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This volume brings together the proceedings of the Firts Congress organized by European Research Consortium on relations between States and religious confessions.

The proceedings of the Second Congress, which took place in Brussels-Louvain on December 7th-8th 1990 have also published in this series, while the papers read at the Third Congress (Augsburg, November 29th-30th 1991) are being published.

The Consortium, which was set up on December 12th 1989, with headquarters at the Istituto di Diritto internazionale *of the University of Milan, is run by the President and the Executive Committee.*

The Consortium promotes the development of studies on ecclesiastical law and relations between States and religious confessions in Europe. In particular, the Consortium seeks: to promote collaboration between Universities and other European cultural institutions which carry out research activity in this field; to make funds and research instruments available to members of the Consortium and young scholars; to encourage meetings and facilitate contacts between scholars (including non members) from European countries; to facilitate cooperation in research development and specialization courses; to provide consultation and collaboration services for both State and private corporations, whether national or international, as regards institutional activities relating to the Consortium (Art. 2 Statute).

The Consortium's research goals have led to provision that there should be at least one member for each European Community country, with an overall total of 30 members. So far, Professors from Universities in Belgium, France, Germany, Great Britain, Greece, Ireland, Italy, Holland, Portugal and Spain have decided to take part.

The Consortium is an associate member of the International Social Science Council with headquarters at UNESCO, Paris.

The next Congress will be held in Madrid in November 1992 and will be dedicated to the theme "Labour Law and the Religious Factor". The yearly Congress for 1993 is planned to be held in Greece.

THE EXECUTIVE COMMITEE

INDEX

CHARALAMBOS K. PAPASTATHIS, *State financial support for the church in Greece* .. 1

ISIDORO MARTIN SANCHEZ, *The financing of religious confessions in spanish law* .. 19

PAOLO MONETA, *Le financement public des églises en Italie* 41

ALEXANDER HOLLERBACH, *Finances and assets of the churches Survey on the Legal Situation in the Federal Republic of Germany* 57

DAVID MCCLEAN, *State financial support for the church: the United Kingdom*..... 77

ISIDORO MARTIN SANCHEZ, *Freedom of education and the religious factor in spanish law* 85

JORGE MIRANDA, *Confessions religieuses et liberté d'enseignement au Portugal*... 105

SALVATORE BERLINGÒ, *Question scolaire et facteur religieux en Italie* 121

BRIGITTE BASDEVANT-GAUDEMET, *Le régime juridique de l'école privée et les aumôneries de l'enseignement public en France* 139

ALEX FRHR. V. CAMPENHAUSEN, *State, school and church in the federal Republic of Germany* 171

JOHN M. HULL, *Church-related schools and religious education in the publicly-funded educational system of England* 181

MR. FOKKO T. OLDENHUIS, *The relation between canon law and civil law* 201

JOSE MARIA GONZALEZ DEL VALLE, *Conclusions* 207

CHARALAMBOS K. PAPASTATHIS
Faculty of Law. University of Thessaloniki

STATE FINANCIAL SUPPORT FOR THE CHURCH IN GREECE

The financing of Churches and religions by public funds is operated in Greece through direct and indirect economic supply, tax exemptions and other facilities (1). The Orthodox Church benefits of financing; of tax exemptions and other facilities the Orthodox Church as well as any "known" (in the sense used by the Constitution) (2) Christian denomination and religion.

I. THE ORTHODOX CHURCH ENJOYS A PRIVILEGED CONDITION IN THE GREEK STATE.

One of the consequences thereof is that many of its financial needs, as well as those of the Orthodox clergy, are covered by the State. This favourable treatment results from many and various reasons.

To the Orthodox Church belongs the vast majority of the Hellenes (96%). At the same time it is a national Church; it has identified with the struggle and survival of the nation over the period of the Ottoman Rule, which in some parts of Greek historical space has

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(1) The present paper is updated with facts until 1989. Abbreviations: D. = Decree; F.L. = Forced Law; L. = Law; L.D. = Legislative Decree; P.D. = Presidential Decree; R.D. = Royal Decree. Average rate in Greece: 1 U.S = *140.20 drs. in 1986; 135.45 drs. in 1987; 141.21 drs. in 1988; 160.95 drs. in 1989, and 158.26 drs. in 1990.*

(2) Art. 13, paragr. 2: "Any known religion is free, and its worship may be practiced without hindrance under protection of law". Known means that the principles of this religion or denomination cannot be secret; they must be freely available to anyone, AN. MARINOS, Greece's New Constitution, "Liberty" 71/n. 6 (Nov. Dec. 1976) 17.

lasted as late as the first decades of the 20th century. In itself, the Orthodox Church has proven an important factor in the conservation of the traditional values and the support of the ethnic identity of the Hellenes; both aims being of outmost importance for a small nation with hardly any affinities of race and language with other peoples. Moreover, the Orthodox Church operates as a link of the emigrants to their fatherland. To ten million Hellenes of Greece correspond four million Hellenes of first and second generation scattered all over the world; the Diaspora.

For them, the parish church is the centre of their community life. Nonetheless, historical centres of Christianity, such as the Patriarchates of Constantinople, Alexandria and Jerusalem, as well as the St. Caterine's Monastery on Mount Sinai, conserve for over 1500 years their Greek profile (3).

To these reasons we may also add others, such as the political process in the frame of the parliamentary system. The votes of a part of the electoral body can be easily influenced by the policy of the various parties towards the Church and its ministers. Also, during the civil war (1946-1949) and the period that followed, the "ideological orientations of Christian-Greek culture" dominated the Greek State and society (4) (article 14 of the Constitution of 1952).

Thus, there is a strong connection between Orthodox Church and nation, people and State, which accounts for the political determination of Greek governments to finance (directly or indirectly) the Church. This connection is expressed in the Constitution, and the legislation as well, both as regards the juridical position of the Church in Greece and the system that governs its relations to the State.

(3) See ST. RUNCIMAN, *The Great Church in Captivity*, Cambridge (Univ. Pr.) 1968; L.A. MISSIR, *Eglises et Etat en Turquie et au Proche-Orient*, Bruxelles 1973; CH. FRAZEE, *The Orthodox Church and Independent Greece, 1821-1852*, Cambridge (Univ. Pr.) 1969.

(4) For some indicative facts, see CHR. GIANNARAS, Καταφύγιο Η\δεῶν, Athens (Domos) (1987); S. AGOURIDIS, Η Εκκλησία μετά τον ψυχρό, πόλεμο newsp. "Ελευθεροτυπία" 16.7.1990.

II. THE STATUS OF ORTHODOX CHIRCH:

The system governing Church and State relations in Modern Greece is that of the supremacy of state law (Staatskirche), in its more specific form, which is called in Greece "Σὐστημα νόμῳ κρατούσηδ πολιτείαδ", i.e. the system of "State-law rule" applied since 1833. The ecclesiastical issues are regulated by State legislation, the competence of which extends to the point of regulating internal matters of Church administration. Today, this jurisdiction of the State is founded upon art. 72, § 1 of the Constitution (1975), stipulating that on matters provided in art. 3 (= Orthodox Church) of the Constitution, Parliament may pass laws in plenary session only, and not in its sections (5).

All the Greek Constitutions, from those drafted during the Revolution of 1821 to the present one (1975), declare the Orthodox Church as "predominant". Essentially, as regards the object of this paper, this term means, according to Greek legal theory and jurisprudence, that:

1. The Orthodox Christian faith is the official religion of the Greek State,
2. The Church organisation expressing this doctrine is a legal person of public law,
3. The State is obliged to secure the Orthodox Church a propitious treatment, and
4. The State may grant the Orthodox Church financial and moral aid, without this being considered a violation of the constitutional principle of equality.

(5) See J. KONIDARIS, Die orthodoxen Kirchen in Griechenl and nach der neuen Grundgesetzgebung, "Zeitschrift für evangelisches Kirchenrecht" 23 (1978) 189-201; PH. SPYROPOULOS, *Die Beziehungen zwischen Staat und Kirche in Griecheland*, (Athen) 1981; G. VLACHOS, *Eglise et Etat en Grèce, "Conscience et Liberté"* 32 (deux. sem. 1986) 88-98; SP. TROIANOS, Ο χωρισμός πολιτείας και Εκκλησίας στο Σύνταγμα του, 1975, "Δίκαιο και πολιτική", 15 (1988) 53-59; CH. PAPASTATHIS, Σχέσεις Εκκλησίας και Πολιτείας κατά το Σύνταγμα του, 1975, "Δίκαιο και πολιτική", 15 (1988) 61-84; V. PARLATO, *Confessionismo e giurisdizionalismo nella Grecia degli anni '80*, "Quaderni di diritto e politica ecclesiastica" 5 (1988) 182-202; AN. MARINOS, *Les relations entre l'Eglise et l'Etat en Grèce pendant le 19em et 20em siècles*, "Kanon" 10 (under print).

This special treatment and financial aid:

1. Concern the Church both as a whole and as a separate legal person of public law (metropolises, parishes, monasteries, ecclesiastical foundations), and not the individual faithful,
2. They must not be directed, through corresponding legal provisions, against other religions and Christian denominations, or against their cult,
3. They must not be contrary to prohibitive or mandatory provisions of the Constitution, and
4. They concern initially the Orthodox Church in Greece. The State has, nevertheless, the facility to extend these measures in favour of the Orthodox Patriarchates of the Middle East and the Orthodox Greek Churches of the Diaspora, as well as in favour of the other "known" (in the sense applied to the term by the Constitution) religious denominations in Greece.

We must explain here the term "Orthodox Church in Greece" (6).

This term is used here because there is no single administration for the Orthodox Church in the whole Greek territory. The Archbishopric of Athens together with the 42 metropolises of Sterea Hellas (Roumeli), the Peloponnesus, the Cycladic and Ionian Islands, Thessaly and the province of Arta in Epirus form the "Autocephalus Church of Greece". The 35 metropolises of Macedonia, Epirus, Thrace, Aegean Islands and the province of Elasson in Thessaly form the Church of the so-called "New Provinces", which is under the spiritual jurisdiction of the Oecumenical Patriarchate of Constantinople, though administratively united to the "Autocephalus Church". Both Churches form the "Church of Greece", governed by the Holy Synod, as supreme administrative body, which has its see in Athens. The Charter of the Church of Greece is contained in the Law 590/1977.

The Archbishopric of Crete and the 7 metropolises form the "Church of Crete", which is under the jurisdiction of the Patriarchate

(6) See C. VAVOUSKOS, *Church and State in Modern Greece. A review article*, "Balkan Studies" 9 (1968) 211-212.

of Constantinople and semi-autonomous toward the latter as regards its administrative jurisdiction. The Holy Synod of the Church of Crete has its see in Heraklion, and its Charter is contained in Law 4149/1961.

The four metropolises of the Dodecanese Islands and the Patriarchal Exarchate of the island of Patmos are under the full jurisdiction (bith spiritual and administrative) of the Ecumenical Patriarchates of the Constantinople. Last, the peninsula of Mount Athos, with its 20 monasteries, has a regime of self-administration as regards both the Ecumenical Patriarchate and the Greek State, while it comes under the spirituals jurisdiction of the Patriarchate. The special privileged status of Mount Athos is based upon article 105 of the Greek Constitution, the public international law and its own Charter, which is drafted and voted by the Holy Community of Mount Athos itself, then sanctioned by the Oecumenical Patriarchate and the Greek Parliament. Its Charter is in force since 1926, sanctioned by the Decree of 10/16.9.1926 of the Greek State.

III. AS IT WAS MENTIONED ABOVE, THE FINANCING OF CHURCHES AND RELIGIOUS DENOMINATIONS BY PUBLIC FUNDS TAKES PLACE IN GREECE THROUGH:

- direct subvention for the Orthodox Church for its various needs,
- payment of the salaries of the clergy (metropolitans-bishops, parish priests, deacons), the preachers and lay employees of the same Church,
- tax exemptions
- various facilities granted by the State and public organisations that involve financial cost.

The above subventions, whatever form they may take, are not granted only by the Ministry of National Education and Cults (competent for the cults in Greece) and by the Ministry of Foreign Affairs (competent for Mount Athos and the Greek Churches abroad), but also by other ministries, prefectures, state legal persons, public services and various organisations.

IV. Direct subventions for the need of the Orthodox Church:

1. A yearly subvention granted to the "Apostoliki Diakonia of the Church in Greece", which is responsible for the missionary and cultural activities of the Church, under the Forced Law 976/1946, article 24, paragraph 1, verse 8. By a recent law (Law 1155/1981, article 7), the amount of this subvention was fixed at 15.000.000 drachmas. This sum, however, may be increased or diminished through a joint decision of the Minister of Education and Cults and of the Minister of Finance. In 1989, this subvention amounted to 4.500.000 drachmas, inscribed in the budget of the Ministry of Education and Cults.
2. A yearly subvention inscribed in the budget of the same Ministry granted to the cathedral of Athens (L. 2844/1954). In 1989, this amounted to 10.000.000 drachmas.
3. The budget of the Ministry of Education and Cults is charged with all the expenses of ecclesiastical education, i.e. 18 schools all over Greece (7). Ecclesiastical education until 1971, was part of public education. At that precise year it was handed over to the Church, but as the latter could not afford the operational costs of ecclesiastical education, it came back over to the State in 1976. The total cost of ecclesiastical education is estimated for 1989 to 612.491.000 drachmas and is solely at the expense of the State (8). It must be stressed that the State pays a normal rent to the Church for any buildings, belonging to the latter, that are used for ecclesiastical education. Thus, in 1987, the State paid the amount of 7.344.000 drachmas to several metropolises as rent for leasing buildings belonging to the latter, which were used for ecclesiastical education in their diocese. The same happens with the building used for the control services of the Ministry of National Education and Cults in Athens.
4. Except ecclesiastical education at home, various laws provide funds for ecclesiastical educational centres abroad. Thus, the Patriarchal Centre for post-graduate studies at Chambésy in Switzerland (L. 476/1986, art. 4, par. 4), the Patriarchate of Jerusalem and the Monastery of Mount Sinai (L. 590/1977, art. 1, par. 1 & 3) for the foundation of specialized schools, are entitled to such funds.
5. A recent agreement between State and Church provides that, monasteries that will cede to the State forest and pasture land, shall receive yearly a special subvention (L. 1811/1988). For 1989, this would amount to 165.590.000 drachmas. This agreement, however, has not yet begun to be applied.
6. As it has been mentioned, the direct subventions to the Church are not only at the charge of the Ministry of Education and Cults and of Ministry for Foreign Affairs (Mount Athos and Hellenic Diaspora). There are parallel and substantial subventions from other sources. These are funds contained in the State budget in expenses for social welfare program, or for welfare foundations, or even for a given State authority whose chief may grant these funds according to his own judgement. That is why this type of subventions cannot be fixed or estimated in advance.

From what items were available, we may indicate here certain grants. Some prefectures subsidize nursing homes for elderly people sponsored by the Church from public funds available for the protection of elderly people; these sums amounted in 1985 to 16.695.000 drachmas and in 1986 to 24.057.100 drs. The Department for Child Protection of the Ministry for Health and social Welfare, subsidizes foundations and activities for the children sponsored by bishoprics; these particular subsidies amounted to 6.470.000 drs. for 1985 and to 7.550.000 drs. for 1986. The same Ministry had granted, until 1986,

(7) The two Faculties of Theology in the Universities of Athens and Thessaloniki are not included in this number.

(8) 830.000.000 and 854.280.000 drs. were inscribed in the budget of the Ministry of National Education and Cults for the years 1990 and 1991 respectively.

the sum of 108.000.000 drs. to the Archbishopric of Crete for the children's hospital in Heraklion, that was then being built by the Archbishopric. Later, it was decided that the hospital should be taken over by the State, because the Church was unable to support it.

The case of the "Nursing Foundation of the Church in Greece", i.e. the hospital for the Orthodox clergy, is a typical example. The Church of Greece founded this hospital in 1968, as a legal person of private law, and was its exclusive property which the Church would support with own financial means. During the period 1979-1984 the State granted a large subvention, amounting to the sum of 792.086.000 drs. The Church, however, being unable to cover the operational costs, offered to concede the hospital to the State. The concession took place (P.D. 124/1985) and the State paid the debts of the hospital amounting to almost 500.000.000 drs.

The Ministry of Culture, in its programme for the conservation of monuments, regularly includes many churches and monasteries of historical and artistic value which are being used for the cult. The yearly total expenditure can not be however assessed. In the same way, the grants given to the Church by various public authorities, from funds that they freely administer, cannot be estimated. Typical examples would be those of two churches in Macedonia recently: 500.000 drs. were granted to a village parish for the publication of the vita of the local patron Saint. 50.000.000 drs. were given to the Church of Saint Dimitrios, – the wealthiest church in Thessaloniki –, for the paving of its yard.

According to the respective laws, the profit of the various public lotteries is given to social welfare foundations. Among the 152 such foundations, to which the profits of the "Special State Lottery" (F.L. 143/1967) of 1988 were given, the 67 were monasteries, metropolises, parish churches and one private society of ecclesiastical choirs. It is notable that this distribution of the profit has been condemned by the Press (9).

(9) "Μακεδονία" 12.4.1990; G. Lakopoulos, in "Το βήμα" 23.12.1990.

V. Remuneration and old-age Pension of Clergy.

1. *Remuneration of Parish Priests and Deacons.*

The income of the clergy always came from the parish and the faithful. After the liberation of Greece, the Church had always sought to hand the regular remuneration of the clergy over the State, in the hope that a financially secure future would encourage young people who had the vocation to enter the ranks of the clergy. This goal was achieved through the F.L. 536/1945, according to which the State took the responsibility of paying salaries to the parish priests of the Church of Greece. To fill somehow the gap that this would cause to the State budget, it was provided that certain income sources of the Church would go to the State. These sources were the 25% of the gross collections realized by parish churches and a contribution paid by the Greek citizens to the public treasury. This contribution was abolished, and the F.L. 469/1968 increased the former 25% rate to 35%. From this percentage exemptions are those grants to the Church for a specific purpose, as well as the amount received from sails of parish real estate. The above contribution, however, covers a very small portion of the total expenditure for the salaries of the parish clergy. For 1989, the sum corresponding to the 35% of the income from this source (parish churches' collection) was estimated at 500.000.000 drs., while the total cost of parish priests' remuneration (and of deacons as well) at 14.700.000.000 drs., which are at the charge of the Ministry of Education and Cults budget.

At the same time, 820 new posts for deacons were created, in the Church of Greece, 90 in Crete and 25 in the Dodecanese Islands, (D. 1398/1973 and D. 1399/1973), posts remunerated by the State.

Since 1945, the relevant legislation was more than once modified and completed. Its enforcement was extended to the parish priests of Crete and the Dodecanese Islands. At present, the remuneration of parish priests and deacons, all over Greece, is governed by L. 1505/1984 which concerns the remuneration of the civil servants.

The parish priests and deacons are divided into four categories, according to their level of education (elementary, secondary, college and university study level). Apart from their salary they are entitled to various allowances according to: their seniority; their family status; for differences in the pay-roll; for Christmas, Easter and summer vacation. They are also entitled to a quantified readjustment of salary based upon the cost of living rate. Those who have a post-graduate study or a Ph.D. degree are entitled to relevant allowances too (10).

According to the available data of March 1987, there were 8.532 parish churches all over Greece, and were remunerated:

Level of education	Priests	Deacons
University (4 years)	1.556	89
College (3 years)	2.070	352
High school (6 years)	2.215	171
Elementary school (6 years)	3.132	180
	8.973	792
	total 9.765	

In conclusion, each priest or deacon receives thus from the State, in 1989, an average annual salary of 1.505.376 drs. (= 9.354 U.S. $).

The priests, as well as the prelates have also personal income from the people for the various sacraments and ceremonies. If the faithful willingly ask them to perform a ceremony (e.g. blessing of a house etc.), this income has tax exemption (11). On the contrary, there is no tax exemption for their income from the parish church for various ceremonies performed in church, such as religious marriages (till 1982 the religious marriage was the only legal one for the Greek citizens), baptisms, funerals, masses etc. (12).

(10) See Sp. Troianos, Παραδόσεις Εκκλησιαστικού Δικαίου, Athens-Komotini (Sakkoulas) 2984, 383-385.

(11) According the decision 106/1962 of the Preliminary Taxation Court of Patras, "Νομικόν βήμα" 12 (1964) 289 ff.

(12) Decision 6530/1964 of the Preliminary Taxation Court of Athens, "Νομικόν βήμα" 12 (1964) 1106 ff.; Sp. Troianos, *op. cit.*, 400-401.

The priests that serve at cemeteries (L. 547/1977, art. 2, paragr. 3), hospitals (L.D. 3097/1954, art. 13) and various educational and charitable legal persons of public law, are remunerated by the respective Municipality, hospital and legal person accordingly in a similar to the previously mentioned way. Those serving at the Religious Service of the Armed Forces and the Police have army ranks and are remunerated accordingly as officers. All the Orthodox clergymen in Greece have health and social security from the "Clergy Security Fund of Greece", to which the State deposits the employer's quota (14% of each clergyman total State emoluments). Lately, the State and Church Committee (1988) (13), which has drafted a new Charter for the Church of Greece, suggested that the above Security Fund must be taken over by the State, and thus the pensions of clergymen be paid by the Public Treasury.

A great number of priests and deacons (about 3.000) have a second employment (in the public or private sector), such as school teachers, secretaries in local Communities, employees in ecclesiastical organizations and legal persons etc. Under L. 1256/1982 and L. 1400/1983, the question of whether these clergymen were entitled to receive full emoluments from their second employment was raised. The "Council of State" (=Administrative Supreme Court of Greece) had decided positively, founding its considerations on the principle of religious freedom (14). Recent legislation (L. 1810/1988, art. 11) has set matters in a slightly different way, providing that the priest holding his second public employment receives the full emolument from his second post, but for his parish service is entitled only to the basic salary and the seniority allowance. If he is employed in the private sector (e.g. teacher in a private school), he is entitled to full emoluments for his parish service but only the basic salary and the seniority allowance from his private post.

(13) Art. 10, paragr. 2 of the draft. See the text in the review "Χριστιανόδ", fasc. 289 (Jan.-March 1989) 27-42, (art. 10 in p. 36). For the Committee: J. Konidaris, Ο νόμος 1700/1987 και η πρόσφατη κρίση στις σχέσεις Εκκλησίας και Πολιτείας, Athens (Sakkoulas) 1988, 201.

(14) Council of State (3rd Depart.) 4045/1983. Evolution of the Jurisprudence: 2715/1984 (3rd. Depart.), 1030/1985.

2. *Remuneration of Prelates.*

The remuneration and pensioning of prelates (metropolitans and bishops) by the State began with the Legislative Decree 295/1969, which concerned the metropolitans of the Dodecanese Islands, and has gradually expanded since. The law actually in force (1041/1980) provides that the State Treasury is in charge of the remuneration and health care of all the prelates of the Church of Greece (whether they are metropolitans or not, in service or retired). Their emoluments correspond to those of the Counsellors of the State, and the Archbishop's to those of the President of the Council of State (L. 590/1977, art. 32, paragr. 1). The same situation is in force for the Archbishop and the prelates of Crete (R.D. 257/1968, art. 2; L.D. 4589/1966, art. 6; L. 449/1976, art. 2; L.D. 986/1971, art. 1) (15). The relevant expense, for 1989, in the budget of the Ministry of Education and Cults amounts to 341.166.000 drs.

3. *Remuneration of Preachers.*

Under L. 817/1978, art. 25, seventy posts for preachers, – which are remunerated by the State –, were created. The recent L. 1811/1988, provides that the State took charge of all the preachers that were remunerated by the "Organization for the Administration of Church Property". For the rest, what has been said for the parish priests is valid also for the preachers.

4. *Remuneration of Russian Priests.*

The State grants the "Organization for the Administration of Church Property" a yearly subvention for the remuneration of the priests of the Russian Church of Athens (F.L. 2200/1940, art. 72, paragr. 1; L. 746/1943; L. 1675/1944; Regulation of the Church of Greece n. 17/1971, art. 1). In 1989, this sum amounts to about 1.500.000 drs.

(15) Sp. Troianos, *op. cit.*, 382.

5. *Remuneration of Church Employees.*

There exist 160 posts of lay employees for the Church of Greece and 35 for those of Crete and the Dodecanese Islands, that have been created by law and are remunerated by the State Treasury (L. 1476/1984, and P.D. 225/1985). Their emoluments correspond to those of the civil servants (L. 1505/1984).

6. *Pensioning of Monks.*

The monks and nuns who also engage in agricultural work (almost all of them do in Greece) are insured at the "Organization for Agricultural Insurance" (L. 4169/1961), which provides for their health care and old age pension.

VI. Tax and other exemptions.

At various times, many and large tax and other exemptions have been instituted for the benefit of religious legal persons (whether they are Orthodox or not, of public and private law), such as bishoprics, churches, monasteries, church welfare or cultural foundations, even non profit associations and foundations that pursue religious or welfare activities. The same is valid for Mount Athos, the Mount Sinai Monastery, and the Holy Sepulchre in Jerusalem. The amount of money that would have otherwise been collected by the State treasury can in no way be established. It is assumed to be very high, since the real estate property as well as, in general, the income of the various religious denominations and of the Orthodox Church in Greece are considerable. These exemptions, at 100% rate, include:

1. The real-estate tax (L. 1249/1982, art. 21. paragr. 2, verse 3 and 11).
2. The real-estate income tax (L.D. 3843/1958, art. 6, paragr. 1, as modified subsequently).
3. The tax on real-estate transfer at 50% rate if the vendor or the purchaser is one of the above mentioned legal persons, and at a 100% rate if both parties belong to the above (L.

1587/1950, art. 4, paragr. 1, B, verse 6, and art. 6; L. 590/1977, art. 48, paragr. 1; written counsel n. 252/28.3.1989 of the Jurisprudence Direction of the Ministry of Finance).

4. The tax on donations of movables and real-estate property (L.D. 118/1973, art. 43, paragr. 1, verses 1 and 3).
5. The inheritance tax (L.D. 118/1973, art. 25, paragr. 1, verse 2).
6. Import taxes on items sent gratis from abroad to the Church of Greece (L. 590/1977, art. 48, paragr. 2).
7. Municipal and community taxes filed for monasteries and the "Organisation for Administration of Church Property" (L.D. 3432/1955, art. 17, paragr. 1).
8. The same are exempted from the obligation to use tax and judiciary stamps (L. 1007/1943, art. 3).
9. Also, donations (real property or money) to churches, monasteries on Mount Athos or other legal persons of public law (monasteries included) are deducted from the donor's income tax (P.D. 129/1989, art. 8, paragr. 5, verse 4; Decision of the Ministry of Finance 1105403/2049/A0012/3.10.1989).
10. Are not subject to taxation revenues from the exposition of holy relics for worship in Churches (Regulation of the Church of Greece n. 2/1969, art. 55), revenues from collections carried for the purpose of building or repairing churches (Regulation n. 8/1972, art. 17, paragr. 1), and the product from the sale of valuables belonging to the Church (art. 5, par. 3 of the same Regulation).
11. The stamp-free official correspondence inside Greece of the Holy Synod and the bishoprics of Crete (L. 4149/1961, art. 15). The Board of Administration of the Hellenic Post has decided (Decision n. 231/113/1.12.1980) that all the official correspondence of ecclesiastical authorities will be free of charge.

VII. Mount Athos.

The Holy Mountain has always enjoyed a privileged status, which is enforced by art. 105 of the Constitution and by public international law (16). This status, – as regards tax and customs duties exemptions, as well as the right of establishment in the peninsula –, has been also recognized in the Joint Declaration n. 4 of the Accession to European Communities of the Hellenic Republic. Besides the exemptions mentioned above in part VII, the subventions to and the special exemptions of Mount Athos are the following:

1. A yearly financial aid. In 1924, some 200.000 acres of land, which belonged to monasteries of Mount Athos, had been expropriated in Chalkidiki to the benefit of refugees from Asia Minor. The Greek State did not have the possibility to pay indemnities to the monasteries. Thus, a yearly subvention was agreed upon. The recent Law 1166/1981 provides that this subvention can be no less than 30.000.000 drs. yearly. In 1988 this sum amounted to 130.000.000 drs., which was distributed among the twenty monasteries.
2. Law 1198/1981 was instituted the public "Centre for the Preservation of the Mount Athos Heritage" in Thessaloniki, which carries out various works on the Holy Mountain. In 1989, its budget amounted to 120.000.000 drs.
3. Fishing in the sea surrounding the peninsula is of tax free, provided that it is carried for the daily needs of the monks (Charter of Mount Athos, art. 170).
4. Products exported from Mount Athos are free of export-tax (Charter of Mount Athos, art. 168).
5. The import of goods for the use of the monks (up to a certain value) is not subject to customs duties (L.D. 10/16.9.1926, art. 2, verse 1).
6. Goods produced in the peninsula are exempted of all taxes (L.D. 10/16.9.1926, art. 2, verse 2/1), as well as

(16) See Dom. Ir. Doens, O.S.B. Ch. Papastathis "Νομική βιβλιογραφία 'Αγίου "Ορους, 1912-1969", Μακεδονικά, 10 (1970) 191-242.

7. The transfer of property and the revenues of the monasteries and monks (inside the peninsula), (L.D. 10/16.9.1926, art. 2, verse 2/2).
8. The monks are exempted of the consumption tax on goods produced and consumed in Mount Athos (L.D. 10/16.9.1926, art. 2, verse 2/3).
9. Deeds for the concession of rights on land in the peninsula are exempted of stamp-duty (L.D. 10/16.9.1926, art. 2, verse 2/4).
10. The Holy Community and the monasteries do not pay the employer's quota to the various Social Security Funds for the lay employees at their service (L. 1759/1989, art. 4, paragr. 1) (17).

VIII. Economic Facilities.

To this category belong various facilities and measures in favour of the Church, in general, of a greater or lesser economic importance, such as:

— The inalienability of real property in Greece belonging to the Orthodox Patriarchates of the Middle East (Alexandria, Antioche, Jerusalem), to the Monastery of Mount Sinai, and to the monasteries of the Ecumenical Patriarchate in Greece (Monasteries of Saint Ioannis Theologos in Patmos, Vlattadon in Thessaloniki and Saint Anastassia in Chalkidiki), according to art. 18, paragr. 8 of the Constitution (18).

— The recognition of the whole peninsula (and coast) of Mount Athos as territory belonging exclusively to its 20 monasteries (art. 105, paragr. 2 of the Constitution).

— The fact that the real property of all monasteries in Greece cannot be usucapted by third parties (L.D. of 22.4.1926).

(17) See Ch. Papastathis, Η ειδική νομική μεταχείριση των Αγιορειτών, Thessaloniki (Kyriakidis Bros) 1988, 75-86.

(18) Ch. Papastathis, Το αναπαλλοτρίωτο υπέρ των πρεσβυγενών Πατριαρχείων, "Χαριστέον Σεραφείμ Τίκα, 'Αρχιεπισκόπῳ 'Αθηνῶν και πάσης 'Ελλάδος", Thessaloniki 1984, 515-530.

This provision has been extended to the real property owned by Roman Catholic monasteries, by a decision of the Court of Appeal of Thessaloniki (1161/1983).

— The discount on domestic airlines' fares, that civil servants enjoy, has been extended in favour of the metropolitans, by decision of the Board of Olympic Airways.

— According to L.D. 3485/1955, all the consumers of electricity in the city of Patra are obliged to pay every month with their bill note a contribution for the construction of the Cathedral of Saint Andrew (local patron Saint). This provision was considered as unconstitutional by the district court ("juge de paix") of Patra (261/1983).

— Various facilities furnished by local authorities, as for example trucks that military units make available for transportation of children vacation camps organized by the Church; the financial aid that prefectures give for religious conventions; the "Organization for the Management of Public Goods" transfers cars to metropolises tax and duty free, etc.

IX. Epilogue.

From the data presented above, it is evident that in Greece the Church has handed over its financial problems to the State, in spite of the former's vast property and large revenues both from its own estate and its flock.

This situation exists and develops, regardless of what the Holy Canons provide, and the actual mission of the Church dictates. It is impossible to asses accurately the total sum of State subventions to the Church. For the year 1989 the Ministry of Education and Cults budget has items for 17.172.747.000 drs. (salaries, ecclesiastical education and many other subventions) (19). Estimating the other direct and indirect subventions granted by other ministries and public services, we could perhaps evaluate them approximately at more than 32.000.000.000 drs. (=199.000.000 U.S. $) for 1989. In the past, the

(19) 21.830.000.000 drs. and 24.304.280.000 drs. for the years 1990 and 1991 respectively.

reason given for the financial aid was that a large part of Church property had been transferred to the State. This argument, however, is obsolete, because the expropriated Church property has been paid off long ago by the State subventions. The essential facts that we should bear in mind are: 1. The Church itself asks for more subventions from the State, 2. The extensive financing of the Church began right after World War II and the Civil War, 3. The financing is gradually increased and extended (e.g. the Committee that drafted a new Charter of the Church of Greece suggested that 1.000 posts for choirs in parish Churches be remunerated by the State), and, 4. All Greek governments up till now have favoured the subventions to the Church.

In any case, and regardless of the reasons, the factors and the calculations that have led the State to secure and preserve this privileged status for the Church, the cost is comparatively enormous for a country that strive to develop its economy. On the other hand, serious objections have been raised to this situation even by ecclesiastical personalities (20). According to these, the full subvention of the Church by the State is absolutely against the Holy Canons, it has communicated to the clergy the mentality of State employees, it has changed the Orthodox Church in Greece into a State agency, and last the number of qualified people attracted to the clergy for a financially secure future has remained very low. According to the above opinion, the revenues from the estates of the Church, – which now remain largely unexploited –, and from a well organized Congregation could cover all the economic needs of the Church.

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(20) See AUGUSTINOS KANTIOTIS (metropolitan of Florina), Τὸ οἰκονομικὸν πρόβλημα τῆς Ἐκκλησίας τῆς Ἑλλάδος εις περίπτωσιν διωγμοῦ ἢ χωρισμοῦ, Athens 1987.

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THE FINANCING OF RELIGIOUS CONFESSIONS IN SPANISH LAW

SUMMARY: I. Introduction — II. Historic evolution — III. Present regime — 1. *Normative sources* — 2. *Foundations of state financing* — 3. *Direct financing* — 4. *Indirect financing* — IV. Conclusions.

I. INTRODUCTION.

State financing of religious Confessions currently exists in numerous States with very different political regimes, and which is instrumented through very different economic systems.

This situation poses a series of legal and economic problems which are ultimately closely linked with the foundations of that financing. In other words, the origin of these problems is a political decision, whereby the State defines its attitude to the religious phenomenon.

In this paper we are going to limit the exposition to the present situation in Spain in this connection. To do so, we shall have to examine the legal grounds of State aid to religious Confessions in State which, like the Spanish, is not confessional but secular. Logically, this study has to be made in the light of constitutional principles, both general and specific of ecclesiastical law, in as far as these principles are the basis of any legal system.

After determining the legal grounds of financing, we shall go on to explain the different direct and indirect systems through which state economic cooperation to religious Confessions is instrumented.

We think it advisable to point out a final detail. The present Spanish system of financing religious Confessions, as occurs in other

countries, is largely the result of extensive historic evolution, which has left its mark. We therefore think it useful to make brief historic reference to enable a better understanding of the system in force.

II. Historic evolution.

State financing of the Catholic Church in Spain has its origin in the progressive Constitution of 1837, whose article 11 establishes: "The Nation undertakes to maintain the worship and ministers of the Catholic Religion which Spaniards profess". The Constitution, which came into being in an atmosphere of extreme anti-clericalism, did however imply a principle of religious tolerance, and at this point was the consequence of the alienation policy maintained by Mendizabal. In the first place, it was a policy intended to remedy the financial situation of a Nation impoverished by war and, as a last resort, to suppress the material power of the Catholic Church. The system chosen for financing was that of making an allocation in the State Budget, by including the obligation started in the constitutional text.

During the Moderate Decade (1844-1854), the Government initiated a policy directed towards achieving reconciliation, aware of the loss of the Church's economic influence, on the one hand, and on the other, its deep rooted nature and social origin. The two basic texts of the legislative work of this period are the Constitution of 1845 and the Concordat of 1851. Article 11 of the Constitution, unlike that of 1837, emphatically declared the confessional nature of the State, and reiterated the commitment of state maintenance of worship and of the ministers of the Catholic Religion. On the other hand, the Concordat laid the bases for reconciliation through the recognition by the Church of the consummated fact of alienation, and the commitment by the government of restoring unalienable ecclesiastical assets.

The Government also agreed to ensure the Church a fixed and independent allocation. The same Concordat established the means for meeting the State's economic obligations, including a tax on rural and urban property and livestock.

The revolutionary Constitution of 1869, which granted religious

freedom for the first time in the history of Spanish constitutionalism, still maintained the obligation of State maintenance of worship and of the ministers of the Catholic Religion.

The revolution of 1868 did indeed contain an anti-clerical ideological component which has clearly evidenced in the parliamentary discussion of the Constitution, and which has reflected in its article 21. Expressions of this anticlericalism were the legislative measures adopted by the Provisional Government, and also the articles of the Draft Constitution of 1873, on the religious question. In this draft, which has never passed, the freedom of worship, separation of the Church and the State, and the prohibition "to subsidize any worship directly or indirectly" by the Nation, regional States and Municipalities, was declared. Nevertheless, this anti-clerical component was inoperative in practice, "as a plan of action was not commenced, as CUENCA points out, which could not even be remotely compared with that applicable shortly afterwards by the initial governments of the III French Republic, in a chronologically shorter period even than the episodic existence of the revolution of 1868".

Financing granted in article 21 of the Constitution continued to be maintained through allocation in the State Budget.

The Constitution of 1876 again established, in its article 11, the confessional nature of the State, tolerance of private non-catholic worship and Nation's obligation to maintain the worship and ministers of the catholic religion.

As far as the subject of the foundation of the state allocation is concerned, most doctrine has emphasized its relation with the alienation process, explaining it as a compensation to the Catholic Church for the expropriation of its assets. However, some authors have indicated as the grounds for this allocation, apart for the aforementioned compensation, the confessional nature of the State. In my opinion, one has to seek the basic grounds of the allocation in the alienation process. We should perhaps understand the confessionality of the State with regard to this subject, as the principle which prevented the extension of State financing to other religious confessions.

"The II Spanish Republic, as V. Reina and A. Reina reveal, no doubt constitutes the most radical and systematic political attempt to remove all influence of the Catholic Church in national life".

The Constitution of 9th December 1931 broke the tradition of the confessionality of the State and proclaimed religious freedom. The key standard concerning the religious subject was article 26, passed after stormy parliamentary discussion. With regard to the ecclesiastic allocation, this article provided: "The State, regions, provinces and municipality shall not maintain, foster or economically assist Churches and religious Associations and Institutions. A special law shall regulate the total extinction of the budget of the clergy in a maximum of two years".

As a result of this provision, allocations to the clergy were reduced by 20 % and those for worship disappeared. However, allocations for rural clergy were maintained. In 1934 the government presided over by Lerroux succeeded in getting Parliament to pass the so-called "Clergy Liabilities Act". This Law sought to overcome the serious financial situation of the low clergy, and was applicable to all priests with an allowance of under seven thousand pesetas. However, as CUENCA points out, this provisional solution arrived at a moment when "the consequences for the credibility of the regime among the clergy had completely disappeared".

After the civil war, through the Law of 9th November 1939, the new Government restored the budget for worship and the clergy, taking as a basis the budgetary allocation drawn up for 1931, increasing it for some items. The preface to this Law clearly showed the political grounds for this restoration. Indeed, alongside the allusion to the nature of reparation of past alienations, the Preface declared that "The Spanish Government ... anxious to demonstrate once again and in a practical manner its filial support of the Church, ... proposes by this Law to render the tribute due to the self-sacrificing Spanish Clergy, who cooperated so efficiently in our victorious Crusade". The Budget Act of 12th January 1940 assigned the sum of 66.899.429 Pesetas to meet "Ecclesiastic obligations".

The system of budgetary allocation was included in the Concordat of 27th August 1953, in which reference was made to the creation of "an adequate ecclesiastic patrimony", by common agreement between the Church and the Government, to enable the self-financing of the Catholic Church. Until that target was met, which obviously was not achieved, the Government undertook to assign the

Church an annual allocation "as indemnity for past alienations of ecclesiastic assets and as a contribution towards the work of the Church in favour of the Nation". The allocation system was completed with a regime of tax exemptions, which benefited different ecclesiastic entities, and which also included amounts received for exercising the priesthood .

