públicos.").

These rights are facially consistent with the rights afforded by the cooperation agreements with Judaism, Islam, and the Protestant churches.²³⁵ However in practice, the State's recognition of Catholic rites is broader than its recognition of the rites of the Jewish, Protestant, and Islamic Federations. For instance, when a canonical court annuls a Catholic marriage, this pronouncement will have civil effect as soon as a civil court approves it.²³⁶ The civil court may accept an annulment on the motion of one party; the other party may object to procedural due process, but not to the substantive elements of the decision.²³⁷ In contrast, the marital decisions of Jewish and Islamic religious courts do not receive civil effect.²³⁸ Similarly, the state's recognition of Catholic holy days is broader than its recognition of Jewish or Islamic holy days. For example, although the Jewish Cooperation Agreement recognizes Saturday as a holy day and allows for Saturday as a day of rest from work,²³⁹ the Constitutional Court has held that private employers are not required to provide a day of rest on Saturday.²⁴⁰

Although the State's recognition of Catholic rites in the Concordat is broader than its recognition of the rites of other religious groups, this does not violate the Constitution's requirement of equality because there is a reasonable and objective justification for the different treatment.²⁴¹ The pronouncements of Catholic marital tribunals are afforded great respect by Spanish civil courts due to the State's centuries-long history of accepting the adjudications of ecclesiastical courts.

The rights afforded by the Concordat are also consistent with the rights afforded to emerging religions, that is, those that are not deeply rooted in Spanish society. All Spaniards are free to practice any religion of their

²³⁵ Recognition of the validity of religious marriage is provided in Article 7 of each Cooperation Agreement. *See, e.g.*, FEREDE Agreement, *supra* note 190, art. 7 ("Se reconocen los efectos civiles a del matrimonio celebrado según la forma religiosa ante los ministros de culto de las Iglesias pertenecientes . . ."). Articles 8 and 9.1 of each Cooperation Agreement provide for religious services in public institutions. *See id.* The agreements for Islam and Judaism allow followers to miss work and school on their religious holy days as a substitute for Catholic holy days. *See, e.g.*, Islamic Agreement, *supra* note 190, art. 12; Jewish Agreement, *supra* note 190, art. 12.

²³⁶ Martínez-Torrón, *Freedom of Religion*, *supra* note 46, at 729.

²³⁷ S.T.C., Nov. 8, 1983, No. 93, in B.O.E. n. 288 (supp.), Dec. 2, 1983, p. 18, FJ 2, at 20 (Spain).

²³⁸ Martínez-Torrón, *Freedom of Religion*, *supra* note 46, at 729. The Protestant Federation does not have religious courts. *Id.*

²³⁹ Jewish Agreement, *supra* note 190, art. 12.

²⁴⁰ *See supra* Part I.B.2.

²⁴¹ *See* Part I.B, *supra*, for a discussion of Articles 16.1 and 9.2 of the Spanish Constitution and Article 1.2 of the LOLR.

choosing and are free to form religious communities. Freedom of religion and freedom of association are fundamental individual rights, “given without the need for legislation.”²⁴² The legislature has said that fundamental rights, such as freedom of religion, apply to communities formed to carry out the rights and that the communities do not need to be authorized or inscribed in a public register to enjoy freedom of religion.²⁴³ The rites and ceremonies of all religions may not be restricted unless necessary to maintain public order²⁴⁴ and adherents of these religions may not be discriminated against.²⁴⁵

Finally, the Concordat carefully provides that Catholic public worship will not infringe the religious rights of non-Catholics.²⁴⁶ The recognition of Catholic rites was not meant to coerce the followers of other religions to convert to Catholicism. It was merely meant to take into account the religious beliefs of the Spanish society, as required by Article 16.3 of the Constitution. The Constitution allows all religions to proclaim their beliefs publically, as long as this proclamation does not infringe on another’s right to freedom of conscience. The recognition of Catholic rites in the Concordat of 1979 does not so infringe, therefore it is constitutional.

B. Foreign Sovereignty of the Catholic Church

Second, the Concordat recognizes the juridical rights of the Catholic Church. It provides that the Catholic Church may organize itself freely, and create dioceses, parishes, and other religious congregations that have legal personality.²⁴⁷ The State agreed to respect the inviolability of the land,

²⁴² FEREDE Agreement, *supra* note 190 (translated from Spanish).

²⁴³ See, e.g., Islamic Agreement, *supra* note 190, pmb. (“Estos derechos, concebidos originariamente como derechos individuales de los ciudadanos, alcanzan también, por derivación, a las Comunidades o Confesiones en que aquellos se integran para el cumplimiento comunitario de sus fines religiosos, sin necesidad de autorización previa, ni de su inscripción en ningún registro público.”).

²⁴⁴ See *supra* Part I.B.1 for a discussion of the grant of freedom of conscience and worship in Article 16.1 of the Spanish Constitution.

²⁴⁵ See *supra* Part I.B.2 for a discussion of the grant of religious equality in Article 14 of the Spanish Constitution.

²⁴⁶ 1979 Concordat I, *supra* note 229, art. 4.2 (“El régimen de asistencia religiosa católica y la actividad pastoral de los centros mencionados que sean de carácter público serán regulados de común acuerdo entre las competentes Autoridades de la Iglesia y del Estado. En todo caso, quedará salvaguardado el derecho a la libertad religiosa de las personas y el debido respeto a sus principios religiosos y éticos.”).

²⁴⁷ *Id.* art. 1.2 (“La Iglesia puede organizarse libremente. En particular, puede crear, modificar o suprimir Diócesis, Parroquias y otras circunscripciones territoriales, que gozarán de personalidad jurídica civil en cuanto la tengan canónica y ésta sea notificada a los órganos competentes del Estado.”).

buildings, archives, registers, and documents of the church.²⁴⁸ Additionally, the State recognized the Catholic Church of Spain's foreign sovereignty.²⁴⁹

Spain does not grant foreign sovereignty to any other religious organization. The reasons for this difference are historical and legal. Historically, the Catholic Church has claimed sovereignty in international affairs, and states have recognized that the papacy is the supreme authority of the Church over political, national, and cultural borders.²⁵⁰ Other religions do not have a similar historical claim to sovereignty. Legally, sovereignty cannot be granted—an actor either is sovereign or is not.²⁵¹ The cooperation agreements with the Protestant, Islamic, and Jewish Federations, which are internal settlements made according to the domestic law of Spain,²⁵² therefore cannot grant sovereignty to these religious organizations.

The Church's right to organize itself freely is a direct implementation of the active requirement that the state remove obstacles to the free exercise of religion.²⁵³ The cooperation agreements with Judaism, Islam, and the Protestant Federation make their respective places of worship inviolable.²⁵⁴ Religions that are not deeply rooted in Spanish society can expect a similar level of state protection because the right to gather publicly to profess religion is protected for all religions by LOLR Article 1.2. Therefore, these provisions of the Concordat are constitutional.

