

1995

The Constitutional Development of Religious Freedom in Spain: An Historical Analysis

Daniel B. Montserrat
Universidad Complutense

Follow this and additional works at: <https://ir.law.fsu.edu/jtlp>



Part of the Comparative and Foreign Law Commons, Constitutional Law Commons, International Law Commons, Religion Law Commons, and the Transnational Law Commons

Recommended Citation

Montserrat, Daniel B. (1995) "The Constitutional Development of Religious Freedom in Spain: An Historical Analysis," *Florida State University Journal of Transnational Law & Policy*. Vol. 4: Iss. 1, Article 2. Available at: <https://ir.law.fsu.edu/jtlp/vol4/iss1/2>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Transnational Law & Policy by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

THE CONSTITUTIONAL DEVELOPMENT OF RELIGIOUS FREEDOM IN SPAIN: AN HISTORICAL ANALYSIS

DANIEL BASTERRA MONTSERRAT*

I. INTRODUCTION

Religious freedom has always constituted a problem in Spain. It can be said that over the centuries, there has only existed intolerance and even on several occasions, persecution. Clearly, the times in which respect and peaceful coexistence occurred in Spain among the three principal religions were limited and fleeting.

Unfortunately, even Spanish constitutional history is replete with examples of religious intolerance. From the Cádiz Constitution of 1808, liberal in its politics, but tremendously repressive with respect to religion up until the present day, there have been scarcely twenty-five years of "religious freedom."

Recalling the period prior to the first constitution, religious freedom was virtually nonexistent. Moreover, the historical obsession with political and religious unity overshadowed what little freedom existed. This desire for unity has itself been the source of significant and weighty problems, for both politics and religion, throughout most of Spanish history. When this quest for unity is mentioned, the name of Torquemada, the Inquisition, or the exploits of the Duke of Alba in the Netherlands are certain to come to mind rather than Toledo and the coexistence of three religions within its walls.¹ Nevertheless, as this essay sets forth the pre-Constitutional and Constitutional history of Spain, it chronicles a development, if intermittent, towards a modern law of religious freedom.

* Professor of Constitutional Law, Universidad Complutense in Madrid, Spain, and Judge of the Court of Appeals (Audiencia Nacional) of Spain. M. Ll. Universidad de Deusto-Bilbao and Ph.D. Universidad Complutense, Madrid.

1. ARTHUR STANLEY TURDEVILLE, *LA INQUISICIÓN ESPAÑOLA 7-15* (Fondo de Cultura Económica 1979) (there is no reason to think that the frenzy for persecution only resided within the Church, given that from the end of the eleventh century, and the beginning of the twelfth there were several cases recorded of heretics having been lynched by angry mobs, who considered their clergy too lenient).

II. PRE-CONSTITUTIONAL PERIOD

A. *The Unique Religious Context*

Prior to the Reformation, the political and religious conditions in Spain were unique among the other countries of Europe. On the one hand, some of its cities served as the meeting point of three religions: Islam, Judaism and Christianity. The tolerant societies of Toledo and Cordoba were true lights that lit up all of Europe. Within these cities' walls was an impressive forum of interchange, growth and hope, in which learned men, scientists and humanists gathered and unified. The three cultures and religions were able to coexist, all but unheard of during that time.²

The freedom of spirit and of piety had been especially great in Spain in the fourteenth and fifteenth century, due to the isolation of the peninsula and the ecclesiastical autonomy that the geography contributed to its fight against Islam. The religious cultures could in this way overcome the most varied of influences, both Muslim and Jewish, which combined with Christian spirituality and the recent rebirth of Antiquity in order to thrust souls to a profoundly mystical free internal life. This tendency had its apogee in the *Enlightened Movement*.

B. *The Experience of the Spanish Jews*

In the first place, it is fitting to point out that among all of the numerous peoples that invaded the Iberian Peninsula in the Middle Ages, none were characterized specifically by their religious preferences. On the other hand, the Jewish immigrants into Spain were exclusively identified by their religion. Even today, Israel is fundamentally defined by its religious mosaic or the faithfully preserved Biblical Old Testament. As the historian Gonzalo Maeso correctly points out,

something similar occurred to the "Arabic-Muslims" at the beginning of the Middle Ages; but one has to recognize that in spite of flying the flag of Islam in all of the regions that they were occupying, and of the undoubted importance that religion had for them it was much deeper and of greater value the sentiment harbored in the soul of the Jewish people, and of greater transcendence in the scope of action of all of their activities. The four canons of the

2. ROLAND BAINTON, *LA LLOTA PER LA LIBERTAT RELIGIOSA* 29 (II Mulino 1969) (however, there are those who pretend that this coexistence was not due to an innate tolerance of the Spaniards, but more due to respect, inclusive of fear, given that Spain had become a convergence point between East and West).

Council of Ilberis (300-303), which come from the oldest known data of this time period, were aimed at imposing reasonable restrictions on the coexistence of Jews and Christians for fear of possible proselytizing on their part or immoderate influence on social life, and are reliable proof of the influence that the religious factor and its origins represented by the situation of the Jews residing in Spain at the beginnings of the IVth century.³

In Castille, Aragon and Catalonia, the Jews were historically permitted to faithfully practice their religion. However, permission was never long-lasting. For several reasons, animosity always ended up building against the Jews, which culminated in the terrible massacres of 1391. A century later, with the taking of Granada, the Catholic kings in that city signed a far-reaching expulsion decree of all Jews who did not renounce their religion and embrace Catholicism. Nevertheless, the historical record makes reference to a certain freedom of religious expression that in the thirteenth century became the fashion in the European Christian countries where there existed important Jewish communities. Freedom of religious expression was composed of public discussions involving issues presided over by the civil authorities and the ecclesiastical hierarchy. As one commentator puts it,