This allocation, consigned in the State Budget, did not have an overall nature, but was structured in various items. This system, criticized by the doctrine, remained in force until the establishment of the present democratic regime.

In 1978, during the so-called "political reform process", an important modification took place in the financing system of the Catholic Church, due to various circumstances, among which we could mention the decision adopted by the XXVII General Assembly of the Spanish Episcopal Conference. Indeed, the Government unilaterally adopted the decision of replacing the allocation by items, by an overall amount, stated in the Budget, which would be handed over to the Episcopal Conference to distribute.

III. Present regime

1. *Normative sources.*

To properly understand the subject dealt with in this paper, in the first place we have to take into account the plurality of normative sources through which the present financing system is structured. These sources, of different categories and diverse legal nature, comprise the Constitution, the Organic Law of Religious Freedom, and Agreements between the Government and religious Confessions. To these basic standards we have to add numerous regulations which develop the provisions contained in these basic standards.

The constitutional precept most directly related with the subject of financing is article 16.3, according to which "No confession shall have a state nature. The public authorities shall bear in mind the religious beliefs of Spanish society and shall maintain the consequent relations of cooperation with the Catholic Church and other Confes-

sions". Although we shall examine the relationship between this provision and other articles of the Constitution later on, we should say that the State's obligation of financing any religious Confession cannot be deduced from it. The said article only obliges the State to maintain relations of cooperation with religious confessions, relations which need not necessarily be economic. And if no constitutional financing demand can be deduced, it is even less fitting to base in the Constitution the fact that "possible financial cooperation assumes given forms"

In our opinion, nor can the obligation of financing by the State be deduced from the Organic Law of Religious Freedom of 5th July 1980. Indeed, contrary to what can be affirmed by certain authors, we believe that one cannot deduce from article 7 of this Organic Law that cooperation with religious Confessions has to be of an economic type, nor that it has to take place through Agreements with them, and consequently neither that it is reserved only to Confessions "which have attained notorious influence in Spain". Certainly, referring to indirect financial cooperation, article 7.2 of the said Organic Law provides that in Agreements which the Government signs with Religious Confessions "the tax benefits foreseen in general legal regulations for non-profit-making entities and others of a beneficent nature" can be extended to these religious Confessions. In other words, article 7.2 speaks of a possibility, but does not impose an obligation on the State. These tax benefits cannot therefore be understood as the minimum contents which necessarily have to form part of these Agreements and which legally can be demanded by signed religious Confessions.

Tax legislation has compared religious Confessions to non-profit-making entities, as far as some tax benefits are concerned. However, in these cases, the comparison is derived from a unilateral provision by the Government and not a demand contained in the Organic Law of Religious Freedom.

In short, direct or indirect economic cooperation with religious Confessions is optional and not compulsory for the State, and can be instrumented through an Agreement or unilaterally through tax legislation.

Finally, one of the normative sources through which cooperation relations, including economic cooperation, can be regulated, are the Agreements which the Government can sign with religious Confessions. To sign these Agreements, the Organic Law of Religious Freedom requires the religious Confession to be registered in the Register of Religious Entities; that it has notorious influence in Spain; and that the Agreement is approved by an act of the Spanish Parliament, following a report by the Advisory Committee on Religious Freedom.

Dispensing now with the subject of the legal nature of these Agreements, and their possible comparison with those signed with the Catholic Church, it suffices to say that until now no Agreement has been signed between the Government and non-catholic Confessions. Nevertheless, there are some draft agreements with some of these Confessions which apparently could be signed shortly .

The Spanish Government signed an Agreement on Economic Affairs with the Catholic Church on 3rd January 1979, containing its direct and indirect financing regime.

2. *Foundations of state financing.*

After considering the sources which support the present financing system, and before going on to examine the technical means through which it is instrumented, the grounds for economic cooperation between the State and religious Confessions must be determined.

Above all, it should be pointed out that, as most doctrine has emphasized, the compensation for past alienations can no longer be sustained as the foundation of the economic state aid. Among other reasons, as ALBIÑANA says, because "there is no deposit of capital which generates income without a term fixed or for life-of the magnitude alluded to". The actual Hierarchy of the Catholic Church has not alluded to alienations as the grounds for economic state aid. The Agreement on Economic Affairs begins with the same approach, by stating in its Preface that "the State can neither ignore nor prolong indefinitely legal obligations contracted in the past" and consequently, "it is necessary to give a new sense both to the titles of economic allocations and to the system according to which this allocation is made".

The doctrinal grounds for economic aid by the State, according to some authors, has been based on the contribution which religious Confessions, and especially the Catholic Church, make on behalf of Spanish society.

Thus, for CORRAL, the religious value assists in achieving man's perfection but, apart from this value, there is a whole series of social services, derived from the charitable and educational activities of the Church, and which justify economic state aid. Other authors feel that the activity of the Catholic Church is a public service to society and for this reason it is only right that it should receive economic support from the State. Examining this last idea in depth, and on the basis that ecclesiastic functions, the same as those of public entities, are at the service of the political community, religious Confessions have been classified as "Sectorial-Corporations" with a public-private basis. The reasons for state financing, in this case, lies in the service which the Confessions render people in a particular field – freedom of conscience and the expression of religious beliefs-in which their activities cannot "be replaced by any body, entity or services of a state nature. Finally, and from a similar position, it has been pointed out that the cause which justifies the state's economic contribution to the Church is the service which the latter renders citizens to enable them to develop their religious dimension.

From the point of view of positive law, the grounds for state financing of the Catholic Church are obviously based on the Agreement on Economic Affairs, i.e., on an international Treaty. However, due to the impossibility of the fact that an international Treaty contains provisions contrary to the Constitution, and on the basis of subjecting the public authorities to the Constitution, constitutional grounds have to be found for the state financing of religious Confessions.

To do so, we have to start from the "freedom" and "pluralism" which article 1.1 of the Constitution advocates – together with justice and equality-as the "higher values" of the Spanish legal system. Pluralism should be understood as the "convocation of men of the most diverse ideas and beliefs" for the construction of the democratic State. On the other hand, the concept of freedom obviously includes any of its expressions and hence, religious freedom.

Taking these principles as a basis, the grounds for the state financing of religious confessions lie in article 9.2 of the Constitution which, when indicating the mission of the modern social State of Law, establishes a generic principle which article 16.3 later specifies with regard to religious matters.

The contemporary State is interested in and promotes any phenomenon which acquires certain social importance; with no doubt whatever, the religious phenomenon does acquire that importance. We therefore find ourselves before a case of direct State intervention, not only to guarantee freedom of choice to citizens on religious matters, but also to assist meeting the religious needs of each of them.

This State intervention to promote socially important phenomena can imply financial aid, earmarked to public funds, when this is necessary for promotion purposes. In keeping with this criteria of social interest, the State does in fact subsidize political parties, trade unions, sport and mass communication media.

The State's interest in the religious phenomenon cannot be considered in itself as an example of confessionality, and thus being incompatible with the principle of secularism which the Spanish Constitution establishes. Secularism should not be understood, in our Constitution, as a principle which implies the ignoring or indifference to the religious fact by the State, but as "that type of action by the State as a result of considering religious matters exclusively as a specific social factor".

The Constitutional Court has emphasized this promotional function of the public authorities on declaring that "from the obligation of subjecting all powers to the Spanish Constitution, not only is the negative obligation of the State deduced of not damaging the individual or institutional sphere protected by fundamental rights, but also the positive obligation of contributing towards the effectiveness of these rights and the values they represent, even though there is no subjective claim by citizens. This obliges the legislator in particular, who receives "the impulse and guide-lines" from fundamental rights. This obligation acquires special importance where a right or fundamental value would be void if the cases for its defence were not established".

However, it must be taken into account that this promotion work by the State depends on the individual who, as established in article 10.1 of the Constitution, is the foundation of the political order. The social group to which a person belongs – among which religious Confessions are included-are the object of promotion as far as necessary means are concerned, so that through them the individual can exercise his fundamental rights, develop his personality and achieve "the conscious and responsible self-determination of life itself", in which his dignity is expressed, as the Constitutional Court has declared.

From this point of view, one can speak of the Spanish Constitution establishing the "personalization" of relations between the State and religious Confessions. And likewise, as we have already mentioned, it should be affirmed that the cooperation relations between the State and religious Confessions which article 16.3 of the Constitution stipulates, can only be understood as a projection of the provisions of article 9.2 of the same legal text. The principle of cooperation established in article 16.3 implies constitutionalizing a specific form of promotion; promotion through relations between two entities: The State and the religious Confessions.

Within this cooperation with religious Confessions, economic State aid can obviously be included, which is permitted – in as far as it is not expressly forbidden-but is not imposed by the Constitution.

After determining the constitutional grounds for economic state aid to religious Confessions, this point has to be placed in relation with the principle of equality.

The principle of equality, whose entitlement corresponds both to individuals and to social groups, is included in our Constitution in article 14, which has to be interpreted in close connection with article 9.2. Equality, as the Constitutional Court has declared, referring to jurisprudence of the European Court on Human Rights, does not involve uniformity of legal treatment, but the prohibition of discrimination.

Discrimination exists when inequality of legal treatment lacks an objective and reasonable justification. In other words, when in equal situations, differentiated treatment occurs, due to arbitrary behaviour by the public authorities. Obviously, legal distinction can never be reasonable when it goes against, or alters, fundamental rights, since equality is, above all, equality of rights.

The principle of religious equality, which is the application of the generic principle of equality to the religious phenomenon, is demanded by the principle of religious freedom and by the secularism of the State. Religious equality means that both citizens and religious Confessions "have as their legal patrimony, the same fundamental right of religious freedom". This religious equality, as we have seen regarding equality generally, does not mean uniformity in the legal treatment of the religious factor, nor consequently specific, differentiated regulation within that treatment. On this point, equality forbids discrimination. In this sense "discrimination does not exist when among the favourable aspects of specific treatment, no other subject of religious freedom is excluded in principle or as a basic condition, although *de facto* some or many individuals do not enjoy or exercise them. Discrimination, whatever it does, requires that a subject of religious freedom no longer possesses his basic legal patrimony or rights, as an equal holder, nor even the possibility of reaching parity with the specific regime which others are recognized".

If we apply the principle of equality to cooperation between the State and religious Confessions, we must affirm that all Confessions are subjects of this cooperation. In this way, it would be unconstitutional, by being discriminatory, for the State to exclude certain religious Confessions from these cooperation relations.

Nevertheless, since equality does not signify uniformity, and as article 16.3 of the Constitution allows the public authorities to bear in mind "the religious beliefs of Spanish society", cooperation relations can adopt different forms, according to the features of each Confession. Hence, the State may cooperate more with some Confessions than with others, and use divers technical means for this cooperation. In the same way, since the principle of cooperation is not defined constitutionally in any specific manner, "the State may offer its protection to certain religious interests unilaterally or bilaterally, but it may also choose not to do so".

The limit of this action is when, through it, citizens and religious Confessions with whom no cooperation exists, are deprived of exercising their fundamental rights.

Based on this premises, economic aid to a given religious Confession is justifiable as a specific form of cooperation, provided "a priori" the remaining Confessions are not excluded from receiving it. On the other hand, the refusal of this aid by some Confessions is not in itself sufficient to consider acceptance by others as illicit.

The main problem in this connection lies in whether it is contrary to the principle of equality that people who do not belong to any Confession have to contribute towards their economic maintenance.

If State aid is provided through a system of budgetary allocation, it does not seem that one can speak of demaging the principle of equality. The reason is that through the budget a series of activities and services are financed, directed towards the community as a whole and, consequently, also to those citizens who have no interest in them, or who are even against them. On the contrary, if financing takes place through individual religious taxes, citizens who do not belong to the Confession financed in this way should be exempted paying them.

In the same way, with regard to indirect financing, if state legislation grants religious entities similar tax treatment to that of non-profit-making entities, it is obvious that entities of different Confessions can also base themselves on it, without it being reserved solely to particular Confessions

3. *Direct financing.*

This financing comprises economic allocations by the State, granted through the pertinent budgetary credits. Within this financing, a distinction can be made between "amounts intended to cover staff remuneration and working expenses of the Church (allocations and allowances) which are characterized by being fixed and renewed periodically, and current transfers and subsidies".

Before examining cases of direct financing, we think it necessary to point out that we do not include subsidies which ecclesiastic entities receive for exercising "non-confessional activities, such as education, welfare or charity. Subsidies received for these activities are due to the activity in itself, irrespective of the religious nature or otherwise of the person who performs them.

A. *The financing regime of the Agreement on Economic Affairs.*

Direct financing of the Catholic Church is basically contained in this Agreement, which establishes a system structured in three stages.

The *first stage* comprises a system of allocations assigned in the General State Budget, which are handed to the Catholic Church (the Episcopal Conference), "of an overall and single nature, to be updated annually".

This allocation shall be updated annually according to "the qualification criteria indicated by the General State Budget, in keeping with the purposes to which the Church devotes the resources received from the State". To do so, each year the Episcopal Conference has to submit a "Report", describing how the sources received the previous year have been used.

This first stage should last a minimum of three years, although in practice it has lasted considerably longer. Criticism of the budget allocation system has stressed in particular that the tax-payer's wishes are not taken into account, nor his economic capacity.

The *second stage* comprises a mixed system of budget allocation and tax allowance. This system, which was left to the discretion of the State the third year after the Agreement came into force, was put into practice in 1988. It consists of assisting the Catholic Church a percentage of personal tax, by the method most suitable technically. "To do so, each tax-payer will have to expressly state, in his respective declaration, his wish regarding the destination of the part affected. In the absence of this declaration, the pertinent amount will be devoted to other purposes".

Developing these principles, the General State Budget Act of 23rd December 1987 provided that as from 1988 a percentage of the returns on Income Tax would be devoted to religious purposes and to others of social interest. The percentage, which has to be determined in the Budget Act each year, was fixed at 0.5239 % for declarations corresponding to the 1987 tax period.

For this system to be operative, in their tax declaration, tax-payers have to state their wish for this percentage to be devoted to

the maintenance of the Catholic Church or to other purposes of social interest.

This system, which was proposed to the non-catholic Confessions, but not accepted by them, will last three years. During this time, it will exist alongside the budget allocation, which will be reduced by the amount of the tax allowance received by the Catholic Church. In any event, it must be taken into account that the resources received by the Catholic Church, by virtue of this combined system, in 1988, 1989 and 1990 will not be less than the budget allocation received in 1987, updated annually.

This system of tax allowance, which has been considered deficient by the Episcopal Conference, meant that in 1988 receipts for the Catholic Church were 2, 900 million pesetas. Tax allowances offer the advantage, with respect to budget allocation, that through this system the citizen's wish is taken into account regarding the destination of his contribution. Furthermore, the contributing capacity is also taken into account, as the amount affected will vary according to the tax-payers economic capacity. Due to this advantages, it has been proposed that this system of financing should be extended to the remaining religious Confessions.

The tax allowance is not an "ecclesiastical tax", as the Fundamental Law of Bonn regulated, since it operates within an existing tax, but is "a case of partial use of specific tax returns".

In the *third stage*, which will commence in 1991, the Catholic Church will be financed exclusively through the tax allowance system. According to the Fifth Additional Provision, point six, of the General State Budget Act, of 23rd December 1987, once this system has been implanted, "each year the Catholic Church will receive monthly, as a payment on account, one twelfth of the tax allowance corresponding to the previous penultimate budget year. This amount will be regulated definitely when final data of Income Tax for the respective fiscal year are available".

This third stage has no specific duration, since it will have to be maintained until the Catholic Church is self-financed. With regard to this ideal situation, we must bear in mind that "the Church declares its aims of obtaining its own resources for meeting its needs".

Self-financing of the Church would therefore be the final situation which would put an end to the tax allowances system. However, this self-financing, which today is fairly unlikely to be achieved, would not mean the end of all economic state aid. Indeed, Article II, 5 of the Agreement provides that "when this aim (self-financing) is achieved, both parties shall reach an agreement to replace the financial cooperation systems quoted in the previous paragraphs of this article by other fields and forms of economic cooperation between the Catholic Church and the State". It is difficult to define "a priori" what these fields would be when the Catholic Church achieves its self-financing, in which financial cooperation will continue. One author has suggested the idea that the Church should finance itself in its strictly religious activities, while the purpose of financial State cooperation would be devoted to charitable and social functions performed by the Church.

B. *Other cases of financing.*

As we have already said, we do not include here the financing of non-religious activities performed by a confessional entity. However, a whole series of religious activities exist, developed almost entirely by the Catholic Church and which, although not included in the financing system of the Agreement on Economic Affairs, do receive specific financing.

As the most significant examples of these activities, we could mention religious assistance to Armed Forces, that conducted in penitentiary establishments and that carried out in public welfare centres. Catholic religious assistance, in all these cases, takes place through chaplains who are considered as civil servants, whose remuneration is charged to the State Budget.

It should also be mentioned that teachers of the Catholic religion in public educational centres are also paid by the State

Finally, the different Conventions signed by the Catholic Church Hierarchy and the Administration have to be taken into account, regarding religious assistance in public hospital centres. In these Conventions different forms of payment are established, earmarked to public funds, for priests who render these welfare services.

4. *Indirect Financing.*

This form of financing consists of establishing, within the tax system "cases of exemptions and other tax benefits (deductions, allowances and refunds)".

In connection with this financing system, in the first place we have to distinguish between the tax regime of the Catholic Church, contained in the Agreement on Economic Affairs and developed by state tax legislation, and that of non-catholic Confessions. State tax legislation has extended some of this tax benefits, guaranteed to the Catholic Church, to these Confessions. However, in very many cases, this legislation contains no mention of non-Catholic Confessions, so there is clear inequality between their tax regime and that of the Catholic Church.

Secondly, it must be taken into account that the Agreement refers to general tax items, which have to be specified regarding tax legislation in force. Regarding this point, the Agreement provides that: "both parties, by common Agreement, shall indicate the tax items in force in which the exemptions listed in articles III to V of this Agreement are specified". Whenever the "Spanish Tax-Legal Regulations are substantially modified, both Parties shall define the tax benefits and cases of exemption applicable in accordance with the principles of this agreement".

In the tax regime of the Catholic Church, stated in the Agreement, the following cases can be differentiated: cases not subject to tax, cases of exemption, tax exemptions by reference and indirect tax benefits.

A. *Cases not subject to tax.*

Not being subject to tax serves as a technique for completing the definition of taxable items, clarifying that "they are excluded from these cases which, strictly speaking, do not meet all the legal requirements to be taxed, but which as they have similarities with other taxable items, can in practice give rise to doubts as to whether or not they are subject to tax".

Cases of not being subject to tax on income, expenses or consumption, as the case may be, are included in Article III of the Agreement, and are as follows:

a) Contributions which the Church receives from the faithful, public collections and alms and obligations.
The amounts which ecclesiastical entities receive by any of these means are not subject to Corporation Tax.

b) The publication of instructions, regulations, pastoral letters, diocesan bulletins and any other document of the competent ecclesiastical authorities, as well as placing them in their customary locations. This case refers to these publications not being subject to V.A.T. Regarding "placing them in their customary locations", tax exemption doesn't include advertising these documents, which may be carried out by Agencies engaged in these services.

c) Educational activities in diocesan and religious Seminaries, and also ecclesiastical disciplines in Church Universities. This education is not subject to V.A.T. However, as these cases are regulated in the Law, it would be more correct to speak of exemption rather than not being subject to tax.

d) The acquisition of objects destined for worship. These purchases are not subjects to V.A.T.

B. *Cases of exemption.*

These cases refer to acts which meet all requirements for paying tax, but which for special reasons the Law excludes from taxation. They are included in article IV of the Agreement.

With regard to these cases, in the first place, we must bear in mind that the subjects which enjoy exemptions are exclusively those listed in article IV, 1 of the Agreement. Namely, the Holy See, the Episcopal Conference, the Dioceses, Parishes and other territorial districts, religious Orders and Congregations, and Institutes of consecrated life, together with their provinces and Houses.

Secondly, we should point out that exemption concerns certain taxes which refer to particular assets and economic returns of the entities mentioned. Cases of exemption are as follows:

a) *The following real estate is totally and permanently exempt of Urban Territorial Tax:*

1. Temples and chapels intended for worship, their premises or adjoining local buildings, designed for pastoral activities.
2. The residence of Bishops, canons and priests with care of souls.
3. Premises designated for offices of the diocesan Curia and parish offices.
4. Seminaries intended for educating diocesan and religious clergy and ecclesiastical Universities, when they teach ecclesiastic disciplines.
5. Buildings devoted primarily to houses or convents of religious Orders, Congregations and Institutes of consecrated life.

This Urban Territorial Tax exemption also has to be understood to cover vegetable gardens, gardens and premises of this urban assets.

b) *Total and permanent exemption of real taxes or profits tax on earnings and estates.*

The mention on income tax has to be referred to Corporation Tax Exemption. However, it must be taken into account that according to the Agreements of 10th October 1980, drawn up by the Church-Spanish Government Technical Committee, this exemption does not cover: *a*) returns obtained from economic undertakings; *b*) earnings derived from assigning assets; *c*) earnings subject to withholding at source; *d*) increases in assets derived from the transfer of capital elements.

The law regulating Corporation Tax grants non-catholic Confessions a regime identical to that of the Catholic Church. However, the Regulations of this tax unjustifiably limit this comparison by establishing that this exemption only covers "legally recognized non-Catholic Confessions with which cooperation agreements are established, referred to in Article 16 of the Constitution".

The allusion to taxes on assets contained in the Agreement, once the Tax on Assets of Corporate Bodies has been withdrawn, has to refer to taxes of a local nature, such as Municipal Tax on Plots of Land.

Real taxes or profits tax of a local nature affect assets, activities or earnings, considered as such, irrespective of the subjects or persons to whom they belong, who perform them or obtain them.

The local Regime Act declares that educational activities carried out by schools in other centres depending on the ecclesiastical hierarchy, classified as beneficent - educational are exempted of the Tax Licence. The same Law exempts from Rural Territorial and Livestock Tax assets of a rural and livestock nature, whose owners or beneficiaries are the entities mentioned in Article IV, 1 of the Agreement.

c) *Total tax exemption on Successions, Donations and Patrimonial Transfers.*

Mention of these taxes involves the exemption of acquisitions of a lucrative nature (Tax on Successions and Donations) and acquired by purchase (tax on Patrimonial Transfers and Documented Legal Acts) carried out by the entities mentioned in Article IV, 1 of the Agreement.

However, we must bear in mind that for this exemption to be valid, the assets or right acquired have to be devoted to worship, supporting the clergy, the sacred apostolate or the exercise of charity.

With regard to acquisitions by purchase, exemptions includes not only Tax on Patrimonial Transfers, but also V.A.T., when it concerns handing over real estate subject to this tax.

d) *Exemption of special taxes and Equivalence Tax.*

Special taxes are titles based on the tax-payers obtaining an increase in value of his assets, as a result of the execution of public work establishing or extending public services.

The Local Regime Act declares exempt assets which enjoy Urban Territorial Tax exemptions, i.e, those mentioned in Article IV, 1 A of the Agreement, by considering that the contributing capacity does not exist in them. These assets are also exempted payment of Municipal Tax on the Increased Value of Land, in its form of Equivalence Tax.

C. *Tax exemption by reference.*

These exemptions refer to certain ecclesiastical entities which are considered comparable, for tax purposes, or other private entities which enjoy tax exemption.

According to Article V of the Agreement, "religious Associations and Entities not included in Article IV of this Agreement and which are engaged in religious, beneficent-educational, medical or hospital or social assistance activities, shall have the right to tax benefits which the legal-tax Regulations of the Spanish State foresee for non-profit-making entities and in all events those guranteed to private beneficent entities".

This Article V of the Agreement posed the question of whether the tax benefits established would be applicable to the entities mentioned in Article IV, 1 of the same Agreement. The problem was solved by the Ministerial Order of 29th July 1983, according to which: "Religious Associations and entities included in Article IV of the Agreement between the Spanish Government and the Holy See, of 3rd January 1979, shall enjoy, in all events, the same tax benefits as the entities referred to in Article V of the Agreement".

Of the tax benefits granted non-profit-making entities, the most important is Corporation Tax exemption.

As far as private beneficent entities are concerned, the law declares them exempt of Tax on Patrimonial Transfers and Documented Legal Acts, in the three forms of the tax: patrimonial transfers acquired by purchase, company operations and documented legal acts.

These entities do not pay V.A.T. either on the social assistance services they render, such as: protection of children and young people, assisting the handicapped, preventing delinquency and social reinsertion, etc. V.A.T. exemption also covers rendering services directly to their members, by legally recognized non-profit-making entities, whose purposes are exclusively of a religious nature.

Private welfare concerns shall also enjoy local tax exemption. Among this, we would quote payment of Urban Territorial Tax on real estate designed for hospitals, homes or beneficent-educational activities. In the same way, they are exempted Municipal Tax on Advertising.

D. *Indirect tax benefits.*

The Agreement provides that amounts donated to ecclesiastical entities listed in Article IV.1 and devoted to worship, supporting the clergy, the sacred apostolate and the exercise of Charity, shall be entitled to the same deductions in Personal Income Tax as amounts given to classified entities or those declared as charities or of public utility.

At present, after the latest legislative reform of Personal Income Tax, the possibilities of tax rebate on quantities donated to these entities are very limited. Only 20 % can be deduced on donations made to them when it concerns assets which form part of the Spanish Historic Heritage, registered in the General Register of Assets of Cultural Interest or which are included in the General Inventory referred to in the Spanish Historic Heritage Act of 25th June 1985. No other donation is entitled to deduction.

IV. Conclusions.

From the examination of the different subjects dealt with here, we think the following conclusions can be drawn.

In the first place, the problem of state financing, both direct and indirect, of non catholic Confessions needs to be adequately solved. This no doubt will be one of the main subjects of forthcoming Agreements between the State and these Confessions which, as we have already said, will apparently be signed shortly.

Secondly, the subject of financing the Catholic Church will have to be tackled on the short term, for when the tax allowance is implanted as the exclusive financing system in 1991. Putting this system into practice, combined with that of budgetary allocation, has not produced very satisfactory economic results. Due to this, the General Assembly of the Spanish Episcopal Conference published a Pastoral Instruction on 22nd April 1988, in which the Bishops suggested to the faithful that they should regularly devote a contribution, depending on the income per family or independent individual, amounting to one per cent of net earnings, as a contribution towards the economic support of the Church. Likewise, they consider that the

tax-payer should be offered the possibility of deducting amounts given to the Church.

Finally, and on the longer term, forms of economic cooperation of the State, referred to in Article II, 5 of the Agreement, must be tackled for the moment when the Catholic Church is self-financed.

A possible solution would be that of financing the religious activities of the Catholic Church and of the remaining Confessions, through an "ecclesiastic tax", either integrated in Personal Income Tax, or as an autonomous tax. In either case, it seems reasonable that financing the religious activities of Confessions through these means arranged by the State should affect exclusively people belonging to these Confessions.

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LE FINANCEMENT PUBLIC DES EGLISES EN ITALIE

SOMMARY: I. Signification du financement public des Eglises dans l'Etat contemporain. — II. Autonomie des Eglises et contrôle de l'Etat dans la gestion des financements. — III. Le financement de l'Eglise catholique depuis l'accord du 18 février 1984. — IV. Le financement des autres Eglises depuis les ententes avec l'Etat. — V. Appréciation générale de l'actuel système de financement. — VI. L'intervention publique pour le service d'assistance religieuse et pour l'enseignement de la religion catholique. — VII. Contributions qui favorisent indirectement les exigences religieuses par les collectivités territoriales.

I. SIGNIFICATION DU FINANCEMENT PUBLIC DES EGLISES DANS L'ETAT CONTEMPORAIN

Le financement public des Eglises ou en faveur des activités de culte ne semble plus susciter, comme auparavant, des controverses, d'aversions ni de polémiques. En effet, aujourd'hui il n'existe plus de positions comme celle du libéralisme du dix-neuvième siècle, qui refusait d'accorder un financement public, avec des ressources provenant de l'ensemble des citoyens, à des besoins religieux concernant une partie seulement de la société et considérés comme strictement privés; ou bien celle, propre aux Etats confessionnels, qui voyait dans le financement public des Eglises un moyen de les asservir au pouvoir de l'Etat ou de les avoir comme alliées pour la réalisation de certains desseins ou de buts de nature politique.

Aujourd'hui la religion est considérée comme un phénomène social, qui constitue un facteur très important pour les modes de vie et d'action d'une partie non négligeable de la population. Ce phénomène mérite, au moins en règle générale, une appréciation positive, parce qu'il favorise la croissance et la maturation de la personnalité

de chaque individu, il développe chez chacun un sentiment de solidarité et d'altruisme envers les autres hommes. Aussi estime-t-on qu'il est juste que l'Etat accorde certaines aides économiques ou certaines formes de soutien en faveur de la religion, qu'il encourage ou facilite certaines activités visant à satisfaire les besoins religieux de ses propres citoyens. Cela ne signifie pas qu'il accorde un traitement privilégié à la religion, car l'Etat démocratique moderne — appelé, à juste titre, Etat social — a l'habitude d'adopter des attitudes analogues à l'égard de très nombreuses autres valeurs ou expressions qui concernent la vie de la collectivité, dans son ensemble ou tout particulièrement certaines communautés de citoyens, et qui, en tant que telles, doivent bénéficier d'une intervention de l'Etat.

Dans ce cadre, le financement des Eglises revêt la signification propre d'aide économique à la religiosité des citoyens, interprétée comme une valeur autonome et indépendante de toute autre finalité: elle n'a pas besoin d'être justifiée par des bénéfices ou des avantages de tout autre nature qui peuvent en découler pour la collectivité. Par exemple, le versement d'une subvention aux curés catholiques répond aux exigences de certains citoyens de pouvoir bénéficier de l'activité d'un ministre de culte et de satisfaire ainsi leur besoin de religiosité. Contrairement au passé, cette aide n'est pas justifiée par la fonction sociale (assistance, éducation, aide morale) exercée par le curé en faveur d'une certaine communauté de citoyens, comme cela arrivait surtout dans les villages de campagne. Ceci ne signifie cependant pas que le soutien accordé aux manifestations du sentiment religieux ne puisse pas s'accompagner d'un soutien d'autres exigences sociales qui doivent être placées sous la tutelle de l'Etat: au contraire, il existe souvent un lien étroit, une interdépendance, une superposition entre les différents intérêts sociaux et il arrive souvent qu'une aide accordée principalement à la religion aille au profit d'autres valeurs sociales aussi que, inversement, la religion bénéficie d'aides visant surtout à satisfaire des intérêts collectifs de type différent.

Cette façon de concevoir l'intervention de l'Etat en faveur de la religion entraîne aussi l'abandon de la tendance à réserver un traitement privilégié et des faveurs spéciales à une ou plusieurs Églises déterminées. Si la religion est considérée comme un phénomène social, si les diverses Églises sont vues comme des communautés de citoyens qui font valoir, comme de nombreuses autres communautés, des intérêts collectifs précis et déterminés, il n'y a plus de raison de préférer une croyance religieuse à une autre. Chacune d'elle recevra le traitement correspondant à l'importance sociale qu'elle revêt et à sa capacité de répondre au besoin effectif de religiosité présent dans le corpus social. C'est dans cette direction que s'oriente indubitablement l'Etat italien, traditionnellement lié à l'Eglise catholique par un rapport spécial: les lois les plus récentes sont en train de mettre en application les indications constitutionnelles qui placent les différentes Eglises sur le même plan d'égalité et de dignité et qui instaurent avec chacune d'elles un rapport fondé sur des accords ou des ententes visant à satisfaire pleinement les exigences religieuses propres à chacune d'elles.

II. Autonomie des Eglises et contrôle de l'Etat dans la gestion des financements

Cependant, à côté de ces considérations, il faut ajouter que certaines Eglises, comme par exemple l'Eglise vaudoise, continuent de refuser toute forme de financement public, car elles retiennent que cela entraîne inévitablement des ingérences, des interférences et des contrôles de la part des pouvoirs publics sur l'activité des Eglises. En outre, cela crée également chez ces dernières un sentiment de dépendance et une limitation à leur propre autonomie lesquels nuisent à leur mission religieuse. Sans aucun doute, ces préoccupations sont fondées en mettant en évidence le fait que le financement public des Eglises doit, encore aujourd'hui, tenir compte de deux impératifs contraires.

D'une part, le besoin de liberté totale et d'autonomie des Eglises dans la gestion des intérêts religieux des citoyens et dans l'organisation des activités du culte. Même si les intérêts religieux, comme cela vient d'être souligné, sont des intérêts de nature sociale qui, en tant que tels, requièrent une intervention de l'Etat, ils ont un caractère si particulier qu'ils ne peuvent être interprétés et satisfaits correctement que par les organismes religieux eux-mêmes. Par conséquent, l'intervention de l'Etat ne peut être qu'indirecte et elle

doit s'arrêter à un certain niveau au-delà duquel ce sont les organisations confessionnelles qui doivent agir en toute liberté. D'autre part il faut aussi tenir compte du fait que l'Etat est responsable devant toute la collectivité des affectations des finances publiques et qu'il peut donc difficilement renoncer à un contrôle, si minime soit-il, sur les formes et les critères selon lesquels est utilisé le financement des activités religieuses.

Le système italien essaie de tenir compte de ces deux impératifs et arrive à une sorte de compromis. Les dernières réformes ont accordé aux Eglises une grande autonomie dans l'emploi des ressources provenant de l'Etat: en effet, la part, de loin la plus importante, du financement public est octroyée aux Eglises, par le versement annuel d'une somme d'argent, sans que l'on fixe au préalable des critères ou des affectations à respecter impérativement. Cependant, le versement de cette somme et son montant effectif sont subordonnés aux voeux exprimés par les citoyens; chaque année, un compte-rendu détaillé des affectations de ces sommes doit être rédigé; on ne permet pas que les relations qui s'instaurent entre les autorités religieuses et les bénéficiaires des subventions soient limitées au seul cadre de l'organisation religieuse mais elles s'insèrent également dans le cadre de l'organisation de l'Etat et l'on crée ainsi en faveur des particuliers des situations juridiques subjectives qui peuvent être placées sous tutelle même devant les organes de l'Etat.

III. Le financement de l'Eglise catholique depuis l'accord du 18 février 1984

A présent, examinons de plus près l'organisation du système de financement des Eglises en vigueur actuellement en Italie. Le système actuel date de l'Accord stipulé entre le Saint Siège et la République italienne le 18 février 1984, entériné par la loi n. 121 du 25 mars 1985 et il est réglementé, en ce qui concerne l'Eglise catholique, par la loi n. 222 du 20 mai 1985, intégrée par le règlement d'application approuvé par le décret de la République n. 33 du 13 février 1987. En ce qui concerne les confessions religieuses différentes de l'Eglise catholique, il faut tenir compte des ententes stipulées avec l'Union italienne des Eglises chrétiennes adventistes du

septième jour, entérinée par la loi n. 516 du 22 novembre 1988; avec les Assemblées de Dieu en Italie, entérinée par la loi n. 517 du 22 novembre 1988; avec l'Union des Communautés juires italiennes, entérinée par la loi n. 101 du 8 mars 1989.

Cet ensemble de dispositions législatives a introduit des innovations radicales par rapport au système précédent qui prévoyait essentiellement deux flux de subventions en faveur de la seule Eglise catholique et strictement affectés aux deux finalités prioritaires pour la vie religieuse: la rémunération des ministres du culte et la construction ainsi que la conservation des édifices religieux.

Le premier type de financement se concrétisait par un rapport direct entre l'Etat et les ministres du culte (évêques, prêtres et autres ecclésiastiques ayant pour tâche le "salut des âmes"): si le revenu dérivant du patrimoine ecclésiastique ("bénéfice") attribué à leur office n'atteignait pas le niveau minimum fixé par la loi, ils avaient le droit de recevoir une subvention complémentaire (appelée supplément de portion congrue) destinée à leur subsistance personnelle. Même les subventions pour les édifices religieux n'étaient attribuées que pour la construction ou la restauration d'oeuvres précises dont l'Etat prenait en charge tout ou une partie des frais.

En revanche, le système actuel accorde aux Eglises une autonomie beaucoup plus grande dans la gestion des subventions prodiguées par l'Etat. En outre, ce système, qui a d'abord été appliqué à l'Eglise catholique seulement, est en train de s'étendre progressivement, avec quelques variations et quelques ajustements, aux autres confessions religieuses qui l'ont expressément demandé dans les ententes stipulées avec l'Etat.

Actuellement, en ce qui concerne l'Eglise catholique, c'est l'Etat qui s'est engagé à verser chaque année à la Conférence épiscopale italienne, autorité qui représente l'Eglise catholique en Italie, une certaine subvention, calculée sur des bases que nous allons examiner, dont la gestion est entièrement confiée à l'autorité ecclésiastique. Cette subvention est destinée à des activités spécifiquement religieuses, et plus précisément, utilisée "pour des exigences de culte de la population, la subsistance du clergé, des activités caritatives en faveur de la collectivité nationale ou des pays du tiers monde" (art. 48 loi n. 222 de 1985). Mais ces fins, expressément prévues par la

loi, sont, comme cela se comprend facilement, très larges et laissent à l'Eglise la liberté d'utiliser les subventions publiques de la façon la plus opportune et pour des activités très diversifiées: de la construction et de l'entretien des édifices religieux au déroulement de fêtes ou de manifestations liturgiques en passant par diverses activités d'assistance, etc.

Cependant, différentes limitations et conditions restreignent cette large autonomie de l'Eglise. En premier lieu, le montant de la somme à verser, n'est plus décidé au niveau du sommet, par décision unilatérale de l'Etat, ou sur la base d'accords avec les autorités religieuses, mais il est subordonné à la volonté des citoyens, exprimée à travers une sorte de référendum qui se déroule chaque année à l'occasion de la déclaration des revenus pour le paiement des impôts.

En effet, il a été décidé qu'une quote-part équivalent à huit pour mille du montant des impôts à payer pour tous les citoyens (impôt sur le revenu des personnes physiques: IRPEF) a une destination précise et obligatoire: "une partie, pour des fins d'intérêt social ou à caractère humanitaire, gérée directement par l'Etat et, une partie, pour des fins à caractère religieux gérée directement par l'Eglise catholique" (art. 47 de la loi n. 22 de 1985).

Dans la déclaration d'impôts qu'il doit présenter chaque année, chaque contribuable peut exprimer sa préférence en faveur de l'une ou de l'autre destination: la somme totale sera repartie proportionnellement aux préférences, et en cas d'absence d'indication de préférence, la répartition se fera proportionnellement aux préférences exprimées.

Tout en laissant à l'Eglise la liberté de gérer ces sommes, à condition qu'elles soient affectées aux finalités à caractère religieux indiquées par la loi, l'Etat ne se désintéresse cependant pas de leurs utilisations et exige de la Conférence épiscopale un compte rendu annuel détaillé, la publication de ce dernier dans un bulletin officiel de la Conférence et la diffusion d'informations adéquates sur le contenu de ce compte-rendu et sur les affectations des sommes reçues.

D'autres obligations ou limitations de l'autonomie de l'Eglise sont prévues, plus spécialement, pour la gestion des sommes spécifiquement destinées à la rémunération du clergé.

A ce sujet, la loi civile, parallèlement à la loi canonique, a prescrit la création d'une structure spéciale s'appuyant sur les Instituts diocésains de subsistance du clergé coordonnés par un Institut central de subsistance constitué auprès de la Conférence épiscopale italienne. L'organisation de ces organes repose sur une structure bien précise (par exemple, un tiers au moins du conseil d'administration doit être composé de représentants du clergé), ils doivent remplir certaines obligations (par exemple, destiner une partie de leur propres ressources pour subvenir aux besoins de ceux qui abandonnent la vie ecclésiastique), ils doivent, plus généralement, assurer "une rémunération digne et correcte du clergé" qui prête service en faveur du diocèse dans les limites fixées périodiquement par la Conférence épiscopale italienne, en tenant compte des autres rémunérations et salaires que chaque sacerdote perçoit déjà d'autres sujets. En revanche, cette dernière obligation, imposée expressément par la loi aux Instituts de subsistance du clergé, fait naître pour les sacerdotes qui sont au service du diocèse, le droit (lui aussi expressément reconnu par la loi civile) de recevoir le nécessaire pour leur subsistance dans la mesure fixée. Etant donné que ce droit concerne les sacerdotes et qu'il est avant tout reconnu par l'organisation religieuse, normalement on le fera valoir dans le cadre de l'Eglise, devant les organes de tutelle prévus par le droit canonique: la loi civile elle-même a voulu favoriser l'arrangement des litiges à l'intérieur de la structure religieuse en prescrivant à la Conférence épiscopale d'instituer des organes adéquats et d'établir des procédures accélérées d'arrangement ou de recours contre les mesures émanant de l'Institut de subsistance du clergé. Mais il est évident qu'il s'agit d'un véritable droit subjectif reconnu par l'organisation civile et qu'on peut donc le faire valoir même devant les tribunaux étatiques. En fait, nous avons là une sorte de contrôle exercé par la base, laissé à l'initiative des personnes intéressées, que l'Etat s'est réservé d'effectuer à travers les organes chargés de l'administration judiciaire et qui vise à éviter que le financement public destiné à la subsistance du clergé puisse entraîner des injustices ou des inégalités entre les citoyens, même pour des activités qu'ils exercent dans le cadre de la communauté religieuse.