²⁴⁸ *Id.* art. 1.5–6 (“Los lugares de culto tienen garantizada su inviolabilidad con arreglo a las Leyes. . . . El Estado respeta y protege la inviolabilidad de los archivos, registros y demás documentos pertenecientes a la Conferencia Episcopal Española, a las Curias . . . y a otras Instituciones y Entidades eclesíásticas.”).

²⁴⁹ *Id.* art. 1.2 (“Ninguna parte del Territorio español dependerá de Obispo cuya sede se encuentre en territorio sometido a la soberanía de otro Estado, y ninguna Diócesis o circunscripción territorial española comprenderá zonas de territorio sujeto a soberanía extranjera.”). The practical application of foreign sovereignty means any internal disputes will be resolved by the local bishop. If he cannot resolve the dispute, it will proceed to a higher authority in the Holy See. Cases brought against the church as an institution must be resolved with reference to international law, just as if a claim were brought against a foreign state. Foreign sovereignty of the church does not give individuals the right to break civil laws, and the state may bring individual clergy before domestic courts.

²⁵⁰ 1983 CODE C.3, 255, 265–67 (Catholic Church); *see also* Minnerath, *supra* note 224, at 468.

²⁵¹ *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 52 (3d ed. 2010) (“The essence of statehood is *sovereignty*, the principle that each nation answers only to its own domestic order and is not accountable to a larger international community, save only to the extent it has consented to do so.”).

²⁵² Minnerath, *supra* note 224, at 468.

²⁵³ *See supra* Part I.B.1.b for a discussion of Article 9.2 of the Spanish Constitution.

²⁵⁴ *E.g.*, FEREDÉ Agreement, *supra* note 190, art. 2.

C. Catholic Religious Education in Public Schools

Third, the concordat recognizes the fundamental importance of religious education and therefore gives the Catholic Church the right to teach the Catholic faith to all people.²⁵⁵ The Holy See may communicate with the Church in Spain and publish information to the clergy and the faithful.²⁵⁶ Public schools must offer Catholic religious education classes,²⁵⁷ with curriculum overseen by the Church and teachers authorized by the relevant bishop,²⁵⁸ to any child who desires Catholic religious education.²⁵⁹ Additionally, the state guaranteed that public school teaching would respect Christian ethics.²⁶⁰

The Jewish, Islamic, and Protestant cooperation agreements provide similar rights for religious education. The followers of these religions may freely disseminate publications,²⁶¹ oversee the religious curriculum taught in public schools,²⁶² and control the hiring and firing of religious education teachers.²⁶³ In 2004, the government approved legislation that mandates funding for Protestant, Islamic, and Judaic instruction in public schools when at least ten students request it.²⁶⁴ In this respect, the state treats Catholic religious education differently from Protestant, Muslim, and Jewish religious education—Catholic students do not have to request religious education. However, this difference is not discriminatory because it has an objective justification. Given Spain's majority Catholic population it would be unreasonable for every school to teach Jewish, Protestant, or Muslim religious

²⁵⁵ Acuerdo entre el Estado español y la Santa Sede sobre enseñanza y asuntos culturales (B.O.E. 1979, 29491) (Spain) [hereinafter 1979 Concordat II] (“El Estado reconoce el derecho fundamental a la educación religiosa . . .”).

²⁵⁶ 1979 Concordat I, *supra* note 229, art. 2 (“La Santa Sede podrá promulgar y publicar libremente cualquier disposición referente al gobierno de la Iglesia y comunicar sin impedimento con los Prelados, el Clero y los fieles, así como ellos podrán hacerlo con la Santa Sede.”).

²⁵⁷ 1979 Concordat II, *supra* note 255, art. 2 (“[I]ncluirán la enseñanza de la religión católica en todos los Centros de Educación . . .”).

²⁵⁸ *Id.* art. 6 (“A la Jerarquía eclesiástica corresponde señalar los contenidos de la enseñanza y formación religiosa católica, así como proponer los libros de texto y material didáctico relativos a dicha enseñanza y formación.”).

²⁵⁹ *Id.* art. 2 (“Por respeto a la libertad de conciencia, dicha enseñanza no tendrá carácter obligatorio para los alumnos. Se garantiza, sin embargo, el derecho a recibirla.”).

²⁶⁰ *Id.* art. 1 (“[L]a educación que se imparta en los centros docentes públicos será respetuosa con los valores de la ética cristiana.”).

²⁶¹ *E.g.*, FEREDE Agreement, *supra* note 190, art. 11.2(a).

²⁶² *Id.* art. 10.

²⁶³ *Id.*

²⁶⁴ *International Religious Freedom Report 2010*, *supra* note 5.

education classes without first ascertaining whether students would want to take these classes.

Unlike the four religions with cooperation agreements, emerging religions are not entitled to provide religious instruction in public schools.²⁶⁵ However, the Constitution does protect freedom of conscience in public schools. Article 27 states that the purpose of education is for the full development of the human personality.²⁶⁶ To this end, public education must respect the parental right to direct the religious and moral education of their children.²⁶⁷ Non-Catholic students are not required to take Catholic religious education classes in school.²⁶⁸ To avoid infringement of the rights of non-Catholics, the Church agreed to coordinate its educational principles with civil education.²⁶⁹ In light of the principle of individual liberty outlined in Section 2.1 of the LOLR,²⁷⁰ and Article 27 of the Constitution, the Concordat reaffirmed the fundamental parental right to choose their children's moral and religious education.²⁷¹

Furthermore, followers of every religion may provide religious education for their children through homeschooling or by enrolling them in private religious schools.²⁷² Although public schools do not provide religious education for emerging religions, these religions can teach their faith in other public areas.²⁷³ Additionally, the state provides a limited fund for cultural,

²⁶⁵ Martínez-Torrón, *supra* note 155, at 140.

²⁶⁶ C.E. art. 27.2, B.O.E. n. 311, Dec. 29, 1978 (Spain) (“La educación tendrá por objeto el pleno desarrollo de la personalidad humana en el respeto a los principios democráticos de convivencia y a los derechos y libertades fundamentales.”).

²⁶⁷ *Id.* art. 27.3 (“Los poderes públicos garantizan el derecho que asiste a los padres para que sus hijos reciban la formación religiosa y moral que esté de acuerdo con sus propias convicciones.”).

²⁶⁸ Martínez-Torrón, *Freedom of Religion*, *supra* note 46, at 732.