[o]ne cannot deny that the participation of the Jews in these matters, in an obvious situation of inferiority, revealed a great courage and conviction of their faith, on equal footing with strong education, if we take into account that they found themselves confronted with erudite and skillful preachers such as Saint Raimundo of Peñafort. The *Dispute of Tortosa* (February, 1413 to November, 1414), [which was] organized by the antipope Benedict XIII, who frequently attended sessions surrounded by his College of Cardinals, was famous and memorable among one and all for its length, external pomp and number of participants. [A]t its conclusion, Benedict XIII ordered the destruction of the Talmud, and ordered oppressive measures against the Jews of the Kingdom of Aragon.⁴

C. Protestantism and the Counter-Reformation

According to the notable historian Maravall, the fact that the two cardinal elements of European political life—freedom of thought and freedom of conscience—had not attained, among the Spaniards, more than an episodic formal recognition and actual effect, did not

3. DAVID GONZALO MAESO, *EL LEGADO DEL JUDAÍSMO ESPAÑOL* 58 (Editora Nacional, Ritmo Universitario 1972).

4. *Id.* at 67.

mean that there had not been noble efforts to attain these freedoms in the history of Spanish constitutional law. Nor did it mean that Spanish contributions to the positive development of these freedoms from the first stages of their appearance in Europe cannot be found.⁵

On the other hand, Spain acted with respect to Protestantism in a very different manner. Due mainly to the policies of Felipe II and Ignacio of Loyola, Spain was the principal bulwark against the Reformation. According to Emili Leonard's work *A General History of Protestantism (Historia General del Protestantismo)*:

as the papacy was incapable of promoting the ecclesiastical and religious reform unanimously called for, it only threw itself into the undertaking to combat the dissidents when it saw that these people had entered 'in its house', in the lands of Spain and Italy where until then it had felt secure. Notwithstanding, the Catholic reaction in those countries was the work of either a half-way independent organization, the Inquisition, or of new religious orders, principally that of the Jesuits, while the strictly pontifical participation in this work, the Council of Trent, played a very small part, at least for the moment, in these events.⁶

The contrast is evident. On the one hand, Spain is capable of producing Torquemada, a destructive man for whom there was only one way of understanding the relationship of man with God, and on the other hand Spain sent Saint Francisco Javier to preach love to the Saracens. Nevertheless, and in spite of these paradoxes, intolerance and persecution predominated the mainstream culture.

D. Efforts at Pluralism

Certainly, there have been spilled rivers of ink spent on the horrors of Spanish intolerance and the Inquisition Court. It is difficult to see those so-called "servants of God," as followers of Jesus Christ with a concomitant message of peace, understanding, respect and love. Less well known, but nonetheless equally as worthy of discussion, are the Spanish contributions to religious and political tolerance. As the historian Maravall states: "there is above us [Spaniards] the sad conscience of having been many more, more influential and more powerful the attitude of intolerance, which the Spaniards have held amongst themselves until the present."⁷

5. JOSÉ A. MARAVALL, *LA OPOSICIÓN POLÍTICA BAJO LOS AUSTRIA 95-99* (Ed. Ariel 1972).

6. EMILE G. LEONARD, *HISTORIA GENERAL DEL PROTESTANTISMO 242* (Ed. Península 1967).

7. JOSÉ MARAVALL, *supra* note 5, at 99 (Maravall holds the thesis that until the sixteenth century, the history of Spain was, in its ideological attitudes, similar to those of other countries in Western Europe. He also suggests that Spain even offers in some aspects a more advanced

According to Menéndez Pidal, situations of pluralism were known previously in Spain when there were considerable groups of people belonging to other religions in the Spanish kingdoms. In Castille, Alfonso VI proclaimed himself king of the two religions, and Alfonso X included in his *General History* not only the history of the Christians, but the Arabs and the Jews as well.⁸ Francisco de Vitoria, who defended the idea that "infidels" who had not had the opportunity to learn the Christian faith had not committed the sin of infidelity, held the view of not forcing the infidels to profess the Catholic faith as well. According to Vitoria, such infidels could be deemed sinners only if they were too violently opposed to the preaching of the faith. "[A]lthough the faith had been related to the Barbarians", he stated in his *Relactio de Indiis*: "in a demonstrable and suitable way, they [the Barbarians] did not want to receive it. It is not licit for this reason to make war against them, nor strip them of their possessions." Melchor Cano, historically seen as "anti-tolerant" given his position in the Inquisition proceedings against the Archbishop Carranza, nonetheless wrote that "God is so restrained with human freedom that no one is himself forced to serve [God]."⁹

Maravall also acknowledges some important personages who defended those dissimilar from themselves and the majority.¹⁰ He referred to Fray Garcia de Loaysa, Bishop of Osma and Cardinal, who wrote many letters to the Emperor Carlos V providing him with information and constant political advice. In these letters, the cleric developed the idea of a possible religious plurality under a common policy. In a letter dated November 18, 1530, he told the Emperor: "[d]o you think His Majesty that everyone obeys and serves you when you would have need, and you are indifferent that they will carry their souls into hell" On the thirtieth day of the same month, he wrote again: "[w]ould His Majesty agree that whether all of Germany be heretics or Christians that they should be embraced, whether they reconcile [ecclesiastically] or do not reconcile [ecclesiastically]." Cardinal Fray Garcia was a proponent of negotiating with the Lutherans, and he stated as much in his letters to the Emperor. In the last of his letters that dealt with this issue, Cardinal Fray Garcia postulated that there should be a neutralization of the

degree of development. It was in the reign of Felipe II, with the isolationism that he imposed, that things changed and Spain, in general, slid down the path of intolerance).

8. MENÉNDEZ PIDAL, *LA ESPAÑA DEL CID* 346 (1929).

9. I. TELLERIA, *EL ARZOBISPO DE CARRANZA Y SU TIEMPO*, (1968) (Melchor Cano cited these words in his translation of the *Tratado de la victoria de sí mismo*).

10. For a more complete study of these personages and their ideology, see MARAVALL, *supra* note 5, at 95-137.

religious differences in the area of political coexistence followed by a true statement of tolerance that should come to be considered a permanent situation, given that there was not hope that an ecclesiastical council would resolve it.