A côté du versement de cette somme annuelle suivant les mo-

dalités que nous venons de voir, l'Etat effectue une forme indirecte de financement à travers un mécanisme d'exonérations fiscales qui tend à promouvoir les offrandes des fidèles en faveur de l'Eglise. En effet, le fidèle peut déduire de ses revenus imposables les offrandes financières, pour un montant maximum de deux millions de lires, faites à l'Institut central de subsistance du clergé.

Contrairement à celles aux subventions octroyées par l'Etat et qui pouvaient avoir des destinations très différentes dans le cadre des activités à caractère religieux, ces sommes sont strictement affectées à la subsistance du clergé. Pour le reste, elles sont soumises elles aussi aux mêmes formes de vérification et de contrôle prévues pour les sommes directement versées par l'Etat (transmission et publication d'un compte rendu annuel, gestion effectuée par les Instituts de subsistance du clergé, reconnaissance de droits subjectifs que les bénéficiaires de ces sommes peuvent faire valoir).

IV. Le financement des autres Eglises depuis les ententes avec l'Etat

Le système de financement direct et d'exonérations fiscales institué pour l'Eglise catholique s'est par la suite étendu aux autres Eglises qui en ont fait la demande lors de la stipulation des ententes prévues par l'article 8 de la Constitution. L'Eglise vaudoise, la première à avoir conclu une entente avec le gouvernement italien, a refusé ce droit car, conformément à sa tradition doctrinaire, elle s'est déclarée contraire à toute forme de soutien financier de la part de l'Etat. En revanche, dans les ententes suivantes stipulées avec les Assemblées de Dieu en Italie (les cultes pentecôtistes) et avec les Eglises adventistes, ces Eglises ont demandé et obtenu de bénéficier de la répartition de la quote-part des huit pour mille de l'IRPEF sur la base des choix exprimés par les citoyens ainsi que la déduction fiscale des offrandes des fidèles, jusqu'à un plafond de deux millions. Il faut également préciser que cette participation à la répartition de cette quote-part de l'IRPEF, contrairement à ce qui a été prévu pour l'Eglise catholique, ne s'effectue que sur la base des choix exprimés par les contribuables. La part relative aux choix non exprimés revient à l'Etat qui la destine aux activités humanitaires qu'il gère.

Par rapport à l'Eglise catholique, il y a également une différence quant à l'obligation de destination imposée par l'Etat pour les sommes qu'il verse directement et pour celles qui proviennent des offrandes des fidèles et qui sont déduites de l'impôt sur le revenu. Pour ces dernières, leur destination présente un caractère très général: rémunération des ministres du culte et activités religieuses, "salut des âmes" et administration ecclésiastique, pour les Eglises pentecôtistes; rémunération des ministres du culte et des missionnaires et activités spécifiques de culte et d'évangélisation, pour les Eglises adventistes. En revanche, les sommes versées directement par l'Etat doivent être exclusivement destinées à des actions sociales et humanitaires en faveur aussi des pays du tiers monde.

L'entente avec la Communauté juive, la dernière à avoir été conçue à ce jour, comporte un système de financement basé essentiellement sur des exonérations fiscales des contributions dues par les fidèles à la Communauté, conformément au statut. En revanche, l'entente ne prévoit aucune participation à la quote-part des huit pour mille des l'IRPEF destinée à des fins sociaux, humanitaires ou religieux. Les contributions versées aux communautés israélites sont déduites du revenu imposable jusqu'à un maximum de 10% du revenu de chaque contribuable et pour un montant global annuel qui ne dépasse pas 7 500 000 lires: ces contributions n'ont pas une destination spécifique même si ce régime fiscal particulier est accordé "en considération des finalités d'assistance et de sécurité sociales poursuivies par la communauté conformément au statut, en faveur de ses fidèles".

Il faut enfin remarquer que si les Eglises pentecôtistes et adventiste sont soumises à l'obligation de transmettre un compte — rendu annuel sur l'utilisation effective des sommes reçues (aussi bien de la part de l'Etat que des fidèles avec déduction des impôts) aucune forme de vérification ou de contrôle n'est prévue pour les communautés juives.

V. Appréciation générale de l'actuel système de financement

Le système qui vient d'être présenté n'est pas encore totalement entré en vigueur. On a déjà réalisé la structure basée sur les

Instituts de subsistance du clergé et depuis cette année, 1989, il est déjà possible de déduire du revenu imposable les offrandes faites à l'Eglise catholique et aux autres communautés religieuses qui ont demandé et obtenu cette forme d'exonération fiscale. En revanche, le financement avec la quote-part des huit pour mille commencera l'année prochaine, 1990: les contribuables seront invités pour la première fois à exprimer leur préférence dans la déclaration des revenus qu'ils présenteront en mai 1991 (et relative aux revenus perçus l'année précédente). Le calcul des parts respectives à affecter aux Eglises ou à la gestion directe de l'Etat ne pourra cependant être effectué que dans trois ans. Ce n'est qu'en 1993 que chaque Eglise recevra donc une subvention publique proportionnelle aux choix exprimés par les citoyens. En attendant, de façon transitoire, on prévoit le versement d'une somme forfaitaire qui, pour l'Eglise catholique, est calculé sur la base de ce que l'Etat lui versait, globalement, pour ses besoins.

Il est difficile de donner une appréciation sur ce nouveau système de financement puisqu'il n'est pas encore entré totalement en vigueur et qu'il manque donc l'application pratique qui permettra d'en évaluer les éventuels avantages et défauts ou d'en conseiller les corrections et les ajustements. En vérité, ce système a déjà soulevé des nombreuses controverses — du moins dans les milieux ecclésiastiques, mais quelquefois civils aussi — au sujet de la rémunération spécifique revenant à chaque ecclésiastique: et ceci révèle déjà, semble-t-il, une complexité excessive du système, une difficulté d'adaptation aux multiples et diverses situations personnelles propres à chaque membre du clergé catholique. Cependant, il faut certainement apprécier le fait que le montant de ce financement est déterminé sur la base d'un libre choix des citoyens qui acquièrent ainsi le pouvoir d'orienter une fraction, si minime soit-elle, des impôts versés à l'Etat vers des oeuvres ou des activités qu'ils jugent, plus que les autres, mériter leur soutien économique. Même les Eglises, qui craignent de se retrouver avec des subventions insuffisantes ou inférieures à leurs attentes, trouveront certainement des avantages dans ce nouveau système: les préférences des citoyens en leur faveur seront certainement proportionnelles à leur engagement dans la gestion de ces subventions, aux activités qu'elles parviendront à mener, aux images de sérieux, de droiture morale et d'efficience qu'elles sauront donner

même envers ceux qui ne se sentent pas vraiment partisans d'un credo religieux précis. Sous cet aspect, les contrôles et les formes de publicité que l'Etat a exigés sur l'utilisation des contributions ne peuvent être considérés comme une ingérence abusive ou une limitation de l'autonomie des Eglises — par ailleurs, comme nous l'avons déjà vu, largement reconnue — mais comme un ultérieur encouragement à travailler dans la direction que nous venons d'indiquer, à donner le meilleur d'elles-mêmes non seulement pour leurs fidèles, mais pour toute la collectivité.

VI. L'INTERVENTION PUBLIQUE POUR LE SERVICE D'ASSISTANCE RELIGIEUSE ET POUR L'ENSEIGNEMENT DE LA RELIGION CATHOLIQUE

Le système de financement que nous venons de décrire ne constitue pas la seule forme d'intervention économique de l'Etat en faveur des exigences religieuses des citoyens. Il existe d'autres formes de subventions qu'il estime nécessaire d'assurer aux citoyens qui professent un certain credo religieux. En particulier, il s'agit du service d'assistance religieuse pour les personnes qui vivent dans des milieux particuliers isolés du reste de la communauté (tels que les forces armées, les prisons, les hôpitaux) ou de l'enseignement de la doctrine religieuse octroyé dans les établissements scolaires publics.

En ce qui concerne le premier point, il faut remarquer que l'attention portée aux exigences religieuses des citoyens qui ne peuvent pas les satisfaire comme tous les autres en raison du milieu particulier où ils vivent, correspond sans aucun doute à une interprétation non pas formelle, mais concrète et substantielle du droit de liberté religieuse solennellement reconnu par toutes les constitutions démocratiques modernes. Le fait d'être au service des forces armées ou d'autres organismes particuliers, d'être dans un hôpital ou une clinique, d'être détenu dans une maison d'arrêt ne doit pas limiter l'exercice des droits de chacun — et surtout les droits fondamentaux inhérents à la dignité de la personne humaine — au-delà des nécessités imposées par ces structures ou milieux ségrégatifs.

Cependant, non seulement l'Etat italien permet aux Eglises d'organiser leurs activités religieuses dans ces milieux, en adoptant les mesures les plus adéquates pour faciliter ou rendre possible leur

réalisation concrète, mais il va même jusqu'à programmer et réglementer l'organisme chargé de ce service, prenant en charge les dépenses relatives.

Dans les forces armées, les hôpitaux et les instituts carcéraux il existe donc une structure stable de sacerdotes affectés au service d'assistance religieuse catholique: ils sont régulièrement rémunérés par l'Etat et liés à celui-ci par un rapport largement analogue à celui de la fonction publique (les aumôniers militaires sont carrément assimilés aux officiers et aux gradés correspondants) tout en conservant une autonomie particulière pour la réalisation concrète de leur service car leurs prestations, de par leur nature, font partie des compétences spécifiques des organes ecclésiastiques. Seule l'Eglise catholique a une organisation stable d'aumôniers intégrés de façon organique dans la structure où ils exercent leurs activités d'assistance religieuse. En effet, pour les autres religions, la mise en place d'un corps de ministres du culte serait disproportionnée, voir superflue dans des nombreux cas, par rapport au nombre restreint de leurs fidèles. Par conséquent, pour les autres Eglises, l'Etat accorde aux ministres du culte la liberté d'accès dans les maisons ou les instituts pour qu'ils puissent assurer leur service d'assistance religieuse. Ce sont les Eglises elles-mêmes, par leur volonté expresse consacrée aussi dans les ententes stipulées avec l'Etat, qui prennent en charge pratiquement tous les frais occasionnés par ce service. Mais il faut donner acte de la disponibilité de l'Etat et des autres organismes publics compétents à prendre en charge ces frais, comme cela est prévu, par exemple, en règle générale, pour l'assistance dans les hôpitaux.

Un autre service important pris en charge par l'Etat en faveur des citoyens qui professent un credo religieux, dans ce cas précis uniquement catholique, est l'enseignement de la religion dans les établissements scolaires, de l'école primaire au lycée. En vérité il s'agit d'un service qui revêt une importance culturelle plus étendue et qui n'est pas limité à la simple satisfaction d'exigences religieuses propres à une communauté de croyants. Comme le souligne le Concordat de 1984, l'enseignement de la religion catholique est assuré par l'Etat en vertu de la reconnaissance de la valeur de la culture religieuse et conformément au fait que les principes religieux

font partie du patrimoine historique du peuple italien. En accord avec ces principes, même l'enseignement religieux a perdu son empreinte catéchistique et confessionnelle d'antan pour revêtir un caractère culturel plus ample qui lui permet d'être suivi non seulement par les catholiques mais par tous les élèves. En effet, cet enseignement a été choisi par un pourcentage de familles et d'élèves de loin supérieur à celui des citoyens italiens qui peuvent se considérer plus ou moins comme des pratiquants de la religion catholique.

Mais il est évident que l'enseignement religieux répond surtout à une exigence ressentie par la communauté catholique — celle de pouvoir diffuser et illustrer sa propre doctrine à travers un canal aussi important et capillaire que celui de l'école publique — et que l'Etat, en prenant en charge cet enseignement, apporte donc une contribution économique considérable à la satisfaction de cette exigence. En ce qui concerne plus particulièrement l'aspect financier, l'enseignement religieux est assuré par des professeurs désignés par les autorités ecclésiastiques, mais nommés et rémunérés par l'Etat au même titre que les autres professeurs, même s'ils ne font pas partie du personnel enseignant titulaire, avec les droits économiques que ce statut comporte, car ils peuvent être révoqués par les autorités ecclésiastiques. Il faut aussi remarquer que jusqu'à il y a quelques années, l'enseignement de la religion était assuré essentiellement par des prêtres et surtout par des curés: aussi le financement public destiné à la rémunération des professeurs représentait-il souvent une forme indirecte de financement pour la subsistance du clergé et cette rétribution s'ajoutait à celle, très modeste en vérité, de la portion congrue. Maintenant que l'enseignement est confié surtout à des laïques, le financement de l'Etat peut constituer une forme de récompense pour ceux qui se vouent totalement à la communauté ecclésiale et qui accomplissent des tâches, parfois très importantes, pour l'organisation et la vie de ces communautés.

VII. Contributions qui favorisent indirectement les exigences religieuses par les collectivités territoriales

Il faut citer aussi quelques subventions destinées à satisfaire des intérêts généraux concernant toute la communauté publique, mais

qui se traduisent concrètement par un bénéfice très important pour les exigences religieuses. La contribution la plus importante est destinée à la récupération, à la restauration et à la conservation des édifices et des biens de valeur historique, artistique ou culturelle. Etant donné qu'en Italie la plupart de ces biens sont des Eglises ou des oeuvres liées au culte, surtout catholique, une grande partie des financements dont nous venons de parler — d'un montant considérable, même s'ils sont insuffisants par rapport aux besoins de l'immense patrimoine historico-artistique existant en Italie — est affectée aux édifices ou biens qui n'ont pas seulement une valeur culturelle, mais qui servent aussi au culte et qui répondent aux besoins religieux d'une partie de la population.

Ceci vaut également pour les institutions qui exercent des activités sociales et caritatives en faveur de toute la collectivité et qui reçoivent justement pour cela, sous des formes diverses, des subventions de la part de l'Etat ou, comme cela arrive souvent, de la part d'autres collectivités publiques. Un grand nombre de ces institutions sont de nature confessionnelle et travaillent dans la société animées d'un profond sentiment de christianisme et du désir de réaliser le commandement évangélique de la charité envers son prochain. Par conséquent, les subventions publiques encouragent et facilitent une activité qui, tout en s'adressant à la plupart des citoyens, est très importante pour les groupes religieux et constitue un moment particulièrement important pour mettre en pratique les principes dans lesquels ils croient.

En revanche, la situation des écoles confessionnelles est très différente. Ces institutions exercent elles aussi une fonction culturelle et éducative qui dépasse certainement les intérêts de la communauté religieuse dont elles sont l'expression. Malgré le nombre et l'importance de ces écoles, en Italie — à part certaines subventions marginales et sporadiques — elles ne reçoivent pas de financements publics. Tout en garantissant la plus grande liberté de créer des écoles privées, la Constitution semble exclure "toute prise en charge par l'Etat" à l'égard de ces établissements privés (voir art. 33). Il faut quand même rappeler que, surtout ces dernières années, s'est développé un mouvement d'opinion favorable à certaines formes, au moins indirectes, de financement public aux écoles confessionnelles

et que la disposition constitutionnelle que nous venons de citer tend à ne plus être interprétée comme une interdiction de financement public.

VIII. Contributions qui favorisent indirectement les exigences religieuses par les collectivités territoriales.

Outre les subventions octroyées par l'administration centrale de l'Etat en faveur des exigences religieuses, il faut tenir compte aussi de celles qui sont versées par les collectivités territoriales (région, département, commune): subventions dont le montant et la diffusion ont augmenté surtout depuis l'institution des régions. La compétence en matière de rapports avec les Eglises est restée à l'Etat central, mais les collectivités locales sont devenues compétentes pour des matières qui, très souvent, présentent des liens, des interférences et des répercussions sur les exigences essentiellement religieuses: c'est le cas surtout de l'urbanisme et de l'assistance sous toutes ses multiples formes (de l'assistance médicale à l'assistance sociale, scolaire, familiale, etc.).

Nous avons déjà fait allusion à ce dernier secteur qui bénéficie de nombreuses interventions étatiques. Avec l'augmentation des compétences des collectivités locales, se sont développées des formes nouvelles et plus articulées de subventions et d'aides; comme celles en faveur de certains hôpitaux confessionnels, de centres médicaux, d'activités caritatives dans le domaine sanitaire et social, pour la protection du patrimoine historique ou des beautés naturelles. Encore une fois, il s'agit d'activités et d'oeuvres d'une grande importance sociale, mais qui souvent, en raison de l'inspiration religieuse qui les soustend, présentent un lien étroit avec les communautés confessionnelles ou les Eglises.

Il faut également mentionner le secteur de l'urbanisme qui a ouvert des possibilités de financement non négligeables (même si elles diffèrent selon les situations locales) pour la construction d'édifices religieux ou de structures annexes. Ces édifices font partie des "oeuvres d'urbanisation" c'est-à-dire de ces oeuvres considérées d'intérêt collectif pour le développement de l'habitat et, en tant que telles, elles bénéficient de subventions économiques. L'une des der-

nières lois générales en matière d'urbanisme — la loi n. 10 du 28 janvier 1977, qui a imposé le versement de subventions particulières pour l'obtention de permis de construire — a stipulé que l'ensemble de ces subventions (outres les profits dérivant de sanctions pour abus immobiliers), est destiné à la réalisation des travaux d'urbanisation. Il en ressort que même les édifices religieux peuvent bénéficier de la répartition de ces sommes, dans une mesure qui varie selon les demandes et les besoins concrets. Dans certains cas, les organismes régionaux ont même fixé un pourcentage précis à destiner aux Eglises ou à d'autres édifices utiles au service religieux, garantissant ainsi aux religions (même à celles qui ne sont pas catholiques) la possibilité de bénéficier de cette ultérieure contribution économique.

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FINANCES AND ASSETS OF THE CHURCHES SURVEY ON THE LEGAL SITUATION IN THE FEDERAL REPUBLIC OF GERMANY (1)

SUMMARY: I. Foundations. — II. The Individual Sources of Financing. — III.The Position of the Churches within the general Law of Duties. — IV. The Church-assets and its administration. — V. The currently operative System in the Discussion.

I. FOUNDATIONS

1. The financing of the churches as well as their assets form part of the conditions of existence and efficacy on which they depend. Their concrete shape is to a large extent determined by these conditions. Being church in the world it has to stick to worldliness which implies money, assets and economics as a whole. An unrealistic spiritualism only could disregard these facts. This is true in particular in view of the complexity of living conditions in modern industrial societies. Of special significance is in this respect the fact that the appearance of the modern state has become more and more that of a tax-state or, in other words, of a state of subsidies (2). The situation of the churches within the State and their relationship to the state does not stay unaffected by this development (3). Thus the

(1) The recent literature can be found in the appendix. For a summarized based orientation one may refer in particular to the writings of v. Campenhausen, Hollerbach and Isensee.

(2) Fundamental to this aspect Klaus VOGEL, *Der Finanz-und Steuerstaat*, in: Josef Isensee-Paul Kirchhof (ed.), *Handbuch des Staatsrechts*, vol. I, Heidelberg 1987, p. 1151-1186.

(3) The following exposition is concentrated on the two "Großkirchen", the Catholic Church and the Protestant Church (EKD and "Länder"-churches). The smaller

fundamental relationship between real freedom and financial independence should be mentioned as a major point. All independent activity needs for its purposes a sufficient economic basis.

2. Within the Federal Republic of Germany the legal arrangement of financing and assets of churches is ensued by rules which are enacted unilaterally — by way of constitution, statute or legal regulation — by the State, by contracts between the State and the Churches, and by unilaterally enacted rules of the ecclesiastical law. The different sorts of legal sources grip into each other and form a compact network of rules within the framework of the German law relating to Churches.

The provisions of the state law and the contractual law belong partly to the field of federal law, partly to the law of the "Länder". That is why the interdependence of both, federal law and the law of the "Länder", has to be observed. The rules of the ecclesiastical law in the area of the Catholic Church are within the scope of the rules of the 5th book of the Codex Iuris Canonici those of diocesan particularistic law; within the scope of Protestant Church they are those of ecclesiastical law of the Churches in the "Länder" (Landeskirchen). Art. 9 of the Fundamental Constitution (Grundordnung) of the EKD (Evangelische Kirche in Deutschland) provides that it, the EKD, has only the permission to set up "directives" concerning the imposition of ecclesiastical tributes and the administration of ecclesiastical assets (4).

3. The constitutional foundations are set up by Art. 4 par. I and II of the Basic Law (Grundgesetz, GG) as well as by Art. 140 GG combined with Art. 136-139 and 141 of the Weimar Constitution (Weimarer Reichsverfassung, WRV). The fundamental relationship between the State and the Church formed by these legal rules and complemented by contracts is characterized by Joseph Listl as follows: "on the basis of an institutional and organizational separa-

religious communities, whether organized under private or public law, are mostly left out of consideration.

(4) On this basis: Richtlinien für das Rechnungsprüfungswesen, 15. März 1956 (ABl. EKD, p. 97) and Ordnung für das kirchliche Haushalts-, Kassen- und Rechnungswesen, 11. Mai 1974 (ABl. EKD, p. 413).

tion of the State and the Church and a strict religious neutrality of the State the order of the state law relating to Churches combines the guarantee of total individual freedom of religion and free activity of the churches and all other religious and "Weltanschauungs" – communities with the acceptance of a role of the churches in the public field which finds its expression in the bestowal of a public law-status through the constitution itself and in various forms of a state-church-cooperation as well as in the promotion of churches and other religious communities by the State." (5).

As Josef Isensee pointed out this system combines two opposite principles: the independence of the churches from the State and their support by the State (6). The State understands itself in this respect in an emphasized way as Social and Cultural State, that means as a State which evaluates the activity of free forces as basically positive, which not only protects it but promotes it actively (7). In the same way as the State has to look after provision for the public (Daseinsvorsorge) it has to look after "provision of freedom" (Freiheitsvorsorge), in other words: "The State being bound by the fundamental rights has got the mandate for activities to enable and to activate these fundamental rights" (8). The principle of subsidiarity plays a role as well in this respect, not in the sense of a strict priority or a second rank but in the sense of a "Leitbild" which is directed towards completion, coordination and cooperation. Thus it is accepted in the area of welfare work that the traditional and through many years successful cooperation of the State with free associations should be promoted and strengthened and that the best possible result should be attained by a coordinated use of public and private means (9).

4. Given this general background the following basic decisions follow from the concrete constitutional rules:

(5) *Das Verhältnis von Kirche und Staat in der Bundesrepublik Deutschland*, in: *Handbuch des Katholischen Kirchenrechts*, ed. Josef Listl, Hubert Müller, Heribert Schmitz, Regensburg 1983, p. 1052 s.

(6) *Die Finanzquellen der Kirchen im deutschen Staatskirchenrecht*, l. c., p. 95.

(7) Cf. Alexander HOLLERBACH, *Grundlagen des Staatskirchenrechts*, in *Handbuch des Staatsrechts*, vol. VI, 1989, p. 528 s.

(8) ISENSEE, l. c., p. 96.

(9) *BVerfGE* 22, 180 (200, 202).

A) The churches are allowed to participate in the general civil law life in the same way as "everybody"; their status as corporation under public law does not prevent them from doing so. They are therefore entitled to take advantages of the protection of the so-called economic fundamental rights, that means in particular of the guarantees of the right of ownership and the right of succession (Art. 14 GG). The churches are free to acquire and to sell property and are free to accept dispositions of individuals under the law of succession to the advantage of the churches.

B) The fundamental right of freedom of religion is also relevant (Art. 4 par. I, II GG). It covers for example the ecclesiastical collect. But as a form of religious practice is accepted as well a charitable activity of the churches, for example the collection of donations for charitable purposes, in particular the collection of gifts in kind to support people in need (10).

C) In the field of institutional state law relating to Churches a fundamental positioning of direction is established by Art. 137 par. I WRV. For in talking of a prohibition of a State church Art. 137 par. I WRV involves as well the prohibition of the complete financing by the State or the total subjection of the church-assets under the management of the State which would comply with the strict system of maintaining a State church. That means in a positive sense: Financing and formation as well as administration of the assets being business of the churches are subject to their own rules and self-administration as laid down by Art. 137 par. III WRV, but only within the limits of the generally valid law. These limits do intervene in this case because the churches — if their actions in the civil law sphere should have any effect — have to rely on the forms which the State law puts at their disposition for financing and assets. In particular they are bound by norms which were enacted in the interest of the security of law life. But in no case discriminating special laws would be authorized.

5. However the basic model which results from the regulations ruling the constitutional status has to be differentiated in quite a few ways:

(10) *BVerfGE* 24, 236 (246, 248, 250).

A) The churches are corporations under public law by way of Art. 137 par. V WRV. Their assets are therefore traditionally ruled by public land law. In this respect the objects which are used for worship enjoy special protection for being "res sacrae" (11).

B) Being corporations under public law the churches are entitled to impose taxes on the basis of civil tax-lists according to the rules of the *"Länder"* (Art. 137 par. VI WRV). Thus the system of the church tax in the sense of a compulsory charge which is levied by the State from the members of the church, is granted by the constitution; it characterizes the Federal Republic of Germany.

C) Art. 138 par. I WRV determines: "The obligations of the State towards the religious communities based on statute, contract or special legal titles are relieved by the legislation of the 'Länder'". This rule does contain a directive to relieve the State obligations, that means to relieve financial contributions to the churches by the general budget of the State which the State was obliged to give on the basis of measures of secularisation dating from the 16th and the early 19th centuries. But as long as the normative conditions for an end of the relationship of obligations are not fulfilled this obligation of the State remains. Insofar it can be argued that Art. 138 par. I WRV has the effect of a barrier to change.

D) At last, the GG has taken on as well a specific guarantee for the church property from the WRV (Art. 138 par. II). According to this article the right of property and other rights of the religious communities and societies in respect to institutions, foundations which are aimed at worship, lessons and welfare, and other assets remain granted. Thus a global prohibition of secularisation exists which goes even beyond Art. 14 GG and makes an unilateral compulsory expropriation impossible. Moreover it is thus accepted that the church property in its public function is a substratum for the free activity of the churches.

6. The constitutional perspective opens our view further on to other elements of the global conception which are important for the subject "Finances and Assets of the Churches".

(11) Cf. Jörg MÜLLER-VOLBEHR, *Körperschaftsstatus und Sachenrecht der Kirche*, in *Zeitschrift für evangelisches Kirchenrecht* 33 (1988), p. 153-183.

A) Following old tradition the State acknowledges that some church-tasks lie so much in its own — the State's — interest as well that he guarantees their observing in state institutions and takes over entirely the costs of materials and personal costs. That is the case for the religious classes in state schools (Art. 7 par. III GG), for the theological faculties (even if there is no constitutional guarantee on the state-level), for the spiritual welfare within the penal system and for the spiritual welfare of the police and the military (see Art. 141 WRV).

B) The liberal Social and Cultural State is willing — as mentioned briefly already — to support financially the activity of free forces to which the churches belong. That finds expression in State subsidies, that means in positive financial allocations to private institutions (12). They concern the field of upbringing and education, in particular of education of adults, further on of help for young and old people, hospitals, and not least, church foreign aid. Beside the work in the field of the protection of historical monuments could be counted in this respect. The State is entitled by the constitution, under certain circumstances even obliged to give such subsidies. Nevertheless it is not possible to derive concrete numbered claims directly from the constitution. Rather is this arranged with the help of statutes. Insofar it has to be assured that churches and affiliated organizations are not at disadvantage against other institutions; at the same time they also do not enjoy any privileges (13).

C) Beside the direct subsidies there exist indirect ones. The State encourages in its tax law donations of private citizens for aims being of public benefit (14). Such donations can be deducted from the income tax by an amount of 5% of the total income. It is the donor who gets the direct advantage out of this regulation; but in any indirect way the Church as recipient of the donation benefits as well. The tax advantage given by the State is though to encourage the willingness to give donations. In this respect it is remarkable that

(12) ISENSEE, 1. c., p. 96 s. Cf. also Axel v. CAMPENHAUSEN, Art. *Freie Träger*, in *Evangelisches Staatslexikon*, 3rd ed., vol. I (1987), col. 959-968.

(13) Cf. *BVerfGE* 75, 40.

(14) Cf. Paul KIRCHHOF, Art. *Gemeinnützigkeit*, in *Staatslexikon*, 7th ed., vol. II (1986), col. 846-849.

the State thus acknowledges the religious affairs as being element of public benefit and that it respects it equally to other elements like academics and research, education or art and culture (15). This form of an (indirect) subsidy is legitimated by the constitution. In the concrete way of carrying these rules out the State is bound by the rule of equality (Art. 3 par. I GG).

II THE INDIVIDUAL SOURCES OF FINANCING

1. The main source for the financing of the churches in the Federal Republic of Germany is the church tax. Comparing the individual dioceses or protestant "Länder"-churches a variation of the percentage share of the churches income can be recognized, partly caused for example by the churches' affiliation to different "Länder". It is mostly indicated as being 75-85% (16), numbers which are also able to be fallen below or to be passed. Thus the tax law in the archbishopric Freiburg comes to 86, 6 % of the global income of the church, in the diocese Rottenburg-Stuttgart it comes to 70, 3% (17).

The church tax is levied as surcharge to the income and wages tax, in an amount of 8 or 9 % of the tax-sum, differing between the "Länder". In the case of the wages tax. It is the task of the employer to keep back the church tax together with the wages tax and to pay it to the tax authority of the State. In the case of the income tax the payment goes to the tax authority which puts the global sum — after taking a discount for administrative charges (3-4 %) — at the disposal of the church in question.

The church tax is a pure membership tax. It should therefore be especially emphasized that the church tax is a system of self-financing of the church under the legal and administrative help of the state. This thought was the decisive one when this church tax system was introduced in the second half of the 19th century. The financing

(15) ISENSEE, 1. c. p. 96.

(16) ISENSEE, 1. c.

(17) Cf. Alexander HOLLERBACH, in *Verfassung des Landes Baden- Württemberg*, ed. Paul Feuchte, Stuttgart 1987, p. 118.

by the general State-budget should have to be relieved by self-financing (18).

For establishing membership the church tax law takes the ecclesiastical law up. The decisive moment is therefore the baptism. Membership is finished in the case of somebody leaving a church; the consequence is the relieving of the tax-obligation and other "civil effects"; the church law status is generally left untouched.

Even if one emphasizes that the church tax is a form of self-financing it should not be overlooked that there is a certain dependence from the State. In this respect it is less important that the churches need the State authorization to fix the rate of taxation. Decisive is that the church tax (being a surcharge) depends on the income tax (a measure tax) and thus on the State's tax policy and the economic situation so that the church income can under certain circumstances be object to not at all insignificant fluctuations. For the State taxes have not only fiscal aims but are also means for social and politico-economic steps (19). It is also easy to understand that the preference for indirect instead of direct taxes would influence the church-tax amount in a negative way. That can and has to be accepted as long and as far as the churches are able to comport loyally towards the State tax policy as an instrument of social-political compensation. In particular the churches will not be able to oppose tax-release-measures which should be of benefit to families and counteract unemployment. On the other hand the churches cannot be refused to fix maximum amounts, that means to cut down the church tax obligations if they lead to an unreasonable burden because of the mechanism of progression of the State tax law and therefore could become an incentive to leave the church. But because of the "tax-justice" the churches will have to make even more use of the possibility to complete the system of subcharge by the fixation of a mini-

(18) Cf. Ernst Rudolf HUBER-Wolfgang HUBER, *Staat und Kirche im 19. und 20. Jahrhundert*, vol. III, Berlin 1983, p. V s. und p. 27 ss.

(19) Especially insistent and fundamental to that Paul KIRCHHOF, *Die Einkommensteuer als Maßstab für die Kirchensteuer*, in *Deutsche Steuerzeitung* 1986, p. 25 ff. On page 28 Kirchhof emphasises that the constitutional guarantee of the churches' right to demand taxes establishes "a return-community, a combine in setting law, an administrative community-task and a joint relying on the individual and the global economic income".

mum church tax or the levying of church money (in the sense of a poll-tax). The steps to release the recipients of low incomes and, in particular, the tax-exemption of natural insurance pensions led to the point where quite a big percentage of members of churches do not have to pay any church tax any more.

With the view on other possible forms of financing of churches it should be emphasized that the decision for a church tax system taken by the Weimar National Assembly and confirmed by the "Parlamentarischer Rat" in 1949 was a conscious decision against the American model of the collection and donation system, a decision which was also supported by the political left wing. The introduction of a system of church-contributions, as it is realized in Austria since 1939, has never been in discussion.

2. Concerning the state payments on the basis of Art. 138 par. I WRV the amount sways to a large extent from "Land" to "Land", from diocese to diocese or from "Land"-church to "Land"-church. The amount in the dioceses of Nordrhein Westfalen is 3 — 6, 5 % (20). In Baden - Württemberg the income of the two "Länder"-churches consist to 8, 3 or 11, 68% of state payment, of the two dioceses to 6, 5 or 13, 2% (21). These differences are based on historical reasons.

Art. 138 par. I WRV contains, as already mentioned, the directive to relieve the State payments. The "Länder" would be authorized to do this by way of legislation. But they could only become active after the federal government would have set up — also by way of legislation — "basic rules". Before starting the formulation of these basic rules it would be necessary, in accordance with Art. 18 of the Reichskonkordat, to establish a "friendly agreement" with the Holy See; that means a contract of redemption would have to be concluded as well. As long as this procedure does not start and end respectively the "Länder" are hindered to relieve the State payments unilaterally. What would be possible are contractual redemptions. On this line lie arrangements in the church contracts which aim at a

(20) ISENSEE, l. c., p. 96.

(21) HOLLERBACH, l. c. (note 17).

pragmatic solution ("Flurbereinigung") (22) in particular by summarizing different legal titles and by estimating at a flat rate.

3. Apart from the classic state payments there exist financial allocations of the State which, as mentioned already, are to be qualified as subsidies. They are not part of the directive or guarantee of Art. 138 par. I WRV.

Sometimes these are payments for the so-called "verfaßte Kirchen". But in general the addressees of these subsidies are institutions which are legally independent in relation to the "Amtskirche". That is for example true for the big church help-institutions which get large contributions from the federal government and the EC commission for their activities in the development-politics (23), further on for the "Deutscher Caritasverband" and the "Diakonisches Werk". To these payments belong also the subsidies for Kindergärten, hospitals and private schools of the church.

Because of the variety of institutions and the variety of the procedures of financing it is difficult to get a survey on the size of these payments of the State. In an overall view on income and expenses of the protestant "Länder"-churches of Westfalen (church-communities included) subsidies and contributions for Kindergärten and Kinderhorte form 12, 48 %, subsidies for other "diakonische" activities 3, 58% (24). Concerning the legal source in other cases there exist specific statutes, budgets and allocation-directives. In the fields of the federal law it is mainly the statute for the economic protection of the hospital and for the regulation of the hospital charges from 29.6.1972 which should be mentioned (25). On the whole it becomes clear that the churches with their "satellites" are fully interweaved with the net of State payments in the social and cultural field. Basically it is obvious that the State has only to leave space for the church-self-determination also in these fields. But in

(22) ISENSEE, 1. c., p. 97.

(23) Cf. ISENSEE, 1. c.

(24) Cf. SCHLIEF, Art. *Kirchliches Finanzwesen*, c. f., col. 527/528 (index 5).

(25) Cf. Otto DEPENHEUER, *Staatliche Finanzierung und Planung im Krankenhauswesen*, Berlin 1986.

individual points some problems arise, in particular as a consequence of the inclusion into a global plan (26).

4. Concerning the other sources of financing the collections do not fall under any directives of the State law relation to churches. Therefore one speaks of a privilege of collection and refers it to collections which take place in or in front of the churches or in a local relation with these respective functions. However, in the case of public collections where the churches do not only want to address their members or participants of functions they are bound by the general law of collection (27). The statutes of the "Länder" prescribe for collections on streets or in houses an obligation to get an authorization and the observance of certain rules.

In respect to the voluntariness of the gifts the donations belong also to the field of collections. The State is indirectly involved in the way that he acknowledges tax advantages under certain circumstances.

In this area as well, it is difficult to get a clear picture of the actual facts. Within the income of the diocese Münster collecting and contributions only amount to 0, 91 %. However, within the income of the church communities in the Nordrhein-Westfalen part of the diocese Münster 4, 36 % arose from collections and donations in the year 1985 (28).

On a global basis it has to be taken into account that donations are mostly not for the benefit of the "verfaßte Kirchen" or church communities, but are for the benefit of the church affiliates or other institutions. Thus the own performances of the big episcopal help-affiliates consist to 80% of donations (29).

5. To be complete concerning the sources for the financing of the churches here should be furtheron mentioned the proceeds of the financial, physical and real assets, and the charges for official duties which have to be qualified as public fees because of the quality of

(26) Cf. *BVerfGE* 53, 366.

(27) Cf. Christoph LINK, Art. *Sammlungswesen, kirchliches*, in *Evangelisches Staatslexikon*, 3rd ed., vol. II (1987), col. 3051-3053.

(28) Cf. SCHLIEF, 1. c., col. 529/530 (index 6 and 7).

(29) Cf. ISENSEE, 1. c., p. 97, note 19.

the churches as corporations. But the amount of these two sources seems to be so small that it only counts as a subordinate factor. In the end it thus becomes so clear again: The churches live on the church tax. It amounts to the lion's share of 3/4 of the income.

III The Position of the Churches within the general Law of Duties

An important factor for the financing of the churches consists of the fact which position the churches hold within the system of the State law taxes (taxes, charges, fees) (30). In the Federal Republic of Germany the churches have not got a global privilegium immunitatis. The quality of the churches as corporations does not prevent them by definition to fall under the State tax law. Nevertheless the State tax law is organized in a way that the churches are usually freed from the most important taxes. That is in particular true for the corporation-, the wealth-and the trade-tax, beside the death duties and the gift tax, finally the proper tax. Only in case where the churches run a business they have insofar to pay corporation - and trade-tax. In the field of taxes on the expenditure of income, that means in particular in the case of the sales tax, there exist a far reaching exemption of taxes of the churches as well, insofar as their activity does not extend in the business sector. The churches are not freed at all from the tax on land acquisition.

The basic reason for both, exemption of taxes and tax-advantages which the churches enjoy lies in the fact that the State acknowledges their existence and effectiveness as "of benefit to the public". This fact does not mean that the churches are privileged in relation to other religious communities or to other free forces in the society. The legal rules for charitable institutions are interpreted broadly. The in this respect decisive statute, the statute on duties (Abgabenordnung, AO) sets different aims side by side: those of non - profit organisations, charitable ones and those of the churches; but the common denominator is the thought of non-profit, in a broader sense. An activity is acknowledged as being of benefit to the public

(30) For details cf. the articles of Axer and of Weides (s. appendix).

in the narrow sense in the case in which it aims to selflessly promote the general public on a material, spiritual or moral field. In particular acknowledged as being such a promotion is the support for research, education, art and culture, religion, international understanding, foreign aid, environmental nature and monument – protection as well as for the patriotism ("Heimatgedanke"), further on the support of help for the youth and the old, the public health service, the welfare service and the sport, finally the general promotion of the democratic State in the Federal Republic of Germany (§ 52 par. II AO). Charitable aims are pursued when an activity aims at selflessly supporting persons who have to rely on help because of their physical, mental or spiritual condition or who are in need (§ 53 AO). Although a lot of church activities could already be covered by the facts of the matter of public utility and charity the pursuit "of church aims" is emphasized as a distinguished fact of matter.

Following the term-definition of § 54 AO church aims are pursued if an activity aims at selflessly promoting a religious community which is a corporation of public law (par. I). It is said in a non-concluding catalogue of examples that to this aim belong in particular the erection, decorating and supporting of places of worship and church rooms, the holding of clergymen, the giving of religious lessons, the funeral and the cultivation of the memory of the dead, beside the administration of the church assets, to pay of the clergymen, church civil servants and sextons, care for age and hindrance of these persons and of their widows and orphans (par. II).