²⁶⁹ 1979 Concordat II, *supra* note 255, pmbl. (“La Iglesia debe coordinar su misión educativa con los principios de libertad civil en material, religiosa, y con los derechos de las familias evitando cualquier discriminación o situación privilegiada.”); Martínez-Torrón, *Freedom of Religion*, *supra* note 46, at 732.

²⁷⁰ The LOLR recognizes the right to choose the religious education you wish to receive. Ley Orgánica de Libertad Religiosa art. 2.1 (B.O.E., 1980, 7) (“La libertad religiosa y de culto garantizada por la Constitución comprende, con la consiguiente inmunidad de coacción, el derecho de toda persona a . . . (c) [r]ecibir e impartir enseñanza e información religiosa . . . dentro y fuera del ámbito escolar, la educación religiosa y moral que esté de acuerdo con sus propias convicciones.”).

²⁷¹ 1979 Concordat II, *supra* note 255, art. 1 (“A la luz del principio de libertad religiosa, la acción educativa respetará el derecho fundamental de los padres sobre la educación moral y religiosa de sus hijos en el ámbito escolar.”).

²⁷² C.E. art. 27.3, B.O.E. n. 311, Dec. 29, 1978 (Spain) (“Los poderes públicos garantizan el derecho que asiste a los padres para que sus hijos reciban la formación religiosa y moral que esté de acuerdo con sus propias convicciones.”); *International Religious Freedom Report 2010*, *supra* note 5.

²⁷³ C.E. art. 16.1, B.O.E. n. 311, Dec. 29, 1978 (Spain); *see also supra* notes 91–94.

educational, and social programs to teach the tenets of minority religions outside of a school setting.²⁷⁴

Spain's Constitutional Court has heard a number of cases concerning religion in public schools. One area of contention has been the Catholic Church's right to authorize religious education teachers—before a school may hire an individual to teach Catholic religion classes, the local bishop must authorize the teacher to teach religion on behalf of the Church, and the bishop may refuse to authorize any teacher he considers inappropriate.²⁷⁵ Because the state can only hire Catholic religious education teachers authorized by the local bishop, the bishop's power is broad. To ensure that a bishop's right to authorize teachers does not infringe on other Constitutional rights, Spanish courts may review these decisions.²⁷⁶

Courts must make two inquiries when reviewing a bishop's decision to authorize or not authorize a religious education teacher. First, they must determine whether authorization was made with respect for the principles of merit and capacity or on purely religious grounds.²⁷⁷ Authorization decisions that are made with respect for the principles of merit and capacity are presumptively valid.²⁷⁸ Authorization decisions that were made on purely religious grounds must be respected by the state because the neutrality provision of Article 16.3 of the constitution prohibits the state from making value judgments on religious issues.²⁷⁹ Catholic religious education is a religious act, meaning the church is responsible for defining the objectives and the means of religious education.²⁸⁰ Therefore the church may set requirements for its religious education teachers, and these requirements may include

²⁷⁴ In 2010 the state provided \$6.2 million for such programs. *International Religious Freedom Report 2010*, *supra* note 5. Paradoxically, however, this fund typically goes to Protestant, Jewish, and Muslim educational programs, and not programs for emerging religions. *Id.*

²⁷⁵ Martínez-Torrón, *supra* note 155, at 142.

²⁷⁶ S.T.C., Feb. 15, 2007, No. 38, in B.O.E. n. 63 (supp.), Mar. 14, 2007, p. 90, FJ 1, at 96 (Spain).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*; *see also supra* Part I.B.3.

²⁸⁰ S.T.C., June 4, 2007, No. 128, in B.O.E. n. 161 (supp.), July 6, 2007, p. 4, FJ 4, at 14–15 (Spain) (“[C]uando la propia autoridad eclesiástica que se pronunció favorablemente el emitir su juicio de idoneidad en un acto de carácter puramente religioso, ajeno por completo al Derecho estatal, se pronuncia negativamente en un momento posterior en razón de un juicio igualmente religioso, que en sí mismo no sea merecedor de un reproche constitucional.”); *see also* S.T.C., Nov. 16, 1993, No. 340, in B.O.E. n. 295 (supp.), Dec. 10, 1993, A 5, at 84 (Spain) (stating that the religious objectives of religious education must be defined by the church, not the state) S.T.C., May 13, 1982, No. 68, in B.O.E. n. 137 (supp.), June 9, 1982, p. 5 (Spain).

religious or moral standards.²⁸¹ As a practical matter, this means that in addition to knowledge of the faith and teaching skill the church may consider a teacher's private and public behavior when deciding to grant or deny authorization.

Second, courts must weigh the conflicting rights of the church to control religious affairs and the teacher's freedom of conscience.²⁸² The Constitutional Court explained this process of review in STC 38/2007. In that case, the bishop revoked authorization from a teacher who had engaged in an extramarital affair; subsequent to the revocation the school fired her.²⁸³ The teacher argued that when the school fired her it discriminated on the basis of religion.²⁸⁴ Recalling that discrimination on the basis of religion is acceptable if there is a reasonable and objective justification,²⁸⁵ the Court examined the church's decision to revoke ecclesiastical authorization from the teacher and the State's decision to fire the unauthorized teacher.²⁸⁶ Affirming that the church's right to teach religion includes the right to decide the qualifications of religion teachers,²⁸⁷ and that the teacher's failure to live according to Catholic moral teaching directly related to her capacity to teach religion, the Court held that the bishop used a religious justification.²⁸⁸ State neutrality therefore required the school to accept this decision and fire the teacher.²⁸⁹ The Court then weighed the conflicting rights of the parties. It weighed the Church's right to teach the faith guaranteed by Article 16.1 of the Constitution heavily, holding that it would be unreasonable to simultaneously allow religious education in

²⁸¹ S.T.C., June 4, 2007, No. 128, *in* B.O.E. n. 161 (supp.), July 6, 2007, p. 4, FJ 4, at 14 (“Si el acceso al sistema docente público para impartir la enseñanza de un determinado credo religioso se soporta, en definitiva, en el juicio de la autoridad religiosa sobre la idoneidad de la persona designada para enseñar la doctrina correspondiente, con base en criterios estricta y exclusivamente religiosos o morales, no puede romperse . . .”). The Church can refuse to authorize a teacher who does not act as a witness to the faith, practicing the doctrine she teaches. *Id.* FJ 7, at 17–18; *see also* S.T.C., Feb. 15, 2001, No. 46, *in* B.O.E. n. 65 (supp.), Mar. 16, 2001, p. 83 (Spain).

²⁸² S.T.C., June 4, 2007, No. 128, *in* B.O.E. n. 161 (supp.), July 6, 2007, p. 4, FJ 2, p. 13–14.

²⁸³ S.T.C., Feb. 15, 2007, No. 38, *in* B.O.E. n. 63 (supp.), Mar. 14, 2007, p. 90, FJ 2, at 96–97.