The Cortes¹¹ (Spanish Parliament) of the XVI century, proposed similar ideas. Many deputies of the Cortes, tired of the destruction and high cost of religious wars, recommended a policy of inhibition. This policy would effectively renew the tax base and refill the depleted treasury. The deputy Francisco de Monzón, from Madrid, suggested a policy of tolerance or abandonment, "that since they want to lose, let them lose out."¹² Another of the defenders of tolerance, understanding and plurality was Vazquez de Menchaca. He developed the thesis of the plurality of principalities, prohibiting the establishment of a universal monarchy. Such a policy was thought to violate natural law and was therefore viewed with suspicion by most Christians. If established, de Menchaca thought, its subjects could believe and behave in different ways. The Valencian writer Furió Ceriol said that a "Good Prince" should extend his justice to all, not adhering to the Machiavellian principle of State religious unity. The Good Prince should accept in exchange the diversity of beliefs, the plurality of groups of different faith and separate views, within the unity of a single motherland and a single justice. According to Ceriol, "all good people, whether they are Jews, Moors, Gentiles, Christians or of another sect, are of the same land, of a single caste and blood, and all bad people are [also] the same way."

II. THE CONSTITUTIONAL PERIOD

Professor Ramírez, of the University of Zaragoza, referred to the constitutional history in its entirety upon the first anniversary of the Spanish Constitution, precisely for the political, social and economic lurches that have registered in our political history since 1812 until the present, and which were an expression, at every moment, of the particular vision that lay in the reality of power. Exactly the same can be said of religious freedom in particular, which has always played a part in the general attitude of the country, whether it was liberal or reactionary. Liberalism has expressed itself everywhere as "laissez-faire", at every church of other religious denominations, while the opposing positions have identified themselves in Spain

11. The word "Cortes" means Parliament. It is the traditional Spanish name, whose origin is from the Middle Ages. (Translator's note.)

12. MARAVALL, *supra* note 5, at 116 (citing Acts of the Cortes of Castilla, title XII, pp. 444, 458, 478, etc.).

uniquely and exclusively with Catholicism. "Someone who knows moderately well the ups and downs of Spanish constitutional history is bound, by coherency, to halt their enthusiasm when discussing an issue such as that which now concerns us. This is especially true when the endeavor is undertaken with the cold and critical ceremony that professional rigor demands."¹³

As it was stated in an article a few weeks before the Constitution of 1978 appeared,

Constitutions [in Spain] have always followed the political pendular movement that guided them, and that is why they have not been sustained for [more than] one or two centuries as in other countries[.] [N]either has it served to meet the aspirations of an entire people, but they did satisfy the aspirations or requirements of the dominant majority in Parliament, and consequently the political party in power.¹⁴

With respect to the aspect of religion, as J.D. Huguey holds, in other countries the presence and conflict of different religions has brought about a regime of religious freedom.

[B]ut[,] in Spain once all the religions, except for Catholicism, were eliminated at the beginning of the ["Modern Era"] the outcome of religious freedom has depended almost entirely upon the political liberals. Many Spanish liberals have been anticlerical in the sense of opposing the power and influence of the clergy, but this did not necessarily mean opposition to Catholicism as a religion.¹⁵

Certainly, religious intolerance includes the greater period of constitutional history. Since the enactment of the first Constitution in 1812 (or the Bayonne Letter of 1808) through 1978, religious freedom was rarely permitted. Since 1812, Catholicism has been the only religion accepted and recognized by the Spanish government. As the State religion, its control over the issue of religious freedom has been all but uninterrupted.

A. *The 1812 Constitution – The First in Spain*

The Constitution prepared in Cádiz was a text steeped in the history of Spain in the nineteenth century. The Cádiz text expressed the political heart and soul—contradictory on occasions—of that time period. According to Ferrando Badía, the Spanish Constitution

13. Manuel Ramírez, *En el aniversario de la Constitución* 8-9 (Andalán, special number, December 7-13, 1979, Zaragoza).

14. Cf. D. BASTERRA, *CONCIENCIA Y LIBERTAD* 16-20 (Spanish edition, 1978).

15. J.D. HUGUEY, *RELIGION IN SPAIN* 16 (1955), reprinted in JAIME PÉREZ LLANTADA, *LA LIBERTAD RELIGIOSA EN ESPAÑA Y EL VATICANO II* 223-224 (I.E.P. 1974).

became accepted *en bloc* in Portugal, the Kingdom of the two Sicilies and Sardinia, and its influence even extended to America, which was an exceptional case in constitutional history.¹⁶ With respect to the issue of religion, in spite of the progressive position that the budding liberals took, the traditional principle finally triumphed due to the limited force of liberalism, popular sentiment and the diversity of opinions among the constituents. Diego Sevilla Andrés affirms that the

attitude of the deputies from Cádiz was conditioned upon the national milieu, as Argüelles would subsequently declare, but it is no less correct that the ruling class . . . was already divided with respect to the place that religion should have in the life of the State. Intolerance in ordinary laws would be the norm at all times. [T]he Penal Code Project of 1834 still sanctioned, as public offenses certain actions against religion, and penalized with death those who tried to introduce into Spain, as stated in article 99, a religion other than Catholicism, or to commit an offence against Catholicism.¹⁷

Therefore, Professor Sánchez Agesta correctly points out that the most serious legacy that the Cortes of Cadiz left to later generations of the century was the issue of religion.¹⁸ In spite of the optimism of many deputies, who thought they had in their hands the process for manufacturing the elixir of happiness for the Spanish people, the question of religion remained. "[W]hen a Congress so august, as that which represented the Spanish Catholic nation, has sworn with solemnity to defend our sacrosanct religion, and puts before Spaniards a political Constitution that will perpetuate their happiness, among which is, without any doubt . . . that which belongs to the spirit."¹⁹

As many as ninety-seven of the deputies to the Cortes who drafted the constitution were clergy. Consequently, and most argued appropriately, the Constitution began with an invocation to the Trinity. "In the name of God the all powerful, Father, Son and Holy Spirit, author and supreme legislator of society."²⁰ However,

16. J. Ferrando Badía, *Vicisitudes e influencias de la Constitución de 1812*, 126 *Revista de Estudios Políticos* 195-216 (1962).