Leaving aside the principal meaning of these norms a big part of their practical relevance lies in the fact that donations to the benefit of the public, for charitable and church aims are tax-deductible. The justification for the fact that the church takes which everybody has to pay are allowed to be subtracted from the income tax-obligation as extra-expenses finds also additional support in this last statement (31).

Following the State law relating to churches tradition in Germany there also exists the exemption of the churches from charges and costs in case they use State courts or offices (32). As far as

(31) Cf. Kirchhof, l. c. (note 19), p. 32.

(32) For this topic Peter Weides, l. c., p. 885, has announced a special article.

such exemptions of charges and costs are founded on law of the "Länder" more recent contracts have set up guarantees for their existence (33). The federal law does not speak of an exemption of the churches from the court-costs, but does not touch already existing norms of the law of the "Länder" concerning the civil, penal and finance jurisdiction (§2 par. II GKG). The same is true, as §11 par. II 2 Kostenordnung states, for the field of the jurisdiction over non-contentious matters. The tax, charges and costs-exemptions which the State gives, are negative State subsidies. Still they only fall under the guarantee of existence of Art. 138 par. I WRV, if and as far as these tax-exemptions have set up an organic part of the established State-church-relations in assets-matters and if judging from their nature they can be treated as equal to a State obligation given to the church for the accomplishment of its task (34). In this respect it becomes therefore important whether the exemptions in question have been part of the legal order already before 1919.

IV The Church-assets and its administration

It is left to the churches themselves in which way they want to form their assets. They own money, physical assets, and real estate. As owners are considered those church institutions which are corporations under public law, that means the diocesan or "Länder"-churches and the parishes, beside the EKD and — in the field of the German bishop's conference — the association of the German dioceses. In particular, the traditional legal form of the foundation should be mentioned. The statutes on foundations of the "Länder" contain special rules on church foundation (35). As such are recognized those which serve predominantly church tasks, in particular the service, the propagation, the welfare work on the education and which should be, according to the statutes, under the control of a church or another religious community which has the legal position

(33) Following the model of Art. 15 Niedersächsischer Evangelischer Kirchenvertrag.

(34) Hollerbach, *Der verfassungsrechtliche Schutz kirchlicher Organisation*, p. 588.

(35) Cf. Hollerbach, 1. c., p. 589s.

of a corporation under public law. Further on it is decisive for getting the State authorization of a church foundation in the form of a foundation of civil law or for the bestowal of the public law legal capacity (which is possible according to the statutes of some "Länder") that the aims of the foundation can be fulfilled reasonably in an organisational relation to a religious community: It is then important also that generally (some federal legal norms excluded) the administration as well as the supervision of the foundation should be looked after only by the religious community according to their own legal norms.

The administration of the church finances and of the church assets has removed itself more and more from the historical explicable State guardianship during the period of recent developments. It now belongs basically to their own business which the churches organize and administer within the limits of the generally valid statutes (36). This is taken into account by recent legal norms in this field which are otherwise formed by the different traditions of the "Länder"-statutes.

Thus Art. 3 of the contract between the "Land" Rheinland Pfalz and the archbishopric Cologne as well as the bishoprics Limburg, Mainz, Speyer and Trier from the 18th September 1975 on questions of the legal position and the administration of the assets of the Catholic Church (37) states succinct that the administration of the assets and the representation of church corporations, institutions and foundations under public law in financial matters is organized by church legislation and that the "Land" will repeal still existing State legal norms in this field. The churches promise that the legal norms guarantee a well-ordered representation of their institutions and that they will be presented to the Minister of Culture before their enactment. This minister is allowed to file an objection within a month in case that a well-ordered representation in financial matters is not granted; in this case the bishoprics have to check the norm in question. The church norms on the representation in financial matters are also published by the State. Included into the obliga-

(36) Cf. Hollerbach, 1. c., p. 591s.

(37) Cf. Joseph Listl (ed.), *Die Konkordate und Kirchenverträge in der Bundesrepublik Deutschland*, vol. II (1987), p. 464.

tions of publishing are also norms on the reservation of authorization of higher church offices and other norms of the church law on administration of assets; their publication serves the security of the legal life.

The form of this contract show the standard of today in relation to the law of the administration of the church assets. After the dismissal of the churches from the State guardianship it is their business in which way they like to organize the administration of the finances and the assets. In this respect in particular, the question of the participation of the laity becomes especially important for the Catholic Church.

In the Protestant churches the tasks of the administration of finances and the assets are looked after within the framework of the existing synodal structure (38). The situation in the Catholic Church is complex. The development in the direction of having general organs which share the responsibility ("Rätesystem") is only a recent one being itself a fruit of the Second Vatican Council. On the other hand, the State had in the course of the church tax legislation imposed bodies which are responsible for the administration of finances and assets and in which the laity is represented, in which it has even got the majority. Both of these developments did not come to a balance yet; beside there are still existing differences in the particular legal norms. In the following it shall be demonstrated which organs of the administration of finances and assets are installed on the local level and the diocesan level by taking as example the archbishopric Freiburg.

The decisive organ on the local level is the council of the presbytery (39). But it forms out from itself a special committee, the so-called "Stiftungsrat" to which belong the parish priest as president, the president of the council of the presbytery and — related to the size of the church community — 3 to 6 of age members elected from the council of the presbytery. The "Stiftungsrat" is responsible for the administration and representation of the local church assets.

(38) Cf. Werner HOFMANN, Art. *Kirchenvermögen*, in *Evangelisches Staatslexikon*, 3rd ed., vol. I (1987), col. 1772 s.

(39) Cf. Satzung der Pfarrgemeinderäte im Erzbistum Freiburg, 20. Oktober 1976 (Amtsblatt der Erzdiözese Freiburg, p. 447).

In contrast, the council of the presbytery is in particular competent for the passing of the resolution for the budget of the church community. Thus a concept is realized which avoids the unconnected juxtaposition of the local pastoral council and the organ of the assets administration without neglecting the special function of the assets administration. This solution thus corresponds basically with the model suggested by the Common Synod of the dioceses in the Federal Republic of Germany (40).

On the level of the dioceses the old structures remained. According to the church tax rules (41) it exists a so-called church tax representation — it is popularly "church tax parliament" — in which the laity has got the majority. 26 people of the laity which are not in the service of the archbishopric are elected into it, further on nine incumbent clergymen. Beside the "Generalvikar" and one representative of the diocesan authorities in the field of assets administration belong by virtue of their office to the committee. Finally the archbishop has got the possibility to appoint three more members. This "church tax representation" is responsible for the drawing-up and the adoption of the budget of the archbishopric. Beside it has to take all resolutions which are necessary in relation to the levying of the church tax. Otherwise the relevant rules for the management of finances and the assets administration are those of the Codex Iuris Canonici. Accordingly there exists a council for the diocesan administration of assets and the office of the economist (42).

V The currently operative System in the Discussion

The currently operative system of the financing of churches and the administration of the church assets offers the churches — on the whole — optimal conditions for a free and efficient display of

(40) Beschluß "Verantwortung des ganzen Gottesvolkes für die Sendung der Kirche", part. III, no. 1. 3 and 4: Gemeinsame Synode der Bistümer in der Bundesrepublik Deutschland. Official ed. I, Freiburg 1976, p. 660. Cf. also Alexander HOLLERBACH, Art. *Gemeinde* (III. Gemeinde in der Katholischen Kirche), in *Evangelisches Staatslexikon*, 3rd ed., vol. I (1987), col. 1049 ss.

(41) Kirchensteuerordnung der Erzdiözese Freiburg, 25. Juli 1978 (Amtsblatt der Erzdiözese Freiburg, p. 407).

(42) For details cf. PUZA, l. c., p. 903 s.

their forces in the service of the faith propagation and the active love of the neighbour. They have not got any reason to renounce this as long as they are conscious about the fact that their credibility should not be damaged and as long as they do justice to their obligation to practice solidarity with the churches of other countries. But the State does not have a reason either to basically renounce itself from this system. It is a proof of its liberal character and its awareness of its own reliance on moral substance which it cannot create by itself that it acknowledges and supports the churches in their "importance for the maintenance and strengthening of the religious and the moral foundations of the human life" (43).

Nevertheless there exist forces in the Federal Republic of Germany which oppose to the currently operative system. In the beginning of the seventies there were efforts in the FDP (Liberal Party) to formulate legal-political postulates under the parole "Free Church in the Free Country" (44). In the beginning very radical demands were raised but the resolution of the party conference (30 September/2nd October 1974) wanted in a moderate form only that the existing church tax should be replaced by a church intern fee-system and that the Art. 138 par. I WRV should be realized. But the FDP did not try to realize these demands in the following time. In recent years these theses are picked up again by the youth organization of this party.

In the party "The Greens" there are also forces which declare war on the currently operative system (45). On the contrast, not only the CDU/CSU but also the SPD do not show any interest in a change. The academic research in the field of the State Law relating to churches does not have to be afraid of a discussion. It will mainly have to ask the critics in a basic respect whether they are not attached to an antiquated model of democracy if they want to tie

(43) Cf. Art. 4 II Landesverfassung Baden-Württemberg.

(44) Cf. Peter RATH (ed.), *Trennung von Staat und Kirche? Dokumente und Argumente*, Reinbek b. Hamburg 1974. Comments about it by Alexander HOLLERBACH, *Liberalismus und Kirchen: Fragen an die F.D.P.*, in *Internationale Katholische Zeitschrift* 4 (1975), p. 160-169.

(45) Cf. Gerald GÖBEL, *Neue Bewegung im Staatskirchenrecht?*, in *Zeitschrift für Rechtspolitik* 1990, p. 189-192.

the State to a strict model of separation and whether they do not encourage an untimely "Etatismus".

Rebus sic stantibus it is not to expect that the critical voices find such an echo that in the near future changes would have to be expected. Rather has the German system to pass another test, that means the test which results from the ongoing development of the European Law. It cannot be excluded that there will be at least indirect consequences for the church tax as effect of the efforts of the EC claim a competence which would include the church tax as such. In contrast, one will have to bring into the consciousness with vigour the fact that the church tax is a form of the self-financing of the church and that the church tax obligation is taken into account in the process of calculating the tax-capacity of the citizens, so that the citizens are not charged additionally. The right to equality is, therefore, not violated.

APPENDIX
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STATE FINANCIAL SUPPORT FOR THE CHURCH: THE UNITED KINGDOM

Summary statement

State financial support for the Church in the United Kingdom is extremely limited. Apart from indirect support through the Church-State partnership in some aspects of the educational system (which is examined in another paper) it is limited almost entirely to some help in the maintenance of historic church buildings. This is true despite the legal "establishment" of churches in England and Scotland.

The legal position of the Churches

The legal position of the various Churches in the United Kingdom is a complex one, and is not always well understood even in this country, so readers may find a short account useful by way of introduction.

The United kingdom is a "composite" State with three distinct bodies of law (but only one Parliament), those for England and Wales (1), for Scotland, and for Northern Ireland; there is a different position on Church matters in each of these countries.

a) In *England*, the majority Church is the Church of England (2), an "established" Church. "Establishment" has a number of

(1) Although "England and Wales" has a single body of law, there being no distinct "Welsh law", the position as to the Church has, as will be seen, differed since 1920 as between the two.

(2) The Church of England regards itself as both Catholic (as continuing the Church built up in England by St. Augustine in 597, and retaining the episcopal system

important legal consequences. Ecclesiastical or canon law is part of the law of the land, and the Church of England's courts are within the recognized system of courts (whereas other Church's courts, such as Roman Catholic diocesan tribunals are treated as private arbitral bodies); the Queen must be a communicant member of the Church of England, and the appointment of bishops, 24 of whom sit in the House of Lords, is made by the Crown (3); and the Queen is also involved, as "Supreme Governor" of the Church, in summoning and dissolving its legislative "parliament", the General Synod. The General Synod, an elected body of three "houses" of bishops, clergy and laity, has power to legislate, by "Measure" on Church matters; these Measures have the same status as Acts of Parliament, which they can repeal or amend. The clergy and other Church officers are, however, not State officers (4). In 1920, those Church of England dioceses which were situated in Wales were constituted as separate "Church in Wales", which has no "established" status (5).

b) In *Scotland* the majority Church is the Church of Scotland, a reformed church with a Presbyterian system of church government. The Church of Scotland is "established", but this status has very few legal consequences; the Queen is bound by oath to protect it, and appoints a Lord High Commissioner to attend its annual General Assembly. There is no State financial support, and the rules of the Church have the force only of private contract between its members.

c) In 1869, when the whole of Ireland was still part of the United Kingdom, the (Anglican) Church of Ireland was "disestablished" by a process similar to that later followed for Wales. No Church now has any special status in *Northern Ireland* (6).

of Church government) and Reformed (Papal authority having been removed in 1532-4 under Henry VIII and again in 1554 under Elizabeth I, whose reign also saw resolved some of the ideological tensions of the times in "the Elizabethan Settlement").

(3) On the advice of the Prime Minister whose field of choice is restricted to two names submitted by the Crown Appointments Commission of the General Synod, a wholly Church body.

(4) Except insofar as they have functions as registrars of marriages.

(5) See the Welsh Church Act 1914; the Act reflects the position that in Wales, the main Christian tradition is the Reformed one.

For the purposes of property and finance all the Churches except the Church of England are essentially treated as private charitable organisations. Their property is held by "trusts"; in the Churches of the Reformed tradition, a single local church congregation will have a body of trustees; in the Roman Catholic Church there are diocesan trustees. The legal arrangements within the Church of England are quite different, and in legal terms unusual.

The formal legal position is that every parish church in the Church of England, and the house of residence provided for the parish priest (7), is owned by the "corporation sole" which consists of the office the parish priest holds by virtue of his appointment. He is regarded as having freehold title to that office, and cannot be removed from it (except for reasons of misconduct or ill-health) until he reaches the age of 70 years. His appointment also carries with it the right to certain income, which until recent years would be a sufficient salary ("stipend") for himself and his family; for this reason, his office is often called his "living" (because it carried a stipend on which he could afford to live). In practice, the building is maintained by the parishioners' voluntary contributions, and almost the whole of the stipend is paid from funds administered by the Church Commissioners (8) and derived partly from the investment income of the Commissioners and partly from the voluntary contributions of Church members within the relevant diocese.

State financial support

In principle there is no State financial support either for the Church of England, the Church of Scotland, or the various "non-established" churches, in respect of

— the stipends of the clergy and other Church officers

(6) Roman Catholic, Church of Ireland and Reformed traditions are all represented amongst the population. Here, as in the rest of Ireland, the Church of Ireland retains the historic churches and cathedrals.

(7) The parish priest is known as the Rector or Vicar; there is no longer any legal distinction between the two titles.

(8) See below.

— the building and maintenance of cathedrals and other churches
— the general operating expenses of the parishes and dioceses.

To this proposition there are some very limited exceptions, applying principally to the Church of England. One more general one is that some clergy (of different Churches) are serving as chaplains in the Armed forces and in the prison and health services, and are paid as officers or employees of the appropriate service.

In common with other charities, the Churches do receive certain tax advantages, principally that where a contributor makes regular payments to the charity over a 4-year period the charity also receives the Income Tax which has been paid in respect of the sum concerned. So a regular gift by an individual of £ 100 to a Church, or other charity, actually benefits the charity by £ 133 at present tax rates.

Church taxation

There is no contribution to any of the churches by any sort of Church tax. There was once power to impose a "church rate", rates being a form of local tax assessed by reference to the value of each house, but this had become obsolete before it was abolished by the Compulsory Church Rate Abolition Act 1868. There is in theory a power to levy a voluntary church rate (9), but it is never done and the whole system of rates levied by local civil authorities is to be abolished in 1990 so that even the theoretical possibility will become impossible of operation.

Clergy stipends

Reference has already been made to a body the full title of which is The Church Commissioners for England. It is an amalgamation of two earlier bodies. The first, *Queen Anne's Bounty*, was a charity established by Queen Anne in 1704 (10); she transferred to

(9) The power is referred to in as recent a Measure as the Parochial Church Councils (Powers) Measure 1956.

(10) See also the Act known as the Queen Anne's Bounty Act 1703.

this charity the income derived from the "first fruits and tenths", an ancient system of taxation on those being appointed to church offices which had in pre-Reformation times been payable to the Pope but more recently to the Crown. The whole system was ended, with some once-for-all payments, by the First Fruits and Tenths Measure 1926.

The second, the *Ecclesiastical Commissioners*, was established in 1836 to carry out the recommendations of a number of Royal Commissions which had enquired into church finances, and in particular into the excessive incomes of certain bishoprics and cathedral chapters, some of which could be diverted to poorer parts of the Church.

The Church Commissioners, amalgamating these two bodies which had in the meantime acquired additional functions, was established under the Church Commissioners Measure 1947. It administers an income of some £ 183 million (1988 figures), of which £ 60 million is income from local parishes and trusts and the balance from the investments and property portfolio. The income is spent mainly on clergy stipends (£ 100 million, of which just over 50% comes from the parishes), pensions (£ 48 million), and on contributions towards the cost of new houses and housing maintenance for the clergy and their families (£ 23 million). The Church Commissioners is in practice managed by committees composed of bishops and persons elected by the General Synod, though of the three officers (the three "Church Estates Commissioners") two are appointed by the Crown; one of these is a full-time officer, the other a Member of Parliament.

It might be argued that the Church Commissioners can be regarded as "State financial support". I do not believe this to be at all correct. Although the origins of the institution historically lie in the transfer of income made by Queen Anne, and there remain some constitutional links with the Crown, the capital and income of the Commissioners has grown enormously in quite recent times as a result of skilful management of what are in effect the Church's own reserve funds; the origins in Queen Anne's Bounty is now a mere historical curiosity.

The only other State involvement in clergy income is that fees for weddings and funerals, which the clergy of the Church of England are obliged as a matter of law to perform at the request of the appropriate persons, are also fixed by law. However the parties concerned are responsible for paying the fees, not the State.

Redundant church buildings

In common with other countries, England has many historic church buildings. Of the 16,500 owned by the Church of England, 8,500 date from before the 16th century and 12,000 are listed by the State as "of special architectural or historic interest"; of the other Churches, only the Church of Scotland has a similar stock of such buildings. Many historic churches are in rural areas which have lost most of their population, and are no longer in regular use. The Pastoral Measure 1968, affecting only the Church of England in whose care these buildings are usually to be found, made detailed provision for these "redundant churches", provisions now contained in the Pastoral Measure 1983. If a church building is declared redundant, attempts are made to find a suitable alternative use which would preserve its main features (11). Failing that it may sometimes be demolished and the site sold, or it is placed in the care of a body known as the Redundant Churches Fund. This consists of up to seven persons appointed by the Crown after advice is submitted via the Prime Minister by the Archbishop of Canterbury (12), and its object is the preservation, in the interests of the nation and the Church of England, of churches and parts of churches (13) of historic and archaeological interest or architectural quality ... together with their contents (14).

Under the Redundant Churches and Other Religious Buildings Act 1969, section 1, grants may be made from State funds towards the expenses of the Redundant Churches Fund. There are three sources of income for that Fund:

(11) In urban situations this can be relatively easy; for example, redundant churches have become community halls, orchestral rehearsal rooms, and college libraries.

(12) Pastoral Measure 1983, s. 44 (2).

(13) In some cases, the Fund has taken over the tower of a church.

(14) Pastoral Measure 1983, s. 44 (4).

a) these State grants made under the 1969 Act and subsequent Grants to Redundant Churches Fund Orders made at 5-yearly intervals with the approval of the House of Commons (15);

b) funds derived from the sale of church sites where the redundant church is not vested in the Fund; two-thirds of the sale proceeds go to the relevant diocese, but the rest, up to a maximum fixed for each 5-year period (16), is available for this purpose (17);

c) funds derived from the general investment income of the Church Commissioners, the amounts of the last two sources being fixed originally by section 52 of the Pastoral Measure 1968 and subsequently by Payments to Redundant Churches Funds Orders made at 5-yearly intervals by the Church Commissioners with the approval of the General Synod (18).

At first the State and the Church contributions were on a 50/50 basis, but the State has in recent years agreed to bear a greater share of the burden, and the most recent Orders give a 70/30 division. The pattern for the quinquennia since 1969 is as follows:

Years	State grant	From Church	Of which from sales	State/ Church
1969-74	200000	200000	100000	50/50
1974-79	700000	700000	350000	50/50
1979-84	1450000	1450000	483000	50/50
1984-89	4800000	3200000	1000000	60/40
1989-94	8700000	3700000	1200000	70/30

There is also power to vest a redundant church in the Department of the Environment, to be cared for by the Historic Buildings and Monuments Commission for England (19). This is available for any non-Anglican churches of exceptional historic interest.

(15) See the Orders of 1974 (S.I. 1974 No. 1206), 1979 (S.I. 1979 No. 478), 1984 (S.I. No. 203) and 1989 (S.I. 1989 No. 463).

(16) Any balance goes to other dioceses which do not have a large income from this source, because they have few such buildings falling redundant.

(17) Pastoral Measure 1983, ss. 51 and 52.

(18) See the Orders of 1974 (S.I. 1974 No. 306), 1979 (S.I. 1979 No. 195), 1983 (for the quinquennium 1984-9) (S.I. 1983 No. 1687), and 1988 (for the quinquennium 1989-1994) (S.I. 1988 No. 1995); as a matter of constitutional propriety, these Orders are made before the State grants are authorised by the Grant Orders cited above.

(19) Redundant Churches and Other Religious Buildings Act 1969 as amended by the National Heritage Act 1983.

State Aid for Churches in Use

Since 1978, the State has made available a sum of money out of which grants may be made for the repair of churches of historic or architectural interest, to supplement money raised locally. The amount was fixed at £ 1 million *in terms of 1973 prices*, the year being that in which a major study of the cost of repairs was undertaken. In the case of any individual church building, only some 40% of the cost will be contributed by the State. Overall the State contribution represents some 8% of the Church of England's expenditure on buildings (e.g., in 1983, it was £ 3.6 million out of a total of £ 43 million).

One condition of this system of grants was that the Church of England should review its legal procedures in respect of church buildings. Unlike other historic public buildings, its churches are exempt from the control of local government agencies which must normally consent to any change in a listed historic building. Instead, the diocesan court must grant permission in the form of a faculty granted by the judge on the petition of the local parish priest and the two (lay) churchwardens (20). The judge applies a body of case-law which takes into account doctrinal as well as aesthetic considerations; he also considers advice by a diocesan advisory committee on the care of churches, but is not bound by that advice. As a result of the review, the voice of groups representing public and conservation interests is also to be heard.

Conclusion

The Church of England, the only Church for which full statistics are available, has a total expenditure on its clergy, buildings, administration, educational and charitable work of over £ 400 million pounds a year. The State provides some £ 6 million in grants for the repair of historic buildings (plus its contribution of £ 9 million to the Redundant Churches Fund). The State contribution to Church finance is, therefore, minimal.

(20) Churchwardens are elected annually in each parish as its leading lay officers.

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FREEDOM OF EDUCATION AND THE RELIGIOUS FACTOR IN SPANISH LAW

SUMMARY: I. Introduction. — II. The meaning of freedom of choice of education in Spanish law. — III. Freedom of education in public centres. — 1. The nature of education in public centres. — 2. Freedom to teach in public centres. — 3. Religious education. — IV. Freedom of education in private centres. — 1. The right to establish private centres. Confessional centres. — 2. Identity of confessional educational centres. — 3. Freedom to teach in confessional educational centres. — 4. Intervention in the control and management of these centres. — 5. Public financing of private educational centres. — V. CONCLUSIONS.

I. INTRODUCTION

Freedom of choice of education, which the Spanish Constitution recognizes and guarantees, implies a set of rights and duties which, to understand them correctly, cannot be interpreted individually, but closely related with other precepts.

Firstly, constitutional principles, both general (freedom, justice, equality, pluralism, etc.), and specific ecclesiastic law (religious freedom, secularism, religious equality and cooperation with the religious confessions), have to be borne in mind, some of which acquire particular importance with respect to confessional education. The reason for this connection is derived from the fact that these principles constitute "the very basis of regulations, which therefore has to prevail throughout their interpretation and application".

Secondly, the interpretation of freedom of choice of education should be made in relation with other fundamental rights, such as the right of freedom of thought, to religious freedom and ideological freedom, in as far as they extend to the field of education, where it acquires specific forms of practice.

Finally, in examining the freedom of choice of education, the provisions of international documents on the subject must be taken into account, for several reasons.

The first reason, of a methodological nature, is that to make an up-to-date study of the science of Ecclesiastic Law, it is not necessary to insist excessively on the constitutional consideration and sovereignty of the State, but to devote more attention to international declarations for the protection of human rights.

The second reason is because full protection of human rights can only be achieved "when the problem of the freedom of the individual, in the complexity of its meanings is transferred from a state level to an international level".

Lastly, because certain Constitutions, like the Spanish, attach special importance to international documents on the question of human rights.

Consequently, as Ferrari points out, the examination of international sources is a "compulsory step for those studying ecclesiastic law who do not wish to lose contact with one of the most important transformation processes of contemporary society".

This joint interpretation which we spoke of at the beginning is derived, ultimately, from the recognition of the dignity of the human being, which the Spanish Constitution considers as the foundation of the legal code. This dignity, as the Constitutional Court has emphasized, is expressed "in the conscious and responsible self-determination of life itself and which involves the claim to respect by others".

This recognition of the dignity of the individual as a legal value, which acquires the nature of a basic principle of the legal system has led the doctrine to consider the right-duty to education as one of a person's rights, in that it implies the right of the human-being to self-realization, namely, to obtaining full education and complete training. This right to full training is started specifically, as BERLINGO points out, in a series of freedom regarding all school members, understood as the educating community.

The Spanish Constitution and constitutional legislation regarding education, recognize the full development of the personality as the purpose of education, and the Constitutional Court has expressed itself in the same terms.

Recognition of the full development of the personality as the aim of educational activity obviously assumes the relationship between the religious factor and education, in that this factor is one of the elements involved in achieving the complete formation of the person. This relationship implies, on the one hand, the right to receive religious education in public schools and, on the other, the right to set up teaching centres of a confessional nature.

Finally, one cannot overlook the fact that in a secular and pluralist state, like Spain, "neutrality of the public school and freedom of choice of private education are two poles of the same sphere, two terms of a dialectic tension which concur, jointly in the definition of the opinion on the correspondence of the whole of the teaching organization with respect to the demands of freedom of pupils, who have the right to make their own personal options freely, without being subject to special liens.

II. THE MEANING OF FREEDOM OF CHOICE OF EDUCATION IN SPANISH LAW.

Spanish doctrine has endeavoured to interpret the sense which freedom of choice of education has, according to article 27 of the Constitution, one of the more conflicting precepts from the political point of view. Different arguments have been used to do so, either insisting on freedom to establish and manage private ideologically characterized centres, or discarding the confusion between freedom to teach and freedom of choice of education, or considering freedom of education as a "supraconcept" from where other rights are derived. From another point of view, the need of distinguishing between education and teaching has been insisted on. And, in this sense, it has been affirmed that teaching is characterized by "transmitting scientific knowledge", whereas education consists of "communicating moral, philosophical and religious convictions, according to a given ideology". However, it should be borne in mind that although it may prove useful from the point of view of regulations to distinguish between education, teaching and culture, what cannot be upheld "is to maintain the teaching service and complete permanent training process of the human personality as separate realities, uncommunicative in their material development".

Taking into account international documents on the subject, the Constitutional Court has declared that "the free choice of education, recognized in article 27.1 of the Constitution, implies on the one hand, the right to set up educational institutions (article 27.6), and, on the other, the right of those who personally perform the function of teaching, to do so with freedom, within the actual limits of the teaching post they hold (article 20.1, c).

Parent's right to choose the religious and moral training they wish for their children (art. 27.3) is also derived from the principle of freedom of choice of education. In all cases, it concerns rights with necessary limits according to their nature, irrespective of those due to harmonizing them with other rights which the legislator can establish, always respecting their essential contents".

On the other hand, the High Court has considered that, together with these three rights which the free choice of education includes in our Constitution, the right to free choice of the teaching centre also forms a part.

This interpretative criterion is included, basically, in the Organic Law regulating the Right to education (L.O.D.E), of 3rd July 1985, and in force, which considers respect of freedom of conscience of pupils to be included in freedom of education, apart from the rights mentioned.

Finally, it should be mentioned that as against certain doctrinal attitudes which maintain the priority of some of the rights included in freedom of education, regarding remaining rights, the Constitutional Court has declared that these are limited and that there should be reciprocal harmonization between them all.

III. Freedom of education in public centres

1. *The nature of education in public centres.*

The profound change experimented in the Spanish legal system due to the democratic conception of the State, established by the 1978 Constitution, could not but be reflected in the regulations of education.

Diversity of beliefs are facts which cannot be ignored, without offending the very idea of democracy. On educational matters, this leads to the lack of an official doctrine.

In a democratic and hence pluralist State, teaching in public centres should be unbiased, from the ideological point of view. This neutrality should be understood as respect to different religious and ideological beliefs, and not as an imposition by the state of pedagogy founded on the systematic exclusion of religious values.

On the other hand, the principles of religious freedom and secularism of the State, included in article 16 of the Constitution, are incompatible with education in public centres in the precepts of a given religious confession.

Following these criteria, the Constitutional Court has declared that "In a political legal system based on pluralism, the ideological and religious freedom of individuals and the non-confessional nature of the State, all public institutions, and most particularly educational centres must indeed be ideologically neutral. This neutrality is a necessary feature of each of the teaching posts in the centre, and not the hypothetical result of the casual coincidence in the same centre, with respect to pupils, of teachers with different ideological tendencies, whose teachings are reciprocally neutralized".

The principle of ideological neutrality, which underlies education in public centres, is included in the said Organic Law of 3rd July 1985 (L.O.D.E).

2. *Freedom to teach in public centres.*

Freedom to teach, recognized in art. 20, 1, c) of the Constitution, poses in the first place the question of those entitled to teach. Regarding this problem, interpreting the concept of freedom to teach broadly, the Constitutional Court has clarified that this right corresponds to all teaching staff "whatever the educational level on which they work and the relationship between their teaching and their own research work".

In accordance with this criterion, the Organic Law of 3rd July 1985 (L.O.D.E) recognizes freedom to teach of all members of the teaching profession, both those who teach in public and private centres.

With regard to the limits of the right to freedom to teach, it should be pointed out that, unlike other rights to freedom (e.g. freedom of assembly, which implies the right of non-association), this cannot mean the freedom of not teaching.

Neither can it signify absolute freedom to teach, completely dispensing with standards regulating the academic system of education, as far as timetables, curicula, suitable conditions, etc. are concerned. With regard to the organization of the centre, it must however be taken into account that the contrast between freedom to teach and the ideological orientation of the centre should not arise in a pluralist State, concerning public education, as this, by definition, is not directed towards any particular doctrine. On the other hand, in private centres, to which we shall refer later, this contrast is possible.

Among the limits of freedom to teach which the Constitution lays down, we should mention in the first place those stated in article 20.4 regarding "respect to rights recognized in this Title, in the precepts of laws developing it, and particularly in the right to honour, privacy, personal image, and protection of young people and children".

These generic limits should be completed with those set forth in sections 2 and 3 of article 27.

Article 27.2 reads: "The purpose of education shall be the full development of the individual's personality, respecting democratic principles of co-existence and fundamental rights and freedom"; this implies limits both with regard to public and private education, and affects the freedom to teach and the right to set up private educational centres, recognized in article 27.6 of the Constitution.

Similarly, article 27.3 which guarantees parents the right for their children to receive religious and moral education according to their own beliefs, also implies a limit to the freedom to teach, both in public and private education.

Finally, when determining the special content of freedom to teach, the Constitutional Court has taken two factors into account: the public or private nature of the centre and the level of education.

"In public centres of any grade or level, freedom to teach has a uniform negative content in that it empowers the teaching staff to resist any order of giving their teaching a given ideological orientation... In this sense, freedom to teach is a notion incompatible with the existence of official science or doctrine".

Alongside this negative content, freedom to teach also has a positive aspect, which is broader in higher education levels, and more reduced in lower levels, since it is the academic authority, and not the teacher, which determines the minimum educational content, through curricula, and also the pedagogical means from which the teacher can choose.

Finally, freedom to teach in public education has the important limitation of forbidding any type of propaganda. "The ideological neutrality of education in public school centres... imposes on their teaching staff the obligation of renouncing any form of ideological indoctrination, which is the only attitude compatible with the respect to the freedom of families who, at their free choice, or forced by circumstances, have not chosen educational centres with a given and explicit ideological orientation for their children".

3. *Religious education.*

A) *Foundation and significance.*

The right guaranteed in article 27.3 of the Constitution, which reveals international documents on the subject, and which is included in legislation developing the Constitution, is doubly protected in public centres first, by enabling religious education and practice in these centres. On this point, the Constitutional Court has declared that the ideological neutrality of public education "does not prevent the organization in public centres of teaching which can be followed freely, to assist parents' right to choose the religious and moral education for their children, in keeping with their own belief".

Secondly, parents' right to choose the religious and moral education of their children is indirectly protected through the prohibition of teachers who render their services in public centres of "any form of ideological indoctrination".

An important problem posed by the interpretation of article 27.3 of the Constitution is that of whether the expression "religious and moral education" only implies the right to receive religious edu-

cation or, on the other hand, also includes other types of ideological non-religious teaching.

In this connection, it should be borne in mind that article 2 of the additional Protocol n. 10 to the Convention for the Protection of Human Rights and Fundamental Liberties, "religious and philosophical beliefs" are spoken of. When defining the concept "philosophical beliefs", the European Court of Human Rights has included all options which "reach a certain degree of obligation, seriousness, coherence and importance, which deserve respect in a democratic society and are not incompatible with a person's dignity".

Obviously, among these beliefs are non-religious, including agnostic and atheist beliefs.

On interpreting article 27.3 of the Constitution, the Spanish High Court, bearing in mind international documents, has declared that parents' right guaranteed in this article includes: "the communication of moral, philosophical and religious beliefs in keeping with a given ideology".

In accordance with this criterion, it must be affirmed that article 27.3 of the Constitution not only guarantees the right to religious education in public centres, but also teaching with a non-religious ideological content, in keeping with parents' beliefs.

B) *The organization of religious education.*

The first thing to be taken into account when examining the regulation of religious education in public centres is the plurality of normative sources and their diverse legal nature The organization of teaching the Catholic religion is basically contained in the Agreement on Education and Cultural Affairs, of 3rd January 1979, signed by Spain and the Holy See. The religious teaching of other Confessions has been regulated unilaterally by the State.

The system of religious education which these provisions stipulate is briefly as follows:

The agreement on Education guarantees that curricula on all levels, except the university, shall include the teaching of the Catholic religion "in conditions comparable to those of others basic subjects". These comparable conditions refer to the time devoted to that teaching, to pedagogical conditions and assessment of this subject.

With regard to the religious teaching of other Confessions, the Ministerial orders of 16th July 1980 establish a similar legal regime to that of teaching the Catholic religion.

This education is voluntary, and the fact of whether or not it is followed cannot involve any discrimination in other school activities.

In Nursery School and Basic General Education (E.G.B.), when enroling their children of wards, parents or guardians should state whether they want them to receive teaching of the Catholic faith or another confession, or do not wish them to receive any.

In the High School Certificate (B.U.P.) and in equivalent grades of Vocational Training, the decision of not receiving religious education implies that the pupil has to enrol in a non-confessional Ethics and Morals course.

In the University Guidance Course (C.O.U.) and in the second grade of Vocational Training, a voluntary "course on subjects of the Catholic Religion and with an academic nature, but not shown in the academic file", may be offered pupils.

Finally, in connection with university education, article V of the Agreement on Education and Cultural Affairs "guarantees that the Catholic Church may organize voluntary courses and other religious activities in public University Centres, using their premises and facilities. The Ecclesiastical Hierarchy shall reach an agreement with the Authorities of Centres to exercise these activities adequately in every aspect".

A similar arrangement does not exist with regard to non- Catholic confessions.

It should be stressed that apart from religious education in public centres, religious training and activities can be arranged for pupils wishing to take part in them, including religious services. To do so, in all public Nursery Schools, E.G.B, High School and Vocational training centres, suitable premises must exist to carry out these activities; the conditions for holding them must be agreed between the academic authority and the pertinent ecclesiastical hierarchies.

The contents of this teaching shall be fixed by the respective ecclesiastic authority and included in the educational curricula by the Ministry of Education.

As far as text books and the didactic material used are con-

cerned, they must be authorized by the Ministry of Education, following a favourable report by the ecclesiastic authority. The ecclesiastic authority may inspect classes of religion in aspects where their competence is recognized.

C) *Teaching Staff.*

Teachers of religion in public Centres are appointed by the respective academic authority, among teachers proposed by the ecclesiastic authority.

In Nursery School and Basic General Education levels, the appointment of teachers of religion, as just mentioned, will correspond preferably to Basic General Education teachers who apply for the post.

In High School and Vocational Training Levels, teachers of religion are named by the Ministry of Education, at the proposal of the ecclesiastic authority.

In any event, no teacher can be obliged to teach religion, nor can he be prevented from doing so, provided he meets the requirements demanded and the ecclesiastic authority makes no objection.

With respect to the dismissal of these teaches, when the ecclesiastical hierarchy considers this relevant, the latter must notify the academic authority in this connection.

Regarding the remunerative system of teachers of religion, article VII of the Agreement on Education and Cultural Affairs provides that: "the economic situation of teachers of the Catholic religion, in the different educational levels, who do not belong to State teaching bodies, shall be arranged between the Central Administration and the Spanish Episcopal Conference". The subject of remuneration of these teachers in public Centres has been regulated through different Ministerial Orders, making them comparable to the different levels of State teachers.

Finally, in connection with the academic statute of teachers of the Catholic religion, we should mention that they "form part of the Teaching Staff of Centres, for all intents and purposes", being subject to the general disciplinary regime of those Centres.

IV. Freedom of education in private centres

1. *The right to establish private centres. Confessional centres.*

Article 27.6 of the Constitution recognizes "individuals and corporate bodies freedom to establish teaching centres respecting constitutional principles".

This implies that in our educational system "public and private centres exist simultaneously. And this refers to any grade of education".

Limits to the right to establish educational centres are, in the first place, respect of the rights recognized in Title I of the Constitution, of the laws which develop it, and particularly the right to honour, privacy and personal image, and the protection of young people and children (art. 20.4 of the Constitution). Secondly, respect of constitutional principles. Thirdly, the limit indicated in article 27.2 of the Constitution, according to which: "The purpose of education shall be the full development of the human personality in the respect of democratic principles of co-existence and fundamental rights and freedom".

Finally, when it concerns educational centres which have to provide regulated education, the additional limit must be taken into account that " they have to be adapted to the requirements which the State imposes on each level of centres".

Although article 27.6 of the Constitution does not mention it, the right to establish a private educational centre involves the holder's right of directing it, as declared by the Constitutional Court, referring especially to article 13 of the International Agreement on Economic, Social and Cultural Rights of 1966.

Article 27.6 of the Constitution implies the right, both of individuals and Confessions and religious entities, to set up confessional educational centres.

With respect to this type of centres, two points should be mentioned. In the first place, these centres can be confessional in the strict sense of the word, or in the broad sense. The mission of the first is the training of religious ministers and maintaining the institutional structure of the Confession. The second provide civil education, but are inspired in a religious ideology.

In the second place, with respect to the legal nature of normative sources, it must be borne in mind that non-Catholic confessional centres are regulated exclusively by State legislation. Whereas the regulation of Catholic confessional centres are contained in the Agreement on Education and Cultural Affairs, apart from unilateral State legislation.

The creation of confessional centres in the strict sense by non-Catholic Confessions have their legal coverage, apart from in article 27.6 of the Constitution, in article 2.2 of the Organic Law of Religious Freedom, in which Churches, Confessions and Religious Communities are recognized the right "to appoint and educate their ministers". In accordance with article 6.1 of the said Organic Law, this type of centre "may include Clauses to safeguard their religious identity and personal nature, as well as due respect of their beliefs, notwithstanding respect of rights and freedom recognized in the Constitution and especially freedom, equality and non-discrimination".

Non-Catholic confessional centres in the broad sense are subject to general legislation on educational matters.

In connection with Catholic centres in the strict sense, the Agreement on Education and Cultural Affairs provides that "the Catholic Church may establish Diocesan and Religious Seminaries, whose specific nature shall be respected by the State". This same Agreement establishes that "The Catholic Church, in accordance with its own right, conserves its autonomy to set up Universities, Faculties, Higher Education Institutes and other Ecclesiastic Science Centres for the training of priests, religious and laymen".

