

Religion and the Secular State of Spain

I. SOCIAL CONTEXT

It is clear from a recent CIS (Sociological Research Center) barometer that a significant number of Spaniards declare they are Catholic (76 percent), although the percentage of churchgoers among the believers is much lower.¹ In other words, a considerable secularisation has occurred among the population of Spanish nationals over the last few years, as in other European countries. Spaniards were asked this question: “How would you define yourself regarding religion: Catholic, believer in another religion, non-believer or Atheist?” Responses included Catholic 76 percent, believer in another religion 2.1 percent, non-believer 13 percent, atheist 7.3 percent, no answer 1.6 percent. For those who, regarding religion, define themselves as Catholics or believers in another religion, the next question was, “How often do you go to mass or other religious services, not counting social occasions such as weddings, communions or funerals?” Almost never 58.2 percent; several times a year 17 percent; at least once a month 9.1 percent; almost every Sunday or national holiday 13.3 percent; several times a week 2 percent; no answer 0.5 percent.²

Over the last few years and due to immigration, the number of believers belonging to non-Catholic religions has increased. The majority of non-Catholic churchgoers are not Spanish. Although there are not official statistics on religious denominations, the reference by nationality is illustrative. Thus, according to the 2008 INE (National Statistics Institute) census, in Spain there are approximately: 1,000,000 foreign national citizens from countries with an Orthodox tradition (mainly from Romania, Bulgaria, the Ukraine and Russia); 900,000 citizens from countries with Islamic tradition (mainly from Morocco, Algeria and Senegal); 600,000 citizens from countries with Protestant tradition (mainly from the United Kingdom). Also, among the traditionally Catholic gypsy population, there have been a considerable number of conversions to Evangelism (above all Pentecostalism) over the last few decades, so now there are more Evangelist gypsies than Catholic gypsies.

II. THEORETICAL AND SCHOLARLY CONTEXT

The Spanish State is neutral in religious-related matters. No religious denomination has a state character. The State neutrality with respect to religion means, according to constitutional jurisprudence, that the State cannot assume religious functions. This does not mean, however, that it has to remain indifferent towards the religious phenomenon³; on the contrary, it is forced to favor the exercise of the fundamental rights of people and of groups and to remove the obstacles that prevent such exercise.

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1. CIS Barometer, July 2009. Study number 281, available at http://www.cis.es/cis/opencm/ES/2_barometros/depositados.jsp.

2. Id.

3. STC 154/2002, 18 July, f.j. 6 “In its objective dimensions, religious freedom entails a dual requirement, referred to by art. 16.3 of the Spanish Constitution; on the one hand, the neutrality of the public powers urges the aconfessionality of the State; on the other hand, the maintenance of cooperation relations of the public powers with the different churches. In this sense, we already said in STC 46/2001, 14 February, f.j. 4, that art. 16.3 of the Constitution, after formulating a statement of neutrality (SSTC 340/1993, 16 November and 177/1996, 11 November), considers that the religious component is perceivable in Spanish society and orders the public powers to maintain “the subsequent cooperation relations with the Catholic Church and with other denominations” thus introducing an idea of a confessionality or positive secularism that “prohibits any type of confusion between religious and state functions (STC 177/ 1996).”

The Constitutional Court has declared that the secularism of the Spanish State is a positive secularism⁴; in other words, it admits cooperation with religious denominations. As an expression of that cooperative secularism, the religious denominations that have signed agreements with the Spanish State can give religion classes – with a denominational nature – in Spanish public schools, providing that such classes are requested by at least ten students. The positive note of the neutrality of the Spanish State finds support in the constitutional text, which forces public authorities to bear in mind the religious beliefs of the Spanish society, and to maintain the subsequent cooperative relations with the Catholic Church and with all other religious denominations. However, there are authors within the Spanish doctrine that consider that cooperation via agreements with the denominations as an expression of state paternalism⁵ towards the denominations, which would be incompatible with secularism. Within these doctrinal currents, there is a tendency for the Spanish state to adopt the French model of a secular State. This secularist conception has been included at a political level in a manifesto by the *Partido Socialista Obrero Español* party, which currently holds a parliamentary majority and therefore occupies the State Government. The mainstream Spanish society is not secular, as shown by the sociological data provided in Section I; however, even though they are a minority, secular movements are present in the media and active in public life. Both impassioned controversies and balanced thoughts often appear on these topics in the press, especially in this last decade.⁶

III. CONSTITUTIONAL CONTEXT

In Spain since the expulsion of Muslims and Jews in the 15th Century, Catholicism has been the only religion in society until the changes caused by the increase of immigration in the last years. From a legal point of view, Spain has had an important tradition of Catholicism as the official religion of the State, with the sole exception of two brief periods: the 1869 Constitution and the Constitution of the Second Spanish Republic (1931-1936). The Republic adopted a legislation of hostility towards religion and towards the church. It produced a strong rejection in one sector of the population and a deep division in Spanish society between Catholics and anti-Catholics. It was not the only but one of the reasons that led to the Spanish Civil War between 1936 and 1939.⁷

After the war, Franco's dictatorship was established – lasting from 1939 to 1975. The State declared itself as Catholic by proclaiming: “the profession and practice of the Catholic religion, which is that of the Spanish State, will enjoy official protection.” The private exercise of other religions was tolerated in their places of worship, but they were not granted true religious freedom, as it was stated that “there is no authorization for external ceremonies or manifestations other than those of the Catholic religion.”⁸ A study of the law of the period reveals judgments in which the Courts considered as criminal activities events such as meetings in private homes of non-Catholic groups to comment on the Bible, the possession of non-Catholic books and magazines, or home visits of those promoting non-Catholic propaganda.⁹

4. STC 46/2001 f.j. 4: “As a special expression of such a positive attitude with respect to the collective exercise of religious freedom in its plural expressions or behaviors, art. 16.3 of the Constitution, after formulating a declaration of neutrality (SSTC 340/1993, 16 November and 177/1996, 11 November), considers that the religious component is perceivable in Spanish society and orders the public powers to maintain ‘the subsequent cooperation relations with the Catholic Church and with other denominations’ thus introducing an idea of aconfessionality or positive secularism that ‘prohibits any type of confusion between religious and state functions (STC 177/ 1996)’. In the same regard, STC 38/2007, F.j. 5.

5. A. Fernández-Coronado, “Sentido de la cooperación del estado laico en una sociedad multireligiosa,” *Revista General de Derecho Canónico y Eclesiástico del Estado* 19 (2009), at <http://iustel.com>.

6. J. M. Martín Patino, “Crisis del Estado laico,” *ABC* 13, VII (2005):3; M. Fernández-Enguita, “Ni confesionalismo ni laicismo,” *El País* 28, III (2005):34.