²⁸⁴ *Id.* FJ 9, at 101–02.

²⁸⁵ *Id.* (citations omitted).

²⁸⁶ *Id.*

²⁸⁷ *Id.* FJ 9, at 101 (“La facultad reconocida a las autoridades eclesiásticas para determinar quiénes sean las personas cualificadas para la enseñanza de su credo religioso constituye una garantía de libertad de las Iglesias para la impartición de su doctrina sin injerencias del poder público.”).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

school but prohibit the Church from imposing qualification requirements.²⁹⁰ The Court minimized the teacher's freedom of religion and freedom from religious coercion guaranteed by Article 16.1 and 16.2,²⁹¹ holding that teacher's rights were only implicated because she decided to become a religious education teacher.²⁹² Balancing the rights of the Church, which the Court weighed heavily, against the rights of the teacher, which the Court weighed lightly, the Court held that the rights of the Church outweighed the rights of the teacher.²⁹³

The European Court of Human Rights approved this balancing test in *Fernández Martínez v. Spain*.²⁹⁴ In the original case before the Spanish Constitutional Court, STC 128/2007, the Court held that the Church did not violate a teacher's rights when it revoked authorization to teach. The petitioner was ordained a priest in 1961 but applied for a dispensation from celibacy in 1984.²⁹⁵ Although he did not receive the dispensation until 1997, the petitioner married in a civil ceremony in 1991 and had five children.²⁹⁶ Despite his marriage, the petitioner received ecclesiastical authorization to teach religion in October of 1991 and was employed as a Catholic religion teacher in a public school.²⁹⁷ In 1996, the petitioner made public his disagreement with Church dogma on celibacy of priests.²⁹⁸ In 1997, the bishop revoked the petitioner's teaching authorization and the school fired him.²⁹⁹ The Constitutional Court used the same review procedure as it did in STC 38/2007: First, the Court reviewed whether the bishop's decision was purely religious,³⁰⁰ and second, it weighed the Church's right to teach the faith and the state's duty of religious neutrality against the teacher's right to freedom of religion and expression.³⁰¹ The Court held that the authorization was revoked after the petitioner publicized his criticism of Church dogma, and therefore, the revocation of

²⁹⁰ *Id.* FJ 12, at 103 (“Resultaría sencillamente irrazonable que la enseñanza religiosa en los centros escolares se llevase a cabo sin tomar en consideración como criterio de selección del profesorado las convicciones religiosas de las personas que libremente deciden concurrir a los puestos de trabajo . . .”).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Fernández Martínez v. Spain*, App. No. 56030/07, Eur. Ct. H.R. para. 45 (May 15, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110916>.

²⁹⁵ S.T.C., June 4, 2007, No. 128, in B.O.E. n. 161 (supp.), July 6, 2007, p. 4, A 2(a), at 4 (Spain).

²⁹⁶ *Id.* A 2(b), at 4.

²⁹⁷ *Id.* A 2(c), at 4.

²⁹⁸ *Id.* A 2(d), at 4.

²⁹⁹ *Id.*

³⁰⁰ *Id.* FJ 5, at 15–16.

³⁰¹ *Id.* FJ 20, at 20–21.

authority was based on purely religious grounds.³⁰² Because the state is required to be neutral in the face of religious decisions, and because the revocation of authority to teach Catholicism is a religious decision, the state was required to respect the Church's decision.³⁰³ Weighing the rights of the Church against the rights of the teacher, the Court commented that a special relationship of trust exists between the Church and its religious education teachers, such that the Church can reasonably expect teachers to agree with Church doctrine and adhere to it.³⁰⁴ Citing STC 38/2007, the Court weighed the rights of the Church more heavily than the rights of the teacher, holding that it would be unreasonable to simultaneously allow religious education in school but prohibit the Church from imposing qualification requirements.³⁰⁵

In its review of STC 128/2007, the European Court of Human Rights agreed that the guarantee of religious freedom and the State's obligation of neutrality preclude it from questioning the bishop's decision to revoke authorization on purely religious grounds.³⁰⁶ Because the teacher's public criticism of Church doctrine broke the special relationship of trust between the Church and its religious education teachers, the bishop was justified when he revoked authorization from the teacher.³⁰⁷ The European Court also agreed that the Constitutional Court's process of weighing the constitutional rights of the Church against those of the teacher struck a fair balance between the various interests.³⁰⁸

Another case decided by the European Court of Human Rights confirms that Spain's treatment of religious education in public schools is in accordance with European principles. In *Lautsi v. Italy*, the Grand Chamber of the

³⁰² *Id.* FJ 5, at 16–17; *accord id.* FJ 5, at 17 (“Es claro que la información periodística publicada en el diario ‘La Verdad,’ que se ha reproducido íntegramente a efectos meramente ilustrativos, ha sido la desencadenante de la nota oficial de la oficina de información diocesana del Obispado de Cartagena antes transcrita emitida en relación con los motivos que han determinado la baja definitiva del actor como profesor de religión . . .”).

³⁰³ *Id.* FJ 4, at 14–15; *accord id.* FJ 3, at 15 (“La neutralidad del Estado en relación con las diferentes confesiones religiosas debe operar en similares términos cuando el juicio eclesialístico de idoneidad opera positivamente en el momento de la eventual constitución de una inicial relación laboral que cuando, en sentido contrario, opera negativamente a la hora de constituir una nueva relación laboral en un curso académico posterior.”).

³⁰⁴ *Id.* FJ 10, at 20–21.

³⁰⁵ *Id.* FJ 11, at 22 ((citing S.T.C., Feb. 15, 2007, No. 38, in B.O.E. n. 63 (supp.), Mar. 14, 2007, p. 90, FJ 10, at 102 (Spain)).

³⁰⁶ *Fernández Martínez v. Spain*, App. No. 56030/07, Eur. Ct. H.R. para. 84 (May 15, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110916>.

³⁰⁷ *Id.*

³⁰⁸ *Id.* para. 89.

European Court held that a crucifix displayed in a public school classroom did not violate the state's duty of neutrality toward religion.³⁰⁹ The crucifix was a passive symbol that did not amount to indoctrination in the Catholic faith or intolerance of students who were non-believers.³¹⁰ Because Catholicism is deeply rooted in Italian culture, the Court held that the display of the crucifix was acceptable.³¹¹ This is an important ruling for Spain due to Spain's similar history of Church entrenchment and its majority Catholic society. It shows that ECHR Article 9 does not require secularization; the government can legitimately reflect the traditional religious views of its majority without violating the ECHR.³¹² Extrapolating from the *Lautsi* ruling, Spain can teach Catholicism in public schools without violating the principle of state neutrality as long as it does not attempt to coerce or indoctrinate its students.