Non-university level catholic centres in the broad sense are ruled by general legislation on education.

University level centres set up by the Catholic Church after the Agreement on Education shall be ruled by the general regime applicable to private universities, both with respect to their creation and the civil recognition of their degrees. On the other hand, Church Universities existing when the said Agreement on Education came into force shall conserve their legal status; studies followed in them shall have civil effects according to standards in force, until "the relevant provisions of recognition are issued, in accordance with general legislation, which shall not demand higher standards than those imposed on State Universities or on public entities".

When these universities are private, they are ruled by their own organization and operating regulation, and consequently have their own staff selection systems, structuring and remunerative system.

2. *Identity of confessional educational centres.*

Those responsible for private centres are entitled to establish their specific nature, i.e., to provide them with an ideology which defines their ideological orientation.

This educational ideology forms part of freedom of education, as a facet of the right to establish educational centres. And it is this possibility of giving a centre its specific nature which leads to the Constitution's recognizing the creation of private centres (art. 27.6), hence a specific and distinct right of other expressions of the principle of free enterprise, included in article 38 of the same legal text.

This specific nature of private centres with their own ideology, compared with other types of undertakings in which the "ideological component" is insignificant, has led to the doctrine considering these centres as one of the so-called "ideological enterprises" or "trend organizations". This characterization which has important legal repercussions especially on a labour relations level, does not, however, imply a particular specific nature of confessional educational centres compared with other trend organizations.

The contents of the ideology cannot be reduced to the religious and moral aspects of education, but must cover all aspects of the centre's educational activities.

Regarding the requirements which the ideology has to meet, the Constitutional Court has declared that it cannot be secret, and consequently the relevant advertising means must be found to make it known by the State authorities and by members of the school community.

The limits of the ideology comprise respecting constitutional principles and fundamental rights, serving the truth and demands of science, respecting the aims of education mentioned in article 27.2 of the Constitution and in article 13.1 of the International Agreement on Economic, Social and Cultural Rights and elsewhere; finally, when it concerns centres providing regulated education, to meet the

minimum standards required which the State imposes on each level of educational centres.

The right to establish the individual character of the centre does not have an instrumental nature with respect to parents' right to choose the religious and moral education of their children, although there is an unquestionable relationship between both rights.

Closely related to these rights is the right to freely chose a centre, which involves for parents to guarantee of being able to give their children the education they wish. Logically, the choice of the educational centre implies the right to demand respect of the ideology by teachers. But it also implies the right to demand that the person responsible for the centre maintains that ideology. Arbitrary altering it would, in fact, mean fraudulent behaviour with respect to parents, who, wishing to educate their children according to a specific ideology, would be defrauded of their right if their children were instructed in a different ideology.

On the other hand, parents, like teachers and pupils, have the obligation of respecting the ideology, and the right of intervention recognized them in article 27.7 of the Constitution cannot be used to cover up situations contrary to that ideology.

3. *Freedom to teach in confessional educational centres.*

Freedom to teach in confessional centres does not have any particular differences with respect to the exercise of this right in remaining ideological characterized educational centres.

Teachers in these centres have their freedom to teach granted, although the contents and limits thereof, logically are different to those of public centres.

Freedom to teach of teachers in private centres has the same negative contents as in public centres. Namely, it empowers the teaching staff to resist any order to give their teaching an ideological orientation imposed by the State.

The problem arises, as the Constitutional Court has pointed out, in the case of "possible collision between the exercise of freedom of education by the person in charge of the centre by providing the latter with its own ideology and freedom of teaching which,

within the limits of that ideology, and developing article 27.1 of the Constitution, the law grants teachers of private centres".

In accordance with Constitutional Court doctrine, the ideology of the centre does not force the teacher rendering his services there to make an apology of same, "nor to transform his teaching into propaganda or indoctrination, nor to subordinate the demands which scientific rigour requires of his work, to that ideology".

On the other hand, the teacher's freedom must be compatible with that of the centre with an ideology. Consequently, this freedom "does not empower him to direct open or covered out attacks against that ideology, but only to perform his activity in the terms he deems more suitable and which, in accordance with a serious and objective criterion, do not prove contrary to the former".

In accordance with these principles, unlike what occurs in public centres, teachers in these centres are not obliged to make an apology of the ideology, not to adapt their teachings to it, although obviously, "a sensu contrario", they can voluntarily carry out these activities. They may likewise differ from the opinions expressed in the ideology. What they cannot do is to attack the ideology or carry out activities contrary to it.

The teacher's simple disagreement with the ideology, if it is not accompanied by attacks or activities contrary to it, would not be the cause of dismissal for ideological reasons. On the other hand, it would be considered as discriminatory dismissal, by being contrary to ideological and religious freedom, recognized in article 16.1 of the Constitution. And this type of dismissal, which damages a fundamental right, is radical and not simply null and void, which means for the employer the obligation of readmission, excluding a substituting indemnity.

Respect for the ideology, understood in these terms, does not infringe the freedom to teach, but it does limit it, since otherwise, "not only would the right to establish the particular character of the centre be deprived of all real content, but parent's right to choose for their children the religious and moral education in keeping with their own beliefs would also be defrauded".

The subject of the possible contrast between the ideology of the centre and the extra-academic conduct of the teacher poses par-

ticular difficulty. Naturally, this contrast can only be considered with respect to actions protected by the law and not in connection with those contrary to the limits imposed on the freedom of education.

The Constitutional Court has considered that the "activities or the licit conduct of teachers beyond their teaching function in a centre provided with its own ideology, can possibly be considered by the director of the centre as a violation of their obligation to respect that ideology... and, consequently, as sufficient grounds for breaking the contractual relationship between the teacher and the centre... for although obviously the working relation between the teacher and the centre, in principle, does not extend to the activities which he carries out, beyond that relationship, the possible notoriety and the nature of these activities, and even their intentionality, can make them an important and even decisive part of the educational task entrusted him".

The criterion of the Constitutional Court seems reasonable, especially if one thinks of its application to the first levels of education in which the teacher's influence on the pupils can be very great. Furthermore, this criterion is also supported by the statement of the same Court that measures imposed on the director would be unconstitutional, which "disregard the distinctive character of the centre in the selection criteria of the teaching staff". If this nature can be taken into account when engaging teachers, it is obvious that it will also be important while they perform their labour activities.

4. *Intervention in the control and management of these centres.*

Article 27.7 of the Constitution stipulates that "Teachers, parents and, if relevant, pupils, shall intervene in the control and management of all centres assisted by the Administration with public funds, in the terms established by the law". Harmonizing this right of intervention and the director's right to management has posed particular difficulties of interpretation.

In the first place, it must be taken into account that the concept of "assisted centres" cannot be identified with that of "totally financed centres". Hence, in accordance with the Constitutional Court, the participation of the school community in centres partially financed by the Administered cannot be excluded. The same Court

has upheld that article 27.7 does not forbid the legislator either from regulating participation "in any type of centre, provided, naturally, that respect of the essential contents of the rights of the director and other members of the school community are granted".

In keeping with this criteria, the Organic Law regulating the Right to Education (L.O.D.E.) classifies non-university educational centres into public and private, making a distinction among the latter into private in the strict sense and grant-aided centres. Private schools, in the strict sense, are exclusively privately owned and financed and enjoy full autonomy. Grant-aided centres are privately run, but are financed with public funds through an agreement entered into between the Administration and the person responsible for the centre.

The L.O.D.E. imposes intervention in the control and management of grant-aided schools through the School Board, in which the different members of the school community are represented.

The School Board has competences, among other questions, in appointing and dismissing the Head Master, and in appointing and dismissing teachers in the disciplinary regime, in approving the budget, in generally programming the centre, and in approving the centre's internal regulations.

These principles apply to all grant-aided centres and so, also, to those of a confessional nature. In the same way, it is obvious that the law determines that it should also extend to private Universities which receive state aid. However, it should be borne in mind that this participation right in centres assisted with public funds has as a limit, respect of the essential content of the holder's right to set up and direct the centre. And that this right, in ideologically characterized centres, implies being able to guarantee respect of the ideology, as well as "assuming as a last resort responsibility of management, especially through exercising decision-making powers in connection with the proposals of Statutes and appointing and dismissing the administrative and pedagogical direction bodies of the teaching staff". Hence, at this point, on the one hand, one cannot deprive the holder of the centre of its rights, nor on the other deprive members of the school community of a degree of intervention in centres financed by public funds.

5. *Public financing of private educational centres.*

The subject of public financing of private centres is closely related with the freedom of education. This question, which was the object of opposing interests during the parliamentary discussion of the Draft Constitution, is considered in article 27.9 of the Constitution, according to which "The public powers shall assist educational centres which meet the requirements established by the law".

This right to financing, stipulated in international documents, has been interpreted by the Human Rights Committee and European Court in the sense that although the public powers have no absolute obligation to finance private schools, they cannot however act in a discriminatory manner in distributing available economic resources to them.

The Spanish Constitutional Court has understood that, although the public powers, according to article 27.9 of the Constitution, have the obligation of assisting educational centres, this does not imply the duty of assisting all these centres by the mere fact of being such.

And in this sense, the reference which this article of the Constitution makes to the "Law" implies that state aid can take place bearing in mind different values or constitutional orders. "Examples of these could be the order of free basic education (art. 27.4 of the Spanish Constitution), promotion by the public powers of the necessary conditions so that freedom and equality are real and effective (art. 1 and 9 of the Spanish Constitution) or the more equitable distribution of regional and personal income (art. 40. no. 1 of the S.C.). The legislator is confronted with the need of harmonizing not only different constitutional values and orders, but also these orders with the inevitable limitation of available resources".

The Agreement on Education and Cultural Affairs establishes the comparison of educational Centres of the Catholic Church and their pupils to non-State Centres, concerning subsidies, grants, tax allowances and other forms of aid which the State can grant.

On the other hand, on examining standards on subsidies, the High Court has considered by demanding the following requirements the right to freedom of education is infringed:

1) that complete education must be provided and the centre has to have a minimum number of school units;

2) that the teaching posts must be distributed exactly in half between qualified holders and assistants;

3) that Vocational Training education must be imparted in a full day — morning and afternoon;

4) that the pupil's zoning criterion be given priority, in obtaining the subsidy. Likewise, it has considered that to take the financial position of the pupils in a school into account, for subsidy purposes, is discriminatory and infringes article 14 of the Constitution.

V. Conclusions

In the light of the different subjects dealt with here, and to sum them up, we think that the points which prove more problematic are the following.

In the first place, suitably regulating in public educational centres, not only religious education, but also that of other non-religious ideologies, thereby guaranteeing the right established in article 27.3 of the Constitution. It is an article which, ultimately, protects the right to the free formation of the conscience.

Secondly, a particularly conflicting subject is that of the relation between the freedom of the teacher and the freedom of centres with an ideology, especially in grant-aided schools. In these, the School Board, according to its composition, may set back the holder to maintain the respect of the centre ideology. Finally, and regarding financing private centres, it would be desirable if other means of subsidy could be devised, such as for example, assigning a given amount to pupils, to ensure that freedom of education really was more effective.

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CONFESSIONS RELIGIEUSES ET LIBERTE D'ENSEIGNEMENT AU PORTUGAL

I

1. La problématique du rôle que jouent les confessions religieuses au sein du système d'enseignement revêt deux aspects principaux:

— le droit qui leur incombe de fonder des écoles différentes de celles de l'Etat (et ceci indépendamment du fait qu'elles soient ou non reconnues);
— l'admissibilité ou la non-admissibilité d'un enseignement de religion et morale dans le cadre de l'école publique.

Cette problématique se situe à l'intersection de la liberté religieuse avec la liberté d'enseignement, deux droits fondamentaux reconnus en général par tous les ordres juridiques démocratiques, encore que leur concrétisation légale puisse présenter des nuances différentes et même des divergences assez considérables. C'est également de cette manière que le problème se pose au Portugal.

II

2. Tout comme dans la plupart des autres pays, le libéralisme, au Portugal, n'a pas entraîné la consécration immédiate de la liberté religieuse. Les trois constitutions du XIXème siècle proclamaient encore une religion d'Etat, la religion catholique (art. 25 de la Constitution de 1822, art. 6 de la Constitution de 1826, art. 3 de la Constitution de 1838) et elles n'admettaient pas le culte public de la part

d'autres religions excepté dans le cas des étrangers et ceci dans des bâtiments destinés à un tel but mais n'ayant pas la forme de temples (art. 6, 2ème partie, de la Charte). Ce n'est qu'après l'avènement de la République que sera proclamée la séparation de l'Eglise et de l'Etat. Et ce fut la Constitution de 1911 la première à garantir aussi bien la liberté de conscience que l'égalité civile et politique de tous les cultes (art. 3, n. 4 et 5). Ce fut la même Constitution qui imposa aussi la neutralité religieuse de l'enseignement dans les écoles privées sous contrôle de l'Etat (art. 3, n. 10).

La Constitution de 1933 (qui correspond au régime autoritaire en place au Portugal de 1926 à 1974) allait se montrer, à cet égard comme à tant d'autres, assez ambiguë.

D'une part, la liberté religieuse y surgissait dans sa double dimension - individuelle, de liberté et d'inviolabilité des croyances et des pratiques religieuses (art. 8 n. 3), et institutionnelle, de liberté d'organisation de toutes les confessions (art. 45); le principe de la séparation obtenant ainsi sa première consécration constitutionnelle (art. 46).

Mais d'autre part, à partir de 1935, la même Constitution établissait que l'enseignement public devait s'orienter selon les principes de la doctrine et de la morale chrétiennes "traditionnelles au Portugal" (art. 45, par. 5) et, à partir de 1951, elle distinguait nettement entre les formes d'organisation de l'Eglise catholique et celles des autres confessions (nouveaux articles 45 et 46).

Finalement, la Constitution actuellement en vigueur, qui date de 1976, est venue garantir la liberté religieuse sans distinguer entre confessions et sans lui imposer des limitations spécifiques (art. 41). C'est là un stade plus avancé que celui des régimes précédents, fussent-ils d'union (les constitutions de la monarchie libérale), de laïcisme (celui de la Constitution de la première république) ou de rapport préférentiel avec l'Eglise catholique (celui de la Constitution de 1933, du moins à partir de 1951).

3. Les matières portant sur l'éducation ont également fait l'objet d'un traitement spécifique de la part de toutes les constitutions portugaises écrites, la liberté de fonder des écoles en parallèle avec l'Etat étant expressément garantie dans quatre d'entre elles.

Sur ce chapitre c'est également l'actuelle Constitution (après la révision de 1982) qui va le plus loin en la matière étant donnée la façon (quand elle est correctement entendue) dont sont formulées les libertés et la place qu'elles y occupent.

4. Laissons de côté d'autres projections ou d'autres connexions de la liberté religieuse à l'intérieur de la Constitution et penchons-nous sur les aspects les plus saillants qu'elle nous offre au fins du présent rapport, à savoir:

— La liberté de religion implique la liberté de la manifester, individuellement ou en commun, tant en public qu'en privé, par l'enseignement (art. 18 de la Déclaration Universelle des Droits de l'Homme, en vertu de la réception formelle qu'en fait l'article 16, n. 2 de la Constitution).

— Est garantie la liberté d'enseignement de toute religion donné dans le cadre de cette même confession (art. 41, n. 5, 1ère partie).

5. En ce qui concerne la liberté d'enseignement, les dispositions les plus importantes sont les suivantes:

— L'Etat ne peut pas s'arroger le droit de programmer l'éducation et la culture selon des orientations philosophiques, esthétiques, politiques ou religieuses quelles qu'elles soient (art. 43, n. 2);
— L'enseignement public ne sera pas confessionnel (art. 43, n. 3);
— Le droit de fonder des écoles privées ou coopératives est garanti (art. 43, n. 4, après la révision constitutionnelle de 1982);
— L'Etat reconnait l'enseignement privé et coopératif, lequel est soumis à son contrôle en vertu de lois spécifiques (art. 43, n. 4, après la révision constitutionnelle de 1989).

6. La systématisation adoptée par la Constitution divise les droits fondamentaux en deux grandes catégories: les droits, libertés et garanties et les droits économiques, sociaux et culturels. Et, outre un régime commun à tous les droits, il existe, pour des raisons

d'ordre historique et structurel, un régime spécifique plus renforcé, relativement aux premiers. La liberté de religion et la liberté d'apprendre et d'enseigner ont leur place parmi les droits, libertés et garanties et ils profitent donc, simultanément, des règles générales et des règles propres aux droits, libertés et garanties.

C'est ainsi que, d'une part:

— Les facultés constitutionnelles que ces droits comportent n'excluent pas toute autre faculté établie par la loi et par les dispositions du droit international qui lui sont applicables (art. 16, n. 1).
— Tous les Portugais et tous les étrangers et les apatrides se trouvant au Portugal ou y résidant jouissent de la liberté religieuse et de la liberté d'enseignement (art. 12 et 13).
— Tous les citoyens sont égaux devant la loi, indépendamment de leur religion (art. 13, 41, n. 2, et 60, n. 1, ainsi que les articles 2 et 16 de la Déclaration Universelle).
— Tous le citoyens ont le droit de saisir des tribunaux, dans les conditions générales de garantie des droits, afin de défendre leur libertés (art. 20 n. 1 de la Constitution). A cet effet ils peuvent, par exemple, avoir recours au contrôle de la constitutionnalité des règles applicables en la matière (art. 207 et 280).
— Tous les citoyens ont le droit de présenter, individuellement ou collectivement, aux organes de l'Etat ou à tout autre pouvoir public, des pétitions, des exposés, des réclamations ou des plaintes dans le but de défendre leur libertés (art. 51, n. 1); parmi ces pouvoirs publics, il y a lieu de citer le "Provedor de Justiça" (art. 23), c'est à dire l'ombudsman portugais.
— L'Etat et les autres pouvoirs publics sont responsables, civilement, — et solidairement avec les titulaires des organes de l'Etat, les fonctionnaires et les agents — des actes ou des omissions pratiqués dans l'exercice de leurs fonctions et qui entrainent une violation des libertés (art. 22).
— Dans l'exercice des libertés religieuse et d'enseignement, les seules limitations auxquelles le citoyen est soumis sont celles prévues par la loi dans le but exclusif d'encourager

la reconnaissance et le respect des droits et libertés des autres et de satisfaire aux exigences justifiées de la morale, de l'ordre public et du bien être dans une société démocratique (art. 29, n. 2 de la Déclaration Universelle). Et, d'autre part:

— Les dispositions constitutionnelles concernant les libertés sont directement applicables (art. 18, n. 1, 1ère partie);
— Ces dispositions engagent tant les pouvoirs publics que les particuliers (art. 18, n. 1, 2ème partie);
— Les obligations des pouvoirs publics consistent, avant tout, dans un devoir de respect ou d'abstention, mais il en découle également des agissements positifs; d'une façon générale, la création et le maintien d'un ordre objectif dans le cadre duquel il soit possible de jouir en sûreté des libertés ("l'ordre constitutionnel démocratique" ou "la légalité démocratique" des articles 3, n. 2; 19; 202 al. b; 205; 227, n. 1; et 272 n. 1) et, en particulier, des devoirs pouvant varier selon les circonstances;
— Les libertés de religion et d'enseignement sont constituées selon la loi (art. 18, n. 2 et 3); elles ne peuvent pas être aménagées par des règlements autonomes, ni soumises au pouvoir discrétionnaire de l'Administration; et la loi dont il est question est la loi émanant de l'Assemblée de la République ou le décret-loi gouvernemental pris en vertu d'une autorisation législative de l'Assemblée (art. 168, n. 1, alinéa b);
— Une éventuelle restriction de l'une ou de l'autre de ces libertés doit se baser sur la Constitution et se borner au strict nécessaire à la sauvegarde d'autres droits ou d'intérêts protégés par la Constitution et elle ne peut pas avoir d'effets rétroactifs, ni diminuer l'étendue et la portée du contenu essentiel de la liberté (art. 18, n. 2 et 3);
— La liberté de conscience et de religion ne peut, en aucun cas, même lors d'un état de siège, être suspendue (art. 19, n. 4);
— Les citoyens ont le droit de résister à tout ordre qui empiète sur la liberté religieuse (art. 21);

— La liberté de conscience, de religion et de culte et la séparation des Eglises et de l'Etat constituent des limites matérielles à la révision constitutionnelle (art. 290, alinéas c et d).

III

7. Aucun doute ne s'est levé, par rapport aux dispositions constitutionnelles applicables, en ce qui concerne le droit de toute et chaque confession religieuse de donner librement l'instruction religieuse et, par conséquent, de créer, maintenir et diriger, en conformité avec ses propres plans, des établissements scolaires de tous les niveaux. Il est vrai que l'article 41, n. 5, parle de la liberté *dans le cadre de sa confession.* Cependant, il ne serait pas raisonnable d'en faire une interprétation restrictive et, même si celle-ci était admissible, il serait encore nécessaire de prendre en considération la clause ouverte ou principe de la non-typicité constitutionnelle des droits (de l'article 16, n. 1 que nous venons de mentionner) et la disposition générale concernant le droit à l'établissement d'écoles par des institutions autres que l'Etat (articles 43, n. 4 et 75). A la lumière de la portée naturelle de ce droit et de la réalité constitutionnelle, il ne serait évidemment pas imaginable que l'on puisse nier aux confessions religieuses le droit de créer des écoles. Personne ne l'a jamais contesté.

8. Le droit ordinaire confirme cette interprétation.

En premier lieu, la loi dite de la liberté religieuse, c'est à dire, la loi n. 4171, du 21 août continue à être en vigueur. Cette dernière établit formellement que:

— Les confessions religieuses reconnues ont le droit d'assurer la formation des ministres de leurs cultes respectifs et elles peuvent créer et diriger des établissements destinés à une telle fin (art. 16, n. 1), le contrôle de l'Etat sur ces établissements ne visant qu'à empêcher que soient commis des abus de liberté religieuse (n. 2);

— Les établissements qui ne se limiteront pas à former des ministres et à donner l'instruction religieuse seront soumis, en ce qui concerne les autres enseignements, au régime prévu pour les établissements d'enseignement privés (n. 3);
— L'inscription de tout étudiant dans un établissement d'enseignement tenu par les institutions religieuses sous-entend qu'il accepte l'enseignement de la religion et morale de la confession en question, sauf déclaration publique du contraire de la part de la direction (art. 7, n. 5).

Deuxièmement, dans le cadre de la Constitution de 1976, plusieurs lois définissant le système éducatif ont été publiées. Aucune d'elles n'exclut les confessions ou communautés religieuses du droit général d'accès à la titularité d'établissements d'enseignement et toutes présupposent l'existence d'un large nombre d'écoles de type confessionnel.

Les lois en question sont:

— La loi n. 9/79, du 19 mars, qui prévoit le soutien de l'Etat aux écoles privées et coopératives (notamment à travers des subventions), le parallélisme pédagogique, la libre circulation de professeurs et élèves et un effort de rapprochement en matière d'allocations sociales, caisse-maladie, retraites;
— La loi n. 65/79, du 4 octobre, laquelle crée le Conseil National pour la liberté d'enseignement (remplacé par la suite par le Conseil National d'Education en vertu de la loi n. 31/87, du 9 janvier);
— Le décret-loi n. 553/80, du 21 novembre (statut de l'enseignement non-supérieur privé et coopératif);
— La loi n. 46/87, du 14 octobre (loi-base du système éducatif) qui assure expressément aux écoles privées et coopératives le droit de suivre leur propres plans et programmes et qui considère ces écoles comme faisant partie, à part entière, du réseau scolaire du moment qu'elles peuvent s'encadrer dans les principes généraux, les objectifs et les structures du système éducatif, ceci dans une perspective de rationalisation des ressources et de garantie de qualité (art. 55);
— Le décret-loi n. 441-A/82, du 6 novembre (coopératives d'enseignement);

— Le décret-loi n. 272/89, du 19 août (statut de l'enseignement supérieur privé et coopératif).

Il convient de noter la participation au Conseil National de l'Education d'un élément à désigner par les organisations confessionnelles (art. 3, alinéa v), de la loi n. 31/87, du 9 juillet).

En troisième lieu, le Portugal a ratifié le Pacte International relatif aux droits civils et politiques et il a adhéré au Premier Protocole additionnel à la Convention européenne de sauvegarde des droits de l'homme, des traités qui garantissent aux parents le droit de faire donner à leurs enfants une éducation et un enseignement conformément à leurs convictions religieuses et philosophiques (respectivement art. 13, n. 3, 2ème partie, et art. 2), ainsi que leur droit à choisir des écoles autres que les écoles publiques, mais devant toutefois se conformer aux règles minimales établies ou approuvées par l'Etat (art. 13, n. 1, 1ère partie du Pacte).

9. Quoique la Constitution portugaise ne reconnaisse pas de distinctions entre les confessions religieuses, il existe, il y a près de cinquante ans, outre la loi de la liberté religieuse déjà mentionnée, un statut spécial de l'Eglise catholique, de nature juridique internationale, à savoir, le Concordat avec le Saint-Siège, signé le 7 mai 1940.

Et il y aurait peut-être lieu de soulever la question de la légitimité ou de la constitutionnalité d'une telle distinction entre l'existence d'un régime général pour toutes les confessions (ou plutôt pour toutes les confessions non-catholiques) et d'un régime spécial pour l'Eglise catholique.

Il faut dire que la question, dans ces termes radicaux, ne s'est pas posée au Portugal au cours des treize années de vie de l'actuelle Constitution. Nul n'a contesté en bloc le Concordat; le protocole additionnel de 1975 (portant sur le divorce entre époux mariés canoniquement), signé après la révolution de 1974, vint confirmer celui-ci; et le consensus règne quant aux dangers que pourrait entraîner une rupture du Concordat (situation de vide juridique et, probablement, de nouvelles confrontations entre Eglise et Etat).

L'interprétation dominante (partagée par les organes de contrôle de la constitutionnalité) défend que les principes constitutionnels tolèrent un traitement différencié des diverses confessions en conformité avec leur poids réel dans la société ou, comme il est souvent dit, en raison de leur différente représentativité. Ce qui, par contre, ne peut en aucun cas être admis par eux, c'est que l'une ou l'autre de ces confessions fasse l'objet d'un traitement, soit privilégié, soit discriminatoire.

L'essentiel est donc que la règle de la liberté sous toutes ses formes soit également valable pour toutes les confessions, quel qu'en soit le nombre des fidèles, et que toutes les organisations religieuses jouissent des mêmes droits constitutionnels et légaux. Mais ce principe ne constitue pas d'obstacle à ce que soient gardées des dispositions concernant spécifiquement et immédiatement l'Eglise catholique — en vertu de sa réalité historique et sociale — du moment que ces dispositions traduisent des critères d'objectivité, de nécessité et de convenance.

10. L'article 20 du Concordat établit ce qui suit:

"Les associations et les organisations de l'Eglise peuvent librement créer et maintenir des écoles privées assimilées à celles de l'Etat; ces écoles seront soumises à la surveillance de l'Etat en conformité avec le droit commun et elles peuvent, aux mêmes termes, être subventionnées et intégrées au réseau public."

"L'enseignement religieux dans les écoles et cours privés ne dépend pas de l'autorisation de l'Etat et il pourra être librement donné par l'Autorité ecclésiastique ou par ses délégués".

"La création de séminaires ou de tout autre établissement visant à la formation et à la culture ecclésiastique de haut niveau est libre. Le régime interne de ces établissements n'est pas soumis à la surveillance de l'Etat. Celui-ci doit cependant être tenu informé des livres adoptés pour les disciplines autres que philosophiques ou théologiques. Les autorités ecclésiastiques concernées feront attention à ce que, dans l'enseignement des disciplines spéciales, telle l'histoire, les légitimes sentiments patriotiques du peuple portugais soient pris en considération".

Il s'agit là d'une norme qui, de par sa force juridique spécifique — supérieure à celle des lois (comme il s'ensuit de l'article 8, n. 2 de la Constitution elle — même) vient consolider substantiellement les garanties accordées aux écoles catholiques; toutefois, son

contenu normatif pourrait s'étendre, avec quelques adaptation, aux écoles de toute autre confession religieuse.

Le Concordat est la source de deux importantes dispositions légales:

— Le décret-loi n. 307/71, du 15 juillet, moyennant lequel l'Etat reconnait, à tous les effets du droit interne portugais, l'Université Catholique, érigée selon les règles du droit canon;
— Le décret-loi n. 293-C/86, du 12 septembre, en vertu duquel les enseignements donnés dans les petits séminaires pourront être reconnus comme équivalents aux cours officiels du préparatoire et du secondaire publics.

IV

11. Par contre, la question de savoir s'il est possible de donner des cours d'instruction religieuse dans les écoles publiques est bien plus complexe et polémique.

Comme il a été dit, la Constitution de 1933, après la modification qu'elle a subi en 1935, établissant que l'enseignement donné dans les écoles publiques devaient être conforme aux principes de la doctrine et de la morale chrétiennes et, "par conséquent", l'article 21 du Concordat prescrit que sont donné l'enseignement de la religion et de la morale catholiques dans les écoles publiques des niveaux élémentaires, complémentaire et moyen aux élèves dont les parents ou ceux qui en ont la charge à leur place n'aient pas demandé qu'ils en soient dispensés; et, aussi, dans les établissements de l'assistance publique.

Il en va différemment de la Constitution de 1976 comme il a été également signalé. Celle-ci déclare que l'enseignement public n'est pas confessionnel (art. 43, n. 3) et elle interdit à l'Etat de planifier l'éducation et la culture selon des orientations religieuses quelles qu'elles soient (art. 43, n. 3). Voila pourquoi la disposition du Concordat est devenue partiellement inconstitutionnelle.

Ceci veut-il dire, toutefois, que la Constitution fait obstacle à ce qu'il y ait un enseignement de la religion catholique et des autres religions dans les écoles publiques? Le Tribunal Constitutionnel, appelé à se prononcer à ce sujet en 1987, a admis, sans équivoque, un tel enseignement du moment que soient observées certaines conditions. A la lumière de cette jurisprudence, toute la réglementation législative pertinente est en train de faire l'objet d'une refonte.

Et qui plus est: du moment que le Portugal se trouve engagé par le Concordat, il faudra réinterpréter la disposition contenue dans l'article 27 dans le sens que l'enseignement catholique doit continuer à être assuré dans les écoles publiques, mais en conformité avec les principes de liberté et d'égalité.

12. En raison du grand intérêt qu'elle présente, cela vaut la peine d'examiner la décision, ci-dessus mentionnée, du Tribunal Constitutionnel: l'arrêt n. 423/87, du 27 octobre.

Curieusement, l'arrêt ne porte pas sur la conformité à la Constitution de l'article 27 du Concordat (ni sur les dispositions correspondantes de l'article 7 de la loi n. 4/71). Sa décision concerne la constitutionnalité d'un acte normatif postérieur, publié quand la nouvelle constitution était déjà entrée en vigueur le décret-loi n. 323/83, du 5juillet, lequel s'était efforcé de développer la discipline législative concernant l'enseignement de la religion et de la morale catholiques.

L'arrêt a adopté comme point de départ une notion positive et non pas uniquement négative, des droits à la liberté. Il accepte, par conséquent, la possibilité et même la nécessité, de l'existence de l'enseignement religieux dans les écoles publiques en tant que corollaire d'une telle vision de la liberté religieuse. Mais il exige, en même temps, que cet enseignement se fasse en des conditions de liberté, de choix totale et il va dans le sens d'en élargissement de sa portée à toutes les confessions.

Selon le Tribunal, le bannissement de l'enseignement religieux dans les écoles publiques (dans et non pas des écoles), conduirait, compte tenu des contextes historiques et culturels qui règnent au sein de la société portugaise, à porter atteinte au principe de la liberté religieuse dans sa composante positive, puisque cette dernière ne représente pas seulement une sphère d'autonomie face à l'Etat, mais qu'elle est aussi un pouvoir concret de réalisation de certaines finalités, lesquelles constituent son objet.

Le caractère non-confessionnel de l'enseignement public est le corollaire du principe de la séparation. Cependant, la neutralité de l'Etat ne constitue pas un obstacle à ce qu'il crée les conditions adéquates à rendre plus aisé l'exercice de la liberté religieuse aux élèves désireux d'obtenir, dans ce but, la formation de leur conscience (qu'elle soit catholique ou athée) d'une certaine façon.

Au demeurant, la Constitution elle-même impose à l'Etat le devoir de coopérer avec les familles à l'éducation de leurs enfants (art. 67, n. 2, alinéa c).

Dans quelles conditions l'enseignement religieux est-il donc possible, ou nécessaire?

Le Tribunal Constitutionnel en a énoncé trois: 1) que l'enseignement religieux soit assumé par les confessions elles-mêmes et non pas par l'Etat, encore que la discipline puisse faire partie du programme scolaire; 2) que la définition des programmes et le recrutement des professeurs soit l'oeuvre des confessions, quoiqu'il puisse revenir à l'Etat de prendre en charge les frais correspondants; 3) que soit exigée une déclaration positive de volonté de recevoir l'enseignement religieux pour l'obtenir — et non pas de volonté positive pour en être dispensé- car l'exercice d'une liberté de facere peut dépendre de la pratique d'un acte donné (requête, déclaration, etc.). Par contre, ceci ne s'applique pas à l'exercice d'une liberté de non facere.

Finalement, si le Tribunal Constitutionnel n'a pas mis en cause l'enseignement de la religion catholique déjà existant, il n'en a pas moins considéré qu'un traitement semblable, approprié aux circonstances spécifiques de chacune d'elles, devrait être attribué aux religions minoritaires. Ce serait là la seule façon de respecter pleinement le principe de l'égalité et d'éviter l'inconstitutionnalité par omission.

13. Cet arrêt a suivi de très près la doctrine que nous défendions déjà concernant ce problème et il nous semble, donc, qu'il doit être qualifié de vrai jalon dans la jurisprudence constitutionnelle portugaise.

En effet, à notre avis, le caractère non-confessionnel de l'enseignement public signifie que l'enseignement public ne s'identifie avec aucune religion, conviction, philosophie ou idéologie; cela ne veut

pas dire que les religions, les convictions, les philosophies ou les idéologies ne doivent pas trouver expression dans l'enseignement public. L'Etat ne peut en imposer aucune; il peut les permettre — il doit les permettre — toutes en liberté et égalité.

Ce que la Constitution prétend c'est d'éviter l'unicité d'une doctrine d'Etat; ce n'est pas sauf à mettre en cause l'éducation et la culture elles — mêmes — d'éviter la présence de la religion, de la philosophie, de l'esthétique, de l'idéologie dans les écoles; ou qu'une Constitution qui en assure la sauvegarde dans le secteur publique des média, n'assure pas sa viabilité dans les écoles publiques.

14. La loi-base mentionnée du système éducatif texte fondamental de concrétisation de principes et règles constitutionnels concernant l'enseignement et qui a été approuvé par une large majorité-contient, au demeurant, une disposition qui correspond à l'orientation adoptée par le Tribunal Constitutionnel.

A savoir, la disposition de l'article 47, n. 3: "les plans d'études de l'enseignement primaire ("básico") et du secondaire contiennent aussi l'enseignement de la morale et de la religion catholiques, à titre facultatif, dans le respect des principes constitutionnels de séparation des Eglises et de l'Etat et du caractère non-confessionnel de l'enseignement public".

15. Outre cette loi et la partie finale de l'article 21 du Concordat, le statut juridique de l'enseignement de la religion et de la morale catholiques dans les écoles publiques portugaises au niveau du primaire et du secondaire, car il n'est pas prévu de le donner dans les établissements d'enseignement supérieur—, est contenu dans les lois suivantes:

— Dans le décret-loi n. 323/83, du 5 juillet, (également mentionné plus haut) expurgé des inconstitutionnalités déclarées par le Tribunal Constitutionnel;
— Dans les ordonnances n. 333/86, du 2 juillet, 831/87, du 18 octobre, et 334-A/88, du 31 mai;
— Dans le très récent décret-loi n. 286/88, du 29 août, qui a restructuré les plans d'étude et les programmes de l'enseignement primaire et secondaire.

16. En ce qui concerne le contenu de l'enseignement et la façon de l'organiser, les règles actuellement en vigueur sont fondamentalement les suivantes:

a) L'Eglise catholique est la responsable exclusive de l'orientation à suivre dans l'enseignement de la religion et de la morale catholiques (art. 4, n. 1, du décret-loi n. 323/83);

b) Il incombe à la Conférence des Evêques d'élaborer et de revoir les programmes de la dite discipline, lesquels seront remis au Ministère de l'Education avant leur entrée en vigueur afin de pouvoir être publiés conjointement avec les programmes des autres disciplines (art. 4, n. 1, alinéa a du même décret-loi);

c) Il tient également à la Conférence des Evêques d'élaborer et d'ensuite faire publier et diffuser les manuels d'enseignement de ladite discipline, ainsi que d'autres instruments auxiliaires du travail destiné aussi bien aux élèves qu'aux professeurs (art. 21 du Concordat et art. 4, n. 1, alinéa b du décret-loi).

17. Quant à l'intégration dans les plans d'études, il est établi que:

a) La discipline de religion et morale catholiques (ou d'éducation morale et religieuse catholique) fait part du plan d'études normal des écoles publiques des niveaux primaires et secondaires (art. 3 n. 1 du décret loi n. 323/83);

b) Parallèlement à cette discipline, il peut aussi exister une discipline d'éducation morale et religieuse d'une autre confession (art. 7, n. 4, in fine, du décret-loi n. 286/89).

Cependant les modalités à suivre pour assurer un tel enseignement ne sont pas définies;

c) La discipline d'éducation religieuse et morale catholique ou d'une autre confession-constitue une alternative à celle de "Développement personnel et social" qui vient d'être créée (art. 7, n. 4, 1ère partie, du décret-loi n. 286/89);

d) Outre cette discipline, le 3ème cycle de l'enseignement secondaire comprend obligatoirement un programme "d'éducation civique visant à la participation aux institutions démocratiques" quoique celui-ci ne corresponde pas à une discipline spécifique (art. 7, n. 3);

e) La discipline de religion et morale est soumise, une fois sauvegardé son caractère spécifique, au régime applicable aux autres disciplines du plan d'études, notamment en ce qui concerne les conditions générales d'immatriculation et le soutien pédagogique (art. 3, n. 2 du décret-loi n. 323/83);

f) Pour ce qui est de la vérification et notation des connaissances, c'est aussi le régime général qui lui est appliqué; toutefois, en aucun cas, il ne peut en résulter, en fin d'année, un quelconque effet négatif sur le passage dans la classe supérieure (art. 3, n. 3);

g) L'enseignement de la religion et de la morale catholiques sera également assuré, selon une modalité adéquate, dans les écoles visant à la préparation et formation d'enseignants pour le niveau préscolaire et pour les écoles primaires. Il y prend un caractère facultatif, de discipline portant sur la nature des fonctions à exercer (art. 6 du décret-loi n. 323/83 et ordonnance n. 831/87, du 16 octobre).

18. De son côté, l'inscription des élèves à cette discipline obéit aux règles suivantes:

a) Pour suivre les cours de religion et morale catholique, il est nécessaire de faire une déclaration positive de volonté dans ce sens (disposition n. 3 de l'ordonnance n. 344-A/88, du 31 mai);

b) Il incombe aux parents ou à ceux qui en tiennent lieu, ou aux élèves eux-mêmes s'ils sont âgés de plus de 16 ans, de faire ladite déclaration (disposition n. 2, n. 1, de l'ordonnance); c. Aux effets de la déclaration de volonté de s'inscrire en ladite discipline, les formulaires d'immatriculation de toutes les années des 1er, 2ème et 3ème cycle de l'enseignement primaire et secondaire devront comprendre un espace destiné à la déclaration (disposition n. 1) et une information détaillée à ce sujet devra être distribuée avec les formulaires (disposition n. 2).