17. DIEGO SEVILLA ANDRÉS, *EL DERECHO DE LIBERTAD RELIGIOSA EN EL CONSTITUCIONALISMO ESPAÑOL HASTA 1926*, 3-35 (Secretariado Público, Intercambio Científico y Extensión Universitaria 1972).

18. See LUIS SÁNCHEZ AGESTA, *HISTORIA DEL CONSTITUCIONALISMO ESPAÑOL* 113 (I.E.P. 1978).

19. The deputy Guereña, in *DIARIO DE SESIONES (ACTS OF PARLIAMENT)*, August 25, 1811, at 1695.

20. According to Solís, a historian of Cádiz and the Cortes, among the deputies, there were ninety ecclesiastical members among whom numbered twenty-one canons, six bishops and three inquisitors; there were fifty-six jurists, among whom there numbered twenty-two public

for some this invocation did not go far enough in its acknowledgement of the Catholic church. These deputies wanted to make a more solemn protestation of the Catholic faith. "It is necessary to make [an invocation to] that of the incarnation of the Son of God," said Simón López,

as that from which is born the Apostolic Roman Catholic religion. Here, although the Son is mentioned, Jesus Christ is not mentioned, as Redeemer and Founder of the Apostolic Roman Catholic religion, and as such mention should be made of Him, and the Most Pure Virgin Mary, in accord with what is done in the Councils, and which is provided for in the Law of Certificates ("Ley de Partidas").²¹

The drafting commission of this Constitution was presided over by Father Diego Muñoz Torrero, considered a liberal priest at the time, together with four other clergy and another nine deputies. As Sánchez Agesta correctly stated, the text of the Constitution was not suddenly revolutionary in its political principles, but it was impeccably doctrinal in the religious sense.²² Menéndez Pelayo holds that the constituents of Cadiz, as the majority of cultured men of their time, were not inspired by any other social doctrine than that of the "Social Contract" of Rousseau, or, at the most, by that of the "Spirit of the laws" of Montesquieu.²³ Sánchez Agesta, for his part, did not view this issue so clearly, and held that "one had to greatly force the argument in order to refer without reservations to the thinking of Rousseau," as "the specific nuance of the doctrine of Rousseau had been to deny all submission to a divine order in order to affirm the pure structural order of society, and the primary sovereign of the general will."²⁴

Certainly, the deputies of Cádiz were going to approve the famous article 12, an example of Catholic firmness, which declared that Catholicism "is and will perpetually be that of the Spanish nation," binding the nation to protect it "by just and wise laws, and

prosecutors; there were thirty members of the military, nine seamen, fourteen members of the nobility, fifteen academic deans, forty-nine high level bureaucrats, eight merchants and twenty Parliamentary deputies without a defined profession. Fernandez Almagro provides other statistics: ninety-seven members of the clergy, among whom there were three bishops; sixty jurists, fifty-five bureaucrats, thirty-seven members of the military, sixteen academic deans, eight members of the nobility and thirty-five others among whom there were proprietors, merchants, writers and physicians. The average age was forty-five, and it constituted a good representation of Spanish society at the beginnings of the 19th century.

21. DIARIO DE SESIONES, August 25, 1811.

22. LUIS SÁNCHEZ AGESTA, *supra* note 18, at 114.

23. 2 MARCELINO MENÉNDEZ PELAYO, *HISTORIA DE LOS HETERODOXOS ESPAÑOLES* 969 (3d ed., B.A.C. 1978).

24. LUIS SÁNCHEZ AGESTA, *supra* note 18, at 74-75.

prohibiting the exercise of any other." One can say that the constituents of Cádiz were judges and dogmatists at the same time, given that they decided that the Catholic religion was the only truth. Consequently, the Constitution professed a pure dogma appropriate to an Ecclesiastical Council.

According to Argüelles, whose writings are important in order to understand the political reasons that moved the deputies of the Cortes to adopt the formula of this article,

it was again dedicated to religious intolerance, and the worst was that many knowingly approved article 12 with great sorrow. In order to establish the opposite doctrine it would have been necessary to fight head to head with all the violence and theological fury of the clergy, whose effects were already all too well felt within and outside the Cortes. For this reason, it was believed prudent to leave it to time; to the progress of the luminaries; to the scholarly debates of the writers, and to the successive and gradual reforms of the coming Cortes' the attainment of the tolerant spirit, with neither struggle or scandal, that predominated in a large part of the ecclesiastical State.²⁵

Article 12 is, with all certainty, the most well-known provision of the Cádiz Constitution in so far as the subject of religion. However, in this Constitution there are other articles, some even more unusual, that are filled with this spirit, even with extreme doctrinaire embellishments. For example, those articles which ordered the Electoral Commissions to begin their meetings with the Catholic mass (articles forty-seven, seventy-one, eighty-six), or article 117, which set forth a separate pledge of their defense. It is worthwhile to cite a part of this article extensively in its original form. "[O]n the 25th of February of every year the last preparatory meeting shall be held, in which all Deputies shall, by putting their hand on the Holy Gospel, pledge the following: '[d]o you swear to defend and preserve the Apostolic Roman Catholic religion, without allowing any other in the Kingdom?'—response, 'Yes, I swear.'" There then followed other questions concerning the preservation of the Constitution, and guarding the nation. It concluded stating: "[i]f you do the above, God will reward you, and if not, he will demand it of you." This phrasing is still in use in the pledging to the flag. Likewise, the King must pledge on his coming to the throne, among other things, to defend and preserve the Catholic religion, without permitting another in the Kingdom (article 173), and the Queen must pledge in the same

25. 2 ARGÜELLES, EXAMEN HISTÓRICO DE LA REFORMA CONSTITUCIONAL QUE HICIERON LAS CORTES GENERALES Y EXTRAORDINARIAS 71 (London, 1835).

manner. The ecclesiastical code of laws is maintained (article 249), and the teaching of the catechism of the Catholic religion is constitutionally imposed in all schools, which must include as well the brief exposition of civil duties, forming as such a new religious-civic subject mixture.

