



State-Religion relations in Spain and Portugal: a brief outline

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Spain

I.- State-Religion relations in Spain

During several centuries and with the exception of the brief intervals when Spain had republican constitutions in 1873 and 1931, Spain was a confessional state in which Catholicism was the state religion.

After the Civil War, an autocratic regime headed by General Franco was established in Spain. On the level of legal policy the presence of the Catholic Church was overpowering: Catholicism as the State religion¹, the radical nullity of any legal form not compatible with the doctrine of the Catholic Church², the presence of members of the Church hierarchy in many political bodies, the reinforcement of the presence and control of the Catholic Church in the culture, and the practise to regulate the common fields or *res mixtae* between State and Church through Concordats³.

¹ The most important was the “Fuero de los Españoles”, enacted in July, 1945. Its article 6 proclaims that “la profesión y práctica de la Religión Católica que es la del Estado español, gozará de la protección oficial. Nadie será molestado por sus creencias religiosas ni el ejercicio privado de su culto. No se permitirán otras ceremonias ni manifestaciones externas que las de la Religión católica”.

² The “Ley de Principios del Movimiento Nacional”, enacted in May, 1958, proclaims that “la Nación española considera como timbre de honor el acatamiento a la Ley de Dios, según la doctrina de la Santa Iglesia Católica, Apostólica y Romana, única verdadera y fe inseparable de la conciencia nacional, que inspirará su legislación”.

³ Franco’s regime signed, during the firsts years, many Concordats with the Holy See. The first one, enacted in 1941, regulated the privilege of presentation. In 1946 were signed the “Acuerdo sobre Provisión de Beneficios no Consistoriales” and the “Acuerdo sobre Universidades y Seminarios Eclesiásticos”. In 1947 the “Motu proprio pontificio sobre Restablecimiento del Tribunal de la Rota española”, and in 1953 the “Acuerdo sobre Jurisdicción Castrense y Asistencia Religiosa a las Fuerzas Armadas”.

The fusion of Throne and Church favoured by Francoism reached its climax with the Concordat signed in 1953 between the Spanish State and the Holy See in which the State assumed the compromise to guarantee the exclusivity of the Catholic religion and the privileges that reclaims the Canon Law⁴.

But the last years of this regime coexisted with important changes in the church. The reason were the Second Vatican Council's documents and specially the *Dignitatis Humanae* Declaration on religious liberty. The assumption by the State as a touchstone the submission to the Law of God according to the doctrine of the Catholic Church, as proposed Article 2 of the "Ley de Principios del Movimiento Nacional"⁵, led to some changes in Spanish law⁶ which had previously been based on Roman Catholic doctrine.

In June 1967, the Law on Religious Freedom was enacted. All of this was an important step forward in this area since it meant that the non-catholic denominations acquired some rights they had been deprived of for centuries. However, this system of liberties was still very restrictive due to the important limits imposed by the Catholic doctrine, and the existing suspicion towards the associative phenomenon in general. The nature of the rights proclaimed by the law was solely a guarantee, without compromising the public authorities to a promotional action. Definitely, this system could be described as merely tolerant.

With the arrival of democracy and the enactment of the Spanish Constitution in 1978, the conditions for the existence of authentic religious liberty were created and all discrimination came to an end. The Constitution set the basis for a State of democratic and social rights and established a new system of Church-State relations.

Article 16⁷ guarantees freedom of ideology, religion and worship for individuals as well as communities, with only those limitations that might be necessary for the

⁴ Article 1: "La Religión Católica, Apostólica y Romana sigue siendo la única de la nación española y gozará de los derechos y prerrogativas que le correspondan de conformidad con la Ley divina y el Derecho Canónico".

⁵ Vid. note 2.

⁶ The article 6.2 of the "Fuero de los Españoles" was modified in 1967: "El Estado asumirá la protección de la libertad religiosa, que será garantizada por una eficaz tutela jurídica que, a la vez, salvaguarde la moral y el orden público".

⁷ "1.-Freedom of ideology, religion and worship of individual and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.