19. Et finalement, pour ce qui est des professeurs de religion et morale, les règles en vigueur sont les suivantes:

a) L'enseignement de la religion et de la morale catholique ne pourra, en aucun cas, être fait par des personnes qui n'auraient pas

été considérées idoines par les autorités ecclésiastiques (art. 21 du Concordat);

b) Les professeurs de religion et morale catholique seront recrutés ou nommés sous proposition de l'autorité ecclésiastique compétente (art. 21, déjà cité du Concordat et art. 5, n. 1, 1ère partie du décret-loi n. 323/83);

c) Les professeurs seront recrutés ou nommés conformément aux lois en vigueur concernant les titres d'études exigés (art. 5, n. 1, 2ème partie du décret-loi n. 323/83);

d) Les professeurs appartiennent au corps de professeurs de l'établissement où ils enseignent et ils jouissent des droits et sont tenus aux devoirs correspondants à une telle situation (art. 5, n. 2, du décret-loi n. 323/83);

e) Dans les écoles primaires, l'enseignement de la discipline est fait soit par l'instituteur, soit par le curé de la paroisse, soit par une autre personne considérée idoine, proposés, dans tous les cas, par les services diocésains compétents, à la direction de l'école (art. 5, n. 3, du décret-loi n. 323/83, et dispositions 14 et ss. de l'ordonnance n. 333/86, du 2 juillet). L'émanation d'un nouvel acte législatif ayant pour but de clarifier quelques aspects de la situation juridique des professeurs de religion et morale, compte tenu de leur double lien envers l'Eglise (qui les choisit et dont ils sont tenus à avoir la confiance) et envers l'Etat (dans les écoles desquelles ils exercent leur métier) - est attendue à tout moment. Cet acte devra, par la même occasion, assurer aux professeurs en question les garanties professionnelles et sociales indispensables.

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QUESTION SCOLAIRE ET FACTEUR RELIGIEUX EN ITALIE

SUMMARY: I. Liberté religieuse et "question scolaire". — II. L'enseignement religieux dans les écoles publiques. — III. Les écoles confessionnelles. — IV. Perspectives "de iure condendo".

I. LIBERTE RELIGIEUSE ET "QUESTION SCOLAIRE".

1.1.1. La confrontation entre quelques Etats européens et les institutions confessionnelles, en particulier celles catholiques, sur le thème de l'école, prit le nom, il y a quelques ans, de "question scolaire".

En cette circonstance, à côté des polémiques qui en dérivèrent, bien des gens furent poussés à remarquer que la "question scolaire" impliquait, au fond, une question de liberté. Cette constatation peut être partagée même et plus encore si, au delà du problème des écoles confessionnelles, on inclut dans les thèmes objet d'intérêt celui aussi de l'enseignement de la religion dans les écoles publiques.

Au-dessous de ce dernier profil, la "question scolaire" peut s'annoncer comme question de liberté surtout à l'égard des Pays qui accueillent dans leurs Chartes fondamentales les principes proclamés par l'Assemblée des Nations Unies de 1948, formalisés par la Convention pour la sauvegarde des droits économiques, sociaux et culturels et des droits civils et politiques (1966), ainsi que par les plus récents documents de la Conférence sur la sécurité et coopération en Europe de 1975 (Helsinki), à 1983 (Madrid), à 1988 (Vienne).

Parmi ces Pays on peut énumérer l'Italie. L'art. 2 de la Constitution républicaine de 1948, avec la "reconnaissance" et la "garantie"

des "droits inviolables de l'homme", atteste la souveraineté de la personne humaine et, pour cela, en sanctionne la liberté et l'autonomie. Pour l'Italie, ainsi que pour les autres Pays démocratiques, la difficulté est représentée plutôt par ce qui peut être appelé le "paradoxe-Böckenförde", d'après lequel un Etat libre et sécularisé vit de prémisses que, lui-même, il ne peut pas garantir. Ce paradoxe, traduit dans les termes spécifiques de la "question scolaire", signifie, suivant les mots employés par Aldo Moro à l'Assemblée constituante italienne, que l'"Etat n'a pour lui-même aucune vérité à enseigner ni en matière religieuse ni en autre matière", et qu'il est donc seulement "organisateur d'écoles, où il accueille démocratiquement le contenu éducatif que la conscience sociale ... lui présente et lui impose".

1.1.2. On peut ajouter, toutefois, que le système constitutionnel italien n'est pas celui d'une simple démocratie formelle. Un autre membre prestigieux de la même Assemblée constituante, Georges La Pira, mit en évidence que la conception de la liberté incluse dans la Charte fondamentale ne fut pas neutre, mais orientée vers la justice, cette observation en trouvant une exacte vérification en quelques dispositions normatives de la même Charte, comme le second alinéa de l'art. 3 ou l'art. 4, qui caractérisent éminemment l'Italie comme un Etat "social".

Il s'agit, par conséquent, d'un Etat qui ne renonce pas à toutes les possibilités d'appréciation ou à tous les fondements axiologiques, et qui ne se défouille de n'importe quelle fonction adressée à l'intégration, à l'orientation, à la coordination et à la reconduction à unité de la dynamique sociale.

Cela est témoigné aussi par les règles de sauvegarde des autonomies territoriales et sociales (art. 5, 6, 29, 30, 39, 43, 45, 49 Const.). La Court constitutionnelle italienne a, du reste, affirmé que la Charte républicaine "sauvegarde", et donc estime positivement, les manifestations communautaires du "sentiment religieux" (sent. 14 février 1973, n. 14). Un autre attesté est donné par les règles qui engagent positivement l'Etat à encourager toutes les initiatives culturelles et les projets formatifs qui existent sur son territoire et à soutenir, pour possible qu'il soit, les réponses données aux exigences éducatives correspondantes (art. 9, 31, 34, 117 Const.).

1.1.3. *Démocratie, solidarité* et *pluralisme* ne gênent pas l'Etat italien, mais au contraire l'orientent dans la pratique d'interventions destinées, à travers le système formatif dans son ensemble, à élever et à faire avancer les fondements éthiques de sa vie en commun, toujours dans le respect d'un équilibre (souvent difficile), qui permette d'assurer à toute le monde une égalité de chances et la possibilité de participer à la dynamique sociale et de s'introduire dans les circuits de pouvoir qui la déterminent.

En définitive, le problème de fond du système italien, comme de chaque système démocratique, porte sur la mesure dans laquelle on puisse et on doive préserver la laïcité, sans qu'on renonce à des tâches précises et à des responsabilités indéfectibles, se référant à l'éducation des jeunes et à la formation d'une conscience libre et discrète de tous ou de la plupart des citoyens (Colin).

II. L'ENSEIGNEMENT RELIGIEUX DANS LES ECOLES PUBLIQUES.

2.1.1. Le législateur italien a cherché à placer la discipline de l'enseignement de la religion aux écoles publiques dans le cadre des principes directeurs de la Charte fondamentale avant rappelés, lorsqu'il a pris la décision, entre 1984 et 1985, d'en réviser le rangement alors en vigueur.

Dans cette perspective il a estimé de se remettre, pour justifier le maintien de l'enseignement de la religion catholique, à la "valeur de la culture religieuse" et à la circonstance que "les principes du catholicisme font partie du patrimoine historique du peuple italien" (art. 9. 2, l. 25 mars 1985, n. 121, de ratification et exécution de l'Accord entre la République italienne et le Saint-Siège, du 18 février 1984).

Sans doute, un semblable encadrement a aidé la Cour constitutionnelle, lorsqu'elle a accordé une première patente de conformité à la nouvelle discipline, par rapport aux principes de laïcité et de pluralisme qui caractèrisent notre système à son échelon le plus élevé (sent. 12 avril 1989, n. 103).

On doit rappeler, en revanche, que – sur la base de ce qu'on a déjà dit – à niveau constitutionnel aussi l'horizon se présente problématique, parceque toutes les fois que, même en vue d'une utilité gé-

nérale, on promeut un facteur socio-culturel particulièrement campé, on court le risque d'altérer ce difficile équilibre au-delà duquel se révèle compromise l'essence de la démocratie, qui consiste dans la "non identification" d'intérêts de part avec ceux publiques (Vitale).

2.1.2. Cette difficulté peut contribuer à expliquer comme la proclamée fidélité à un unique tableau de références constitutionnelles se scinde en solutions nettement écartées — au-delà des considérables différences des prémisses de fait — pour la religion catholique et pour les autres fois religieuses.

Dans la première hypothèse la directive visée à la promotion des valeurs historique-culturelles, connexes au facteur religieux, se concrétise dans l'"assurance" que l'enseignement de la religion catholique "continuera" à être présent "dans les écoles publiques non universitaires de chaque ordre et degré" (art. 9.2 cit.). Cet enseignement (donné à totale charge de l'Etat) est à insérer "dans le cadre des finalités de l'école publique" (art. 9.2 cit.) et en même temps, est déployé "en conformité à la doctrine de l'Eglise", selon des programmes et des modules organisateurs déterminés en accord avec la Conférence épiscopale italienne, par des enseignants reconnus aptes de la part de l'Autorité ecclésiastique, et nommés avec l'approbation de la même Autorité (n. 5 du Protocole additionnel, qui fait part intégrante de l'Accord cit.). Dans la seconde hypothèse, un objectif analogue — c'est-à-dire celui de garantir que l'école publique soit un centre de promotion culturelle, sociale et civile, ouvert à l'apport de tous les membres de la société, ou bien celui de garantir le caractère pluraliste de la même école — est poursuivi "en assurant", aux représentants de quelques Confessions différentes de la catholique (dans les "Ententes", respectivement, avec les Eglises représentées par la Table vandoise, avec les "Assemblées de Dieu en Italie", avec les Eglises chrétiennes adventistes du 7ème jour, avec l'Union des Communautés israélites italiennes), le "droit de répondre aux éventuelles demandes provenant des élèves, de leurs familles ou des organes scolaires, pour ce qui concerne l'étude du fait religieux et de ses implications" (voir: art. 10, l. 11 août 1984, n. 449; art. 9, l. 22 novembre 1988, n. 517; art. 12, l. 22 nov. 1988, n. 516; art. 10.4, l. 8 mars 1989, n. 101).

2.1.3. Les contre-indications pour ce dernier type de solution semblent être, à première vue, presque nulles, considérant aussi que les dites Confessions déclarent de se charger des poids financiers de chaque intervention. Toutefois, à bien regarder, d'une solution de ce genre se déroulent quelques conséquences peu conformes par rapport au "projet" des Constituants sur le système d'instruction publique:

a) l'obligation de répondre à n'importe quelle demande de service provenant des usagers, au-delà de chaque possibilité de contrôle sur le fondement ou, au contraire, sur le caractère artificiel de la question;

b) la réduction de l'aspect éducatif et promoteur du service scolaire, entendu comme simple véhicule de curiosité ou contenant des renseignements sur des faits plutôt que comme instrument d'intégration de la personnalité globale de l'élève.

Il ne s'agit pas, comme on peut noter, de contre-indications de peu de compte. Néanmoins, les ambiguïtés reconnaissables dans le système concordé avec l'Eglise catholique suscitent des perplexités encore plus grandes.

L'ambivalence foncière de cette dernière discipline est à chercher dans la contradiction entre les justifications "pluralistes" et les modalités à réaliser, fondamentalement "confessionnelles", du système choisi. Les difficultés émergées dans la phase de première application de la nouvelle discipline sont à reconduire à cette ambiguïté d'origine. Le rappel aux objectifs de promotion et "au cadre des finalités de l'école", plutôt que soutenir une déconfessionalisation de l'enseignement, est servi à l'Eglise pour ne céder rien, ou pas du tout, sur sa caractérisation de part.

2.1.4. L'"Entente", stipulée aux termes du n. 5 du Protocole additionnel, entre la Conférence épiscopale italienne et le Ministère de l'instruction publique (exécutée avec le d.P.R. du 16 décembre 1985, n. 751) a contribué, de son côté, à déterminer ce résultat. Avec cette "Entente" l'Autorité ecclésiastique a obtenu que les termes de l'Accord de 1984 fussent précisés dans le sens le plus favorable à la partie confessionnelle; en particulier, l'insertion de quelques clauses (voir le n. 2.1 de l'"Entente") a renforcé les raisons pour une mise en demeure de la nature (qu'on pouvait supposer) "facultative" ou "additionnelle" de l'enseignement.

L'Accord de 1984 avait établi, vraiment, que, dans le "respect de la liberté de conscience et de la responsabilité éducative des parents", était "garanti à chacun le droit à choisir si se servir ou ne pas se servir" de l'enseignement de la religion catholique. Une affirmation semblable — prise en soi et appuyée, en outre, sur la règle simultanée de l'"Entente" stipulée avec la table vandoise, défendant la coïncidence entre l'enseignement religieux (catholique) et l'enseignement d'autres matières (art. 9, 1. n. 449 cit.) — semblait légitimer une interprétation tournée à attribuer à l'enseignement de la religion catholique le caractère de matière facultative, à enseigner en horaire différent de celui des autres leçons.

D'autres passages de l'Accord, complétés et soutenus, à vrai dire, par les règles du Protocole additionnel, se prêtaient, en revanche, à rendre pas du tout certaine cette interprétation (et à justifier, sur le point, les protestations contenues dans la note n. 6650 de 1987, faite parvenir par le "Consilium pro publicis Ecclesiae negotiis" au Gouvernement italien).

2.1.5. L'ambiguïté du tableau normatif explique les oscillations de la jurisprudence. On peut ainsi rappeler les prononciations du Tribunal administratif du Lazio (sent. 17 juillet 1987, n. 1273 et 1274), qui ont défini "facultatif", dans le sens de "additionnel", l'enseignement de la religion catholique; l'arrêt du Conseil d'Etat, qui a sanctionné un "droit d'option obligatoire" (croyant existant l'obligation de fréquence d'une "*matière alternative*" à l'enseignement de la religion catholique) (sent. 27 août 1988, n. 1006); le jugement, enfin, de la Cour constitutionnelle, qui a exclu telle obligation, sans toutefois prendre expressément parti pour la simple "facultativité" de l'enseignement en question (sent. 12 avril 1989 cit.)

En effet, l'enseignement susdit est un vrai et propre "hybride" (Vitale): bien qu'il ne soit pas obligatoire, il peut être placé à l'intérieur du normal horaire des leçons et, dans ce cas, il pourrait obliger, au moins les mineurs, qui fréquentent l'école maternelle (3-5 ans) ou l'école secondaire (11-17 ans), à ne pas s'éloigner de l'école, à la garde de laquelle ils ont été confiés par les parents. Ces derniers peuvent, néanmoins, exercer le droit qui découle de l'art. 112 du R.D. 26 avril 1928, n. 1297, si leurs enfants fréquentent les écoles élémentaires (6-10 ans), et ils peuvent obtenir ainsi que le

chef d'institut en autorise l'absence, même au moment où ils ne réclament pas pour eux l'enseignement de la religion catholique; en tout cas, l'école ne peut pas obliger ces garçons à suivre un enseignement alternatif. Ceci n'était pas même prévu, du reste, pour les "dispensés" de l'enseignement religieux sur la base du mécanisme d'exonération en vigueur dans l'antécédente discipline.

Pour la solution de l'"option libre" penchent, actuellement, soit la jurisprudence (TAR Lazio, 1 novembre 1988 n. 1341), soit la pratique administrative (circulaires M.P.I, nn. 188 et 189, respectivement du 25 et du 29 mai 1989). La loi 18 juin 1986, n. 281 (sur la capacité des choix scolaires) semble lui offrir quelques soutiens, lorsqu'elle prévue l'hypothèse (non exclusive) d'"enseignements d'option". Il faut ajouter que cette loi a été précédée par une (soit générique et non traduite jamais en loi) "entente" avec la Table vaudoise (3 avril 1986).

Il est significatif, à ce sujet, que la déjà rappelée disposition normative de l'"Entente" avec la Table vaudoise du 21 février 1984 (art. 9) n'ait plus été reproduite, dans sa rigoureuse teneur littérale, par les successives correspondantes prévisions des Accords avec les Adventistes, les Pentécostaires et les Communautés Israélites (art. 11.2, l. n. 516, cit.; art. 8.2, 1. n. 517, cit; art. 11.3, 1. n. 101, cit.). Un ultérieur éclaircissement législatif serait néanmoins souhaitable, même nécessaire.

2.2.1. Par contrecoup, l'état juridique aussi des enseignants de religion est un "hybride", qui attende une nouvelle définition législative.

Les contrats de l'emploi public garantissent à ces enseignants une satisfaisante position pour la rétribution (voir l'art. 3 du d.P.R. 23 août 1988, n. 399), et la jurisprudence leur assure une convenable tutelle sur le plan du traitement de retraite et de mutualité, selon ce qui résulte d'une récente prononciation de la Cour des comptes auprès de la Région Sardaigne (sent. 2 février 1989, n. 10), sur la base de la comparaison avec les "enseignants chargés à temps indéterminé".

Il faut, toutefois, observer que, grâce à une série de lois récentes, ces dernières figures d'enseignants, contreparties une fois de l'Etat dans un rapport précaire, ont été maintenant éliminés et absor-

bées dans les rôles de l'emploi public, donc insérées dans un rapport fixe.

Les enseignants de religion restent, pourtant, l'unique forme de "précariat" agissant auprès des écoles publiques. D'autre côté, les caractéristique connexes avec leur nomination, et le constant conditionnement déterminé par l'"approbatio" de l'Autorité ecclésiastique, toujours empêchent que le Conseil d'Etat donne un avis favorable à l'encadrement dans les rôles normaux, même quand ils sont en possession du titre d'étude et de l'habilitation correspondante (voir le dernier Avis de la Section II du 1 mars 1989).

III. Les ecoles confessionnelles.

3.1.1. La réforme de la vieille discipline concordataire sur l'enseignement de la religion dans les écoles publiques aurait pu-t- être utilisée pour arriver à une formulation la plus claire et univoque de la nouvelle discipline et à la création d'un rangement le plus satisfaisant pour les deux Parties. Ceci n'est pas sorti. Il faut, néanmoins, faire les comptes avec l'actuel stade d'évolution du système d'instruction italien, pour comprendre aussi le lien de réciprocité entre la solution concordée à propos de l'enseignement religieux et l'autre aspect de la "question scolaire", ou de la liberté d'enseignement, relatif aux écoles confessionnelles en Italie.

De ce point de vue — malgré les déjà rappelés principes constitutionnels sur la liberté de la personne et le pluralisme formatif et culturel, et malgré l'explicite reconnaissance de la liberté d'initiative d'organismes et de privés dans le champ de l'instruction (art. 33.3, Const.) — la situation italienne reste caractérisée par un apparat scolaire public fort centralisé et tout compréhensif, qui laisse en effet peu d'espace à l'explication des autonomies.

Cela peut contribuer à révéler le motif pour lequel la solution choisie pour l'enseignement religieux dans l'école publique présente des marges d'ambiguïté, qui risquent d'en compromettre les caractères de laïcité et de pluralisme.

L'Etat n'était pas prêt à préparer une articulation la plus ouverte et flexible pour le système global des procès de formation; pour cela l'Eglise a insisté au but du maintien d'une présence confessionnelle au sein de l'école publique (Berlingò).

3.1.2. La priorité que, jusqu'au présent, on a donné en Italie à la gestion directe du côté de l'Etat du système d'instruction à été justifiée, toutefois, avec la préoccupation, très avertie par les Constituants, de faire de ce système un instrument de promotion, intégration et péréquation sociale. On comprend donc — dans une phase de développement du Pays caractérisée par de larges poches d'analphabétisme et par de fortes asymétries dans la diffusion de la scolarisation — que la Charte constitutionnelle ait prédéterminé une précise *obligation* pour le législateur à pourvoir, en premier lieu, à l'école publique et ait formulé une simple *directive* au bénéfice du pluralisme scolaire extérieur. La possibilité d'interventions au profit de l'initiative privée est, pour cela, laissée à la discrétion du même législateur, une fois qu'on ait pourvu à rendre le plus possible présente et efficace celle de l'Etat. Celui-ci fut l'objectif qui mut les proposants (Corbino, Codignola et Malagugini) de l'amendement additionnel du cité troisième alinéa de l'article 33 Const.: "sans poids pour l'Etat".

3.1.3. En quelques mots, la situation actuelle peut être ainsi décrite: l'Etat satisfait, plus ou moins bien, à l'*obligation* lui confiée par les Constituants; au contraire, il n'a pas encore donné suite, en parallèle, à la *directive* constitutionnelle.

Il faut être clairs: la fonction de l'école publique reste irremplaçable dans le système conçu par la Constitution italienne. Ses objectifs de déconditionnement, d'intégration et de promotion sociaux résultent centraux et ne peuvent pas être absolus par d'autres agents formatifs.

Si le lien, toutefois, entre le service d'instruction et l'itinéraire formatif ou le projet éducatif choisis par ou pour une personne humaine devient toujours plus étroit à l'époque actuelle (Cour const., sent. 8 juin 1987, n. 215), c'est également de plus en plus insuffisant que le droit à l'instruction résulte protégé comme droit parfait, ou comme "valeur immédiatement normative ou coercitive", seulement pour les (familles des) élèves qui fréquentent l'école publique (art. 33.2, 34.2, Const.).

La solidarité foncière entre toutes les valeurs apicales de la Constitution, mise en lumière par le développement social et économique du Pays, pousse à éviter les risques d'une école publique so-

lipsiste, repliée en elle même. Il s'agirait de risques au poursuivre les objectifs qui justifient la centralité et la primauté elles-aussi de cette école, si le législateur ordinaire italien continuait à couvrir ses défaillances par le rappel à une interprétation littérale de (seulement) quelques des dispositions constitutionnelles, à partir de la clause exonérative du troisième alinéa de l'art. 33 Const., déjà vue au-dessus.

L'affaire de l'enseignement de la religion dans l'école publique pourrait être assumée comme un indicateur symptomatique à ce sujet.

3.2.1. Il y a beaucoup de temps qu'on observe que la mise en activité des règles générales sur l'instruction (même) privée, et d'une n'importe quelle forme d'intervention pour la promouvoir, ne servirait pas la cause du pluralisme, car la majeure partie des écoles non publiques en Italie sont d'inspiration catholique (Spagna-Musso, Vitale). Cet argument ne semble pas représenter un obstacle sérieux à l'accomplie réalisation du "projet" constitutionnel en matière.

Maintenant la quote-part des écoles confessionnelles catholique est attestée au-dessous de 5% à l'égard de tous les niveaux d'instruction, exception faite pour les écoles maternelles, pour lesquelles elle se maintient au-dessus de 40%; donc, le 13% environ sur le donné total (voir: *La scuola cattolica nell'Italia che cambia*, FIDAE-CENSIS, Roma, 1989). Même les dimensions du phénomène n'autorisent plus à prévoir des périls de monopoles ou oligopoles privés, comme ceux que la Cour constitutionnelle craint à raison dans le domaine de l'émission radio-télévisée (sent. 14 juillet 1988, n. 826).

Le problème, toutefois, doit être établi sur le plan de la qualité ou des principes, plutôt que sur celui de la quantité ou du fait. Les écoles confessionnelles dont on discute ne sont pas les "écoles des confessions" en sens étroit, c'est-à-dire les entités ou les instituts (comme les écoles catéchétiques, les oratoires, les séminaires, les facultés théologiques pour le clerc), auxquelles elles confient la tâche officielle de perpétuer leur "projet" institutionnel, leur "identité" génétique.

Les écoles prises en considération dans le présent examen attentif sont les "écoles confessionnelles" au sens le plus large, c'est à dire les écoles qui répètent, c'est vrai, leur inspiration ou "tendance"

d'une déterminée croyance religieuse, mais visent, en même temps, à les répandre dans le tissus communautaire à travers la comparaison et le dialogue avec d'autres cultures, sans proposer une unique vision organique et totalisante sur la vie de la communauté civile.

3.2.2. La distinction à peine délinée ne descend pas de purs relevés sociologiques, mais d'une précise scansion normative: les écoles du premier type sont faites objet de discipline par l'art. 10,1. n. 121 cit., l'art. 15,1. n. 449 cit., l'art. 14, l. n. 516 cit., l'art. 10, l. n. 517 cit., l'art. 13, l. n. 101 cit.; les écoles du deuxième type, par l'art. 9.1, 1. n. 121 cit., l'art. 13, l. n. 516 cit., les artt. 13-15, l. n. 517 cit., l'art. 12, l. n. 101 cit.

Parmi les normes ainsi rappelées, celles qui règlent les écoles *des* Confessions, au sens le plus étroit, renvoient à l'autonomie de l'ordre ecclésiastique; celles qui règlent *les écoles confessionnelles,* au sens le plus large, renvoient à la discipline générale dictée par les lois italiennes en matière d'instruction. L'éventuelle "ecclésiasticité" de l'institut gérant ne peut pas, elle-même, soutenir un *status* exceptionnel pour les écoles reliées avec tel institut. Le système italien attribue un relief juridique autonome à l'activité d'instruction, distingué de celui de l'entité qui gére l'école.

La normative commune, qu'on devait établir pour une accomplie réalisation de l'art. 33 Const., serait donc en mesure d'investir le secteur aussi des écoles confessionnelles au sens le plus large, en incitant et en valorisant leur potentialités pluralistes et une toujours majeure inhérence aux intérêts généraux. La nécessité et la possibilité de respecter la spécificité de ces écoles, même dans un cadre général, ne peuvent ni impliquer ni réclamer le vide normatif, par lequel sont accentués, pas éloignés, les risques de monopolisation et de dirigisme (encore plus si bien occultés).

3.2.3. En acte, le système italien donne relief à la tendance (confessionnelle aussi) des écoles surtout par l'intermédiaire de l'application jurisprudentielle des principes constitutionnels placés à protection du pluralisme en genre, et de déterminées formations sociales en particulier (art. 2, 5, 6, 7, 8, 9, 18, 19, 20, 21, 30, 33, 39, 49 etc., Const.) (Lo Castro).

Les points problématiques de cette protection regardent la li-

berté d'accès des élèves, la liberté de participation des usagers et des opérateurs à la gérance, la liberté des enseignants et des dépendants en genre.

Des règles législatives univoques sur ces points n'existent pas; en revanche ont été avancées, ces derniers temps, des propositions qui ont la tâche d'atténuer le relief de la tendance, préconisant une totale extension du "Statut des travailleurs" (l. 20 mai 1970, n. 300) — même dans la partie relative à leur "stabilité réelle", c'est-à-dire à leur réintégration dans la place de travail (art. 18) — à toutes les organisations de tendance qui prennent les dimensions d'entreprises (p.d.l. 17 octobre 1985, n. 1537, Sénat: Giugni et autres).

3.2.4. Cela explique pourquoi sur quelques points, comme celui de l'accès des étudiants, la jurisprudence est restée univoque par rapport au précédent qui a, il y a beaucoup de temps, privilégié le respect de la tendance (Cons. Et., Sect. VI, 6 juin 1972, n. 304); pendant que sur d'autres points, comme celui de la liberté de participation (syndicale) à l'intérieur de l'école, elle est allée de plus en plus en consolidant une adresse (inaugurée par Préture Bologna, 30 décembre 1974) tournée à la reconnaissance pleine de cette liberté.

Pour cela, en fin, qui se rapporte au problème le plus délicat, celui de la liberté des enseignants et du personnel non-enseignant, est valable en jurisprudence une approbation de fond sur la nécessité de protéger la tendance (Cour. Const. 14 décembre 1972, n. 195 et, *per incidens*, aussi 27 juin 1975, n. 189); les contrastes, néanmoins, s'insurgent lorsqu'il s'agit de repérer les limites de ce relief. Jusqu'à présent l'adresse prédominante est favorable à l'importance la plus plaine de la tendance: soit qu'on conjugue ou non la tendance avec les formes et les dimensions d'une entreprise, soit qu'il s'agit de contraste idéologique ou de conduite scolaire, et non, plus ou moins exemplaire (Cour de Cassation, Sect.trav., 19 janvier 1989, n. 253; Tribunal Pordenone, 23 mai 1989, n. 391).

Quelques symptômes font néanmoins prévoir (sur la base aussi de déterminations autonomes des mêmes organismes gérants, dans le contexte de la négociation collective: voir art. 45 du Contrat AGIDAE, artt. 4, 8, 37 du Contrat FISM) une progressive réduction de ce relief (Cour de Cassation, Sect. trav., 9 février 1989, n. 819; Préture Pordenone, 6 mars 1989, n. 1.).

3.2.5. L'incertain tableau normatif favorise l'apparition de contradictions. D'autre côté, la situation existante assure, toutefois, des marges appréciables d'élasticité, qui permettent de graduer opportunément l'importance de la tendance, en cherchant de correspondre, au-delà de schémas abstraits, aux réels intérêts et aux concrètes exigences, à la fois prévalants. On offre ainsi des chances meilleures au critère du mineur sacrifice possible des valeurs gravées par la tendance, lorsqu'il s'agit, comme dans les questions rappelées, de biens constitutionnellement remarqués et protégés, eux-aussi.

Cela, au moins, jusqu'à la définition d'un approprié cadre normatif d'ensemble.

3.3.1. Pour ce qui concerne la position des étudiants au sein des écoles confessionnelles, il faut rappeler le droit qu'ils ont à l'attribution de la valeur légale aux titres d'étude obtenus, où ces écoles parviennent à la parité, au sens énoncé par la Constitution (art. 33.4 Const.).

L'énoncé constitutionnel n'a pas encore reçu une organique réalisation, parceque les différents genres d'écoles poursuivent la reconnaissance par l'Etat sur la base de normes antécédentes la Charte fondamentale et, en partie, invalidées par des inconstitutionnalités acclamées (Cour const., 4 juin 1958, n. 36). Par exemple: l'unique forme de reconnaissance pour les écoles du niveau d'instruction élémentaire est celle de l'"égalisation" (="parificazione"), qui, d'un côté, légitime — unique exception dans le panorama italien aux degrés d'instruction élémentaire et secondaire — de charger à l'Etat une consistante cotisation financière (à couverture des gages des enseignants); de l'autre côté, néanmoins, limite excessivement, avec la convention d'égalisation, l'autonomie et la liberté de l'école.

3.3.2. Pour ce qui se rapporte à l'assimilation des élèves audessous d'autres profils, il faut rappeler que, sur la base de l'art. 34 Const., l'art. 42 du d.P.R. 24 juillet 1977, n. 616, les a rapprochés à ceux des écoles publiques dans la jouissance du "droit à l'étude", c'est-à-dire des providences apprêtées par les pouvoirs publics dans le but d'éliminer les obstacles qui peuvent, en effet, s'opposer à l'accès de tous au service scolaire et, pour cela, gêner la possibilité de tous de se présenter, avec la même égalité de chances, au monde

du travail et des professions et à la vie de relation (artt. 3.2, 4, 34 Const.).

Que cette assimilation soit pleine et immédiate est révoqué en doute par quelques prononciations de la Cour constitutionnelle (sent. 22 janvier 1982, n. 36; ord. 16 juin 1988, n. 668), de façon peu justifiée, à mon avis. La Cour, au vrai, assume comme correct, à ce propos, l'exercice du pouvoir discrétionnaire du côté du législateur régional (art. 117 Const.) même quand il se base sur un critère d'exclusion (celui des élevées pensions pour la fréquence) peu univoque. La jurisprudence administrative, elle-aussi, est d'avis de ne pas pouvoir tirer ce critère *ad consequentias* en manière aveugle, au fin de ne pas courir le risque de le transformer dans une "illation évidemment arbitraire", et dans une discrimination pour l'école privée (obligée ainsi à circonscrire ses usagers à ceux qui soient à même de payer des pensions d'haut montant) (Cons. Et., Sect. V, 29.11.85, n. 429.).

Une fois que le législateur régional décide de pouvoir et de devoir intervenir en faveur des élèves qui appartiennent à un déterminé niveau de revenu, sa discrétionnalité peut être considérée épuisée; la distinction ultérieure entre des usagers de certaines écoles et ceux d'autres, sur la base de présomptions peu univoques risque d'introduire des discriminations inacceptables. Dans ce cas il s'agit, à vrai dire, de bénéfices qui concernent directement les disciples, pas les écoles.

Le raisonnement de la Cour serait, au contraire, à même d'être partagé, quand les écoles étaient les directes bénéficiaires (voir *supra*, 3.1.2).

3.3.3. La jouissance d'un traitement non discriminé du côté des disciples des écoles confessionnelles, par rapport à ceux des écoles publiques en ce qui concerne le "droit à l'étude", assume aujourd'hui un grand relief. L'évolution de ce droit est, en effet, fort intéressante. D'une part il vise à garantir l'ensemble des conditions aptes à compléter et acheter l'activité didactique institutionnellement déroulée par les écoles; en même temps il vise à assurer les services correspondants: aux usagers de classes moyennes contre le payement de contributions rapportées aux coûts de gérance; aux usagers provenant des classes moins riches avec la *full assistance* complètement gratuite.

La voie du "droit à l'étude" — déjà ouverte non seulement par la législation régionale, mais aussi par quelques normes de déterminées lois de l'Etat, en matière d'écoles maternelles et d'Universités privées (art. 31, l. 24 juillet 1962, n. 1073; art. 32, l. 16 mars 1968, n. 444; art. 14, l. 18 décembre 1951, n. 1551; art. 122, d.P.R. 11 juillet 1980, n. 382), ainsi qu'en matière de taxes scolaires — et la voie des normes générales sur le service scolaire et sur les Universités privées — à travers: la reconnaissance de l'autonomie des particulières unités scolaires ou universitaires; une convenable articulation des programmes (avec la définition de matières *obligatoires* et *facultatives*), même à des niveaux différents de celui universitaire; une surveillée, mais plus étendue, mobilité et utilisation aussi des enseignants (conventions, *part-time*, etc.) — sont les voies d'accès dans le système scolaire italien d'éléments d'innovation et de flexibilité. Cette innovation et cette flexibilité pourraient conduire à un rangement le plus satisfaisant, soit pour l'enseignement religieux dans les écoles publiques, soit pour les libertés *dans les* et *des* écoles confessionnelles, c'est-à-dire à des résultats sur la "question scolaire" le plus en ligne avec les principes constitutionnels.

IV. Perspectives "de iure condendo".

4.1.1. Le Gouvernement italien a présenté au Parlement quelques projets de lois à ce propos, dans le temps aussi de la courante législature (voir: Sénat, p.d.l. 29 août 1988, n. 1300 "Universités privées reconnues par l'Etat"; 19 janvier 1989, n. 1531 "Normes sur l'autonomie des écoles etc."; 6 février 1989, n. 1575 "Loi-cadre sur le droit à l'étude dans l'école primaire et secondaire"; 6 février 1989, n. 1576 "Dispositions sur le droit à l'étude dans le milieu de l'instruction supérieure").

On sait, toutefois, que le législateur italien est très lent en procédant avec les réformes dans le système scolaire; en ce cas, on ajoute le frein qui peut dériver des rappels contenus en des actes d'importance extérieure, comme l'Accord avec le Saint-Siège et les "Ententes" avec les confessions de minorités (même si ces rappels peuvent, en certaines circonstances, pousser aussi, pas freiner).

La formation d'un *consensus*, même normatif, à niveau européen, dans le tableau d'une commune discipline de la liberté religieuse, ayant pour objet la liberté d'enseignement -dans son double revers de la laïcité de l'école publique et du pluralisme des institutions scolaires (confessionnelles aussi)- pourrait résulter comme un valable aide pour déplacer des résistances tenaces et combler de vieux retards.

NOTE

Les développements des éléments de bibliographie esquissés dans le texte sont les suivants:

S. BERLINGÒ, *Libertà d'istruzione e fattore religioso*, Giuffrè, Milano, 1987, 31 ss.

P. COLIN, *Come parlare dei "temi cristiani" della Rivoluzione*, en *Concilium*, 1/1989, 146 s.

G. LO CASTRO, *Rapporti di lavoro nelle organizzazioni di tendenza*, en *Rapporti di lavoro e fattore religioso*, Jovene, Napoli, 1988, 47 ss.

E. SPAGNA-MUSSO, *Sulla legittimità costituzionale dei finanziamenti statali alle scuole private*, en *Scritti Ambrosini*, III, Giuffrè, Milano, 1970, 1963 ss.

A. VITALE, *Scuola e fattore religioso*, en *Quaderni di diritto e politica ecclesiastica*, 1989/1, 99 ss.

Pour les autres références contenues dans le texte, voir les numéros de la citée Revue "Quaderni di diritto e politica ecclesiastica" aux années correspondantes et, pour celles normatives en particulier, voir aussi: S. BERLINGÒ et G. CASUSCELLI, *Codice del diritto ecclesiastico*, Giuffrè, Milano, 1988.

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LE REGIME JURIDIQUE DE L'ECOLE PRIVEE ET LES AUMONERIES DE L'ENSEIGNEMENT PUBLIC EN FRANCE (1)

SUMMARY: I. Aperçu historique. — II. La liberté de l'enseignement, principe à valeur constitutionnelle. — III. La loi Debré. — IV. Les contrats. — V. L'enseignement religieux dans les établissements publics: Les aumôneries de l'enseignement public. — VI. Situation particulière des départements de l'est de la France.

I. APERÇU HISTORIQUE

La Révolution avait fait table rase de l'organisation scolaire de l'Ancien Régime, mais n'avait rien établi de durable à la place (2). Il revint à Napoléon, par la loi du 10 mai 1806, de créer l'Université impériale "corps chargé exclusivement de l'enseignement et de l'éducation publique".

L'Empereur réservait à l'Etat le *monopole* du grand service de l'éducation; la liberté de l'enseignement n'avait pas ici sa place. Sous la Restauration, ce monopole subsiste, en ce sens qu'il existe un système scolaire unique pour tous, mais l'Eglise y a sa part; les décisions sur les questions scolaires relèvent d'instances largement

(1) Nous remercions Madame de Saint-Exupéry, chargée de mission au secrétariat de l'enseignement catholique, pour les précieuses indications qu'elle nous a aimablement communiquées.

(2) Sous l'Ancien Régime, l'enseignement est assuré essentiellement sous la dépendance de l'Eglise. Il repose notamment sur les collèges aux mains des Jésuites; mais à partir de leur expulsion en 1762, l'Etat s'octroie une plus grande responsabilité dans le système éducatif. La Constitution de 1791 propose "une instruction publique commune à tous les citoyens" et gratuite. Celle de l'an III semble accepter un certain système de liberté. Mais la Convention écarte toute influence de l'Eglise.

influencées par la hiérarchie ecclésiastique; en 1822, le Grand Maître de l'université est un évêque, Mgr. Frayssinous. Pourtant le double secteur de l'enseignement devait renaître au cours du XIXe siècle. Ecoles publiques et écoles privées en viendront à se partager les élèves, tout en demeurant longtemps rivales. Mais la législation actuelle veut les rendre complémentaires.

La liberté de l'enseignement fut affirmée par diverses lois qui demeurent aujourd'hui les cadres fondamentaux dans lesquels s'inscrit la réglementation de l'enseignement privé:

Enseignement primaire: loi Guizot (28 juin 1833), puis loi Goblet (30 octobre 1886).

Enseignement secondaire:	loi Falloux (15 mars 1850)
Enseignement supérieur:	loi Dupanloup (12 juillet 1875) (3)
Enseignement technique:	loi Estier (23 juillet 1919).

Ces textes résultent des affrontements qui opposèrent, tout au long du XIXe siècle, les partisans de l'école publique aux défenseurs de l'école privée.

Pendant longtemps, la liberté de l'enseignement fut revendiquée essentiellement par les catholiques et les libéraux. Au XIXe siècle elle apparut, aux yeux de beaucoup, comme une liberté recherchée par les conservateurs et les monarchistes, alors que toutes les autres grandes libertés publiques étaient présentées comme des conquêtes des Républicains. Si les courants dominants dans l'Eglise, notamment dans l'épiscopat, dénonçaient globalement la place faite aux libertés modernes, ils ne manquaient pas de faire une réserve, faisant grief à l'Etat de ne pas laisser à l'Eglise la part de liberté qui devait lui revenir de l'organisation du système éducatif. Au XIX siècle, bien souvent, les catholiques pensèrent que le développement des écoles libres constituait une condition de la survie d'une Eglise qui se sentait menacée dans son existence. A l'opposé, les républicains, sous la Troisième République, virent dans le triomphe de l'école laïque un pilier essentiel de l'édifice politique en construction. Ils luttèrent donc contre les écoles libres, sans jamais cependant remettre expressément en cause le principe théorique de l'existence de la liberté de l'enseignement.

Récemment, la querelle scolaire ne semblait pas close en France. C'est sans doute l'histoire propre à la France qui explique que, parmi l'ensemble de libertés publiques, la liberté de l'enseignement reste, pour beaucoup, une mal aimée.

(3) La liberté de l'enseignement supérieur ne sera pas examinée dans le présent rapport; sur cette question bien spécifique, nous renvoyons aux travaux de P.H. PRELOT: *Naissance de l'enseignement supérieur libre: la loi du 12 juillet 1875*; P.U.F. 1987, 139p. et: L'enseignement supérieur d'initiative privée, th. droit, Paris II, 1988, 524 p. dactyl.