B. The Constitutions of 1837 and 1845: following the course of 1812

It is not strange that the ideas of free culture ("libreculturismo") would reappear among the liberals. The plan of this group, which in Cádiz did not dare to profess freedom of worship, took this as their standard into the political fight, but did not achieve success until 1856. The issue of religion was not abandoned in the political struggles of the nineteenth century, especially in the first two-thirds of the century, and which began to gain ground slowly, but steadily.

Article eleven stated that the "Nation is bound to maintain the worship and the ministers of the Catholic religion, which the Spaniards profess." The constituents did not clearly set forth the principle with regards to religion. Article eleven was approved by 125 votes against thirty-four following long declarations, some of them tedious, reiterative and partisan, with moralizing discussions, apologies, dogmas, and even airs of preaching and with arguments containing very little legal basis for the most part. Finally, after long discussions, the idea of the constitutional support of worship and clergy won out. As Professor Sánchez Agesta states, "together with a clear animosity, the royalist thinking of subjecting the Church to political power was revealed."²⁶

Article 11's second statement contrasted dramatically with its previous incarnation in the Constitution of 1812. The first difference was the lack of a religious invocation which the constituents found "ridiculous and antiquated." This precept was recognized as infinitely less dogmatic and radical than that of 1812. In 1837, it is limited to describing a fact, a reality, pointing out the denomination of the nation as being that of the Catholic religion, which the great majority of Spaniards professed. Here, the precept that prohibited the exercise of another form of worship disappeared. The denomination of the State was not set forth, and the way was opened to discussion. The unity that, until then, had been affirmed was greatly weakened.

The affirmation of denomination in such a precise formula in the Constitution, which article eleven was going to have, should not be too surprising. Within constitutional history, the issue of religion, with respect to plurality had progressed very little. By 1845,

26. LUIS SÁNCHEZ AGESTA, *supra* note 18, at 243.

religious freedom had progressed to not greater a status than in the Cádiz Constitution of 1812. This was not due to a lack of liberals or proponents of a more open society. Those who understood the problem and desired change simply saw the need to adapt rather than oppose. They simply saw in it an issue to which one had to adapt, as they believe circumstances dictate. The work undertaken in those years responded to individual mindsets, and not so much as to personal convictions.

According to the preamble of the 1845 Constitution, the purpose of the new Constitution was "to put in harmony with the current needs of the State the old forums and freedoms of these kingdoms." It spoke, from its preamble until its last line, to a more conservative norm. Its precepts inhibited rather than enhanced the current state of religious affairs; retreating rather than moving forward.

The Parliamentary decision concerning article eleven which were to define the issue of religion paralleled the earlier decisions of 1837 in which support of the clergy became paramount. In this instance, however, given the anemic support the previous Constitution granted the Catholic church, the Cortes proposed to ensure forever this support.²⁷ Deputy Alos argued that by placing the State in charge "in a decorous and independent way" (as this addition proposed in article eleven), the odious contribution would then disappear that the masses paid "with great repugnance." The arguments for such a strong linkage appealed more to the childish nostalgia of the deputies rather than to political acuteness. Deputy Ferreira Caamaño referred to reportedly having seen priests asking for alms because they did not receive the subsidy that was due them.²⁸ Such was the extent of the appeals for stronger acknowledgement of the Catholic church by the government. Contradictory opinions also arose that asked that the clergy have their income separate and independent, without need to resort to the State for their support, but article eleven was ultimately enacted forging a permanent bond between the State and the Catholic church. The issue of religion lingered throughout the debates of 1845, much as it had in 1837, although the ultimate document was more clear and forceful. The generic declaration concerning the Catholic religion made in 1837 that Catholicism was the religion "that Spaniards profess," gave way to "[t]he religion of the Spanish Nation is Apostolic Roman Catholic" in 1845.

27. DIARIO DE SESIONES, November 15, 1844, at 473.

28. *Id.* at 478.

Although not signed until 1851, the Concordat²⁹ with the Vatican being negotiated during the 1840s reflected this new attitude of the state towards Catholicism. The Concordat defined religious unity as:

[t]he Apostolic Roman Catholic religion that, with the exclusion of any other, shall continue being the only one of the Spanish nation, shall always be preserved in the territories of our Catholic King, with all the rights and privileges that should be enjoyed according to the law of God, and that set forth by the sacred canons.

C. *The New Democratic Constitution of 1869*

In 1869, a new Constitution was ratified far different than its predecessors owing to its new democratic nature. It was the first such Constitution in Spain that could be considered democratic.

This new approach was manifested in the new Article twenty-one which stated:

The Nation is bound to support the worship and ministers of the Catholic religion.

The public or private exercise of any other [religion] remains guaranteed to all foreign residents in Spain, without any more limitations than those of the universal rules of morality and of law.

If any Spaniards profess a religion other than Catholicism, everything set forth in the previous paragraph is applicable to them as well.

With this new third paragraph of article twenty-one, the exiled Protestants could return to Spain, reopen their churches and reorganize several communities. The first synod of the Spanish Reformed Church began in Seville on July 15, 1869. A large part of the Protestants' activities during their newly won reintegration involved education and teaching in the primary schools. By 1873, the Protestant movement had created its own theological seminary, and began publishing its own of books, pamphlets and magazines.³⁰

29. "Concordat" is an International Agreement or Treaty with the Vatican. (Translator's notes.)

30. 5 VINCENTE CÁRCCEL ORTI, *HISTORIA DE LA IGLESIA EN ESPAÑA* 197. (Contains an extensive bibliography concerning the history and development of Protestantism in Spain during the nineteenth century).