7. For State legislation on religion during the Second Spanish Republic see P. Lombardia, “Precedentes del Derecho eclesiástico español,” *Derecho Eclesiástico del Estado Español*, (Eunsa: Pamplona, 1980), 151-58.

8. *Fuero de los Españoles* (one of the Franco's Constitutional Laws) as formulated in 1945 (art. 6).

9. A study of these judgments can be found in L. Martín Retortillo, *Libertad Religiosa y Orden Público*(

Franco's Regime was replaced by a democracy in 1978 when a new Constitution, the current Constitution, was proclaimed.¹⁰ The new regime meant a radical change with regard to the State policies in religious matters. Thus, we went from a system of a strong confessional State to a system of State secularity with religious freedom, equality, and cooperation with the confessions. These are the four constitutional principles in force inspiring the relationships between the Spanish State and Religion.

Religious freedom and equality are at the same time principles and fundamental rights. Secularity of the State and cooperation with confessions are only principles.

A. *Religious Freedom*

Religious freedom as a fundamental right is recognized in Article 16.1 of the Spanish Constitution which provides: "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." Its consideration as a State principle comes emphasizes the rule found in Article 9.2 of the Constitution, providing that "it is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life." Thus, the law prescribes the State as not only a passive spectator, but a social State involved in the active task of promoting freedom and equality.

First of all, the religious freedom principle requires immunity of coercion in the religious field from the State and also from private persons. Nonetheless, absence of coercion is not enough to guarantee religious freedom. The Spanish State is also obligated to remove obstacles and promote conditions to make religious freedom of individuals and communities real and effective, for instance in adopting the necessary measures to facilitate religious assistance in public hospitals, penitentiary or military establishments.

B. *The Principle of Religious Equality*

Religious equality and non-discrimination as fundamental rights are established in Article 14 of the Constitution that states "Spaniards are equal before the law and may not in any way be discriminated against on account of...religion...."

The consideration of equality as a State principle correlates with Article 9.2 of the Constitution that, as we have previously seen, imposes on the public powers an active obligation of removing obstacles and promoting conditions for an effective guarantee of freedom and equality for both individuals and communities. The religious equality principle means, first of all, non-discrimination or the rejection of different legal treatment for individuals or groups by reason of their religious convictions or attitudes. It also means that the State is obliged to equally guarantee religious freedom for individuals and groups. All of them, regardless of their different features, historical tradition, or social roots are equally holders of the same fundamental right of religious freedom. Nonetheless, equality does not mean uniformity; it does not prevent the recognition of peculiarities. In other words, equality means equal religious freedom for everybody.

C. *The Principle of Secularity of the State*

Whereas religious freedom and nondiscrimination are at the same time principles and rights, secularity and cooperation are only State principles.¹¹

Tecnos: Madrid, 1970). For information on the main lines of Franco's legal frame for religious freedom see P. Lombardía, *Precedentes*, 158-73; A. de la Hera, "Actitud del Franquismo ante la Iglesia", *Iglesia Católica y regímenes autoritarios y democráticos*, ed. Ivan Iban Pérez (EDERSA: Madrid, 1987), 43-70.

10. BOE (Boletín Oficial del Estado) n° 311, 29 December 1978.

11. STC 94/1983, November 8, f.j. n° 5.

Article 16.3 of the Constitution establishes “no religion shall have a state character.” The linguistic expression is inspired by the German Constitution, but it is foreign to the Spanish tradition because it declares literally not the secularity of the State but the not-state character of religion that is typical of the protestant tradition of national churches organized and protected by the State. In any case, apart from the good or bad choice of the words, it is clear that Article 16.3 means that the Spanish State is a secular State.¹²

A secular State considers that the religious option is something that competes to individuals but not to the State. It confines its task to effectively guaranteeing (as a social State) the freedom of individuals and religious groups and to guarantee that the exercise of religious freedom is taking place within the limits of constitutional public order. Secularity of the State means the incompetence of the State to make a religious pronouncement. A consequence of this incompetence in religion is the respect for the autonomy of confessions. It is convenient to consider that secularity is a feature of public powers but not of individuals. Incompetence of the State on religion does not mean state profession of atheism or agnosticism: this option would be also contrary to secularity as it expresses and states a declaration of faith (in this case a negative declaration) but not the absence of it.¹³

D. The Principle of Cooperation

The principle of cooperation is established in Article 16.3 of the Constitution providing “the public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.” In addition, confusion and lack of communication between State and confessions are contrary to the cooperation principle. Recognizing their mutual autonomy, the cooperation principle effectively guarantees religious freedom and equality, delineating the State as the State and the confessions as confessions.

Important manifestations of the cooperation principle are the Agreements between the State and the confessions in order to bilaterally regulate the issues of mutual interest. Nonetheless, Agreements with confessions in our country are not a constitutional requirement as they are in Italy. In fact, Agreements are provided only for some confessions (those with notorious roots) whereas the cooperation principle extends to all of them by a constitutional imperative.

IV. LEGAL CONTEXT

A Code of Ecclesiastical Law does not exist in our country. We have some specific regulations relative to religious factors and some regulations dispersed in different sectors of our legal system (i.e., provisions on civil effects of religious marriage in the Civil Code, provisions on the offenses relative to freedom of conscience and protection of the religious feelings in the Criminal Code). However, all these provisions are inspired on the same principles that give them unity and make it possible to speak of a “system” of ecclesiastical law. We have already referred to these constitutional principles.

Article 81 of the Spanish Constitution establishes that the implementation of fundamental rights and public freedoms shall take place through Organic Acts. The approval, amendment, or repeal of these Acts requires the overall majority of the Members of Congress in a final vote on the bill as a whole. According to this rule, Organic Act 7/1980 of 5 July of Religious Freedom was passed to implement the fundamental right of religious freedom.¹⁴ The first part of the Law (Articles 1-4) discuss

12. See M. J. Roca, “Laicidad del Estado y garantías en el ejercicio de la libertad: dos caras de la misma moneda,” *El Cronista del Estado de Derecho* 3, (March 2009): 44-51.

13. In this sense the Constitutional Court has declared that “the secularity of the State does not prevent the religious feelings or beliefs of society to be protected” (Auto TC 180/1986, 21 February 1986, f.j. n° 2).

14. For a current reflection of the Law see J. Martínez Torrón, “La Ley Orgánica de Libertad Religiosa,

the essential content of the right of religious freedom, its limits, frame of application and judicial protection. It is a direct development of what is recognized in the Constitution. In the second part of the Law (Articles 5-8), the legislator determines, between the different options constitutionally legitimate, the general conditions of the relationships of the State with the confessions. It determines how the confessions obtain legal personality in Spanish law, recognizes their autonomy, provides the possibility of Agreements for those confessions with notorious roots, and creates the Advisory Committee on Religious Freedom in the Ministry of Justice. It also outlines that the membership shall be divided equally between the representatives of the government and of the confessions and with the participation of experts.