D. Economic Support for the Catholic Church

Fourth, the State agreed to provide economic support to the Catholic Church.³¹³ The concordat provided that the church is not subject to income taxes or sales taxes,³¹⁴ it is exempt from property taxes,³¹⁵ and it enjoys the same economic rights as non-religious charities.³¹⁶ Additionally, Spaniards may assign a portion of their income tax payment to the Catholic Church.³¹⁷

³⁰⁹ *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (Mar. 18, 2011), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040#\[{"itemid":\["001-104040"\]}\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040#[{).

³¹⁰ *Id.* paras. 71–74; see also Witte & Arold, *supra* note 15, at 52.

³¹¹ *Lautsi*, App. No. 30814/06, para. 36.

³¹² Witte & Arold, *supra* note 15, at 52.

³¹³ Specifically, the concordat requires the state to “collaborate with the Catholic Church to ensure its maintenance.” Acuerdo entre el estado español y la santa sede sobre asuntos económicos art. 2.1 (B.O.E. 1979, 29490) (Spain) [hereinafter 1979 Concordat III] (“El Estado se compromete a colaborar con la Iglesia Católica en la consecución de su adecuado sostenimiento económico, con respeto absoluto del principio de libertad religiosa.”).

³¹⁴ The church is not subject to income taxes or sales taxes with regard to published works, teaching in seminaries or religious institutions, and the acquisition of objects to be used for worship. *Id.* art. 3.

³¹⁵ It is exempt from property tax on buildings used for worship, for housing clergy, church administrative offices, seminaries, convents, and monasteries. *Id.* art. 4.

³¹⁶ The Church has the right to create institutions that benefit the public welfare, and these shall enjoy the same rights and benefits of private, nonreligious charities. 1979 Concordat I, *supra* note 229, art. 5.1 (“Las instituciones o entidades de carácter benéfico o asistencial de la Iglesia o dependientes de ella se registrarán por sus normas estatutarias y gozarán de los mismos derechos y beneficios que los entes clasificados como de beneficencia privada.”).

³¹⁷ 1979 Concordat III, *supra* note 313, art. 2.2 (“[E]l Estado podrá asignar a la Iglesia católica un porcentaje del rendimiento de la imposición sobre la renta o el patrimonio neto u otra de carácter personal . . .”). The assignment was meant to be a temporary source of economic aid; the Church promised to be self-supporting within three years. *Id.* art. 2.5 (“La Iglesia Católica declara su propósito de lograr por sí misma los recursos suficientes para la atención de sus necesidades.”); *id.* art. 2.4 (“[S]e llevará a cabo en el

The assignment is completely voluntary, meaning taxpayers may choose to assign a tax benefit to a different religious entity, or to not assign any portion of their taxes.³¹⁸ In 2010, income tax assignments amounted to twenty-five percent of the Church's operating budget.³¹⁹

The concordat's tax exemptions are constitutional because they are consistent with the LOLR and with the constitutional principal of equality. The agreements with Islam, Judaism, and the Protestant Federations contain the same tax exemptions.³²⁰

The assignment of income tax revenue, however, is not consistent with the constitutional principal of equality. The cooperation agreements with the Protestant, Islamic, and Jewish Federations are not equal to the concordat with the Catholic Church because these agreements do not create systems of financing for the respective religions.³²¹ Although taxpayers can choose to assign the 0.7% of their income taxes to any other religious organization, any charity, or to the state, in practice this provision channels more money to the Church than to any other religion.³²² In an effort to combat this inequality, the state created the Foundation of Pluralism and Coexistence ("Foundation") in 2005.³²³ The Foundation contributes money to the cultural and educational programs run by the religions with deep roots in Spanish society.³²⁴ Although the specific funds may not be used for worship-related activities, a religious organization that receives Foundation funding will necessarily have more

plazo de tres años."'). However, the Church did not become financially independent, and the tax assignment was extended. In 2007, Prime Minister Zapatero raised the tax assignment from 0.52% to 0.7% of each taxpayer's income taxes. Combalía & Roca, *supra* note 1, at 638.

³¹⁸ 1979 Concordat III, *supra* note 313, art. 2.2 ("Para ello será preciso que cada contribuyente manifestó expresamente en la declaración respectiva su voluntad acerca del destino de la parte afectada."); *see also* Carmen Garcimartín Montero, *Direct Financing of the Religious Denominations in Spain: Changes Introduced by the 2005 General State Budget Law*, 48 J. CHURCH & ST. 175, 185 (2006).

³¹⁹ Combalía & Roca, *supra* note 1, at 638.

³²⁰ *See, e.g.*, FEREDE Agreement, *supra* note 190, art. 11.

³²¹ *See* Garcimartín Montero, *supra* note 318, at 189–90. The Jewish Federation rejected a system of tax assignments at the outset of negotiations. *Id.* The Protestant Federation could not come to an internal agreement on the best way to secure state financing and therefore abandoned the idea. *Id.* The state rejected the Islamic Federation's proposed system of budgetary funding because it was not proportional to the Catholic Church's system of tax assignments. *Id.*

³²² Martínez-Torrón, *supra* note 1, at 803; *see, e.g.*, Francisco Delgado, *Datos Aproximados Sobre la Financiación de la Iglesia Católica en España y sus Orígenes*, EL OBSERVATORIO DE LA LAICIDAD (Apr. 1, 2010), <http://www.laicismo.org/detalle.php?tg=41&pg=1&pk=18319>.

³²³ Orden ECI/925/2005 (B.O.E. 2005, 12743).

³²⁴ *Id.*

money for its worship activities. Money it previously allocated to cultural and educational activities can now be redistributed to worship activities.³²⁵

However, the creation of the Foundation does not change the fact that the assignment of income tax revenue gives preferential treatment to the Catholic Church.³²⁶ This is because the state unilaterally determines how the Foundation's funds will be distributed, whereas the tax assignment system allows the Catholic Church to determine how that revenue will be used.³²⁷ This is fundamentally unequal treatment and seems to hinder, rather than promote, state cooperation with religions.³²⁸ Furthermore, while the Foundation allows for state funds to be distributed to deeply-rooted religions, there is no similar organization to distribute state funds to the many religions that do not have deep roots in Spanish society.

Although the state does not provide equal financing for all religions, this fact does not make the Concordat unconstitutional. Article 16.3 specifically requires the state to maintain cooperative relations with the Catholic Church, and one manifestation of this cooperation was a system of tax assignments for the Church. The fact that the state has not created a similar system of assignments for other religions, or created a different form of direct financing, does not make the Concordat unconstitutional. Instead, it calls into question the sufficiency of the state's cooperation with other religions.