2.- Nobody may be compelled to make statements regarding his religion, beliefs or ideology.

3.- There shall be no State religion. The public authorities shall take the religious beliefs

maintenance of public order. Moreover, it affirms that nobody can be compelled to declare his or her ideology, religions or beliefs. This concept of religion seems to exclude phenomena such as atheism, indifference or agnosticism, which are comprised in the term “ideological freedom”.

Finally, the article establishes a non-confessional State and bearing in mind the religious beliefs of Spanish society, the public authorities are obliged to develop and maintain appropriate relations of cooperation with the Catholic Church and other religious denominations.

For a broad overview of the constitutional system, this Article must be connected with other constitutional provisions where proclaims the responsibility of the public powers to promote conditions so that liberty and equality of the individuals and the groups he joins will be real and effective⁸, the religious equality⁹, the interpretation of the fundamental rights and liberties according to the treaties and international agreements ratified by Spain¹⁰, right to determine the religious upbringing of one’s children¹¹. In addition, there are various other constitutional provisions may influence the development of the model: academic freedom¹², freedom to establish schools¹³, conscientious objection to military service¹⁴, and so on.

os Spanish society into account and shall in consequence maintain appropriate cooperation with the Catholic Church and the other confessions”. Translations to English are taken from Alberto de la Hera and Rosa María Martínez de Codes (eds.), Spanish legislation on religious affairs, Ministerio de Justicia. Centro de Publicaciones, Madrid, 1998.

⁸ Article 9.2 reads as follows: “It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life”.

⁹ The Spanish text of Article 14 proclaims: “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance”.

¹⁰ Article 10.2: “The rules relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain”.

¹¹ Article 27 (concerning educational rights) provides in paragraph 3: “The public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction that is in accordance with their own convictions”.

¹² Article 20.1 c) recognizes: “The right to academic freedom”.

¹³ Article 27.6 reads as follows: “The right of individual and legal entities to set up teaching establishments is recognized, provided they respect Constitutional principles”.

¹⁴ Article 30.2 reads as follows: “The law shall determine the military obligations of

The 1978 Constitution sought a middle ground between the separatism proclaimed by the Second Spanish Republic and the Catholic State of Franco's regime, taking into account historical experience. To that aim, the Constitution implicitly embraces four principles which guide church-state legal relations.

The first principle is the religious liberty principle. The basic content is that religious liberty is understood not only as a fundamental freedom proclaimed in the Constitution, but also as the basic attitude of the state toward religion. The state does not intend to treat one particular religious group specially. The Government promotes religion as a freedom of each citizen, and the best way to protect these freedom is to avoid the legal establishment of an official religion.

The second principle is the secularity principle. The state is impartial towards the various individual religious subjects. Professing one's faith is not a freedom or right the state could exercise. This principle, however, does not promote a system of strict separatism between religion and the state.

The third principle is the equality and non-discrimination principle. According to Article 14 of the Constitution, non-discrimination is a basic human right and should be entirely applied to individuals and in a relative fashion to religious groups.

The last principle is the cooperation principle. The Constitution recognizes that the state and religious groups or denominations are different entities. The Government and the religious groups are viewed as different entities with different goals, and are not subordinate to each other. Churches and the state operate in the same society, and are not isolated from each other, therefore avoiding a strict separatist system, as in France. State and religious groups have common fields of interest because the state promotes religious freedom and religious groups are institutional or organizational channels of religious liberty.

No one would deny that the Spanish model, insofar as ecclesiastical law is concerned, is a cooperation model, but only with denominations. The Constitution assumes that the religious phenomenon is particularly worthy of protection. The materialization of religious freedom should be no left to social forces, but the public authorities should intervene in order to establish equilibrium, where necessary, and facilitate effective exercise of this freedom. On this basis, cooperation with the different

Spaniards and shall regulate, with the proper safeguards, conscientious objection as well as other grounds for exemption from compulsory military service in lieu thereof".

religious denominations would be a requirement to achieve complete religious freedom, since it would be unobtainable by individuals alone.