The Organic Act of Religious Freedom applies to individuals and religious groups in a strict sense, providing in Article 3. 2 that “activities, purposes and entities relating to or engaging in the study of and experimentation with psychic or para-psychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims do not qualify for the protection provided in this Act.”

The Organic Act provides the general legal regime for all confessions and stipulates the possibility of a specific legal frame by signing an Agreement with the State. Bilateral instruments have been utilized in Spain from the eighteenth century to regulate matters of common interest for Church and State, used exclusively to define the legal status of the Catholic Church. These were the Concordats, an ancient institution with a juridical nature analogous to that of international treaties. The concordatarian Agreements that are currently in effect with the Catholic Church in Spain date from 1976 to 1979.¹⁵

The Organic Law of Religious Freedom created a sort of replica of the Concordats and made them available to any religious denomination with notorious roots in Spanish society; these formal agreements have to be approved by an act of Parliament.¹⁶

Which religious beliefs are considered to have notorious roots in Spain? In addition to the Catholic Church, some groups include Protestants, Jews and Muslims. In 1992, these three religions signed their respective cooperation agreements with the State that were approved on the same day (on November the 10th) in three different laws.¹⁷

To obtain the notorious roots qualification and to be able to sign Agreements, the various Evangelical churches had to join together in a single Federation (even taking in non-Evangelical churches, such as Greek Orthodox Church in Spain or the Seventh Day Adventists); all the Jewish communities also had to join together in a Federation; and the same was the case for the various Islamic communities.¹⁸ This led to some problems as the various Jewish or Muslim communities and the different Evangelical churches are not uniform, and there are significant differences between them.

To elaborate the agreements with minority religions, the guidelines for the existing agreement with the Catholic Church were followed. Thus, they recognized civil validity

veintiocho años después,” *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 19 (2009).

15. In 1979, the 1953 Concordat was replaced by a set of Agreements with the Holy See which, in fact, collectively constitute a Concordat and are similar to international treaties in Spanish law. These bilateral Agreements regulate legal affairs, economic affairs, education and cultural affairs, and religious assistance to the Armed Forces. For more information on these Agreements with the Holy See, cf. P. Lombardía & J. Fornés, “Las fuentes del derecho eclesiástico español,” *Tratado de derecho eclesiástico*, (Eunsa: Pamplona, 1994) 321–76.

16. On these Agreements cf. VV.AA., *Acuerdos del Estado Español con los judíos, musulmanes y protestantes*, *Publicaciones de la Universidad Pontificia de Salamanca* (Salamanca, 1994); D. García-Pardo, “El sistema de acuerdos con las confesiones minoritarias en España e Italia,” *BOE y Centro de Estudios Políticos y Constitucionales* (Madrid, 1999).

17. Law 24/1992, of 10 November, approving the Agreement of Cooperation between the State and the Federation of Evangelical Religious Entities of Spain; Law 25/1992, of 10 November, approving the Agreement of Cooperation between the State and the Israelite Communities of Spain; Law 26/1992, of 10 November, approving the Agreement of Cooperation between the State and the Islamic Commission of Spain (BOE nº 272, 12 November 1992).

18. The Federation of Evangelical Religious Entities of Spain (Federation de Entidades Religiosas Evangélicas de España, FEREDE); the Jewish Communities of Spain (Federación de Comunidades Judías, FCJ); the Islamic Commission of Spain (Comisión Islámica de España, CIE).

of marriage administered in accordance with Islamic, Jewish or Evangelical ceremony.¹⁹ They also recognized, among other rights, the possibility of teaching classes in their religion in state schools upon student request,²⁰ when there was at least ten students in each class, and the teacher is paid by the State²¹; a system of tax benefits; and the right to religious assistance for persons in military, prisons, hospital or other similar public centers. This right is guaranteed for members of all beliefs, however, the system to achieve it will not be the same in all cases. Taking into account that most Spanish citizens are Catholics, the public hospitals have assigned one or more Catholic ministers to attend patients who wish to be visited by them. These ministers offer their services in a regular way, with a timetable and payment from the relevant health authority. For citizens of other religions, no such regular service has been created because there is not a sufficient social demand for it. The arbitrated system is to provide free access for the minister to the center when a patient requests it, but not of a regular nature, and therefore, without payment.

We saw how the agreements with minorities arbitrate the freedom that the Catholics had for the Jewish, Muslims and Evangelicals, but in addition they recognize in these minorities some peculiarities that Catholics do not need. For example, in the agreements with the Jews and with the Muslims, the public powers commit themselves to protecting, in terms of food products, the denomination *halal* (for the Muslims) and *kosher* (for the Jews). If the religions register these denominations in the Patent and Trademark Office, it is guaranteed that the products that carry the denomination will have been produced in accordance with the respective religious laws.²²

This order is not stipulated for Catholics, who have no religious dietary laws. In the same way, for Jews and Muslims, as they have their own funeral rites, the possibility of assigning them plots in municipal cemeteries has been provided.²³ Also in the Agreements with minorities there is the possibility to change some religious holidays or

19. "The civil effects of marriages celebrated before the ministers of Churches belonging to the FEREDÉ are recognized. For full recognition of these effects, the marriage must be registered in the Civil Registry Office." "Civil effects of marriages held in accordance with formal Jewish rules and officiated by dignities pertaining to the FCI member Communities shall be acknowledged. Full recognition of such validity shall call for registration of such marriages in the Civil Registry Office". "Civil validity of marriage administered in accordance with the religious ceremony established under Islamic Law is acknowledged from the time of the wedding is held if the parties thereto meet the legal capacity requirements established by the Civil Code. The bride and groom shall lend their consent in the presence of one of the persons mentioned in art. 3.1 above (Islamic religious leaders and imams of the CIE) and at least two witnesses, who must be of age. For full recognition of these effects, the marriage must be registered in the Civil Registry Office (art. 7.1 of the Agreements with the FEREDÉ, FCI and CIE).

20. "Students, their parents and those school organisms so requesting, shall be guaranteed the right to receive (Evangelical/ Jewish/ Islamic) religious classes in public and private subsidized schools, at the primary, elementary and secondary levels, as long as the exercise of this right is not in conflict with the nature of the centre" (art. 10.1 of the Agreements with the FEREDÉ, the FCI, and the CIE).

See in this regard A. González-Varas, "Moral and religious teaching in Spanish schools," *Education Law Journal* 10, 4 (2009): 271-79; J. Mantecón, "L'enseignement de la religion dans l'école publique espagnole," *Revue Générale de Droit* 30 (1999-2000): 277.