Ainsi, le débat y est encore d'actualité, plus que dans la plupart des pays européens (Cf. les manifestations de mai et juin 1984, suscitées par un projet de loi que le gouvernement retira pour faire tomber les tensions). Pourtant, l'enjeu du conflit a changé. On ne se bat plus pour l'existence même d'une religion ou d'un régime politique, mais seulement pour la défense d'un système éducatif. Surtout, le principe de la liberté de l'enseignement semble fermement établi en France, même si ses modalités de mise en oeuvre peuvent varier.

Ce principe de reconnaissance de la liberté de l'enseignement suppose:

- Que l'on admette que tout particulier est libre d'enseigner ce qu'il désire, selon les méthodes de son choix, sous réserve d'un contrôle exercé par l'Etat sur quelques points limitativement énumérés.
- Que toute famille, sans distinction notamment de race ou de religion, soit libre d'envoyer ses enfants dans une école publique ou une école privée.
- Qu'il existe en fait comme en droit une réelle égalité entre ces deux secteurs scolaires. Cette égalité suppose que chacun de ces deux secteurs dispose effectivement des moyens nécessaires pour fonctionner ce qui, en pratique, implique une aide de l'Etat au fonctionnement de l'école privée.

On considère aujourd'hui que ces principes ont valeur constitutionnelle.

II. LA LIBERTÉ DE L'ENSEIGNEMENT, PRINCIPE À VALEUR CONSTITUTIONNELLE

La liberté de l'enseignement ne fut pas expressément mentionnée dans les déclarations des droits de l'époque révolutionnaire. Parmi les textes constitutionnels, le plus explicite est l'article 9 de la Constitution de 1848: "L'enseignement est libre. La liberté d'enseigner s'exercera selon les conditions de capacité et de moralité déterminées par les lois et sous la surveillance de l'Etat. Cette surveillance s'étend sur tous les établissements d'éducation et d'enseignement sans aucune exception".

La valeur juridique de ce texte ne survécut pas au régime qu'il mit en place.

Il est admis aujourd'hui que la liberté de l'enseignement constitue un principe constitutionnel. Ce point fut expressément tranché par la décision du Conseil Constitutionnel du 23 novembre 1977 (4). Plus récemment, la même assemblée a rappelé cette position (5). D'autre part, la décision de 1977 affirmait qu'une aide de l'Etat à l'enseignement privé n'était pas contraire à la Constitution.

La solution adoptée en France doit être rapprochée des *principes européens*. La Convention Européenne des droits de l'homme n'envisage pas expressément la liberté d'enseignement. Mais l'article 2 du 1er protocole additionnel à la Convention de 1954 précise: "Nul ne peut se voir refuser le droit à l'instruction. L'Etat, dans l'exercice des fonctions qu'il assumera dans le domaine de l'éducation et de l'enseignement, respectera le droit des parents d'assurer cette éducation et cet enseignement conformément à leurs convictions religieuses et philosophiques". La rédaction de cet article avait donné lieu à de longues discussions entre partisans et adversaires de l'enseignement libre. Finalement il consacre d'une part le droit à l'instruction, d'autre part le respect des convictions religieuses et

(4) (A.J.D.A. 1978, p. 565, et note Rivéro): "Considérant que ce principe, qui a notamment été rappelé à l'article 91 de la loi des finances du 31 mars 1931, constitue l'un des principes fondamentaux reconnus par les lois de la République, réaffirmés par le préambule de la Constitution de 1946 et auxquels la Constitution de 1958 a conféré valeur constitutionnelle ...". Le raisonnement du Conseil Constitutionnel consista à se riférer à la constitution de 1958 qui, elle même, reprend expressément le préambule de 1946. Or ce préambule contient une formule relative aux "principes fondamentaux reconnus par les lois de la République". En fait, lors de l'élaboration du texte de 1946, derrière cette expression assez vague, les rédacteurs pensaient à la liberté de l'enseignement, mais sans oser la viser expressément, parce que au lendemain de la Libération la coloration souvent religieuse de l'école privée suscitait des oppositions. Le texte de 1946 est à rapprocher de la loi de finances de 1931 qui fait de la liberté de l'enseignement un "principe fondamental reconnu par les lois de la République". Or, par décision du 16 juillet 1971, le Conseil constitutionnel a considéré que ces "principes fondamentaux reconnus par les lois de la République" avaient valeur constitutionnelle. En l'application de sa propre jurisprudence, il a pu affirmer en 1977 que la liberté de l'enseignement qualifiée par la loi de 1931 de "principe fondamental reconnu par les lois de la République" a valeur constitutionnelle.

(5) Cons. Const. 18 janv. 1985, R.F.D.A. 1985, 5, p. 633 et art. Delvolvé: "...Principe de la liberté d'enseignement, qui a valeur constitutionnelle...".

philosophiques. Cette disposition oblige – t – elle l'Etat à assurer le respect des opinions à l'intérieur de l'école publique? ou le contraint – elle à autoriser la création d'écoles privées?

Deux affaires éclairent en partie l'interprétation que l'on peut en donner: — Affaire Kjeidsen (arrêt 7 dec. 1976). A cette occasion, la commission européenne des droits de l'Homme avait considéré que "... l'article 2 interdit à l'Etat d'empêcher les parents d'assurer l'éducation de leurs enfants en dehors des école publiques...". Cependant, l'arrêt de la Cour se bornait à dire que le texte du protocole ne consacrait pas de façon expresse le principe de liberté d'enseignement.

— Plus récemment, dans l'affaire X et Y contre Royaume Uni (arrêt 7 décembre 1982), la commission avait considéré que l'article 2 n'astreint pas l'Etat à créer ou à subventionner des établissements conformes à des convictions déterminées.

Il suffit que l'Etat respecte ces convictions dans l'enseignement tel qu'il existe.

III. La loi Debré

Si la législation élaborée au cours du XIXe siècle reste en vigueur, l'essentiel du régime des établissements d'enseignement privé est cependant régi par des textes élaborés sous la Ve République. En 1959, la conjoncture politique semblait favorable au vote d'une loi permettant à l'enseignement privé de contribuer au bon fonctionnement de l'ensemble du système éducatif national. Le gouvernement créa, au début de 1959, la commission Lapie, dont les conclusions furent largement reprises dans la *loi Debré du 31 Décembre 1959*.

La loi Debré, dans son article 1, déclare: "l'Etat proclame et respecte la liberté de l'enseignement et en garantit l'exercice aux établissements privés régulièrement ouverts".

Le même article indique immédiatement l'élément essentiel de la loi: les établissements privés peuvent passer des *contrats* avec l'Etat. L'établissement garde alors son "caractère propre", mais l'enseignement y est soumis au contrôle de l'Etat et doit être dispensé dans le "respect total de la liberté de conscience. Tous les enfants, sans distinction d'origine, d'opinions ou de croyance y ont accès".

Cette possibilité de contrat constitue la clef de voûte de l'ensemble de la réforme. Mais avant d'en détailler les modalités, la loi règle le sort des établissements privés qui n'entreraient pas dans le système ainsi crée:

— Ils peuvent rester des établissements privés hors contrat; le contrôle de l'Etat se limitera "aux titres exigés des directeurs et des maîtres, à l'obligation scolaire, au respect de l'ordre public et des bonnes moeurs, à la prévention sanitaire et sociale" (art. 2).
— Ils peuvent aussi demander à être intégrés dans l'enseignement public (art. 3).

Dans l'esprit du législateur de 1959, ces deux solutions extrêmes ne devaient être appliquées que dans les cas — rares et regrettables — où aucun contrat n'interviendrait. La suite du texte réglemente donc les contrats. L'article 4 donne aux établissements privés la possibilité de passer avec l'Etat un *"contrat d'association à l'enseignement public"*.

L'article 5 leur permet de se lier à l'Etat par un *"contrat simple"*.

L'un ou l'autre de ces types de contrats doivent permettre la coopération des deux modes d'enseignement, qui ne fusionnent pas pour autant mais gardent chacun leur spécificité. Par ces solutions contractuelles, l'enseignement privé est placé sous l'autorité du Ministre de l'Education Nationale; il reçoit une importante aide financière de l'Etat. Mais garde cependant son *"caractère propre"* (6).

Les *chiffres* montrent l'ampleur de cette politique contractuelle: *en 1985*, la population scolaire totale atteignait 14 millions d'élèves et l'enseignement privé représentait 16% de ce chiffre (dont 1% seulement dans l'enseignement non confessionnel). La quasi totalité des écoles privées catholiques ont souscrit un contrat.

(6) Cf. appréciation donnée en 1977 par Michel Debré sur la loi de 1959, Débats J.O.A.N., 1977, p. 4382: "Lorsque voici quelques années, s'est posé le grave problème des rapports de l'Etat et de l'enseignement privé, catholique ou laïque, il y avait deux thèses en présence: l'une consistant à dire que l'aide de l'Etat à l'enseignement privé, catholique ou laïque, devait précéder l'intégration de l'enseignement privé dans l'enseignement public, que ce dernier devait, en définitive, jouir d'un véritable monopole. La seconde consistait au contraire à affirmer que l'enseignement devait subsister avec l'aide de l'Etat sans que l'Etat fut autorisé à exercer le moindre contrôle sur lui. Ni l'une ni l'autre de ces deux thèses n'a été retenue par le gouvernement ou par le législateur. Tous deux ont voulu maintenir les deux types d'enseignement placés l'un et l'autre sous le contrôle du Ministre de l'Education Nationale et sous l'autorité des lois de la République".

— Dans le premier degré 600.000 élèves (60%) étaient sous contrat simple et 340.000 (40%) sous contrat d'association.
— Dans le second degré, 1 million d'élèves étaient sous contrat d'association (93%) car depuis 1980 le secondaire ne peut plus passer de contrat simple.

L'aide de l'Etat à l'enseignement privé a représenté 20 Milliards de francs en 1985.

Les chiffres restent à peu près constants d'une année sur l'autre. En 1989, moins de 5% de l'enseignement privé demeure hors contrat. Dans l'enseignement privé sous contrat, l'enseignement catholique représente 90%, les 10% restant se partagent entre écoles protestantes, israélites ou non confessionnelles.

A la rentrée 1988/1989, l'enseignement catholique, primaire et secondaire accueillait, dans les écoles sous contrat ou hors contrat, 1.969.183 élèves (enseignement agricole non compris), dont 904.199 dans le premier degré et 1.064.984 dans le secondaire et l'enseignement post-baccalauréat (7).

Reste à expliquer la nature de chacun de ces types de contrats, ainsi que les droits et obligations en découlant pour l'Etat comme pour les classes sous contrat.

IV. Les contrats

A) *Etablissements concernés par chaque type de contrat.*

— *Contrat simple*: la loi de 1959 prévoyait que ce régime pouvait s'appliquer:
— aux établissements du premier degré.
— de façon transitoire, jusqu'en 1979, aux établissements du second degré, classiques, modernes ou techniques.

En 1989 environs les deux tiers des écoles primaires sous contrat sont régies par un contrat simple.

(7) Ces chiffres représentent une augmentation de 0,10% par rapport à la rentrée 87. En revanche, entre 86 et 87 on avait constaté une légère baisse: 0,28%. D'autre part, les effectifs du primaire fléchissent légèrement alors que ceux du secondaire augmentent. (Même évolution dans le secteur public).

— *Contrat d'association*: Il est la seule possibilité offerte actuellement aux établissements privés du secondaire qui désirent un régime contractuel. Il est possible dans le primaire.

Dans l'un ou l'autre cas, ce sont les *classes* et non l'ensemble des écoles qui sont sous contrat. De fait, le contrat, passé par l'établissement, peut viser toutes les classes ou seulement certaines d'entre elles précisément désignées. Dans un même établissement, voisinent donc des classes hors contrat et des classes sous contrat.

B) *Conditions auxquelles un établissement doit satisfaire pour prétendre à passer un contrat*:

1 + *Contrat simple*: l'article 5 de la loi Debré dispose: "peuvent bénéficier d'un contrat simple les établissements justifiant des seules conditions suivantes: durée de fonctionnement, qualification des maîtres, nombres d'élèves, salubrité des locaux scolaires". Cette disposition est interprétée comme impliquant les conditions suivantes:

— L'enseignement *doit fonctionner régulièrement depuis déjà au moins cinq ans*. Les contrats sont conclus pour chaque classe et non globalement pour un établissement. Toutefois, la condition de délai, c'est à dire l'obligation de fonctionner déjà depuis au moins 5 ans pour pouvoir passer un contrat, doit s'apprécier selon "*l'ordre d'enseignement*" et non pour chaque classe (8).
— Le directeur et les maîtres qui enseignent dans les classes sous contrat doivent "*posséder les titres* de capacité exigés pour les emplois correspondants de l'enseignement public

(8) Cette condition de délai doit jouer lorsqu'il s'agit de l'ouverture d'un nouvel ordre d'enseignement (C.E. 13 janv. 1965, école du Sacré-Coeur de Gorron, Lebon p. 30); c'est à dire lors de la création de classes secondaires dans un établissement qui ne comportait que du primaire, ou vice-versa. Pour le ministère, il y a aussi deux ordres distincts d'enseignement entre les classes de collège et celles de lycée, distinction dont les autorités de l'enseignement privé souhaitent la disparition. En revanche, les qualifications de classique, moderne ou technique n'ont pas à être prises en considération. D'autre part, ce délai de cinq ans peut être ramené à un an si l'établissement est créé dans un quartier nouveau d'une zone urbaine comprenant au moins 300 logements neufs.

ou des titres reconnus équivalents par la réglementation en vigueur"(décret du 22 avril 1960).
— L'établissement doit rassembler un *nombre d'élèves suffisant*. L'interprétation de cette règle a pu varier. Dans l'ensemble on a tendu vers une comparaison avec les effectifs de l'enseignement public.
— La *salubrité et l'hygiène* des locaux sont appréciées par les services de l'inspection académique.

2 + *Contrat d'association*: la loi de 1959 n'énonce pas avec précision les conditions requises pour établir un contrat d'association. L'article 4 précise seulement que ces établissements doivent "répondre à un besoin scolaire reconnu", formule vague que les textes réglementaires ne précisent pas d'avantage. En tout état de cause, la conclusion d'un contrat d'association implique que soient déjà remplies les conditions nécessaires à la conclusion d'un contrat simple. A celles-ci s'ajoute le "besoin scolaire reconnu". L'interprétation de la formule mit longtemps à se dégager.

Récemment, le Conseil d'Etat a eu à se prononcer (C.E. 25 nov. 1988, Lycée technique de Rodez). En définitive il semble que la notion de besoin scolaire reconnu doive s'apprécier au point de vue *quantitatif* (un nombre suffisant d'élèves demandant cette formation) et *qualitatif* (répondant à la demande des parents). En somme, le contrat est possible, s'il n'y a pas, à proximité, un autre établissement privé pouvant accueillir les candidats à la formation en question (9).

(9) Avant que le Conseil d'Etat n'ait l'occasion de se prononcer, deux décisions des tribunaux administratifs permettaient de dégager quelques points (T.A. Rennes 12 juil. 1967, A.E.P. de Mordelles c/Min. educ. nat.; et T.A. Poitiers, 18 oct. 1967, école St.Paul c/Min. educ. nat.; Cf. N.Fontaine, *La liberté de l'enseignement*, p. 81):

— La référence à la carte scolaire de l'enseignement public ne constitue pas le seul critère d'appréciation.

— Le besoin scolaire semble devoir s'apprécier en fonction de la spécificité de l'établissement demandeur.

La loi du 1er juin 1971 s'orientait dans le même sens, en précisant que le "besoin scolaire reconnu doit être apprécié en fonction des principes énoncés à l'article 1 de la présente loi" (amendement à l'article 4 de la loi de 1959). Les débats qui eurent lieu à cette occasion montrent aussi que la volonté du législateur était de ne pas limiter l'appréciation de l'administration à des critères purement quantitatifs.

Les contrats imposent des obligations aux maîtres et aux établissements, en contrepartie de l'importante aide financière accordée par l'Etat et les collectivités publiques.

C) *La condition des maîtres.*

Un des apports essentiels de la loi de 1959 est d'avoir posé le principe du *paiement par l'Etat du salaire des enseignants des classes privées sous contrat.* La situation de ces maîtres est fixée par référence aux règles édictées pour l'enseignement public bien que ces enseignants ne deviennent en aucun cas des fonctionnaires.

1 *La nomination* de l'enseignant du privé: les conditions de recrutement des maîtres de l'enseignement privé sous contrat obéissent en principe aux mêmes règles que celles édictées pour l'enseignement public.

Les conditions générales résultent de l'art. 1 du décret du 10 mars 1964 qui exige:

— La nationalité française.
— La jouissance de ces droits civiques.
— une situation régulière au regard des lois sur le recrutement de l'armée.
— les conditions d'aptitude physique exigées du personnel enseignant du public.
— l'absence de sanction disciplinaire grave dans l'enseignement public.

Plus importante est la disposition relative aux capacités requises; l'article 1 du décret du 22 avril 1960 prévoit que nul ne peut diriger un établissement privé sous contrat ou enseigner dans les classes sous contrat, s'il ne possède "les titres et capacités exigés pour les emplois correspondants de l'enseignement public ou des titres reconnus équivalents par la réglementation en vigueur". C'est le principe d'assimilation qui trouve ici un domaine d'application essentiel.

Le maître une fois nommé sera classé dans l'échelle de rémunération correspondant à ses diplômes.

S'il satisfait à ces conditions de recrutement, l'enseignant privé peut être engagé par un contrat de travail dont la nature diffère selon qu'il y a contrat d'association ou contrat simple.

— *Le contrat d'enseignement*:

il intervient dans les établissements sous *contrat d'association.* Il est passé entre l'enseignant et l'Etat (c'est à dire le ministère par la voie du rectorat)

La loi du 25 janvier 1985 (art. 18 n. 2) prévoit que l'enseignement est "confié en accord avec la direction de l'établissement soit à des maîtres d'un établissement public, soit à des maîtres liés à l'Etat par contrat". Cette disposition modifie la réglementation antérieure: avant 1985, le chef d'établissement proposait un enseignant à la nomination, alors que désormais son intervention se limite à donner — ou à refuser — son accord à la proposition émanant de l'administration. L'autorité académique détient l'initiative. Généralement, une concertation entre l'administration et l'établissement permet de donner satisfaction aux uns et aux autres.

Dans le cas d'un contrat d'association, l'Etat est l'employeur du maître qui ne devient pas pour autant fonctionnaire. Il est rétribué par l'Etat, mais comme *agent de droit public contractuel non titulaire.* Notamment, son régime de sécurité sociale est le régime général identique à celui des salariés du secteur privé. D'autre part, il ne bénéficie pas de la sécurité de l'emploi des fonctionnaires.

— *L'agrément*

Dans les établissements sous *contrat simple*, l'enseignant est seulement agréé par l'Etat qui le paie comme un *salarié de droit privé.* L'école est son employeur. L'agrément n'établit aucun lien contractuel entre l'Etat et le maître privé. Le contrat de travail est passé entre l'enseignant et l'organisme de gestion de l'école (de fait, chaque école comporte un organisme de gestion qui fonctionne comme une association locale, régie le plus souvent par la loi de 1901).

Finalement, dans l'un ou l'autre cas, on aboutit à cette situation paradoxale dans laquelle des agents non titulaires de l'Etat, ou des agents de droit privé, sont rétribués par l'Etat et sont soumis, en matière de traitement et d'avantages sociaux, aux mêmes règles que les fonctionnaires titulaires.

2 La *carrière* des maîtres et le financement des salaires par l'Etat:

L'Etat prend en charge la rémunération des maîtres des classes sous contra" compte tenu des diplômes et des rémunérations en vigueur dans l'enseignement public" (art. 5 loi 1959). Leur car-

rière suit une progression semblable à celle du personnel titulaire de l'enseignement public. Des règles d'avancement comparables s'appliquent. Pourtant, ils ne bénéficient pas automatiquement de la même garantie de l'emploi.

Lors de l'élaboration de la loi *Jospin*, les maîtres de l'enseignement privé se sont montrés inquiets parceque, n'étant pas fonctionnaires titulaires d'une part, et n'ayant pas, le plus souvent, le même niveau de diplômes que les enseignants du public d'autre part, ils n'étaient pas visés par le plan de revalorisation de la fonction enseignante tel qu'il avait été élaboré dans un premier temps. Mais, après négociations, ils ont obtenu du ministère l'assurance que leur carrière serait revalorisée de la même façon que celle de leurs collègues du secteur public. Sur ce point, la loi voteé en juillet 1989 satisfait les membres de l'enseignement privé.

Les règles de *mutation* sont un peu différentes. Dans l'enseignement privé, l'Etat, l'association gestionnaire de l'établissement, et le directeur interviennent lors d'une procédure de mutation. Ces trois autorités n'ont pas forcément les mêmes préoccupations et ne sont pas coordonnées. La question se pose pratiquement lorsqu'un établissement réduit son activité ou que, pour toute autre raison, le contrat passé entre l'établissement et l'Etat est résilié, totalement, ou en ce qui concerne seulement certaines classes. Cette décision entraîne, ipso facto, la résiliation du contrat d'enseignement ou de l'agrément des maîtres des classes visées. Des enseignants peuvent donc se trouver sans emploi garanti. Cependant le décret du 12 juillet 1985 vient apporter quelques assurances aux maîtres en accordant une priorité à la nomination dans d'autres établissements aux maîtres, privés de leur emploi à la suite de la résiliation totale ou partielle d'un contrat d'association. La procédure de mutation permet en général à l'intéressé d'être maintenu dans une situation équivalente à celle qu'il occupait.

La cessation définitive des fonctions intervient normalement lors de la mise à la retraite ou, — à titre exceptionnel — lors d'une sanction individuelle de licenciement.

Le *licenciement individuel* est rare, mais peut être prononcé:

— Pour le maître agréé (contrat simple), il peut résulter: soit de la rupture du contrat de travail par le chef d'établissement, employeur privé — cette rupture ne peut intervenir que dans les cas prévus par la convention collective régissante ce contrat de travail de droit privé (Cf. pour l'enseignement catholique, dernière mise à jour en septembre 1986) — soit du retrait de l'agrément par l'administration.

— Pour le maître contractuel (contrat d'association) la rupture résulte de la résiliation du contrat par le ministre de l'éducation nationale.

Dans la pratique, une question s'est posée à diverses reprises: un établissement privé catholique peut-il licencier un *maître divorcé et remarié*?

Doctrine et jurisprudence ont longtemps hésité; puis il a semblé qu'un arrêt de la Cour de Cassation en 1978 autorisait le licenciement dans de telles circonstances (10). Mais cette jurisprudence est peut-être remise en cause aujourd'hui. Cette question est brûlante, le droit séculier (droit du travail et droit pénal) semblant incompatible avec les exigences du droit canonique: Avant 1987, le Code du Travail prévoyait la possibilité de décider d'un licenciement "pour motif légitime". On pouvait considérer qu'une divorce suivi d'un remariage portait atteinte au "caractère propre" de l'établissement et qu'en conséquence un "motif légitime" de licenciement existait. Mais la loi de 1987 a supprimé cette expression tant du Code du Travail que du Code Pénale (11).

Dès lors, on considère en droit français que le Code du Travail n'autorise plus un licenciement pour considérations de vie privée. Le désaccord entre le droit canonique et le droit français est net (12).

(10) En 1978, la Cour de Cassation a considéré que "il ne peut être porté atteinte à la liberté du mariage par un employeur que dans des cas très exceptionnels où les nécessités des fonctions l'exigent impérieusement". Mais elle a ajouté que, dans le cas d'espèce, existaient des circonstances exceptionnelles qui justifiaient la décision de licenciement. (Cass. ass. plénière, 19 mai 1978, Dame Roy c. assoc. éduc. populaire Sainte Marthe; Bull. civ. ass. plen. n. 1 D.S. 1978-341). Cette jurisprudence considère que les convictions religieuses de l'enseignant "avaient été prises en considération et que cet élément de l'accord des volontés, qui reste habituellement en dehors des rapports de travail, avait été incorporé volontairement dans le contrat dont il était devenu partie essentielle et déterminante".

Par la suite, la jurisprudence a semblé tenir compte de cette position, sans que la question soit pour autant clairement tranchée.

(11) Les travaux préparatoires de cette loi établissent que la modification visait à protéger les homosexuels contre des licenciements fondés uniquement sur leur vie privée.

(12) Récemment une affaire a fait grand bruit: un chef d'établissement du secondaire a divorcé et s'est remarié. L'affaire a été portée devant le tribunal correctionnel qui s'est déclaré incompétent. L'eveque a demandé la résiliation du contrat du directeur, mais ne l'a pas obtenu du ministère; l'organisme de gestion ne souhaitait d'ailleurs pas non plus ce licenciement. L'eveque a alors retiré l'appellation de "catholique" à l'établis-

3 + *Les obligations* des enseignants dans les classes sous contrat:

Les formules contractuelles imposent certaines contraintes:

La loi Debré précise (art. 1) que ces écoles doivent respecter la liberté de conscience des élèves et accepter "tous les enfants sans distinction d'origine, d'opinion ou de croyance".

Surtout, dans les classes sous contrat, les enseignements doivent se soumettre à certaines règles visant tant le contenu de l'enseignement que la pédagogie mise en oeuvre (13).

— Dans le cas du *contrat d'association* l'enseignement sera dispensé selon les règles et les programmes de l'enseignement public. On constate un *alignement complet* sur les écoles publiques. Les matières doivent y être réparties selon le même horaire. Cette exigence est la contrepartie de l'aide financière accordée par l'Etat.

— Dans le cas d'un *contrat simple, les* contraintes imposées aux classes sous contrat sont *plus légères*: les maîtres doivent préparer aux examens officiels et utiliser les manuels scolaires autorisés. Cependant, on admet que l'établissement possède une certaine liberté, une marge de manoeuvre lui permettant de modifier dans une limite de 20%, les horaires et matières en vigueur dans le secteur public.

4 + Les incidences de la *loi Jospin*:

Dans sa première rédaction, le projet Jospin ne concernait pas l'enseignement privé. Mais un amendement prévu que les dispositions de cette loi sont étendues au privé, et s'appliquent dans le cadre de la loi Debré.

Notamment, seront en vigueur dans les établissements privés les dispositions relatives aux modalités d'enseignement: modification des cycles, des rythmes scolaires ... En revanche, les dispositions sur

sement. L'affaire est venue devant les prud'hommes qui, en juin 1989, ont consideré que le licenciement n'avait pas un caractère abusif. Ce pendant le jugement ne dit pas clairement sur quel motif il se fonde; et le tribunal a accordé quelques indemnites au directeur qui, de plus, a retrouvé rapidement un autre emploi.

(13) D'un point de vue purement théorique, on peut se demander si ces règles, visant le contenu de l'enseignement, ne sont pas en contradiction avec le principe même d'une liberté de l'enseignement.

les projets d'établissement ne sont pas applicables, c'est à dire que le privé reste libre d'élaborer ses propres projets.

Le texte ainsi voté donne toute satisfaction aux membres de l'enseignement privé. Peut-on voir dans cet accord entre un gouvernement socialiste et les tenants de l'école privée un signe de l'apaisement des vieilles querelles scolaires en France?

D) *L'aide financière publique*

L'aide financière essentielle est évidemment la prise en charge par l'Etat des traitements des établissements sous contrat.

Dans le cas d'un contrat simple, l'aide financière publique s'arrête là. La contribution demandée aux familles doit permettre de faire face aux autres dépenses.

Dans le cas d'un contrat d'association (toutes les écoles du secondaire et 1/3 des écoles du primaire), la contribution financière publique ne se limite pas à ces salaires. Mais les règles la régissant sont complexes. Une série de distinctions doivent être faites:

— Aide de l'Etat ou aide des collectivités publiques: région, département, commune; (la répartition des charges fut modifiée par les récentes mesures de décentralisation: lois de mars et juillet 1982 posant les principes généraux; loi du 7 janvier 1983 sur les transferts de compétences, et surtout, pour l'enseignement, loi du 25 janvier 1985).
— Subventions aux investissements immobiliers, ou prise en charge des dépenses de fonctionnement (matériel), ou simples secours accordés aux enfants.
— Aides aux classes maternelles enfantines, ou aux écoles primaires, ou à l'enseignement secondaire, ou encore au technique.

Une difficulté supplémentaire tient au fait que *le contrat fait naître des obligations à la charge de collectivités publiques non parties à la convention.*

En effet, le contrat d'association est passé entre l'Etat et l'établissement. Il crée cependant des charges incombant à la région, au département ou à la commune (selon la catégorie d'établissement). Le projet de loi de 1985 prévoyait que la collectivité locale intéressée devait donner son avis, voire son accord avant la conclusion du contrat d'association. Le Conseil Constitutionnel, dans sa décision du 18 janvier 1985, annula cette disposition qui risquait de créer, sur l'ensemble du territoire national, certaines di-

vergences dans la mise en application d'une liberté publique fondamentale. En conséquence, un préfet n'est pas tenu de consulter une commune avant de conclure ou de renouveler un contrat d'association liant une école primaire à l'Etat (C.E. 19 juin 1985, commune de Bouguenais, Lebon p. 194).

1 + Pour les secours à accorder aux élèves:

Aux termes de l'article 7 de la loi du 31 décembre 1959, "les collectivités locales peuvent faire bénéficier des mesures à caractère social tout enfant, sans considération de l'établissement qu'il fréquente". Les collectivités locales ont donc la possibilité, mais non l'obligation, d'accorder aux élèves des écoles privées les mêmes aides qu'à ceux des écoles publiques. Il appartient notamment au conseil municipal d'apprécier, pour chaque mesure à caractère social — par exemple le transport scolaire — s'il veut en étendre le bénéfice aux élèves des écoles privées. (C.E. juill. 1985, Ville d'Albi, Lebon p. 220).

2 + En ce qui concerne les bâtiments et les biens immobiliers de ces écoles:

Jusqu'à présent, ces bâtiments sont presque toujours objet de propriété privée:

les 2/3 appartiennent à des congrégations.

le reste appartient à des associations de propriétaires ou à quelques particuliers.

Cependant, depuis 1988 on admet que les collectivités locales puissent concéder des baux emphytéotiques, pratique qui commence à être usitée, dans le Centre par exemple.

Se pose la question de l'aide de l'Etat à l'investissement ou à l'entretien de ce patrimoine immobilier. En se fondant sur les lois de 1886 pour le primaire et de 1919 pour le technique, le Conseil d'Etat (19 mars 1986, dép. de Loire-Atlantique, Lebon p. 76) a décidé:

— Dans le primaire, toute subvention à l'immobilier est interdite.

— Dans le technique, toute subvention à l'immobilier est libre (14).

(14) Cet arrêt s'est d'ailleurs borné à confirmer une jurisprudence ancienne: C.E. 29 octobre 1930, commune de Villeneuve d'Aveyron, rec. p. 867.

La question vient d'être tranchée pour le secondaire pour le secondarie, par un arret du Conseil d'Etat en date du 6 avril 1990 (15).

3 + La prise en charge des dépenses de *fonctionnement*:

Les collectivités publiques participent aux dépenses de fonctionnement des classes sous contrat d'association. Cette prise en charge s'effectue alors "dans les mêmes conditions que celles des classes correspondantes de l'enseignement public" (loi 1959). Comme dans le public, ces modalités varient selon que l'on envisage l'enseignement primaire ou secondaire.

a) Pour les *écoles primaires*:

Les dépenses de fonctionnement des écoles publiques sont à la charge des *communes*; il en va de même pour les écoles primaires privées, dès lors qu'il s'agit de classes sous contrat d'association (Cf. C.E. 12 fev. 1982, commune d'Aurillac, A.J.D.A. 1982, p. 469). Cette ancienne disposition n'est pas modifiée par les récentes lois de décentralisation. En conséquence, les communes participent aux dépenses de fonctionnement des classes primaires sous contrat d'association par une contribution forfaitaire calculée selon les mêmes critères que pour les classes correspondantes de l'enseignement public.

Les forfaits versés varient énormément selon les communes; en moyenne, ils sont de l'ordre de 1500 fr. par an et par enfant pour le primaire, et de 2000 fr. par an et par enfant dans les classes maternelles.

Le Conseil d'Etat a eu l'occasion de confirmer sa jurisprudence dans plusieurs arrêts récents. (C.E. 31 mai 1985, assoc. d'éduc. pop. N.D. à Arc - Les - Gray, Lebon, p. 167 ou C.E. "31 mai 1985, commune de Moissac, Lebon p. 168). Ces décisions rappellent les principales règles en la matière. Elles n'innovent pas, mais réaffirment une jurisprudence que les lois de décentralisation n'ont pas modifiée:

1. *Les communes doivent supporter les dépenses de fonctionne-*

(15) Cet arret confirme un jugement du T.A. de Rennes. (3 juil. 1986) qui avait annulé une décision du conseil général d'Ile et Vilaine actroysant des subventions, à l'investissement en faveur de plusieurs collèges du département.

ment des classes des établissements du premier degré sous contrat d'association; ceci bien qu'elles ne soient pas parties au contrat.

2. Il s'agit là de *dépenses obligatoires* pour la commune; dès lors le préfet peut les inscrire d'office au budget de la commune.
3. Le *calcul* de cette dépense obligatoire doit être effectué selon les mêmes critères que ceux appliqués aux écoles publiques; la dépense prend la forme d'une "contribution forfaitaire versée par élève et par an et calculée selon les mêmes critères que pour les classes correspondantes de l'enseignement public".
4. La commune sur le territoire de laquelle est situé l'établissement n'est tenue de prendre en charge les frais de fonctionnement *qu'en ce qui concerne les élèves résidants* dans cette commune. Là encore les principes régissant les écoles publiques s'appliquent aux établissements privés (cf. C.E. 21 nov. 1986, assoc. de gestion N.D. de Verneuil, Lebon, p. 427; ou C.E. 3 avr. 1987, Min. éduc. nat. c. école privée ST. Anne-au - Bouscat, Dr.adm. 1987, n. 189) (16).
5. Cette prise en charge concerne les écoles élémentaires sous contrat d'association, mais *non les classes maternelles ou enfantines*, à moins que ces dernières n'aient été régulièrement créées à la demande de la commune qui aurait donné son accord au contrat les régissant, (mêmes arrêts ou encore: C.E. 24 juill. 1987, commune de Braine) et se serait ainsi engagée par convention à participer aux dépenses de fonctionnement. Cette règle se justifie par le fait que l'enseignement en maternelle, avant 6 ans, n'est pas obligatoire.

(16) Cependant, la situation des écoles privées est différente de celle du secteur public, dans la mesure où souvent ces établissements rassemblent un nombre important d'élèves ne résidant pas sur le territoire de la commune où est située l'école privée. Qui doit alors prendre en charge les dépenses de fonctionnement occasionnées par ces élèves non résidants?

— La commune où est situé l'établissement ne peut pas y être tenue. Il arrive cependant, de façon non exceptionnelle, que la commune siège de l'établissement accepte de payer pour les élèves non résidants.

— Quant aux communes de résidence des élèves, elles peuvent participer aux dépenses de fonctionnement de l'école située sur le territoire d'une autre commune, mais elles n'en ont nullement l'obligation. Le paiement d'une telle contribution ne peut résulter que d'une décision librement prise par les conseils municipaux saisis d'une demande de l'école. Dans la pratique, cette participation est inexistante.

b) Pour les *écoles secondaires*, classiques modernes ou techniques:

Le principe général est le même: les communautés locales participent aux dépenses de fonctionnement des établissements privés sous contrat dans les mêmes conditions qu'elles participent aux dépenses des collèges et lycées du secteur public. La répartition des charges de fonctionnement entre l'Etat et les collectivités locales s'effectue selon les critères suivants:

L'*Etat* prend en charge les dépenses de *fonctionnement en personnel* (personnel auxiliaire, sans compter les enseignants). Cela correspond à 70 ou 80% des dépenses de fonctionnement. Pour 1988/89, le forfait d'externat à la charge de l'Etat est fixé, selon les classes, entre 2287 fr. et 4469 fr. par élève et par an (ces sommes sont majorées pour les grandes villes).

Les *collectivités locales* prennent à leur charge les *autres dépenses de fonctionnement, en matériel* (30 à 20% du total). Cela comprend le petit entretien des bâtiments mais pas les gros travaux d'amélioration. Ces collectivités publiques versent une contribution forfaitaire par élève et par an, calculée selon les mêmes critères que pour les classes correspondantes de l'enseignement public. Cette contribution est donc égale au coût moyen d'un élève externe dans le public. Les collectivités conservent une marge de liberté dans la mesure où ce coût moyen dépend directement des dépenses qu'elles ont décidé elles-mêmes de consentir pour les établissements d'enseignement public qui leur sont rattachés et peut donc varier.

La charge incombe exclusivement au *département pour les collèges* et à la *région pour les lycées*. Quant aux établissements agricoles privés, ils reçoivent directement leur aide de l'Etat uniquement.

Ces dépenses sont *obligatoires* et leur répartition résulte donc de la nouvelle législation sur la décentralisation.

E) *La participation financière demandée aux parents:*

Les établissements privés *hors contrat* coûtent *cher* aux familles puisque:

— les enseignants ne sont pas rémunérés par l'Etat.
— aucune dépense de fonctionnement ne peut être assurée sur fond public.

En revanche, dans les établissements privés *sous contrat, la scolarité est en principe gratuite* pour les élèves, comme dans le secteur public. Ce point est important car la gratuité de l'enseignement public est un principe constitutionnel (const. 1946, art. 25), et la loi Debré prévoit que tous les enfants peuvent avoir accès aux établissements privés sous contrat. Dans les faits, ce principe de gratuité est souvent appliqué en province; il est moins strictement respecté à Paris. Ces établissements justifient la participation financière qu'ils demandent aux familles par les arguments suivants:

— coût de l'entretien, de l'amélioration ou de l'agrandissement des bâtiments. En effet, seules les dépenses de petit entretien courant (chauffage, peinture...) sont considérées comme dépenses de fonctionnement pouvant être prises en charge par l'Etat.
— services particuliers assurés aux élèves, qui bénéficient parfois d'un encadrement plus strict.

En tout état de cause, la contribution demandée aux familles n'est pas fixée librement par l'établissement; chaque année, celui-ci présente au préfet ses propositions, assorties de pièces justificatives. Le préfet peut éventuellement refuser les augmentations de dépenses mises à la charge des parents; l'établissement devra accepter la décision préfectorale s'il désire garder le contrat le liant à l'Etat. Néanmoins, en pratique, les préfets ne s'opposent jamais aux demandes des établissements sur ce point.

Quelques exemples de montants de contributions familiales:
— Exemple d'un lycée parisien du quartier latin, établissement public, coût annuel pour 1989/90:

	Frais annexes	Suppl.demi-pension
collège	90f	1850f
lycée, prépa	130f	2000f

— Exemple d'un des plus prestigieux établissements privés sous contrat d'association, dans le même quartier, coût annuel pour 1989/90:

	Scolarité	Suppl. demi-pension	Suppl.pension
collège	7560 f	5740 f	
lycée, prépa	8830 f	5740 f	31135f

— Exemple d'un établissement sous contrat d'association de la banlieue parisienne de moyenne importance, coût annuel pour 1988/89:

	Scolarité	Suppl.demi-pension
collège:	3100 f	3000 f

— Exemple en province: Dans l'ensemble du département de la Mayenne, la moyenne des sommes demandées par les écoles primaires sous contrat est de 200f par an et par enfant. Ailleurs, on demande souvent entre 500 et 800f par an et par enfant.

V. L'ENSEIGNEMENT RELIGIEUX DANS LES ÉTABLISSEMENTS PUBLICS: LES AUMÔNERIES DE L'ENSEIGNEMENT PUBLIC (17)

A) *Historique et législation actuelle:*

Lors de la création par Napoléon de l'Université impériale, publique et laïque, des postes d'aumôniers furent institués dans tous les lycées et collèges municipaux. Ces aumôniers étaient désignés par le proviseur et nommés par l'évêque. Ils étaient fonctionnaires, entièrement intégrés à l'enseignement public. Leurs cours avaient lieu à l'intérieur de l'établissement, où, de plus, ils logeaient. Le même service pouvait être assuré par des pasteurs ou des rabbins pour les élèves protestants ou israélites.

Cette situation initiale subit quelques modifications au cours du XIXème siècle et ce sont surtout les lois scolaires de *1880* qui changèrent profondément le système:

— Dans l'enseignement primaire, on remplaça "l'instruction morale et religieuse" par "l'instruction morale et civique", ce qui si-

(17) Nous remercions J.M. Swerry des renseignements qu'il nous a communiqué. (J.M. Swerry a sontenu, en 1991, devant l'Université de Paris XI, une thése de doctorat en droit).

gnifiait que *l'enseignement de la religion cessait d'être donné à l'école primaire* (18).