One of the first tasks in the matter of State-Church relations after the death of General Franco consisted in the conclusion of a number of treaties, to take place of the 1953 Concordat. These treaties have the status of treaties under international law. In fact, they form a single whole (the four main treaties even bear the same date), so they may be said to form a Concordat, made up of a number of documents. In that sense, according to the Constitution but prior to the General Act of Religious Freedom of 1980, to which I will refer later, the Catholic Church entered into four agreements. This split method can be justified as a way of efficient negotiation.

The agreements signed in december,1979 deal with four main issues. The first covers legal matters, including marriage, legal personality recognition according to Canon Law, protection of religious sites and religious archives, and observance of religious days. The second one covers financial matters, such as tax exemptions, and governmental funds. The third one deals with religion and culture, including religious education in public schools, church monitored education facilities, and ecclesiastical properties with cultural or historical value. Finally, the fourth agreement deals with religious attendance of the armed forces and military service of clergymen and members of religious orders.

The General Act of Religious Freedom, enacted in July, 1980 gives legal development to all the provisions that are contained in the Constitution. The only limits to religious freedom established by the Act are those related to possible infringements of public liberties, the exercise of which are expressly guaranteed by the said Act, and the safeguarding of public health, morality and order which are protected by law in any democratic society¹⁵.

In my opinion, the Act apart from making provisions for religious freedom, is intended in practice to determine the position of the denominations other than the Catholic Church. The position of this one is determined by the treaties with the Holy See already mentioned. The Act introduces a completely new development into the

¹⁵ Article 3.1 proclaims: “The rights deriving from the freedom of worship and religion may not be exercised to the detriment of the right of other to practise their public freedoms and fundamental rights or of public safety, health and morality, elements which constitute the order ensured under the rule of Law in democratic societies”.

system of sources of spanish ecclesiastical law: the possibility of concluding treaties with other denominations besides the Catholic Church.

In conclusion, this act contains different tools to achieve cooperation between the State and religious entities. The first tool is the Religious Entities Register Book. Registration in this special book, after compliance with several conditions, endows religious groups with a special legal rank or position in the spanish legal system: the category or the status of “religious confession”. Thus, “religious confession” is the basic and specific organizational category in the Spanish state-church system. However, not every group is automatically classified as “religious confession”. According to the General Act, admission to the Register Book has formal requisites: foundations in Spain, identification details, representatives¹⁶, and a substantial condition as well. The substantial condition is a “religious purpose”, a word that is not defined in the General Act. Instead, the General Act declares what are not “religious purposes”. Article 3.2 establishes that “activities, purposes and Entities relating to or engaging in the study of and experimentation with psychic or parapsychological 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”.

This indirect control over religious character has been strongly criticized because it indirectly encourages a three-tier state-church system, that is, religious confessions with agreement, religious confessions without agreement, and religious groups without registration.

This registration has additional effects: registered denominations may decide to negotiate a treaty, they can obtain civil law validity for marriage performed according to their own rules, they may provide pastoral care in schools, and so on. Furthermore, and perhaps most important, “1. Registered Churches, Faiths and religious Communities shall be fully independent and may lay down their own organisational rules, internal and staff by-laws. Such rules, as well as those governing the institutions they create to accomplish their purposes, may include clauses on the safeguard of their religious identity and own personality, as well as the due respect for their beliefs, without

¹⁶ Article 5.2 provides: “Registration shall be granted by virtue of an application together with an authentic document containing notice of the foundation or establishment of the organisation in Spain, declaration of religious purpose, denomination and other particulars of identity, rules of procedure and representative bodies, including such body’s power and requisites for valid designation thereof”.

prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination. 2. Churches, Faiths and religious Communities may create and promote, for the accomplishment of their purposes, Associations, Foundations and Institutions pursuant to the provisions of ordinary legislation”¹⁷.

In all, registration seems to me to mean that the denomination concerned enters the area of special protective law represented by Spanish ecclesiastical law.