21. Resolution of 23 April 1996 and Accord, concerning the designation and economic regulation of persons responsible for Evangelical religious teaching at public primary and secondary educational teaching centers (BOE n° 18, 4 May 1996); and Resolution of 23 April 1996 and Accord concerning the designation and economic regulation of persons responsible for Islamic religious teaching at public primary and secondary educational teaching centers (BOE n° 107, 3 May 1996). See M. Rodríguez-Blanco, "El régimen jurídico de los profesores de religión en centros docentes públicos," *Il Diritto Ecclesiastico* CXII, 2 (2001):482-573.

22. "In order to protect the proper use of such denominations (Halal / Kasher, Kosher, Hashrut –and all of these associated with the terms U, K or Parve–), the (CIE / FCI), must apply for and obtain registration of the corresponding trademarks from the Patent and Trademark Office, pursuant the legal standards in force. Once the above requirements are met, products bearing the (CIE / FCI) mark on the package shall be guaranteed for the intents and purposes of marketing, import and export, to have been prepared in accordance with (Islamic Law / Jewish law and tradition).The slaughtering of animals in accordance with (Islamic Laws / Jewish Law) must abide by health standards in force" (art. 14. 2 and 3 of the Agreements with the CIE and with the FCI).

23. See art. 2. 6 and art. 2. 5 of the Agreements with the FCI and with the CIE, respectively. See A. González-Varas, "Libertad religiosa y cementerios: incidencia del factor religioso sobre las necrópolis," *Ius Canonicum* 82 (2001):645-95.

days off. Prior agreement must be reached between the parties concerned (the worker and the company).²⁴

V. THE STATE AND RELIGIOUS AUTONOMY

The religious denominations registered in the Religious Entities Register, organized under the Ministry of Justice, enjoy full autonomy in the Spanish State (Article 6 of the LOLR²⁵). This autonomy is recognized both for the Churches, denominations, and for the legal persons depending upon them (religious orders, foundations, teaching institutions, hospitals or other care institutions, etc.). The fact that the denominations have their own internal law is a clear expression of religious autonomy. This internal law of the denominations is recognized to some extent within the State Law through the typical institutions of private international law: referral and budget. By virtue of referral, certain denominational rules are effective in State Law, as is the case of the institution of canonical marriage, and in the marriage form, according to the Protestant, Jewish and Islamic rites. Applying the budget theory, the denominational origin terms that appear in the State Law are interpreted in agreement with the denominational law where this term has its origin (e.g. ministers of cults, temples).

The recent pronouncement of the TC, which includes the right of access to the register as an essential part of the content of the right, as it indirectly states that the essential content is not reduced to the numbering contained in Article 2 of the LOLR, as intended by the individual vote of four magistrates, seems to permit an interpretation that also includes the right to autonomy of the churches. The idea that the right to autonomy forms part of the essential content of religious freedom of the denominations is reinforced in legal basis number seven of the actual Decision:

The registration of a religious entity in the Register entails, above all, the recognition of its legal personality as a religious group; in other words, the identification and admission into the legal system of a group of people whose aim is to exercise, with immunity of coercion, their basic right to the collective exercise of religious freedom, as established in Article 5.1 of the LOLR. But at the same time, the recognition of this specific or singular legal personification confers a certain “status” on the entity, which above all is expressed in the full autonomy attributed to it by Article 6.1 of this law, by virtue of which the religious entities or denominations registered “may establish their own rules of organization, internal regime and regimes of their personnel.” It adds the precept that the power of self-regulation may include the configuration of institutions created to exercise their purposes, as well as clauses to safeguard their religious identity and own nature, and due respect for their beliefs.²⁶

On the other hand, the specific “status” of religious entity conferred by the registration in the Register is not limited to the aforementioned internal scope, through the recognition of the capacity of self-organization of the collective subject. Rather, it extends as well to an external aspect, in the sense that the specific expressions that, in the exercise of the basic right, are carried out by the members of the registered group or community are facilitated in such a way as to permit the collective exercise of religious freedom with immunity from coercion, with no obstacles or disturbances of any kind.²⁷

The decision of the Constitutional Court on February 15, 2001 guides the interpretation of the limits that are included in Article 6.1 of the LOLR (the basic rights recognised in the Constitution, especially freedom, equality and non-discrimination), in

24. See art. 12 of the Agreements with the FCI and with the CIE.

25. Art. 6.1: “The Churches, Denominations and religious Communities registered, shall have full autonomy and shall be able to establish their own rules of organization, internal regime and regime of their personnel. These rules, like the rules that regulate the institutions created by them to carry out their purposes, shall be able to include clauses that safeguard their religious identity and own nature, as well as due respect for their beliefs, without detriment to the rights and freedoms recognized by the Constitution and especially those relating to freedom, equality and non-discrimination.”

26. STC 46/2001, 15 February, FJ 7.

27. STC 46/2001, 15 February, FJ 7.

the sense that they must coincide with the limits of Article 3 of the LOLR. It must also be taken into account that “the limits of the freedom of beliefs are submitted to a strict and restrictive interpretation.”²⁸

The right to autonomy of the churches will have a different intensity depending on whether such right extends towards their members or towards third parties outside the denomination and depending on whether a contractual link, of which a denominational entity is a party, exists or not.²⁹ The autonomy of these denominations may not alter the private legal traffic, or affect the legal mandates, to the extent that it may endanger the Rule of Law or alter the legal certainty.³⁰

With respect to the right of the denominations to establish the content of religion classes, the TC reinforced the autonomy of the denominations by declaring that “if religion classes do not form part of the general programming as religion is a subject that students can voluntarily choose, it is obvious that the teaching staff and the student parent associations lack the capacity to develop the study plan of the different educational levels, of the different religious denominations that, under the protection of Article 3.3., can establish alternative and supplementary teaching, competences that are beyond the control of the school boards that have a secular or non-denominational nature and must not intervene....”³¹

It can be said, therefore, that this power is an expression of the right to autonomy of the churches. In other words, denominations are protected by their right to autonomy, in the transmission of the dogmatic contents and values of the religion class, which may not coincide with the state conception.

With respect to the possible harm to the neutrality of the State on resorting to an external body (the denominational authorities) to hire religion teachers in public schools, who carry out a job that is considered public employment, the constitutional jurisprudence establishes that the autonomy of the religious denominations prevails³². The neutrality of the State forces it to not replace religious denominations in judgements on appropriateness, or to interfere in them.³³ As a general rule, in education centers and elsewhere, the option of demanding the workers of an entity or enterprise with its own set of ideas to be loyal to another set of ideas is an expression of the right to autonomy of the denominations (pursuant to community directive 2000/78, Article 4.2).

Furthermore, the fact that it is impossible to demand the cancellation of the baptism entry in parish records is considered a sign of respect for the conception that Christian churches have of each other. Appealing to the rights acknowledged in the Organic Law on Personal Data Protection on the power of owners to have access to their personal data,

28. STC 141/2000, 28 May FJ 3. Earlier, STC, 20/1990, 15 February, FJ 3 and 5; STC 120/1990, 27 June, FJ 10 and STC 137/1990, 19 July, FJ 8.