C. *The Regressive Constitution of 1876.*

Seven short years later in 1876, the Bourbon monarchy returned to Spain. With these new leaders came the need for anew, less tolerant Constitution. The religious questions were once again filled with acrimony and rancor. The discussions were extremely long taking up hundred of pages of text in the Congressional Session Journal of the time. Article eleven reemerged in a form much more reminiscent of the intolerant form it had taken earlier:

[t]he Apostolic Roman Catholic Religion is that of the State. The Nation is obligated to support the worship and its ministers. No one shall be disturbed in Spanish territory for their religious opinions, nor for the exercise of their respective worship, except for the respect due to Christian morality.

Nevertheless, ceremonies or public demonstrations other than those of the religion of the State shall not be permitted.

This manifestation of Article eleven established a jurisprudence, which has been preserved almost literally in current Spanish constitutional Law. The second and third paragraphs of article eleven have been incorporated, with very small modifications, into the Spanish Code of Laws ("Fuero de los Espanoles") and to the Concordat of 1953.³¹

According to historians, the wounds caused by the arguments over the subject of religion have still not healed. It has been the cause of great hatred, fights and blood, and inclusive, in part, of what has come to be called the two Spains that is so well expressed by the great poet Machado.

D. *The Fall of the Monarchy*

In 1931, the Bourbon Monarchy fell, and a Republic was installed in Spain. The issue of religion again caused deep divisions both in the Parliamentary assembly and throughout the country. The anti-clerical forces sought to "rule the roost", and held the greater political weight. On the other hand, the right, principally represented by the Basque-Navarres and agrarian forces, were transformed into the champions, for once, of religious freedom. However, their religious concerns revolved primarily around their own partisan interests.

The truth was that religious freedom was not going to be debated. The entire issue was going to turn on the Catholic Church, and the religious orders. There was going to be little objectivity,

31. LUIS SÁNCHEZ AGESTA, *supra* note 18, at 388.

with one side defending the Catholic religion, and the other side mercilessly attacking it. It was not an example of high Parliamentary debate.

The issue of religion remained captured in articles twenty-six and twenty-seven which stated:

All religious faiths shall be considered as associations subjected to a special law. The State, regions, provinces and municipalities shall not support, favor nor economically assist Churches, religious associations and institutions.

A special law shall regulate the total extinction, within a maximum period of two years, of the budget of the clergy.

Those religious orders, which impose by their bylaws, besides the three canonical vows, another special vow of obedience to an authority different than that of the legitimate one of the State shall be dissolved. Their possessions shall be nationalized and given over to charitable and teaching purposes.

The other religious orders shall be subject to a special law voted for by this Constitutional Cortes, and modified to the following criteria:

1. Dissolution of those that, by their activities, constitute a danger to the security of the State.
2. Recording of those religious orders that may remain in a special Registry for which the Justice Ministry is responsible.
3. Inability to acquire and retain, per se or, by a person interposed, more assets than those, which are previously justified as destined for their living or to the direct fulfillment of their own purposes.
4. Prohibition on undertaking industry, commerce or teaching.
5. Submission to all tax laws of the country.
6. Duty to annually reconcile accounts with the State concerning the investment of their assets in relation with the purposes of the association.

The assets of the religious orders can be nationalized.

The final draft of article twenty-seven was as follows:

Freedom of conscience and the right to profess and freely practice whatever religion remains guaranteed in Spanish territory, except for the respect due to the requirements of the public morale.

The cemeteries shall be subject exclusively to civil jurisdiction. There shall not be in the cemeteries a separation of enclosed areas for religious reasons.

All faiths shall be able to carry out their worship privately. In each case, the public expressions of worship must be authorized by the Government.

No one shall be compelled to officially state their religious beliefs.

Religious status shall not constitute a qualifying circumstance of one's civil or political status, except for that set forth in this Constitution concerning the naming of the President of the Republic, and in order to be President of the Council of Ministers.

III. THE FRANCO DICTATORSHIP

The Spanish Constitutions have been, almost without exception, the platform of the political party or group in power and used as an instrument to impose their ideology. Likewise, there have been penular movements or extremism that have come to cause a phenomena of reaction. Consequently, the political-social tensions that had been accumulating during the Second Republic, and that had polarized Spanish society into two large antagonistic and irreconcilable *blocs* came together in Spain in the Civil War of 1936. This was the means by which the dominant power, that was the winner of the Civil War in 1939, totally eliminated the previous legislation and imposed their own. The truth is that, from the start, the struggle was presented as a "National Uprising," and later as a "Crusade". The Civil War became cloaked under a divine invocation. The Spanish people had been given the mission "to go to war" with the new Philistines much like the Jews of antiquity. "The war is not a conflict of a political nature, in the strict sense of the word . . . [i]t is the war that maintains the Christian and Spanish spirit against this other spirit that would want to melt everything human into the mold of Marxist materialism[,]," as Cardinal Goma stated. Within all of this confused setting the controversy between the Spanish Catholic, on the one hand, and the unorthodox the anti-Spanish continued.³²

For all intents and purposes there was no Constitution to speak of during the Franco regime. The Spanish Code of Laws, the Fundamental Laws, were not approved by an independent Parliament elected by the people. The Fundamental Laws essentially replaced the Constitution and became the highest legal authority of this period. Nevertheless, it has to be stated for the record that the decrees of the Spanish Code of Laws were, legally speaking, a simple

32. See IBAN-PRieto, LECCIONES DE DERECHO ECLESIASTICO 53, etc. (Tecnos ed. 1985).

declaration of principles, as their enforcement was not demandable before any court.³³

The sixth article, which followed almost literally the formula of the canonist Constitution of 1876, explicitly affirmed the denomination of the State: "[t]he professing and the practice of the Catholic Religion, which is that of the Spanish State, shall enjoy official protection. No one shall be disturbed as a result of their religious beliefs in the private exercise of their worship; beliefs or external expressions other than the Catholic religion shall not be permitted."^{34 35}

Likewise, the Law of the Principles of the National Movement ("Ley de Principios del Movimiento Nacional") of May 17, 1958, contained in its second article an explicit statement of denomination: "[t]he Spanish Nation considers as a title of honor the observance of the Law of God, according to the doctrine of the Holy Apostolic Roman Catholic Church, one truth, and inseparable faith of the national conscience that shall inspire its legislation."