The second tool is the Committee on Freedom of Worship. It is “created in the Ministry of Justice whose membership, which shall be stable, shall be divided equally between the representatives of the Central Government and of the corresponding Churches, Faiths and religious Communities or their Federations including, in any case, those that have a notorious influence in Spain, with the participation as well of persons of renowned competence whose counsel is considered to be of interest in matters related to this Act. Such Committee may have, in turn, a standing commission whose membership shall be likewise equally apportioned.

The functions of such Committee shall consist of reviewing, reporting on and setting forth proposals with respect to issues relating to the enforcement of this Act and such intervention shall be mandatory in the preparation of and recommendations for the Cooperation Agreements or Conventions referred in the preceding article”¹⁸

The third tool is the possibility of concluding agreements with the Spanish government. This possibility is stipulated in Article 7.1¹⁹. To perform these agreements, two conditions are required: registration in the religious entities register book and notorious influence in Spanish society. The second one is an obscure clause with no clear meaning. Scholars have thoroughly studied this clause, and have contrasted it with similar clauses from the Italian and German agreements system. This attempt has proven futile because the government has interpreted the clause with discretion. In fact, the government has not chosen a numerical interpretation, but rather a historical interpretation. This explains why Spain has signed agreements with Muslims and with

¹⁷ Article 6.

¹⁸ Article 8.

¹⁹ “The State, taking account of the religious beliefs existing in Spanish society, shall establish, as appropriate, Co-operation Agreements or Conventions with the Churches, Faiths or religious Communities enrolled in the Registry where warranted by their notorious influence in Spanish society, due to their domain or number of followers. Such Agreements shall, in any case, be subject to approval by an Act of Parliament”.

Jews. However, it has not even signed any agreement with Jehovah's Witnesses, who are more numerous in Spain. The Catholic Church is a different case concerning the "notorious influence" clause, as it is supposed to be implicit in the constitutional text²⁰.

In november, 1992 Spain entered into agreements with three religious groups: the evangetic entities, the jewish communities and the muslim commission. These agreements, which are a landmark in our system, are and have been highly valued by the said religious denominations, since, for the first time, a system of co-operation with the non-Catholic minorities was established with the Spanish state but an analysis of their form raises further questions. Although the various groups were encouraged by the administration to form Federations²¹ for the purpose of negotiating a treaty, the content and the formal legal nature of the treaties are very similar and in some cases even identical. These agreements work in the legal system as ordinary laws, and contain provisions similar to those in the agreements with the Catholic Church. The treaties with the Holy See were used as models, but while the treaties with the non-Catholic denominations deal with the same issues as the treaties with the Holy See such as were given to the Catholic Church, but merely contain declaratory provisions without normative content.

The impression is that these treaties were not actually the result of negotiations but rather represent a text offered by the Administrations which it judges appropriate and which must be accepted almost to the letter. The text offers only certain advantages not enjoyed by other denominations. In this sense, the treaties prove to be a means of obtaining tax advantages, of being able to provide pastoral care in the Armed Forces and the prisons in a certain way, or to cause certain religions to be taught in schools, they obtain civil law validity for marriages performed according to their own rules and include more specific norms concerning dietary religious rules and places of burial. As for the structure and content of the three agreements, we would say they are very similar, though there are some differences-details which differ, due to the uniqueness of each of the mentioned groups.

The agreement system operates both between the spanish State and religious groups at different levels. The organisation of Spain as a so-called "State of

²⁰ Article 16.3.

²¹ The agreements were signed with the Federation of Evangelical Religious Entities of Spain, the Federation of Israelite Communities of Spain and the Islamic Commission of Spain.

Autonomous Communities” in which these political territorial units may pass legislation with the status of law raises the possibility of autonomous, or regional, ecclesiastical law. For instance, the regional units, called Autonomous Communities are able to sign agreements. In fact, these entities have signed agreements with the Catholic Bishops concerning religious places, lands and goods with artistic significance. In 1995 also the Evangelical Church have signed a collaboration agreement with the Community of Madrid. We can foresee a legal system in which different types of agreements exist, namely, agreements between churches and the State and between churches or religious regional groups and Autonomous Communities.