29. STC 141/2000, 29 May, FJ 4, art. 16 protects an “*agüere ligere* consistente (...) in professing the beliefs desired and behaving in agreement with them, as well as in maintaining them with respect to third parties and being able to proselytize them. This power (...) possesses a different intensity depending on whether it extends to one’s own behavior and how each party disposes of this, or on the repercussion that such behavior, in agreement with one’s own beliefs, has on third parties, be these the actual State or individuals, aiming for them to become the target and receivers of these same beliefs.”

30. STC 141/2000, 29 May, FJ 4, “From the moment when their convictions and the adaptation of their behavior to these convictions is done externally, and is not restricted to their private and individual sphere, and the extent to which they are affected becomes clear to third parties, the believer cannot hope, protected by the freedom of beliefs of art. 16.1 CE, that any limit to that behavior will only be a restriction of the infringing freedom of the constitutional precept mentioned; or alter, just by upholding the freedom of beliefs, the private legal traffic or the mandatory nature of the legal mandates on the occasion of the exercise of this freedom, under the pretext of relativizing them to an intolerable point for the survival of the actual democratic Rule of Law of which legal certainty is also a fundamental principle.”

31. STC 1 April 1988, FJ 3.

32. STC de 15-II-2007, FJ 2.

33. This is mentioned in the jurisprudence that came about in a conflict between the Union of Seventh-day Adventist Christian Churches and some of its members; see the study of G. Moreno Botella, “Ministro de culto adventista y autonomía confesional,” *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1 (2003) at <http://iustel.com>.

some people, who had made a declaration of apostasy, aimed to cancel the baptism entry. In this conflict, the Spanish Supreme Court³⁴ has acknowledged that Churches are entitled for the baptism records to reflect the conception that they have on this: it cannot be deleted, therefore it cannot be cancelled.

VI. RELIGION AND THE AUTONOMY OF THE STATE

No religious denomination has a state character. Consequently, the State enjoys full autonomy with respect to the religious creed of any denomination. This State autonomy does not mean that the State cannot include values in its laws that originate from a certain religious conception of life. It will include them or not depending on whether these values are shared by mainstream society and whether they are legally recognized through the established democratic channels. Religious denominations have no representation in the legislative bodies of the Spanish State, or in the Assemblies of the Autonomous Communities. Religious denominations also do not have representation in the advisory commissions of the public bodies for the protection of childhood or youth.

By virtue of the autonomy of the religious denominations, no denomination can exert control over other denominations. Those denominations that are acknowledged as having well-known deeply-rooted beliefs (*notorio arraigo*) in Spain are entitled to appoint a representative who will form part of the Advisory Commission for Religious Freedom. This Commission acts as a consultant for the executive power and its opinion must be heard by the Government before an Agreement is signed between the State and a Denomination with well-known deeply-rooted beliefs (*notorio arraigo*) in Spain.

In Spanish law there is no limitation for access to the civil service or to any representative post, with respect to religious belonging. Indeed, a rule of this type would go against Article 14 of the Constitution, which forbids any discrimination for religious reasons, against Article 16.2, which establishes that “nobody can be forced to declare about their ideology, religion or beliefs,”³⁵ and against Article 103.3, which establishes the principles of merit and capacity with respect to access to the civil service.

The organization of State funerals on the occasion of terrorist attacks or the decease of Spanish soldiers on missions abroad do not harm the neutrality or represent a lack of autonomy of the State with respect to the churches. These funerals, which are not prescribed in any legal rule, are a solemn expression of condolence.

A. *Legal Regulation of Religion as a Social Phenomenon*

The religious phenomenon is regulated in Spain as a specific social phenomenon, which differs from humanitarian, philanthropic movements or solidarity movements in general. This, however, does not mean that positive religious freedom has prevalence over negative religious freedom on a personal or individual level. Under Spanish law, atheists and agnostics have the same scope of religious freedom as believers of any denomination. This does not prevent religion from being considered as a factor of positive social influence, as the State is forced to cooperate with religious denominations. If religion were to be considered as something that society is indifferent to, forcing the State to collaborate would seem contradictory. There is, however, a doctrinal current that is contrary to this consideration, which tries, as a logical consequence, to reduce the cooperation of the State with the denominations as much as possible. In addition, there is a tendency today to not differentiate the protection of religious freedom with respect to ideological freedom or freedom of thought in the legal field.

34. STS of 19 September 2008, contentious-administrative court (section six), further appeal no. 6031/2007. On this decision (and subsequent ones that follow its doctrine), see B. González Moreno, “El derecho fundamental a la protección de datos personales: su contenido y límites respecto al bautismo y la apostasía,” *Revista General de Derecho Canónico y Eclesiástico del Estado* 19 (2009).

35. M. J. Roca, *La declaración de la propia religión o creencias en el Derecho español*, (Santiago de Compostela, 1992).

B. *State Financial Support for Religion*

The right to extract voluntary economic benefits from the faithful is acknowledged in Spain for all religious denominations. In addition, all religious denominations benefit at least from the tax exemptions that non-profit entities enjoy. In 1979, the Catholic Church signed an agreement on economic affairs with the Spanish State. By virtue of that agreement, and through successive modifications, today, citizens wishing to do so can assign 0.7 percent of the amount they have to pay to the Treasury to the Catholic Church, through the personal income tax. This is not a religious tax similar to the tax that exists in the Federal Republic of Germany, as it is not linked to religious belonging, nor is it compulsory. Members of the Catholic Church may choose not to assign any amount in favour of the denomination they belong to and people who have not been baptized in the Catholic Church may assign 0.7 percent of their taxes to the Catholic Church through the personal income tax. This assignment covers approximately 25 percent of the necessary budget. Pursuant to the European regulation, following order EHA/3958/2006, 28 December, the cases of non-subjection and the exemptions foreseen in arts. III and IV of the Agreement between the Spanish State and the Holy See, 3 January 1979, with respect to value added tax and the Canary indirect general tax, were eliminated.