In the same way, the Spanish Code of Laws fell into what could be called political, or perhaps sociological, doctrinarism, supported by the sociological foundation of Spain, which could have come to respect religious freedom as in the case of the Scandinavian countries. The Law of Principles of the National Movement fell into doctrinal or ideological avowals, which are much more serious and inappropriate, given that the Law bound itself to follow the dictates of the Catholic magisterium and as a result damaged the principle of equality. The problems in this case were much more serious, such as the doctrinal education in all public schools, and at all academic levels, the unilateral religious focus of various political and social issues and the numerous and considerable economic subsidies. Further, the Concordat between the Vatican and the Spanish State, signed in 1953, followed the line traced in these Fundamental Laws, and categorically stated in article one: "[t]he Apostolic Roman Catholic religion continues to be the only one in the Spanish Nation."

Not even the enactment of the Law of Religious Freedom ("Ley de Libertad Religiosa") in 1967 (Law 44, of June 28) sufficiently

33. JORGE SOLÉ TURA, INTRODUCCIÓN AL REGIMEN POLÍTICO ESPAÑOL 34 (Ariel ed. 1971).

34. It was not until January 10, 1967 that, by means of the Organic Law of the State ("Ley Orgánica del Estado"), the second paragraph was changed to introduce what euphemistically was labeled religious freedom, but was nothing other than religious tolerance.

35. It is accurate to say, although again only as a footnote, that other Fundamental Laws ("Leyes Fundamentales") also concerned themselves with the issue of religion. Thus, the Code of Labor Laws ("Fuero del Trabajo") of March 9, 1938 and modified by the Organic Law previously cited, began its preamble stating: "Renewing the Catholic tradition of social justice"

formalized the status of religious freedom.³⁶ From the beginning, that is to say, from the first words of its preamble, it referred to the second principle of the Law of Principles of the National Movement: "according to which the doctrine of the Catholic Church shall inspire in Spain its legislation, and constitutes a sound foundation of the current Law." Later, the fifth paragraph of the same preamble states: "[i]t should be noted that the new draft had previously merited the approval of the Holy See." Nevertheless, with this Law opening up religious tolerance, the cycle was closed for the time being (at least, and it is hoped forever) on the absence of religious freedom in Spain.

IV. TODAY—THE 1978 CONSTITUTION

The political process has been complex, and in a certain way atypical until the Spanish Constitution of 1978. What has come to be called the "transition" of the previous authoritarian system to Western European court democracy has not been anything other than a type of political self-transformation from the previous structures to the current ones.

The complex and difficult cooperation of the transition of the Francoist autocracy based upon seven fundamental laws came into effect at different periods, and was made to measure for the autocrat.³⁷ It produced a democracy compatible with the European community, that had been achieved through the formal utilization of the machinery formed in the Francoist system. The Francoist Cortes "approved the Law of Political Reform, while in Spain the principal political parties of the opposition were recognized, including the Spanish Communist Party, having in this way gone around the serious hurdle that was represented by the reactionary groups, and by some leaders of the Army."³⁸

A key piece of this transition was the Law of Political Reform ("Ley de la Reforma Política"), approved by the Council of Ministers on September 10, 1976. The implementation of this Law would allow the planned and necessary steps to be taken for the reform to continue. Political parties were to be legalized, the National Movement was to disappear and general elections were to be held, which was the principal objective of the Law. Consequently, the previous Cortes, whose Parliamentary deputies were almost entirely hand-

36. Previously the Council of Ministers had rejected a liberal plan of the Minister of Foreign Affairs, Mr. Fernando María Castiella.

37. PABLO LUCAS VERDÚ, *LA OCTAVA LEY FUNDAMENTAL. CRÍTICA JURÍDICO-POLÍTICA DE LA REFORMA SUAREZ 22* (Tecnos ed. 1976).

38. *Id.*

picked, would disappear to be replaced with democratically elected representatives to the Congress and in the Senate.

The Spanish Constitution has often reflected a liberal ideological vein, and has been seen as a champion of freedoms. Freedom is a specific value of the 1978 Constitution that appears within Title I, whose article ten, first paragraph states: "[t]he dignity of the person, the inviolable rights that are inherent to the person, the free development of personality, respect for the law and the rights of others are the basis of political order and of social peace."

Following this constitutional statement respectful of all freedoms and fundamental rights, article sixteen generically guarantees religious freedom, in which is framed religious freedom itself, freedom of conscience, freedom of faith or of beliefs, including ideological. Ideological is a term too broad as to be included in the article dedicated to religious freedom, and placed ahead of other meanings. It states textually:

1. Individual and community ideological freedom, religious freedom and freedom of worship are guaranteed, without any limitations in their expression other than those necessary for the maintaining of public order protected by law.
2. No one shall be obliged to state their ideology, religion or beliefs.
3. No faith shall have a State character. The public authorities shall take into account the religious beliefs of Spanish society, and shall maintain the resulting relationships of cooperation with the Catholic Church and the other faiths.

It should be cause for celebration among the Spaniards that the Spanish Constitution has decided to finally travel the path of non-doctrinairism of the State, and of full freedom for all religions and individuals. However, in order to arrive at the current text, a long road had to be travelled.

A. The Law of Development ("Ley de Desarrollo")

As is mandated in article eighty-one of the Constitution, the development of Article 16 should have been undertaken by means of the Organic Law given that it was fundamental law. This gives the Law of Development a priority ranking in the hierarchy of the sources of legal ordering, which are only subject to the Constitution, of which in many cases these types of laws are a mere extension.³⁹ "The Organic Law of Religious Freedom" ("Ley Orgánica de Libertad

39. JAIME PÉREZ-LLANTADA, *Hacia un análisis jurídico de la Ley Orgánica de Libertad Religiosa*, 6-7 UNED BULLETIN—FACULTY OF LAW, 5-6.