But one should not forget that the Constitution does not, however, fix the technical mechanism by which this co-operation is to be implemented. The treaties with the denominations may be a means of putting this co-operation into practice, but clearly they are neither the only possible means nor is co-operation insured by the mere existence of treaties. The general law on associations would also be applied to other religious groups which are not protected by the General Act of religious freedom because there are not registered as “religious confessions”. The General Act excludes these groups from its range of protective provisions . In fact, the general law on associations would also be applicable to the new religious movements, or sects; in Spain there are no special provisions for these bodies; were they involved in illegal activities they could be proceeded against under the general provisions of the Criminal Code.

We can conclude that in fewer than twenty years, the spanish legal system has evolved from a catholic state to a system grounded on religious liberty. Furnished with a new sense, agreements serve to develop the institutional dimension of religious liberty: promoting religious liberty and respecting religious identity of the groups.

In summary and from my personal point of view, one may describe the spanish model of ecclesiastical law as being a model protecting religious freedom which supports institutionalized religious practices and holds in correspondingly lower estimation those who have no religion or tend towards an unconventional model of religion.

II.- State-Religion relations in Portugal

In Portugal, the republican revolution of 1910 was a religious revolution as well. Principles like separation of church and State were confirmed in the Constitution of 1911. Due to some radical Jacobin impulses and probably also to the conservatism of the Catholic Church the principle of separation was not to be interpreted as ordaining the neutrality of State institutions towards Church. Instead of being neutral, the state often adopted a negative position on religion and on the existence of God. Despite some lack of moderation, this was the beginning of a long process leading to a civil rights approach. Freedom of religion and conscience started to be recognised as a fundamental aspect of human dignity.

In 1933 Salazar, a dictator like Franco, enacted a new Constitution. His connections with the church hierarchy and the catholic movement were obvious. However, his Constitution was cautious in religious matters and the liberal-republican achievements were not completely forgotten. Article 46 stated that the State remained separate from the Catholic Church and any other religion. And article 45 stressed the principle of equal treatment of the different denominations, freedom of organisation and worship, and the neutrality of teaching in state schools. But this constitutional balance was soon disrupted. Through consecutive constitutional amendments, from 1935 to 1971, the Roman Catholic religion recovered its position as “the religion of the Portuguese nation” (amendment of 1951, Law 2048) or “as the traditional religion of the Portuguese nation” (amendment of 1971, Law 3/71).

The relations between the State and the Catholic Church were set out in a Concordat, signed between Portugal and the Holy See in 1940. This Concordat is still partially in force and is an unquestionably system of privilege. Through the Concordat the Catholic Church is acknowledged by Portuguese domestic law as a legal person, without any further procedures or conditions. The general framework of its status comprises several privileges like: jurisdiction in matters concerning the Catholic faith; freedom to organise and institute corporate legal persons according to canonical rules; general exemption from taxes, both local and national, including the taxes on income and consumption; exemption from some public duties, such as jury service at Courts of Law and some tribunals; exemption of the ministers of the Church from some military duties that are replaced by the obligation of chaplaincy work for the Army; the obligation of the State to allow the teaching of Catholic morals and religion by the

Church in some levels of State schools; power of the Church to celebrate marriages under Canon Law to which the civil law assigns full legal force and so on.

In 1971, during the liberal phase of the régime, a law on religious freedom tried to mitigate this privilege system by acknowledging in general terms some institutional rights to be enjoyed by other denominations and some civil rights by their believers, but not equal rights by comparison with those enjoyed by the Catholic Church.

In 1976 democracy brought a new Constitution, which established in Article 41²² a system of equality and separation between State and denominations. In this sense, unlike other constitutions like the Spanish, the Portuguese one does not mention any specific religion. However, the status of the Catholic Church remains basically as established in the Concordat of 1940, confirmed and amended in 1975, even if a good deal of its provisions are deemed partially or totally unconstitutional by most authors. The Catholic Church still enjoys privileges not granted to the remaining denominations and the Portuguese State still chooses to support the fundamental tasks of the dominant denomination.