The “Pluralism and Co-existence” Foundation is a public foundation, created in 2005, whose assets come entirely from the tax item that is assigned to it each year in the general State budgets. This foundation has been created to finance the religious denominations that have well-known and deep-rooted beliefs (*notorio arraigo*) in Spain.³⁶

Apart from these two direct channels whereby the State cooperates with the denominations for their financing, there are also some indirect cooperation channels, which include the following exemptions; increases in assets as a result of gifts, acquired by the Holy See, the Episcopal Conference, the dioceses, the parishes, the religious congregations and orders, as well as religious associations and entities engaged in charity-teaching, medical, hospital or social assistance activities, are exempt from the Company tax, when the conditions and requirements demanded in the aforementioned agreement concur to enjoy exemption with respect to death duties and gift taxes. The same benefit will be applicable to recognize non-Catholic confessional associations, when they are registered and have signed an Agreement with the Spanish state.³⁷

Religious foundations³⁸ benefit from the tax regime of non-profit entities and from the tax incentives to patronage.³⁹ By virtue of Article 63 of the law on the reform of local tax offices (law 51/2002, 27 December), those of the Catholic church, under the terms foreseen in Agreement between the Spanish State and the Holy See on Economic affairs, and those of legally recognized non-Catholic confessional associations, under the terms established in the respective cooperation agreements, are exempt from the tax on the ownership of real property.

Apart from the direct financing (by tax allocation, for the Catholic Church, and the Foundation on Pluralism and Co-existence for Denominations with well-known and deep-rooted beliefs (*notorio arraigo*) and apart from indirect financing (through tax exemptions and cases of non-subjection to taxes), the State directly finances some religious or educational services provided by the denominations. Thus, for example, the Covenant of Collaboration was signed on 24 October 2007 between the State and the Islamic Commission of Spain to finance the expenses caused by providing religious assistance in

36. Art. 7.1. of the Articles of the Foundation: “the aim of the Foundation is to contribute to the execution of cultural, educational and social integration type programs and projects of non-Catholic religious denominations that have a Cooperation Agreement with the Spanish State or denominations with well-known and deep-rooted beliefs (*notorio arraigo*) in Spain. Art. 8.1. of the Articles of the Foundation: “the Foundation is created in benefit of non-Catholic religious denominations that have been declared to have well-known and deep-rooted beliefs (*notorio arraigo*) pursuant to Organic Law 7/1980, 5 July, on religious freedom.”

37. Law 29/1987, 18 December, on death duties and gift taxes. Final provision 4.

38. Law 50/2002, 26 December, additional provision 2.

39. Law 49/2002, 23 December, additional provisions 8 and 9 and Royal Decree 1270/2003, 10 October, whereby the application regulation for this law is approved.

state penitentiaries; by virtue of the agreement, the State assumes the payment⁴⁰ of the Islamic ministers who provide Islamic religious assistance. Likewise, it assumes the payment of the Evangelic Christian religion classes, as stipulated in Judgment of 23 April 1996.⁴¹

C. *Religious Marriage in Spanish law*

The Civil Code was adapted to the new constitutional principles on marriage via Law of 7 July 1981, which established an optional marriage system that acknowledges two forms of marriage with civil effects: civil marriage and religious marriage; and it attributes the contracting parties the freedom to choose one model or the other. Article 59 establishes that “consent to marriage may be given in the way foreseen by a registered religious denomination, under the terms agreed with the State, and lacking this, authorised by the State legislation.”

To date, only those denominations with an Agreement (Catholic church, FEREDE (Federation of Evangelic Religious Bodies of Spain), FCI (Federation of Israelite Communities of Spain), and CIE (Islamic Commission of Spain) have regulated this possibility in their respective Agreements. Differences between the civil effectiveness of canonical marriage and that of other religious marriages are explained by the deep-rooted nature and historical tradition of canonical marriage in Spain.

D. *Civil Effectiveness of Marriage and of Canonical Resolution*

In accordance with the regulations provided for in the Civil Code and in the Agreement with the Holy See on Legal Affairs, a marriage held according to the rules of canonical Law produces civil effects from the time it is held. To fully recognize these effects, registration in the Registry Office is necessary. Thus, a canonical marriage is effective in Spain without requiring preliminary civil proceedings, although it will not be fully effective until it is registered at the Registry Office, namely, without prejudice to rights acquired in good faith by third parties. The registration at the Registry Office is carried out simply by presenting the Church certificate, but the entry will be denied when, from the documents presented or from the entries of the Registry office, it is verified that the marriage does not meet the requirements demanded for it to be valid in the Civil Code.

On the request of either party, judgments pronounced by the Church courts on canonical marriage, the judgements on nullity of canonical marriage and the pontifical decisions on unconsummated marriage will have civil effectiveness in Spain, if they adapt to the State Law in judgement pronounced by the competent civil Judge in agreement with the conditions that are established for the exequatur of foreign decisions. Recognition of these canonical judgements does not prevent those who have held a canonical marriage in Spain from being able, if they so wish, to resort to civil jurisdiction to obtain the nullity, annulment or civil separation of their marriage.

E. *Civil Effectiveness of Other Religious Marriages (FEREDE, FCI, CIE)*

Apart from canonical marriage, in Spain it is possible to hold Islamic, Jewish or Protestant marriages with civil effects. This possibility, foreseen in the Civil Code, is developed in the three Agreements of 1992. For this purpose, and unlike what occurs

40. The amount that must be paid to each religious assistant will depend on the demand for religious assistance effectively proved, in agreement with the following scale: Up to 50 inmates: Half day (1) / Full day (0). From 51 to 150 inmates: Half day (0) / Full day (1). More than 150 inmates: Half Fay (1) / Full day (1). The full day will be considered as six hours and the half day three hours.

41. Judgment of the sub-secretariat (of the Ministry of the Presidency), whereby the publication of the agreement of the Council of Ministers, 1 March 1996, is made available, as well as the agreement on the appointment and economic regime of the people responsible for Evangelic religion teaching, in primary and secondary education public teaching centers (B.O.E. 4 May).

with canonical marriage, the law demands that the contracting parties initiate the proceedings before the officer of the relative Registry Office prior to the marriage. After verifying the civil marriage capacity of the contracting parties, the officer at the Registry Offices grants the certificate of capacity that authorizes the parties to hold a marriage with civil effects within six months as from the issue of the certificate, before the minister of the relative religion and before at least two witnesses of full legal age. The marriage will take effect as from the moment the marriage is held, but without prejudice to the rights acquired in good faith by third parties, until it is registered at the Registry Office. Recognition of these religious marriages does not even entail full recognition of the way they are held as this is regulated in civil law (Agreements of 1992) imposing requirements that, at times, the religious law does not demand (for example, the presence of the Imam in Islamic marriages). However, the result of this is that anyone wishing to hold an Islamic, Jewish or Evangelic marriage with civil effectiveness does not have to submit to two ceremonies, the religious and the civil ones.

As an exception, the preliminary civil proceedings can be eliminated in the case of Islamic marriage, but in this case, it will only be effective at the time such marriage is held if the contracting parties satisfy the civil capacity requirements and, at the time of the registration, the officer verifies the civil capacity requirements.

Unlike canonical marriages, in the case of these religious marriages no civil effectiveness is recognized for the possible judgements of nullity or annulment derived from denominational courts.