The 1979 Concordat is consistent with the Constitution's grant of religious freedom. It does not violate the principles of neutrality and equality because the rights it affords to the Catholic Church are parallel with the rights afforded to other religions, both deeply rooted and emerging. The 1979 Concordat is therefore a legitimate use of the doctrine of state cooperation.

III. THE 1979 CONCORDAT IS CONSISTENT WITH THE ECHR'S PROVISIONS FOR RELIGIOUS FREEDOM

The previous Part argued that the 1979 Concordat is consistent with Articles 16.1, 16.3, and 9.2 of the Spanish Constitution. However, to be constitutional, the Concordat must also comply with Article 10.2 of the Spanish Constitution. Recall that Article 10.2 requires all fundamental rights

³²⁵ Garcimartín Montero, *supra* note 318, at 195.

³²⁶ *Id.* at 192.

³²⁷ *Id.* at 194.

³²⁸ *Id.* at 195.

be interpreted in accordance with the international treaties ratified by Spain before 1978.³²⁹ Because the Concordat of 1979 is part and parcel of the Constitution's grant of fundamental rights to the Catholic Church, it must comport with the treaties ratified before 1978. Spain ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1977.³³⁰ Therefore, the Concordat must comply with the protections embodied in the ECHR.

The ECHR requires member states to both actively secure the rights and freedoms set forth in the Convention and to refrain from interfering with those rights.³³¹ Additionally, the Convention established the European Court of Human Rights to enforce the principles it set forth.³³² The ECHR protects religious liberty in Article 9, which splits freedom of religion into two categories: freedom of religious belief and free expression of religious belief.³³³ This Part will discuss three things: (A) the ECHR's grant of freedom of religious belief; (B) the ECHR's grant of freedom of expression of religious belief; and (C) the European Court of Human Rights' case law interpreting the ECHR's Article 9 grants.

A. *Freedom of Religious Belief*

The ECHR protects freedom of religious belief in Article 9, stating that “[e]veryone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief . . .”³³⁴ The Convention assumed that all religions are equal in the sense that none contains the absolute truth.³³⁵ If Catholicism is as valid as Islam, which is as valid as Scientology, then each person should have the right to choose the religion he prefers.³³⁶ All religions are equally protectable, according to the Convention, “not because they provide ‘reasonable’ or ‘true’ answers to vital questions, but because they

³²⁹ C.E. art 10.2, B.O.E. n. 311, Dec. 29, 1978 (Spain).

³³⁰ *The European Human Rights System*, HREA, http://www.hrea.org/index.php?doc_id=365 (last visited Mar. 4, 2013).

³³¹ European Convention on Human Rights, *supra* note 73, art. 1.

³³² *Id.* art. 19.

³³³ For a detailed discussion of the religious liberty protections in international law, including the drafting history and application of Article 9 of the European Convention on Human Rights, see MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* (1997).

³³⁴ European Convention on Human Rights, *supra* note 73, art. 9.

³³⁵ Javier Martínez-Torrón, *Freedom of Expression and Freedom of Religion in the Case Law of the European Court of Human Rights*, in *STATE-CHURCH RELATIONS IN EUROPE: CONTEMPORARY ISSUES AND TRENDS AT THE BEGINNING OF THE 21ST CENTURY* 61, 71 (Lucia Grešková ed., 2008).

³³⁶ *Id.*

are the result of the person's legitimate choice."³³⁷ Non-belief is likewise protected.³³⁸

The ECHR does not limit freedom of belief, but the European Court of Human Rights has narrowly construed the beliefs that qualify for protection.³³⁹ To qualify as a "religious belief," a belief must relate to a substantial aspect of human life and behavior, must attain a certain level of cogency, seriousness, cohesion, and importance, and must be compatible with respect for human dignity.³⁴⁰ Similarly, not every act that is motivated by a qualifying belief is covered by Article 9. The court draws a distinction between an activity central to the expression of religion and one that is merely inspired or encouraged by it.³⁴¹

B. Free Expression of Religious Belief

The ECHR protects expression of religious belief in Article 9, stating that "[e]veryone has the right to . . . freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."³⁴² The ECHR protects both public and private religious expression, such as proselytism, ritual animal slaughters, free access to places of worship, and the ability to take part in religious observances.³⁴³

The Convention permits interference with freedom of religious expression in the broad circumstances "prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order,

³³⁷ *Id.* at 72.

³³⁸ MURDOCH, *supra* note 165, at 12.

³³⁹ *Id.* at 11.

³⁴⁰ *Id.* For example, beliefs in assisted suicide, or language preferences, or disposal of human remains after death do not qualify. *Id.* Religious belief is not synonymous with the words "opinions" or "ideas." EVANS, *supra* note 333, at 290 (citing *Campbell & Cosans v. United Kingdom*, 8 Eur. Ct. H.R. (ser. A) (1982)). In this respect, the scope of Article 9 is broader than the scope of Article 10, which protects freedom of association. *Id.*

³⁴¹ MURDOCH, *supra* note 165, at 15. For example, distribution of information persuading women not to undergo abortions is not included in the scope of Article 9. *Id.* at 16; *see, e.g., Arrowsmith v. United Kingdom*, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5, 19–20 (1978) (pacifist's dissemination of leaflets that express critical observations of the government rather than pacifist values do not qualify as a manifestation of belief).

³⁴² European Convention on Human Rights, *supra* note 73, art. 9.

³⁴³ MURDOCH, *supra* note 165, at 15–16.

health or morals, or for the protection of the rights and freedoms of others.”³⁴⁴ The limitation balances individual rights against competing considerations. A state may therefore curtail religious expression if it can prove that a qualifying consideration outweighs individual rights. Implicit in this balancing test is the requirement that the interference has a legitimate aim.³⁴⁵ In practice, a state can easily prove a legitimate aim for the interference.³⁴⁶ Proving the interference is necessary in a democratic society is more difficult, and requires the action be proportionate to the legitimate aim pursued and justified by relevant and sufficient reasons.³⁴⁷

C. *European Court of Human Rights and the 1979 Concordat*

The European Court of Human Rights helps define the scope and content of the substantive rights granted by the ECHR.³⁴⁸ Therefore, the Spanish Constitutional Court has held that Spain’s grant of rights should be congruous with the case law of the European Court of Human Rights.³⁴⁹ The European Court of Human Rights has decided numerous cases regarding Article 9.³⁵⁰ Important for the purposes of this Comment are those Article 9 cases that touch on rights given to the Catholic Church in the 1979 Concordat. By way of reminder, those rights are: (1) state recognition of Catholic rites, such as

³⁴⁴ European Convention on Human Rights, *supra* note 73, art. 9. This replicates the formula used for balancing individual rights against relevant competing considerations found elsewhere in the convention. Murdoch, *supra* note 164, at 10.