In that sense, some authors maintain that these privileges and articles are contradictory to the Constitution, since the State is bound to a passive behaviour in respect to the rights of denominations and churches and to an active duty of supplying the tools for effective exercise of the freedom of religion. For these authors, what is wrong is only the refusal of the legislator to extend those privileges to the other denominations. Hence the unconstitutionality is caused by an omission on the part of the legislator rather than by virtue of the Concordat.

Denominations are regulated by the law on religious freedom of 1971. This was enacted before the Constitution, and requires supplementation in order to grant rights and privileges similar to those currently enjoyed by the Catholic Church. Assuming it is

²² “1. A liberdade de consciência, de religião e de culto é inviolável.

2. Ninguém pode ser perseguido, privado de direitos ou isento de obrigações ou deveres cívicos por causa das suas convicções ou prática religiosa.

3. Ninguém pode ser perguntado por qualquer autoridade acerca das suas convicções ou prática religiosa, salvo para recolha de dados estatísticos não individualmente identificáveis, nem ser prejudicado por se recusar a responder.

4. As igrejas e outras comunidades religiosas estão separadas do Estado e são livres na sua organização e no exercício das suas funções e do culto.

5. É garantida a liberdade de ensino de qualquer religião praticado no âmbito da respectiva confissão, bem como a utilização de meios de comunicação social próprios para o prosseguimento das suas actividades.

neither practically feasible nor politically possible that the Catholic Church should have its historically-based rights and privileges diminished, the strategy for equalisation would be to extend most of those rights and privileges to other denominations. That task is being performed slowly. In that way, the Government has elaborated a project of Law on Religious Freedom that is waiting to be enacted. This project, highly influenced by the spanish General Act on Religious Freedom, recognises a certain number of rights which are a consequence of the right of religious freedom.

It creates a Committee on Freedom of Worship like the spanish one, and with similar competences²³. It creates a Religious Entities Register Book, too. Registration in this special book, after compliance with several conditions, endows religious groups with a special rank or position in order to give rights and privileges to those religious groups. The project regulates several matters like culture, financial support of the denominations, religious assistance in the Armed Forces, prisons and hospitals, marriage, the relations between the mass-media and the denominations, and the possibility to sign agreements between the denominations and the State in the case of matters not reflected in the Project, or insufficiently regulated in it.

This possibility is stipulated in Articles 44 to 50 and two conditions are required: registration in the religious entities register book and settlement in the country. The second one, unlike the spanish clause of “notorious influence in the society”, is not an obscure clause. Article 36 proclaims: “1.Consideram-se radicadas no País as igrejas e comunidades religiosas inscritas com garantia de duração, sendo a qualificação atestada pelo Ministro da Justiça, em vista do número de crentes e da história da sua existência em Portugal ... 2. O atestado não poderá ser requerido antes de 30 anos de presença social organizada no País, salvo se se tratar de igreja ou comunidade religiosa fundada no estrangeiro há mais de 60 anos ...”.

However, nowadays this is only a Project.

Summing up the relevant provisions of the Portuguese Constitution we can say that the State is limited in the religious field. Principles of separation between State and

6. É garantido o direito à objecção de consciência, nos termos da lei”.

²³ Article 52 reads as follows: “1. A Comissão tem funções de estudo, informação, parecer e proposta em todas as matérias relacionadas com a aplicação da lei da liberdade religiosa, com o desenvolvimento, melhoria e eventual revisão da mesma lei e, em geral, com o direito das religiões em Portugal.

2. A Comissão tem igualmente funções de investigação científica das igrejas, comunidades e movimentos religiosos em Portugal”.

denominations, neutrality and equal treatment are duly defined and adopted. However the social-factor weight of the Roman Catholic religion is still enough to warrant the Catholic Church enjoying a special status based on instruments and rules on a level different to that of the Constitution and the combined effect of these instruments and rules leads to a situation of “de facto” inequality. Yet the combination of sociological factors, history and the legislation lead us to two propositions: the principle of equal treatment is not entirely enforced; and the principle of separation is interpreted in a quite modest way.