VII. RELIGIOUS EDUCATION OF THE YOUTH

Article 27.1 of the Constitution establishes that “everyone has the right to education. Freedom of teaching is recognized.” Thus, it recognizes two different rights.

On the one hand, the right to education basically leads to the obligation of the public powers to guarantee a place in school for everyone, via the creation of ideologically neutral and free public centres. It also means that the state power must manage and guide the educational system so as to guarantee its quality.

On the other hand, freedom of teaching is the right of citizens and social groups to create teaching centers so that parents have the right to choose the type of education that they wish their children to receive. These centers may, as we will see, have a certain ideology and they may be fostered by religious denominations. In Spain, in fact, the Catholic denominational school continues playing a very important role in the entire education system. The ideology of the center will be developed based on respect for constitutional principles. Thus, Article 27.6 of the Constitution states that “physical and legal persons are acknowledged the freedom to create teaching centres, based on respect for the constitutional principles.”

The issue of religion classes in public schools connects to the recognized right in Article 27.3 of the Constitution, which establishes that “the public powers guarantee the parents’ right for their children to receive religious and moral education that is in agreement with their own convictions.”

Let us see, in more detail, the connection of these rights to the religious factor.

A. *Teaching Centers with Ideology*

There are three types of teaching centers in Spain, depending on their ownership and financing. Public centres, with public financing and ownership; private centers, with private financing and ownership; and private aided schools, with private ownership and public financing. As the latter receive public financing, they have to satisfy certain requisites with respect to how they are organized and to their student admission criteria.

The ideology is the actual nature and orientation of the center. Public centers must be ideologically neutral so that all students fit into the public school, regardless of their ideas and beliefs. The neutrality aims to guarantee the students’ freedom of conscience. Hence, public centers cannot become instruments used by the public powers to

disseminate an official ideology or doctrine. In public centers, teachers may “resist any mandate consisting in offering a certain ideological orientation to their teaching” (STC [Decision of the Constitutional Court] of 13 February 1981). In turn, they will have to relinquish any type of indoctrination over their students. In the words of the Constitutional Court: “the ideological neutrality of teaching in public teaching centres ... imposes on teachers, who work therein, an obligation to relinquish any form of ideological indoctrination, which is the only attitude compatible with the respect for the freedom of the families that, based on their free decision or forced by circumstances, have not chosen teaching centres with a certain and explicit ideological orientation for their children.”

Article 115 of the Education Act 2/2006 permits owners of private aided and private education centers to endow them with an ideology; namely, a document that shows the actual nature of the centers from the point of view of their religious and ideological orientation, although it is not limited to these aspects. The ideology conditions the behavior of the members of the educational community. The rights and academic freedom of the teacher fall within two extremes. On the one hand, as indicated by the Constitutional Court in the aforementioned decision, the existence of ideology “does not force them to become apologists for such ideas, or to transform their teaching into propaganda or indoctrination, or to subordinate the demands imposed by scientific rigour on their work to that ideology.” In turn, the freedom of teachers is “freedom in the teaching posts they occupy, in other words, in a certain centre, and it must, therefore, be compatible with the freedom of the centre, of which the ideology forms part. The freedom of teachers does not empower them, therefore, to aim open or overlapping attacks against that ideology, but only to develop their activity in the terms they consider to be the most adequate and which, in agreement with a serious and objective criterion, are not contrary to the former.”

The most problematic question in this regard is the relevance of the activities undertaken by teachers hired by centers with ideology that are contrary to such ideology but are carried out outside their teaching function. The Constitutional Court has defended the evaluation of each specific case. It indicates that the service relationship between teachers and centers does not extend to their non-academic behavior, but it states, at the same time, that “the possible notoriety and nature of these activities and even their intentionality may make them an important and even decisive part of the educational task that is entrusted to them.”

B. Religion Classes in Public Centers

In the Spanish system it has been understood that whenever religion classes are voluntary in public centers, this does not violate the secular nature of the State or the neutrality of the public school. On the contrary, such classes are aimed at making religious freedom possible, as indicated in Article 2 LOLR (Act on religious freedom), “The freedom of worship and religion guaranteed by the Constitution secures the right, which may therefore be exercised by all without duress, to: (...) receive and give religious teaching and information of any kind, orally, in writing or any other means; choose religious and moral education in keeping with their own convictions for themselves and for any non-emancipated minors or legally incompetent persons, in and outside the academic domain (...). 3. To ensure true and effective application of these rights, public authorities shall adopt the necessary measures to facilitate (...) religious training in public schools.” Thus, our Constitutional Court has indicated that the neutrality of the State and of its school centers “does not prevent the organization in public centers of classes of free choice to provide the parents with the right to choose for their children the religious and moral education that is in agreement with their own convictions (Article 27.3 of the Constitution)” (STC 5/1981, repeating this principle in STC 38/2007).

With respect to the religion classes given in public schools, for the moment, these contemplate Catholic, Muslim, Jewish and Protestant teachings, under the terms established by the Holy See on teaching and cultural affairs and in Article 10 of the three

Agreements of 1992 with the FEREDE, the FCI and the CIE. These are subjects that must be offered by the centers but, given their denominational nature, these students are free to follow them.

One of the most debated aspects has been the alternative that students should study who do not choose to take religion. For primary students, the regulation in force does not establish a specific activity, rather it points out that “they will receive proper educational attention, so that the choice of one option or the other (that is, study religion or not) does not represent any discrimination.” For secondary education students, apart from giving them the same options that primary students have, it establishes the possibility, for those who do not want to study religion, of choosing the non-denominational teaching of the history and culture of religions.

As the teaching of religion is denominational teaching, the teachers who have to deliver it are proposed by religious denominations so long as they have the proper academic qualifications as a guarantee of their competence. Out of those proposed, the center chooses the people it deems most appropriate. They will be hired for an indefinite time and will be paid in line with supply teachers of the same educational level. If the religious authority deems that one of the people proposed no longer satisfies the necessary requirements to occupy the post, it may withdraw the appropriateness certification, which will represent the dismissal of the teacher on the basis of lacking one of the necessary requisites to carry out his/her functions. This recruitment system, with the intervention of both the religious authorities and public centers, has been the subject of different conflicts and appeals but it was confirmed by the Constitutional Court in STC 38/2007 of 15 February.

It is clear that religion classes cannot be compulsory, as if this were the case it would violate the neutrality of the public school and the student’s freedom of beliefs. A debate has arisen recently due to the compulsory implementation in the Spanish education system of the so-called subject “Education for citizenship.” The social debate was transferred to the judicial field on the occasion of the conscientious objections brought forward by several parents who refused to let their children receive this subject as they considered that, based on the objectives and minimum content defined by the public powers, it was not a neutral discipline but rather based on a specific ideology, which could represent an imposed indoctrination outside the parents’ election, and contrary to their religious and ideological freedom. The decision of the Higher Courts of Justice varied in the different Autonomous Communities. On 28 January 2009, the Supreme Court unified the doctrine by ruling against the right to object to the subject.