³⁴⁵ MURDOCH, *supra* note 165, at 10.

³⁴⁶ *Id.* at 26.

³⁴⁷ *Id.* at 30. Determining whether a measure is necessary and proportionate is not a mechanical exercise, but some generalizations can be made. The stronger the social necessity, the less difficult it will be to justify the interference. For instance, national security and public safety are compelling social needs. *Id.* at 31.

³⁴⁸ Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 677, 698 (Helen Keller & Alec Stone Sweet eds., 2008).

³⁴⁹ S.T.C., Mar. 14, 1984, No. 36, in B.O.E. n. 80 (supp.), Apr. 3, 1984, p. 21, at 22 (Spain) (“[A]rtículo 10.2 . . . autoriza y aun a conseja, referirse, para la búsqueda de estos criterios, a la doctrina sentada por el Tribunal Europeo de los Derechos Humanos”); *see also* S.T.C., Sept. 27, 1999, No. 162, in B.O.E. n. 263 (supp.), Nov. 3, 1999, p. 9, FJ 5, at 19 (Spain) (“El [Tribunal Europeo de los Derechos Humanos] constituye un obligado y valioso medio hermenéutico para configurar el contenido y alcance de los derechos fundamentales.”); Keller & Sweet, *supra* note 348, at 698.

³⁵⁰ *E.g.*, Lautsi v. Italy, App. No. 30814/06, Eur. Ct. H.R. (Mar. 18, 2011), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040> (the right to display religious symbols in public); Schüth v. Germany, App. No. 1620/03, Eur. Ct. H.R. (Sept. 23, 2010), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469> (employment by a religious institution); Grzelak v. Poland, App. No. 7710/02, Eur. Ct. H.R. (June 15, 2010), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99384> (religious education in public schools); Metro. Church of Bessarabia v. Moldova, 2001-XII Eur. Ct. H.R. 81, 107–19 (state recognition of religious communities).

marriage, holy days, and attending mass; (2) foreign sovereignty of the Church, including state recognition of the Church leaders; (3) Catholic religious education in public schools; and (4) economic support for the Catholic Church, including a voluntary assignment of income tax revenue.

First, Article 9's grant of freedom of conscience extends to individuals in state custody. The Court held that prison inmates must be allowed to take part in religious worship.³⁵¹ However, other religious considerations, such as the wearing of religious clothing, talismans, or beards, has been carefully constrained according to the need for order and security.³⁵² The 1979 Concordat requires the state provide mass for prison inmates as a way to ensure that all people can fully and effectively practice the Catholic religion. The Concordat does not, however, grant other forms of religious manifestation to inmates. In the same way as the European Court of Human Rights, the Concordat recognizes the demands of order and security in prisons.

Second, Article 9 provides a measure of sovereignty to religious organizations. In *Hasan and Chaush v. Bulgaria*, the Bulgarian government replaced the national leader of the Bulgarian Muslim community against the will of the community.³⁵³ The Court held that the state cannot interfere with the internal affairs of a religious community.³⁵⁴ This is similar to the Concordat's grant of sovereignty to the Catholic Church in Spain. The Concordat provides that the state may not interfere with the Church's creation of diocese and other congregations, its appointment of priests and Church hierarchy, or its land, buildings, and archives.

Third, Article 9 of the ECHR allows teaching of the faith as a manifestation of belief. In *Kokkinakis v. Greece*, the Court explained that an individual's right to change his religion necessarily includes the freedom of others to try to convince him to adopt their religion.³⁵⁵ However, the state may restrict proselytism when it amounts to coercion, since coercion is not compatible with respect for the freedom of conscience of others.³⁵⁶ In Spain, the Catholic

³⁵¹ Case of X v. U.K., App. No. 5947/72, 5 Eur. Comm'n H.R. Dec. & Rep. 8 (1976).

³⁵² See X v. Austria, App. No. 1753/63, 8 Eur. Comm'n H.R. Dec. & Rep. 20 (1965) (the need to be able to identify prisoners warranted the refusal to allow a prisoner to grow a beard).

³⁵³ Hasan & Chaush v. Bulgaria, App. No. 30985/96, 34 Eur. H.R. Rep. 1339 (2000).

³⁵⁴ *Id.*

³⁵⁵ Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 418 (1993) ("While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to 'manifest [one's] religion.' Bearing witness in words and deeds is bound up with the existence of religious convictions.").

³⁵⁶ *Id.* para. 48. The Court defined improper proselytism as "offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it

Church's right to teach religious education in public schools is not proselytism and does not amount to coercion. Every public school is required to offer Catholic religious education classes, but students are not required to enroll.

Fourth, the case law of the European Court addresses a state's economic support of religious organizations. In *Bruno v. Sweden*, the Court held that a state may permissibly raise funds for a religious organization through tax revenue as long as non-believers could opt out of the tax.³⁵⁷ A state may not require non-believers to support a religious organization; this is a corollary of Article 9's freedom of conscience protection.³⁵⁸ The 1979 Concordat creates a voluntary church tax. Non-Catholics may assign the tax revenue to another religious organization or to the government. Therefore, the Concordat complies with the rule of *Bruno v. Sweden*.

The preceding cases can be distilled to one central principle of the European Court's Article 9 case law: state preference for one religion over another does not necessarily violate the ECHR, provided that inequalities in the treatment of religions have an "objective and reasonable justification." State actions that do not infringe on the right of citizens to worship freely are legitimate, even if they are not completely neutral. More important than separation of church and state, in the view of the European Court of Human Rights, is that the state provide religious freedom for all. For this reason, several European nations have de facto or de jure establishments of one faith along with robust religious freedom for others.³⁵⁹ The Spanish model of church-state relations therefore accords with the ECHR.

CONCLUSION

The Spanish model of religious freedom demonstrates that true and complete religious liberty can exist without strict separation of church and state. The Constitution of 1978 allows the Spanish government to form

may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others." *Id.*

³⁵⁷ *Bruno v. Sweden*, App. No. 32196/96, Eur. Ct. H.R. (Aug. 28, 2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5998>. Sweden allowed non-believers to be exempt from the portion of a tax that paid for religious activities. *Id.*

³⁵⁸ MURDOCH, *supra* note 165, at 34–36.

³⁵⁹ Of the forty-seven current member states of the ECHR, only twelve have officially established religions. These twelve countries are: Denmark, Liechtenstein, Finland, Georgia, Greece, Iceland, Malta, Monaco, Norway, Sweden, Switzerland, and the United Kingdom. Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 405 (2008).

cooperative relationships with religious organizations, while still upholding the principles of state neutrality and equality.