Religiosa") supposes a norm that should define, state clearly and accurately interpret, by the work of the same legislator, the law and fundamental principle that the Constitution expresses and guarantees.⁴⁰ Its full breadth is set upon stating explicitly the bundle of individual and community rights, and its implications in the scheme of "State-Religion" relationships.

The Organic Law 7/80 of July 5 develops the constitutional rule concerning religious freedom, and forms the legal common denominator for all faiths. The first article of the Organic Law collects the constitutional principles concerning this issue, some expressly and others implicitly, which are reaffirmed in duplicate form, as is the case with the principal of state non-doctrinairism.

Furthermore, it is worthwhile to highlight the second section, because it sets forth with complete clarity the rule of nondiscrimination for reasons of religious beliefs: "religious beliefs shall not constitute a reason for inequality or discrimination before the Law. Religious reasons shall not be alleged to prevent anyone from the exercise of any work or activity or the undertaking of public offices or functions."

The right of religious freedom is embraced within the array of fundamental rights recognized by the Spanish Constitution in the second chapter. However, at the same time this right should be framed in the constitutional "portico" that expresses the higher values as a goal towards which the legal order should be directed. Consequently, the rules invoked to regulate the religious act should relates its requirements with article 1.1 of the Constitution.

The second article of the Law of Religious Freedom contemplates the content of the guarantee in its individual and institutional aspects, and those of religious faiths.

The first section primarily contemplates religious freedom relative to the individual, in the internal rules as well as in its external expressions. Likewise, it guarantees the freedom to not profess any belief, of changing one's faith or abandoning that which one had. Equally, it guarantees freedom of worship, in its affirmative as well as its negative aspects, that is to say, practicing the acts of worship and not receiving religious assistance contrary to one's own convictions.

This last incidental clause is of great interest, especially for those persons that find themselves subject to certain rigorous disciplines such as military service, the Forces of Public Order or even residents of a nursing home in which the autonomy of their will is diminished

40. *Id.*

by virtue of the disciplinary character of some institutions. These individuals may be compelled to effect a religious act which is considered by the institution as just another act of the discipline of the institution. For example, to protect militarily a Catholic religious procession or to accompany by escort a religious image. Religious acts are essentially personal acts, and it is in performing them where one may suffer the most significant and radical humiliations. Moreover, the casuistic second article of the Law of Religious Freedom sets forth the possibility of holding a wedding in accord with one's own rites, and of receiving and imparting religious instruction in accordance with one's own convictions.

In addition to these articles, the limits of the exercise of this right is set forth in the subsequent sections of the Law, which should be fully democratic, as well as the legal personality of the religious entities and their autonomy with respect to the State. Nevertheless, with respect to community rights, the second article recognizes the power to establish places of worship or of meeting, the right to designate and train their own ministers, as well as the right to disclose and spread their creed and the ability to maintain the relationships with their own organizations or with other faiths within and outside of Spain.

Likewise, the Law provides for the recording in a special Registry as an instrument of qualification of religious faiths, and at the same time as a secure, probative and favored method. Once recorded, the State grants the religious faith full autonomy, legal personality and an ability to legally establish relationships with the State.

B. The System of Cooperative Agreements with the Catholic, Protestant, Jewish and Muslim Faiths

The first of these Cooperative Agreements approved was with the Catholic Church in January, 1979. Following that Agreement, a considerable time went by until agreements were reached with the Protestants, Jews and Muslims, which were likewise embraced by means of Law in 1992.

These four Agreements, as has been said, are contained within the Spanish legal rules as ordinary laws, and have similar contents. Although, greater strength was given to the Catholic Church by virtue of its sociological weight.⁴¹

41. 1. Places of worship: all places of worship belonging to these four faiths enjoy inviolability; the police not being allowed to penetrate them without a judicial order or with the permission of the ecclesiastical authorities.
2. Ministers of worship: Said laws define what is considered a minister of worship, granting this protocol to those persons whom dedicate

V. CONCLUSION

There has been no constitutional resolution to the outstanding issues concerning religious freedom in Spain, nor has there been any important judgment handed down with respect to religious freedom. Spain is undergoing a stage of interpretation and development of these laws. Consequently, a perspective of at least five years will be necessary in order for the Courts, and especially the Constitutional Court, to hand down any judgment relative to conflicts that may arise concerning this issue.

themselves full time to the service of the church, are compensated by the church and at the same time obtain a certificate from the church or religious faith which considers such persons as ministers of worship. They have the right to the privilege of professional confidence, protected from being forced to reveal those things that have been revealed to them in the exercise of their ministry. They should be able to undertake military service in positions that are compatible with the status of ministers of worship, and they also have the right to all the benefits of social security.

3. Marriages: The ministers of these faiths may solemnize religious marriages with a civil validity. All marriages celebrated as such shall be recorded in the corresponding civil registry.

4. All persons belonging to any of these religious faiths, with a military status, have the right to enjoy the time necessary to attend the religious services of their faith. These religious services shall be celebrated by ministers of worship assigned by their respective faiths.

5. The right to be attended to by a minister of worship of one's own faith is guaranteed in hospitals, prisons and other similar institutions, without limitations on time, though respecting in all cases the internal rules of said institutions.

6. The right to obtain religious education in public schools prevails in accordance with one's own faith. The hours that are dedicated to religious instruction shall be imparted by teachers designated by each church or faith. The textbooks for religious instruction shall be prepared by each church or faith. The public schools shall supply adequate classrooms for this type of instruction.

7. Likewise, the churches and faiths may establish high schools, colleges, universities and theological schools.

8. Churches and faiths are exempt from taxes, with respect to all buildings destined as churches, offices, seminaries and houses of ministers of worship. Likewise, they can organize collections in the public thoroughfares, and the money given by members to their respective churches may be deducted from that individual's annual taxes.

9. Finally, Jews and Seventh Day Adventists shall have Saturday as a religious holiday and Muslims shall have Friday. In addition to these days, certain special holidays are recognized for Jews as well as for Muslims, all of which are set forth in their respective laws.