VIII. RELIGIOUS SYMBOLS IN PUBLIC PLACES

As yet, no similar law to the French one has been passed in the Spanish State with respect to the presence of religious symbols in public spaces. There is no regulation in force, either, that foresees the presence of crucifixes or other religious symbols in school classrooms, as there is in Italy or in Bavaria. In fact, new school centers are not usually equipped with crucifixes. The controversial cases arise in the older public centers. Private schools have the right (as part of the right to autonomy of denominations) to conduct their teaching within the framework of their own ideas. Hence the presence of religious symbols in schools with their own ideology is fully guaranteed.

Conflicting cases have arisen above all in the school sector due to the presence of crucifixes or nativities (in some cases, due to religious services, too.⁴² To date, the majority of the decisions passed by the Higher Courts of Justice have considered that any decisions adopted by the school councils of the respective education centres –regardless of whether the decision was to keep or remove the religious symbol – were according to

42. On this topic, see: A. González-Varas, “Los actos religiosos en las escuelas públicas en el Derecho español y comparado,” at *Revista General de Derecho Canónico y Derecho Eclesiástico* 19 (2009).

law⁴³. In the Autonomous Community of Andalusia, when parents of a school center asked for crucifixes to be removed from the classrooms, the solution adopted was to order the removal and suggest that religious symbols be displayed only in the classroom where Christian religion classes were delivered.⁴⁴ On the contrary, in the Autonomous Community of Castile-Leon, the Higher Court of Justice twice ordered the removal of crucifixes from a school center,⁴⁵ on the request of some parents, regardless of the decision adopted by the school council.

Conflictive cases are not reduced to the school sector, as they also include the presence of crucifixes and the Bible in swearing-in acts of public posts. By virtue of Royal Decree 707/1979, 5 April, Article 1, during acts involving taking possession of public posts or functions in the Administration, they are asked: Do you swear or promise on your conscience and honor to fulfil the obligations of the post... etc.)? This question will be answered by the person who has taken possession with one single affirmative answer. In other words, the situation of the person having to publicly express the option chosen does not arise. However, if the person chooses to take the oath, the Christian religious symbols (crucifix and Bible) are present; if the person chooses to make the promise, the text of the Constitution is present.

The total suppression of any religious reference or symbol in the public space in Spain seems impossible, without squandering a good part of its cultural legacy. For example, the building where the Spanish Supreme Court has its headquarters is a historical building that is full of frescoes with many biblical references. On the contrary, the building where the Constitutional Court has its headquarters is a newly constructed modern building, without any reference to any religious symbol. As yet, nobody has considered it reasonable to demand the elimination of the fresco painting from the Supreme Court, or ask for religious symbols to be introduced in the Constitutional Court.

Logically, religious symbols in the field of relations between individuals receive a different treatment. The desire expressed by some workers to wear (or not wear) certain garments in their work environment due to religious reasons, when the employer had not been warned during the interview prior to signing the work contract, has not been accepted by the courts.⁴⁶

IX. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

Recently, a series of conflicts has been arising with reference to the tutelage that freedom of expression merits when its exercise collides with respect for religious feelings:

43. Thus the Decision of the Higher Court of Justice of Madrid, 5 October 2002, on the crucifix in school classrooms. Among the doctrinal authors who have studied the topic, see: M. Alenda, "La presencia de símbolos religiosos en las aulas públicas, con especial referencia a la cuestión del velo islámico," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 9 (2005) at <http://iustel.com>; A. González-Varas, *Confessione religiosa, diritto e scuola pubblica in Italia. Insegnamento, culto e simbologia religiosa nelle scuole pubbliche* (Bologna, 2005):207; Ditto, "La simbologia religiosa en los espacios públicos: problemas generales y soluciones concretas en los estados europeo," *Inmigración y Derecho*, ed. I. C. Iglesias Canle Valencia (2006): 249; S. Cañamares, *Libertad religiosa, simbología y laicidad del Estado*, (Pamplona, 2005): 123; G. Moreno Botella, "Libertad religiosa y neutralidad escolar a propósito del crucifijo y otros símbolos de carácter confessional," *Revista Española de Derecho Canónico* 58 (2001).

44. There is also a report by the Ombudsman of a village in Andalusia, who, in his conclusions deems that the only places where the presence of the crucifix does not harm the State secularism in the school sector are places of cult or in the religion classroom. Perhaps, consistent with that report, the Junta of Andalusia has ordered that the crucifixes should be removed from the Virgen de la Cabeza School in Jaen, where some parents requested their removal. That is, in this case, the decision has been assumed by the Autonomous Public Administration and not by the School Board, as in the case of the Madrid school. M. J. Roca, "La jurisprudencia y doctrina alemana e italiana sobre simbología religiosa en la escuela y los principios de tolerancia y laicidad. crítica y propuestas para el Derecho español," *Anuario de Derecho Eclesiástico del Estado* 23 (2007): 257.

45. Decisions of the Court of Justice of Castile-Leon (Contentious-Administrative court), 20 September 2007 (number 1617/2007; this can be consulted in the Aranzadi Repertory of Jurisprudence, with reference RJCA/2008/109) and of 14 December 2009 (which can be consulted online at <http://www.tirantonline.com>, with reference TOL 1.724.360).

46. J. Rosell, "Imprudencia de sanción laboral por uso de vestimenta religiosa," *Aranzadi social* 1 (2003).

film premieres, shows, photographic exhibitions, publication of books, etc. that ridicule sacred figures or certain beliefs, presenting them in an obscene or offensive manner.⁴⁷ The problem does not arise with respect to respectful criticism which, obviously, is protected by freedom of expression, but rather with respect to offences. Both freedom of expression and respect for religious feelings are legally protected assets so each specific case must be pondered to reach a proper solution to the conflict.

The Spanish law protects religious feelings, both in its unilateral rules, even criminally in its more serious injuries, qualifying profanation and mocking as an offence (Articles 524 and 525 of the Criminal Code), and also in its agreement-based regulation. Thus, the Agreement with the Holy See on Cultural Affairs expressly establishes that “safeguarding the principles of religious freedom and expression, the State will ensure that the feelings of the Catholics are respected in its social media and will establish the relative agreement on these matters with the Spanish Episcopal Conference” (Article 14).

47. For an analysis of de conflict in the International field see Z. Combalía, “Libertad de expresión y difamación de las religiones: el debate en Naciones Unidas a propósito del conflicto de las caricaturas de Mahoma,” *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 20 (May 2009); R. Palomino, “Libertad religiosa y libertad de expresión,” *Ius Canonicum* 98, 2009: 509-48.