If we desire complete liberty of the church, it is not possible to have absolute separation of church and state. That could not work unless worship was carried on without any public manifestations, in only the inner temple of the soul. But one of the main functions of organized religion is to bring its adherents together for the outward expression of their faith. Therefore, the government must provide not only the liberty to form communities for worship, but must also provide the means to enjoy it. The Spanish Constitution not only protects freedom of conscience by prohibiting discrimination on the basis of religion, it protects freedom of conscience by requiring the state to facilitate the participation of all citizens in religious life. In this way, Spain has created a real and effective liberty.³⁶⁰

The most important way Spain has provided for real and effective liberty of conscience is through cooperation agreements with the religious organizations that are deeply rooted in Spanish society. The 1979 Concordat with the Catholic Church was the first cooperation agreement created under the new constitution. It presented the church and state as partners in the development of Spanish society.³⁶¹ The 1979 Concordat provided state recognition of Catholic rites, foreign sovereignty of the Catholic Church, Catholic religious education in public schools, and economic support for the church. The Concordat became a model for later cooperation agreements with the Protestant Federation, the Islamic Federation, and the Jewish Federation. In those agreements, the state conferred to the religious organizations many of the rights originally given to the Catholic Church. For that reason, the cooperation of the state with religions has been beneficial for the development of the three minority religions that are deeply rooted in Spanish society.³⁶²

The ultimate aim of the 1979 Concordat is to realize freedom of religion to the full extent allowed by the Constitution. The cooperative regime it creates is beneficial for both the Church and the state. For the church, the Constitution allows believers to live according to their religion and the norms of ecclesiastical law and allows church authorities to exercise their functions

³⁶⁰ As Jules Simon said, “[A] shabby ceremonial and a needy clergy are at once a scandal and a public peril. It is a fault, both in policy and logic, to tolerate religion in a state and to condemn it to misery and shame.” De Bourge, *supra* note 11, at 555 (quoting JULES SIMON, *LA LIBERTÉ DE CONSCIENCE* (1857)).

³⁶¹ Peter Petkoff, *Legal Perspectives and Religious Perspectives of Religious Rights Under International Law in the Vatican Concordats (1963–2004)*, 158 *LAW & JUST.: CHRISTIAN L. REV.* 30, 42 (2007).

³⁶² Martínez-Torrón, *supra* note 1, at 796.

without fear of persecution. For the state, the Constitution requires the laws and administration to respect and enforce the general principal of religious freedom.³⁶³

State-church cooperation is a familiar concept to Catholic thinkers. In the fifth century, St. Augustine urged all men to dedicate themselves to the eternal truths of the Christian faith.³⁶⁴ In 1864, Pope Pius IX said the state should be governed according to Catholic teachings.³⁶⁵ The Second Vatican Council claimed that the subject and the goal of all social institutions must be the human person, because humanity's progress and the advancement of society itself hinge on one another.³⁶⁶ In the Pastoral Constitution on the Church in the Modern World, Pope Paul VI said, "We are tempted to think that our personal rights are fully ensured only when we are exempt from every requirement of divine law, but this way lies not the maintenance of the dignity of the human person, but its annihilation."³⁶⁷

Because the state seeks the betterment of its people, it should encourage participation in social institutions, including religious institutions. The state must not interfere with the goals of the spiritual community,³⁶⁸ but must engage in a dialogue with it. Spanish law understands that religion is not just a concern for the individual conscience. Religion is innately about community and society, therefore the state must be interested in it.³⁶⁹

The concept of church and state cooperation is not foreign to secular philosophers, either. According to one famous neo-Marxist, Jürgen Habermas, the state depends on a political integration of citizens that must be more than an accommodation of religion by secular society, but must connect the societal morality to the legal order "in such a way that one consistently proceeds from the other."³⁷⁰

³⁶³ Plöchl, *supra* note 224, at 16–17.

³⁶⁴ See SAINT AUGUSTINE, *supra* note 18, at 322–23.

³⁶⁵ See Pope Pius IX, *supra* note 22, at 382.

³⁶⁶ PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD – GAUDIUM ET SPES, para. 25 (1965), translation available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html (promulgated by Pope Paul VI).

³⁶⁷ *Id.* para. 41.

³⁶⁸ AVERY DULLES, A CHURCH TO BELIEVE IN: DISCIPLESHIP IN THE DYNAMICS OF FREEDOM 164 (1982).

³⁶⁹ Petkoff, *supra* note 361, at 33–34.

³⁷⁰ Jürgen Habermas, *Pre-Political Foundations of the Democratic Constitutional State?*, in THE DIALECTICS OF SECULARIZATION: ON REASON AND RELIGION 21, 49 (Brian McNeil trans., Florian Schuller ed., 2006).

It is important to remember that both the state and the church are devoted to the welfare of mankind.³⁷¹ Although the church and the political community in their own fields are autonomous and independent,³⁷² their service will be more effective if they work together.³⁷³ By creating a society that does not merely tolerate religious belief, but promotes its growth, Spain can better advance the common good. Religion teaches morality and respect for the inherent dignity of mankind.³⁷⁴

This Comment does not suggest that state cooperation with religion is always a good thing. In fact, two defective methods of state cooperation readily come to mind. First, if the church governs the state, it can ignore the consciences of non-believers. Second, if the state governs the church, it can ignore the rights of believers. However, Spain was able to forge a cooperative regime that affirms the rights of the majority Catholic society without trampling on the rights of the minority. The government's grant of specific rights and privileges to religious groups promotes religious freedom for believers and non-believers. For believers, the rights ensure that they can take part in a living and mature faith that encompasses every sphere³⁷⁵: religious education, civil recognition of sacraments and holy days, and non-taxation of tithes are all an attempt to ensure that the Catholic Church is present in Spain for those who want it. The rights also protect non-believers, who cannot be coerced into belief. In practice, Spain's protection of religious freedom is not perfect. The fact that emerging religions cannot negotiate bilateral agreements with the state might be an impermissible form of discrimination that calls into question the state's neutrality.³⁷⁶ But the beauty of the Spanish system is that it allows the state to address this discrimination and to fix it by engaging directly with the affected religions. Through cooperation, Spain can continue to work toward full religious freedom for all people.

MELISSA CURVINO*

³⁷¹ Pope Paul VI, *supra* note 366, para. 74.

³⁷² *Id.* para. 76.

³⁷³ *Id.*

³⁷⁴ Religion teaches that "everyone must consider his neighbor without exception as another self . . ." *Id.* para. 27.

³⁷⁵ *Id.* paras. 17–21.

³⁷⁶ Martínez-Torrón, *supra* note 1, at 807–08.

* Notes & Comments Editor, *Emory International Law Review*; J.D., Emory University School of Law (2013); B.A., University of Notre Dame (2010). The Author would like to thank Professors John Witte, Jr. and Javier Martínez-Torrón for their instrumental guidance and insight.