— Dans l'enseignement *secondaire*, la situation fut d'abord réglée pour les établissements de filles créés par la loi Camille See en 1880; cette loi prévoyait: "l'enseignement religieux sera donné, sur demande des parents, par les ministres des différents cultes, dans l'intérieur des établissements, en dehors des heures de classe. Les ministres des différents cultes seront agrées par le ministre de l'Instruction publique. Il ne résideront pas dans l'établissement". En somme, les aumôniers, auparavant fonctionnaires intégrés à l'établissement, sont désormais seulement agréés pour venir faire des cours d'instruction religieuse et ce uniquement aux élèves dont les parents le souhaitent. Ils devinrent le *"professeur ecclésiastique", venant de l'extérieur.*

Un an plus tard le régime des lycées de garçon fut modifié: le statut personnel des aumôniers fonctionnaires est maintenu, mais les cours d'instruction religieuse sont donnés hors des heures de classe, et seulement aux élèves dont les pères en ont exprimé le souhait.

Le régime des aumôneries fut indirectement touché par la loi de *1905*, affirmant que la République "ne subventionne aucun culte"; l'article 2 ajoutait: "pourront toutefois être inscrites audits budgets (de l'Etat ou des collectivités locales), les dépenses relatives à des services d'aumôneries destinées à assurer le libre exercice des cultes dans les établissements publics tels que lycées, collèges, écoles, hospices, asiles et prisons. En pratique, le financement des aumôneries de l'enseignement public n'est jamais assuré sur fonds publics, mais reste à la charge des familles.

Ce principe général fut complété par une circulaire ministérielle du 5 novembre 1927 qui portait atteinte à l'enseignement religieux dans les lycées d'externes, et prévoyait pour les lycées d'internes, que cet enseignement devait être organisé au profit des pensionnaires, les externes pouvant le suivre. Une participation financière

(18) Les programmes prévoyaient cependant l'enseignement des "devoirs envers Dieu". De plus, l'école devait vaquer un jour par semaine en plus du dimanche pour permettre aux parents de faire donner, s'ils le désiraient, à leurs enfants, l'instruction religieuse en dehors des édifices scolaires. La situation dans l'enseignement primaire est restée la même depuis un siècle.

était demandée aux familles, l'établissement ne devant supporter aucune charge.

Ces règles doivent permettre la conciliation du principe de laïcité et du principe de liberté des cultes. L'organisation même du service public laïc doit permettre, voire faciliter, la pratique du culte: les aumôneries sont créées de droit à l'intérieur de l'établissement lorsque les utilisateurs du service public sont empêchés de sortir du dit établissement.

Ainsi dès le début du XXème siècle, les aumôniers fonctionnaires disparurent et furent remplacés par des "professeurs ecclésiastiques", rémunérés par les familles.

Pendant un temps, les cotisations à la charge des familles étaient prélevées par l'établissement scolaire lui-même; elles étaient donc effectivement versées.

Progressivement les mêmes cotisations furent remises directement à l'aumônerie; dans la pratique elles rentrèrent beaucoup moins régulièrement.

Le *régime actuel* s'inspire largement des mêmes principes. L'article 1 de la loi Debré de 1959 affirme que "l'Etat assure aux enfants et adolescents, dans les établissements publics d'enseignement, la possibilité de recevoir un enseignement conforme à leurs aptitudes dans un égal respect de toutes les croyances ... L'Etat prend toutes dispositions utiles pour assurer aux élèves de l'enseignement public la liberté des cultes et de l'instruction religieuse".

Toutefois le statut de *1960* — décret du 22 avril 1960 et arrêté du 8 août 1960 — innove quelque peu: il étend la possibilité d'organiser des aumôneries dans tous les établissements du second degré (l'enseignement primaire n'est pas concerné), créés par les réformes scolaires intervenues depuis la Libération et prévoit le cas d'aumôneries fonctionnant à l'extérieur de l'établissement scolaire et reconnues cependant officiellement par l'Education Nationale. On ne connaissait auparavant l'aumônerie qu'en tant que service fonctionnant à l'intérieur des établissements. Toutes les fois qu'elle fonctionnait, de fait, hors des locaux scolaires, les règlements ignoraient son existence.

B) *Fonctionnement.*

Le service d'aumônerie est constamment défini en référence au principe du respect de la liberté de conscience et du libre exercice des cultes. Mais il ne saurait être question pour le service public laïc de prendre en charge l'organisation d'une pastorale. L'autorité publique intervient lors de l'institution de ces services, mais ne s'immisce pas dans la mise en oeuvre d'une pastorale.

1 + Création et financement de l'aumônerie
Il résulte des différents textes suscités que:

— un service d'aumônerie est institué de droit, à la demande des parents ou des élèves majeurs: dans les lycées et collèges de jeunes filles dans les établissement comportant un internat.
— Dans tous les autres établissements secondaires, y compris les établissements mixtes, les plus nombreux aujourd'hui, un service d'aumônerie peut être créé à la demande des parents ou des élèves majeurs. Le pouvoir de décision appartient au seul recteur, qui se prononce sur le rapport du chef d'établissement. Le recteur peut décider que les activités religieuses auront lieu à l'intérieur ou à l'extérieur de l'établissement, selon l'opportunité. Il prend en considération des questions diverses: age, ou sexe des enfants, présence de demi-pensionnaires, éloignement des lieux de culte ou d'autres locaux de réunion etc...

Le pouvoir d'appréciation du recteur est discrétionnaire, et le chef d'établissement est informé de la décision rectorale. En somme, la décision concernant l'existence d'un service d'aumônerie (quand elle n'est par de droit), et les conditions de son fonctionnement, relèvent d'un haut fonctionnaire dépendant directement du pouvoir politique. Les circulaires ministérielles recommandent la bienveillance et le libéralisme; cependant cette procédure ne satisfait pas pleinement l'exigence de garantie de liberté d'exercice des cultes et de l'enseignement religieux.

Dans les faits, un certain nombre d'aumôneries fonctionne à l'intérieur des locaux scolaires; d'autres se situent à l'extérieur de ces locaux.

— La première situation présente l'avantage de mieux marquer l'intérêt que l'Eglise porte à l'Ecole et de pouvoir souvent toucher un plus grand nombre de jeunes. Mais elle risque de conduire l'aumônerie à s'organiser sur un modèle trop "scolaire". Et son existence peut être ressentie comme une tentative d'ingérence de l'Eglise dans l'Ecole. Aujourd'hui, beaucoup d'aumôneries souhaitent fonctionner à l'intérieur de l'établissement.
— Le fonctionnement de l'aumônerie à l'extérieur de l'établissement offre aux jeunes un meilleur "espace de liberté" et "d'expression personnelle". Il facilite la participation des laïcs. Mais il risque d'occulter le fait scolaire. Cette solution fut particulièrement recherchée après les événements de 1968.

Quelle que soit la catégorie d'établissements secondaires concerné, c'est toujours à partir d'une *demande des parents* — ou des élèves majeurs — que l'aumônerie peut être créée.

Ce principe est constant depuis la loi de 1880. C'est le droit exclusif des parents à obtenir de l'école la liberté effective de faire donner une éducation religieuse à leurs enfants. Ces demandes doivent être établies individuellement par des familles, et ne pas résulter de démarches de groupes quels qu'ils soient. Sont à fortiori exclues toutes requêtes de responsables religieux; le principe de laïcité trouve ici son application.

Créées par décision de l'autorité administrative, les aumôneries de l'enseignement public ne perçoivent cependant, en fait, *aucune subvention* sur fonds publics:

L'article 2 de la loi de 1905 autorisait ces subventions; mais très vite après la loi de Séparation, s'instaura la pratique de ne procurer aucune aide financière publique aux aumôneries de l'enseignement. Le décret d'avril 1960 rappelle: "les frais d'aumônerie sont à la charge des familles, sous réserve de l'application des dispositions de l'art. 2 de la loi de 1905..." c'est à dire que l'on réaffirme la pratique du non financement par l'Etat, tout en considérant que l'art. 2 de la loi de 1905 pourrait, éventuellement, s'appliquer.

Longtemps payé directement grâce aux cotisations perçues dans le cadre de l'aumônerie où il exerçait ses fonctions, l'aumônier reçoit maintenant son salaire du diocèse, comme tout autre prêtre diocésain. Les cotisations versées par les parents (faibles et irrégulières) servent au financement des dépenses de fonctionnement.

Signalons également qu'à côté des aumôneries reconnues officiellement par le Rectorat, peuvent exister des aumôneries scolaires reconnues comme telles par les seules autorités ecclésiastiques, et ignorées de l'administration.

2 + Les responsables d'aumônerie:

La désignation du responsable de l'aumônerie résulte d'une nomination par le recteur d'académie, sur proposition des autorités du culte concerné. Eventuellement, le chef d'établissement, dans le rapport qu'il adresse au recteur, peut suggérer un nom (ou des noms) en accord avec les autorités religieuses.

Dans la pratique, quel est ce responsable? Ses titres et ses qualifications ont évolué au cours du temps. Napoléon avait créé un poste d'aumônier, fonctionnaire public. Dans le régime de Séparation de l'Eglise et de l'Etat, l'aumônier perdit sa qualité de fonctionnaire.

D'autre part, progressivement, d'autres responsables ou animateurs intervinrent, à côté ou à la place de l'aumônier.

On parle maintenant de l'aumônerie. Quels en sont les responsables? Le décret du 22 avril 1960 en attribue la charge aux *"aumôniers et ministres des différents cultes" et* une circulaire de 1979 précise: "... Il convient de regarder comme entrant dans le cadre de l'expression "aumônier et ministres des cultes" *toute personne* régulièrement désignée par l'autorité religieuse compétente". De fait, malgré l'image traditionnelle de l'aumônier-prêtre, les "non prêtres" sont de plus en plus nombreux. Il s'agit de religieuses ou de laïcs, proposés par les autorités ecclésiastiques. La circulaire ministérielle d'avril 1988 entérine l'évolution en ne parlant plus que du "responsable de l'aumônerie".

De plus, la même circulaire, tenant compte de l'évolution des moeurs et de la transformation du visage des aumôneries, prévoit que le recteur peut "à la demande de l'autorité religieuse et après avis du chef de l'établissement, etre conduit à autoriser la constitution d'équipes de responsables d'aumônerie, nommément désignés...". De fait, la place des laïcs dans les équipes d'animation d'aumônerie est importante et tend à s'accroître.

Pour l'ensemble des aumôneries de l'enseignement public, on peut retenir les chiffres suivants: en 1980 (sur 92 diocèses consultés, 83 ont répondu):

	nombre d'établis. scolaires publics	nombre d'aumôneries officiellement reconnues
Collèges	4163	1623
Lycées d'ens.nt général	785	642
Lycées techniques	302	139
Lycées d'ens.nt profess.	1186	273
Etablissements agricoles	137	79

En somme les aumôneries sont peu présentes dans les collèges et lycées d'enseignement professionnels; elles sont en revanche courantes dans les lycées d'enseignement général.

En 1980, un peu plus de 50% de ces aumôneries avaient comme responsable principal un prêtre. En 1988 les responsables laïcs sont de plus en plus nombreux; il y a encore plus de 1000 aumôneries dont le responsable est un prêtre (mais cela représente moins de 50% du total).

3 + Les élèves

La laïcité implique évidemment que tous les élèves ne participent pas automatiquement aux activités de l'aumônerie. Leur présence repose uniquement sur la volonté individuelle, exprimée par la demande préalable des parents, ou des élèves majeurs.

Les *inscriptions* aux activités religieuses doivent être faites chaque année à la rentrée. L'aumônier doit renvoyer au chef d'établissement des élèves non inscrits qui se présenteraient à ses cours. La logique de la laïcité et du respect de la liberté de conscience interdit tout prosélytisme au sein de l'établissement.

Si l'inscription dépend de la libre décision des familles, il importe cependant que lesdites familles soient informées de l'existence même de l'aumônerie, ainsi que des activités proposées. Cette information incombe au chef d'établissement, qui peut autoriser un affichage des lieux et des horaires de cours. La question soulève parfois quelques difficultés pratiques: toute propagande est interdite à l'intérieur des locaux scolaires. Mais où passe la frontière entre propagande et information? La question est d'autant plus épineuse lorsque l'aumônerie catholique est la seule existante, ce qui est le plus souvent le cas.

Une fois qu'ils sont inscrits à l'aumônerie, quels sont les *formes d'enseignement religieux ou de pastorale* qui sont proposées aux élèves?

Les textes réglementaires émanant des autorités étatiques ne peuvent contenir aucune prescription sur ce point, qui ne relève pas de la compétence de l'Education Nationale, mais seulement des autorités religieuses.

Si les fonctions premières de l'aumônier furent, autrefois, de dispenser des cours d'instruction religieuse, l'évolution a, depuis, considérablement modifié la mission que les aumôneries se fixent à elles-mêmes. Aujourd'hui l'aumônerie se présente comme un *"espace d'accueil et de liberté"*, un lieu de dialogue et de rencontre. Les traditionnels cours d'instruction religieuse ne constituent plus l'essentiel de la tâche des équipes d'aumônerie qui se font plus attentives aux questions des enfants, à leurs interrogations sur leur propre vie, scolaire et extra-scolaire. Il s'agit d'aider le jeune dans la découverte de la foi et dans la construction de sa personnalité par des activités et des discussions les plus variées.

Le *nombre des jeunes* qui participent à la vie de l'aumônerie varie énormément selon les lieux, les responsables et les familles. En

moyenne, en 1968, 15% de la population scolaire de l'enseignement secondaire public fréquentait l'aumônerie.

Cette proportion tombe à 11% en 1978 et se répartit très inégalement selon les classes concernées (en 6ème et 5ème: plus de 25% des élèves vont à l'aumônerie; en 3ème: 10%; en terminale: moins de 5%).

Il semble que ces chiffres aient encore fléchi depuis 10 ans (mais toute comparaison des pourcentages est sujette à caution car il n'est pas certain qu'ils aient été établis sur des bases exactement semblables). En 1988, de la 6ème à la 3ème, 10% des élèves fréquentent l'aumônerie; de la 2ème à la Terminale (lycées d'enseignement général et lycées technologiques), environ 3%.

VI. Situation particulière des départements de l'est de la France

En France métropolitaine, dans les trois départements du Haut-Rhin, du Bas-Rhin et de la Moselle, la législation concordataire est toujours en vigueur (loi du 12 Germinal an X — 8 avril 1802 — comprenant la Convention signée entre le gouvernement français et Pie VII, at les Articles Organiques, acte unilatéral du Gouvernement français).

Dans ces trois départements, comme partout en France, existent des établissements d'enseignement privé, à coté de ceux de l'enseignement public.

— *L'enseignement privé* n'est ni plus ni moins développé que dans le reste de la France. Il est soumis aux mêmes règles juridiques pour l'essentiel, avec quelques particularités, notamment:

— obligation pour les maîtres de posséder les titres exigés par le statut local pour enseigner en Alsace-Moselle déjà avant la loi Debré.

— L'enseignement religieux y est matière obligatoire, et est organisé comme dans le secteur public de ces départements.

— *L'enseignement public* présente certains caractères spécifiques. De fait, dans le secteur public, *l'enseignement religieux est intégré* à l'ensemble des matières figurant dans les programmes généraux. Ceux qui le dispensent sont en principe rémunérés par l'Etat

comme tout autre enseignant. L'enseignement public a ici gardé un certain caractère confessionnel.

Ce droit local résulte:
— De la législation française antérieure à 1870 (notamment la loi Falloux de 1850).
— De lois introduites après 1870 et confirmées depuis les deux guerres mondiales.
— Du maintien en vigueur de la législation concordataire.

Le régime juridique applicable est le même pour les religions catholique, protestante et israélite.

A) *Enseignement du premier degré:*

Son organisation repose encore très largement sur la loi Falloux à laquelle furent apportés quelques aménagements.

Cette loi affirmait le principe de confessionnalité des écoles primaires, c'est à dire que ces établissements devaient être fréquentés par des maîtres et des enfants appartenant à la même confession. L'éducation toute entière était cimentée par la religion, dont l'instituteur assurait l'enseignement. Les écoles normales d'instituteurs devaient, elles aussi, présenter ce caractère confessionnel. Cependant, la loi permettait d'instituer des écoles interconfessionnelles. Elle autorisait d'autre part "sur demande expresse des parents", à ce que les enfants d'une confession soient admis dans une école d'une autre confession, lorsqu'il n'existait qu'une seule école dans la commune.

1 — Depuis une cinquantaine d'années, les *écoles interconfessionnelles* se multiplient. Dans beaucoup de petits villages, école catholique et école protestante fusionnent, ce qui n'est pas l'introduction déguisée d'une certaine laïcisation. L'enseignement religieux est maintenu dans le cadre des horaires officiels et est dispensé séparément aux enfants catholiques et aux protestants.

2 — Par respect pour la liberté de conscience des familles, les parents peuvent obtenir des *dispenses* d'enseignement religieux *pour leurs enfants* (19).

3 — Dans le même esprit, pour respecter la liberté de

(19) Demandes motivées adressées au sous préfet et toujours examinées avec bienveillance. Toutefois, en pratique, ces demandes restent assez peu nombreuses dans l'enseignement primaire.

Il existe actuellement 14 "chaires de professeurs de religion" (10 en Alsace et 4 en Moselle), toutes réservées à l'enseignement catholique. Elles sont occupées par des ministres du culte sans charge de paroisse, nommés par le recteur d'académie, et ayant le statut de professeurs certifiés (sauf pour les droits à la retraite).

D'autres ministres du culte assurent également cet enseignement et sont rémunérés comme maîtres auxiliaires de seconde catégorie, ou comme des professeurs certifiés, selon leurs diplômes.

Les laïcs, titulaires d'une licence de théologie ou d'enseignement religieux sont maîtres auxiliaires de seconde catégorie s'ils enseignent à plein temps.

Les professeurs de religion ont les *mêmes droits et les mêmes devoirs* que les autres professeurs. Ils sont soumis à un système d'inspection comparable à celui que connaissent leurs collègues. Dès lors qu'ils ne sont pas de simples vacataires, ils assistent aux conseils de classe mais ne peuvent pas s'opposer aux décisions prises par leurs collègues.

Des négociations sont actuellement en cours entre le rectorat et les enseignants de religion qui voudraient pouvoir être titularisés.

Pratiquement, dans chaque établissement secondaire, il y a un enseignement catholique, et presque toujours aussi un protestant.

3 — Les pourcentages d'*élèves* suivant les cours de chacune des trois religions était celui-ci en 1985/86:

Bas-Rhin	enseignement catholique	41,1% des élèves
	enseignement protestant	9,7% des élèves
	enseignement israélite	0,8% des élèves
Haut-Rhin	enseignement catholique	49,9% des élèves
	enseignement protestant	2,9% des élèves
	enseignement israélite	0,2% des élèves

D'autre part, d'une façon générale, les élèves des collèges sont plus nombreux à suivre l'enseignement religieux (69,5% d'entre eux), que ceux des lycées (23%).

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STATE, SCHOOL AND CHURCH IN THE FEDERAL REPUBLIC OF GERMANY

1. The legal situation of schools in the Federal Republic of Germany is the outcome of a long history. The "Westfälische Friede" declared that the schools were still an appendage of the church (Annexum religionis). School history in the following period was one of progressive secularization and nationalization. The Prussian Common Law (1794) declared the schools, which up till then had predominantly been supported by churches, trusts and towns, to be "State Organizations". The Imperial Constitution of 1848 included an ordinance according to which the schools were to be removed from the care of the priesthood. However, this did not take place at the onset, not even during the conflict between State and the Roman Catholic Church. Administration of the schools was removed in stages from control by the church during the course of the 19th century. The Imperial Constitution of 1919 decreed: "the entire educational system comes under control by the State." This formulation has been taken over word for word in Article 7, paragraph 1 of the constitution.

2. As opposed to systems prevailing in other countries, it has been the rule rather than exception since the 19th century that schools are publicly supported by the State or the Municipalities. Private schools have indeed always been admissable too. However, amongst the various forms of schools, they have been given a varyingly great to extremely modest significance. The price that the State had to pay for essential control of schools was that the State itself had to make allowances for religious needs. Up till the most recent times, the school in Germany has been a denominational

school. Exceptions in certain states with pronounced mixing of denominations as in Baden or in Nassau are formed by the Christian co educational schools (non denominational schools). In addition, one consequence of the predominance of the state school was that in the normal case and as a principal it provided denominational religious instruction.

3. In accordance with the constitutional arrangements of the Federal Republic of Germany, the schools are the exclusive prerogative of the Federal States, in terms of legislation. Nevertheless, Article 7 of the constitution itself contains the essential points. The wording is as follows:

> Art 7. [Schulwesen] (1) Das gesamte Schulwesen steht unter der Aufsicht des Staates.
>
> (2) Die Erziehungsberechtigten haben das Recht, über die Teilnahme des Kindes am Religionsunterricht zu bestimmen.
>
> (3) Der Religionsunterricht ist in den öffentlichen Schulen mit Ausnahme der bekenntnisfreien Schulen ordentliches Lehrfach. Unbeschadet des staatlichen Aufsichtsrechtes wird der Religionsunterricht in Übereinstimmung mit den Grundsätzen der Religionsgemeinschaften erteilit. Kein Lehrer darf gegen seinen Willen verpflichtet werden, Religionsunterricht zu erteilen.
>
> (4) Das Recht zur Errichtung von privaten Schulen wird gewährleistet. Private Schulen als Ersatz für öffentliche Schulen bedürfen der Genehmigung des Staates und unterstehen den Landesgesetzen. Die Genehmigung ist zu erteilen, wenn die privaten Schulen in ihren Lehrzielen und Einrichtungen so wie in der wissenschaftlichen Ausbildung ihrer Lehrkräfte nicht hinter den öffentlichen Schulen zurückstehen und eine Sonderung der Schüler nach den Besitzverhältnissen der Eltern nicht gefordert wird. Die Genehmigung ist zu versagen, wenn die wirtschaftliche und rechtliche Stellung der Lehrkräfte nicht genügen gesichert ist.
>
> (5) Eine private Volksschule ist nur zuzulassen, wenn die Unterrichtsverwaltung ein besonderes pädagogisches Interesse anerkennt oder, auf Antrag von Erziehungsberechtigten, wenn sie als Gemeinschaftsschule, als Bekenntnis-oder Weltanschauungsschule errichtet werden soll und eine öffentliche Volksschule dieser Art in der Gemeinde nicht besteht.
>
> (6) Vorschulen bleiben aufgehoben.

The framework outlined by the Federal constitution is then fully complemented by the educational laws of the individual Federal States.

4. The term *control of schools (Article 7, paragraph 1 of the constitution)* is explained with the words of the Federal Constitutional Court. i.e. "the embodiment of the State's sovereign rights regarding schools, namely the entirety of the State's authority concerning the organization, planning, direction and supervision of the educational system" (BVerfGE 47, 46 (71)). The historically venerable term of school supervision is accordingly a collective term. It comprises the most varied administrative functions and tasks. "Supervision of schools within the meaning of Article 7, paragraph 1 of the constitution in any case incorporates the authority of the State with regard to centralized control and organization of the educational system. ... Educational planning and the opportunity to influence the establishment, alteration and dissolution of individual State schools are vested in the State." (BVerfGE 26, 228 (238)). Hence, Article 7 does not justify a State school monopoly but notwithstanding this, a comprehensive responsibility of the State for the educational system. The constitution "provides the State with the authority needed for planning and organization of the educational system with the aim of guaranteeing a school system which is open to all young citizens according to their individual capabilities, in terms of the educational opportunities appropriate for life in the society of today (BVerfGE 53, 185 (196)).

5. The co educational (non-denominational) school today is the rule rather than the exception amongst State schools. In such schools, pupils of all denominations are educated without discrimination as far as religion or ideology are concerned. Historically, the co educational school has a tradition in denominationally mixed areas (e.g. Baden, Nassau). Furthermore, following a long struggle in the Weimar era, it has first become generally accepted as a consequence of school reforms, since 1965. The denominational schools were replaced by Christian co educational schools in a process that was not without its dramatic peaks.

6. Some *State denominational schools* still exist in Nordrhein-Westfalen and in Niedersachsen.

In *Nordrhein-Westfalen*, under certain conditions primary schools have to be established on application by parents, as denom-

inational schools or as ideological schools or existing schools have to be converted appropriately.

In *Niedersachsen*, primary schools (not intermediate schools) can, on application by the parents, be established for pupils of the same denomination when in addition, the existence of a central co educational school at the very least continues to be guaranteed. Further relaxations continue to exist in the former Oldenburg part of the State of Niedersachsen.

In *Bayern, school legislation* envisages that within the framework of co-educational (non-denominational) schools parallel age-group classes may be formed according to denomination, so-called denominational classes, on application by the parents. The only condition imposed is that this is possible in terms of school organization. In Baden-Württemberg, Niedersachsen, Nordrhein-Westfalen and Schleswig-Holstein, they go a stage further, in that where possible, *a denominational proportioning is observed between teachers and pupils*. In view of an above average number of undenominational teachers, this regulation is likely to fall into abeyance.

7. *Christian co-educational schools* fundamentally exist today in Bayern, Baden- Württemberg, Niedersachsen, Nordrhein-Westfalen, Rheinland-Pfalz, Schleswig-Holstein and in Saarland. The same applies for Hessen but here, the legal position is disputed. Without this, the Christian character of the co educational school is threatened with an existence on paper only, if teachers and parents are not united by the church. The schools in Bremen, Hamburg and Berlin are in the religious sense, ideologically neutral. Obviously, they are not non-denominational within the meaning of Article 7, paragraph 3, sentence 1, in as far as they give religious instruction as a proper teaching subject.

8. The constitutional admissibility of the Christian co educational school has led to lively controversy. The constitutionality has been reputedly called to question with the argument that its educational conception which is based on Christian fundamentals encroaches upon the fundamental rights of minorities and is irreconcilable with the spirit of the liberal democratic state. Accordingly, any attempt at ideological or religious influencing of children would be

unconstitutional. In contrast to this, it is necessary to maintain that the constitution does not require an exclusion of religious and ideological convictions from public life. Religious freedom (Article 4 of the constitution), in as far as its significance for development of the individual is concerned, must be taken seriously as a constitutionally basic value in schools particularly in view of its marked effects on human dignity. It is not State indifference that it demands but rather an open neutrality. The furtherance of freedom from any form of religious ties in public life is not prescribed by the constitution which indicates the opportunity for ideological differentiation in Article 7, paragraph 5. The Federal Constitutional Court has confirmed that the co educational school accords to the constitution (BVerfGE 41, 29 ff.; 41, 65 ff.; 41, 88 ff.). The fact that it is not possible to grant all the wishes of parents does not in turn make a certain mutuality unconstitutional. No right evolves out of the parental right with which the religious designation of the school can be determined. The co educational school attempts to maintain a considerate balance between the heterogeneous wishes of parents concerning the upbringing of their children.

In the co educational school, non-Christian pupils can almost be made acquainted with Christianity as a creative cultural factor. This is not discrimination. The schools are educationally tasked with introducing children to their environment. In this respect, the informative elements of the Christian inheritance are kept alive in the co educational school. However, the schools must honestly impart instruction in other traditional channels.

9. The arrangement of "non-denominational" school prayers has let to prolonged legal disputes. These are not confronted with constitutional reservations as long as they are supported on the basis of free will principles (BVerfGE 52, 223 ff.). It goes without saying that non-participation must not be purchased at the price of discrimination. Conflicts arising here must be settled in a spirit of tolerance, whereby tolerance must be expected from dissidents also.

10. According to *Article 7, paragraph 3 of the constitution, religious instruction* is a normal teaching subject "in State schools, with the exception of non-denominational schools. Without prejudice

to the State's visitatorial right, religious instruction is given in harmony with the principles of the religious community. No teacher may be compelled to give religious instruction should he not agree to do so of its own free will." The first sentence contains a legal ruling of an organizational character. The second contains a basic right. The regulation accords to that of the preceeding constitution of the Reich of 1919.

With the guarantee of religious instruction, the constitution decides against a laical separation of State and Church. Here, an element of the connection between State and Church remains, albeit not so much in the interests of the religious community but rather more in the cause of religious liberty, which also demands respect in public institutions. The freedom of the teacher, the parents and the pupil in a religiously neutral state has led to the solution that in one respect, the parents have the right to decide the question of the child's participation (Article 7, paragraph 2 of the constitution) until said child becomes of age and decides his own religious leanings. The teachers are at liberty to refuse to give religious instruction without leaving themselves open to any form of legal consequence of a negative nature.

11. The parents have the right to give notice of withdrawal of the child from religious instruction. According to article 4 of the constitution, the child itself has this right, once it has come of age in the religious sense. The annus discretionis has been fixed as the 12th year of life, basing on the law of the Reich of 1921, dealing with the religious upbringing of children. The state constitution of Bayern (Article 137 I) Rheinland-Pfalz (Art. 35 I) and the Saarland (Article 29 II sentence 3), recognize the right of a child to make such decisions from the age of 18 only. The continued validity of these regulations which are older than the constitution, is a subject of controversy.

12. This regulation of Article 7, paragraph 3 of the constitution applies in all the Federal States with the exception of Bremen and Berlin. Basing on the local constitution, confessionally non-committed instruction is given in Bremen in biblical history on a general Christian basis. Formerly, one understood this to be instruction of an

evangelical nature that could also be attended by Lutherians and Reform Church Christians. Catholics simply weren't considered. The special status of Berlin has emerged from the previous constellation of a majority of Social Democrats and Communists who wanted to expell religion from public life and in any case, from the State schools. Accordingly, they declared it to be a concern of the Church. Here, imparting of such instructions is left to the sole discretion of the churches within the framework of the school of course and credited to the teaching perquisites of the teacher. Moreover, both organizationally and financially, the State does meet the Church half way, so that for the laity, the "Church instruction" appears to be "religious instruction".

13. Religious instruction is given in all schools excepting those which are non-denominational, which represent a definite ideology.

14. State supervision of schools also embraces religious instruction, for it is a governmental responsibility. The State cannot relinquish this responsibility to the Church. The State must create the necessary material and staffing conditions. Nevertheless, the religious communities have a decisive influence as far as the content of the instruction is concerned. It is to be given "in harmony with the principles of the religious communities" (Article 7, paragraph 3 of the constitution).

15. Without prejudice to the possibility of cancellation, religious instruction is a proper teaching subject, i.e. a compulsory subject and not an optional one.

It is on an equal footing with other subjects and the grading awarded has a considerable bearing on promotion. It is the only proper instructional subject that can be declined both by pupils and teachers without substantiation.

16. Six State constitutions contain standardizations concerning religious instruction, which correspond in essence to the Federal constitution, in some cases going beyond this, which is legally acceptable according to Article 142 of the constitution. More specific rulings are given in the Federal States about the following questions:

Authorization of the religious instructor by the religious community, known as missio canonica by Catholics, whereas the Protestants talk about Vocatio.

The necessity of an understanding with the religious community concerning the teaching syllabi and textbooks.

Questions of inspection or even supervision of the religious instruction by the religious community (Visitatio).

Abs. Questions concerning alternative instruction for those pupils who do not wish to partake in religious instruction.

17. The right to have denominational religious instruction included in the teaching plan is applicable to all religious communities, if a minimum number of pupils are available, hence jews and moslems also. Religious instruction is also not a prerogative of those religious communities who enjoy the status of a body corporate; it is concretization of religious freedom and not a consequence of body corporate status.

18. In agreements between the State and the Church, the guarantee of religious instruction is contractually safeguarded. Several agreements contain rulings, in which the Christian character of the school, respectively the remains of the denominational school are guaranteed. The school reforms of the last 20 years brought about numerous alterations to Church agreements. In no case have the churches resisted changes that became imperative due to political circumstances. In the treaty between the (R.C.) Church and Niedersachsen, the Roman Catholic Church recognized for the first time on Earth the co educational school as a proper school.

19. In the Federal Republic of Germany the school is a national responsibility. As a consequence, the State school is the normal school. As an exception the private school is, however, approved (privately supported schools, Article 7, paragraph 4 of the constitution). Accordingly, it is the right of every natural and legal person to establish and run a private school. Churches and religious communities in particular make use of this right but trusts and associations too, especially the associations of the anthroposophistic "Freien Waldorfschule". Private schools which equate to State

schools in their aims and essential teaching matter are substitute schools because they can be used as an alternative to the State school. They require governmental approval.

Afterwards a right exists when the schools in terms of their teaching aims and institutions as well as with regard to the scientific education of the teaching staff if the school does not measure up to the State schools and a segregation of the pupils according to the affluence of their parents is not to be furthered. Approval is to be withheld if the economic and legal position of the teacher is not properly safeguarded. The compulsory attendance applicable to State schools can be complied with in a substitute school. A substitute school that has proved itself can be given State recognition and State school leaving awards can be awarded. They are financially supported by the State. The term *supplementary schools* means those which have no equivalent in the State educational system. They do not require approval. It is only necessary to advertise their opening before schooling is begun. Private schools too are subject to State supervision of schooling matters. They are given financial support as provided for under State legislation. Supplementary schools have a legal right afterwards.

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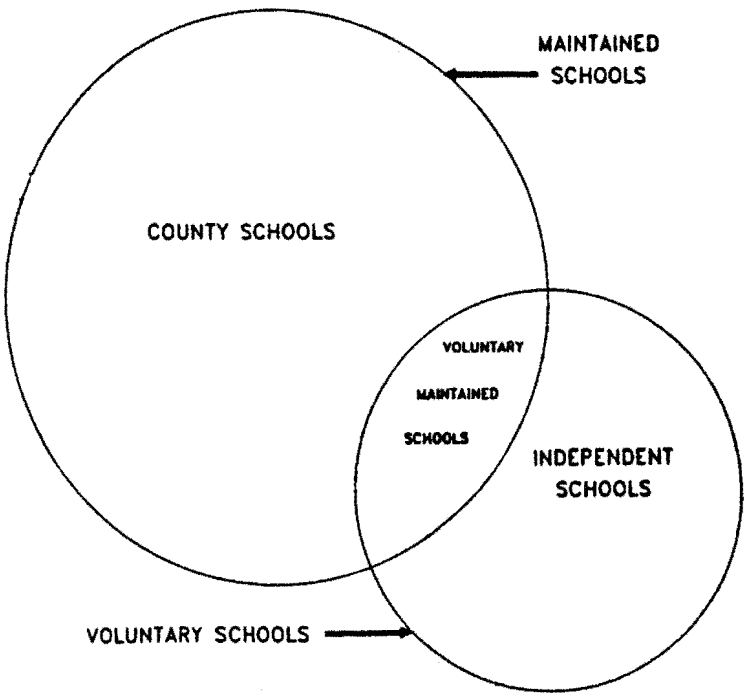
CHURCH-RELATED SCHOOLS AND RELIGIOUS EDUCATION IN THE PUBLICLY-FUNDED EDUCATIONAL SYSTEM OF ENGLAND

SUMMARY: 1. Historical Background. — 2. The 1944 Settlement. — 3. The Teaching of Religion in Schools under the 1944 Act. — 4. Statistics. — 5. The 1988 Education Reform Act. — 6. Evaluations.

1. HISTORICAL BACKGROUND.

Before 1870 almost all schools in England were church schools. Not until the creation of the local School Boards following the 1870 Forster Education Act did schools owned by the public emerge. The largest of the bodies proving church schools were the National Society (mainly Church of England) founded in 1811 and the British and Foreign School Society (mainly for Protestant free churches) founded in 1808. Government grants to education began in 1833 and were given to these Societies. The grants grew rapidly from their first year and were accompanied by the growth of a Central Government Inspectorate which was to report on the use of these public funds. When the State launched its own schools (through local School Boards) in 1870, there was gradually created what has come to be known as the "Dual system" i.e. a system in which church and state cooperate in public education. Between 1870 and 1944 the dual system was increasingly recognised as a problem, since the continually rising expenses of education meant that the church schools were always struggling, in spite of the increased government grants, to achieve the required national standards.

DIAGRAM 1.

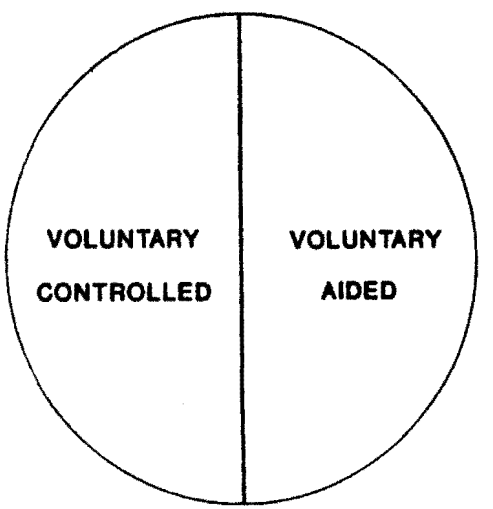


In 1944 a new agreement was reached whereby church schools were offered various degrees of relationship with the State (i.e. with the LEAs) in return for giving up a degree of their autonomy. In general, the principle adopted was that the more financial support a school received, the less autonomy it could exercise. There were two main kinds of association with the LEA, one called "controlled" because the Local Education Authority took control of the school and took over its finances completely, although it remained the property of the church, and the other called "aided" because the LEA only aided but did not control such schools. Thus emerged the characteristic modern form of the dual system. Schools owned and run by the Protestant free churches (e. g. the Methodists, Baptists and Congregationalists) gradually diminished or were taken over by the State, and so in the years after the Second World War the main denominations with an extensive stake in education were the Church of England and the Roman Catholic Church. On the whole, Roman Catholic schools tend to be aided, while Church of England schools tend to be equally divided between aided and controlled. (See Diagram 2). It must be remembered that in England (but not in other parts of the United Kingdom) the Church of England is the established church. In general, the educational legislation for England also covers Wales except for the fact that in Wales there is no established church, but in Scotland the educational legislation is quite different.

2. THE 1944 SETTLEMENT.

As it has been pointed out, following the 1944 Education Act (the Butler Act) voluntary church schools were given the option of being bought out altogether by the State, coming into the State (i.e. the maintained system) either as aided or controlled schools, or of

DIAGRAM 2.



VOLUNTARY MAINTAINED SCHOOLS

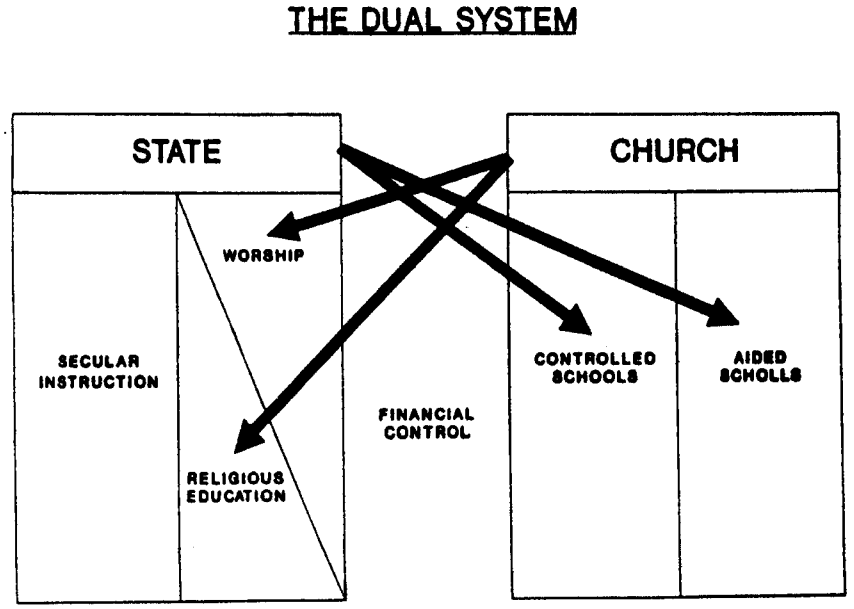
remaining outside the maintained system altogether as privately endowed and/or free paying independent schools. Not only did the church school agree, on the whole, to thus become financially and administratively integrated into the national education system, but the county or LEA schools (those owned as well as maintained by the Local Education Authorities) agreed to accept new legislation which provided for compulsory daily school worship and compulsory religious education. This did not lead to much or any actual increase in daily worship or religious education in LEA schools, since these schools were already permitted but not required to make worship and religious education available to their pupils under the 1870 Act. What had previously been permitted was now required, but since almost all of the LEA schools had been providing daily worship and religious education anyway, the result was a confirmation and a recognition of the place of religion in the schools rather than extension.

Nevertheless it is true that 1944 Act not only brought religious education and worship onto the statutes and brought religious education within the official duties of the HMI (Her/His Majesty's Inspectors, the government education inspectorate) but also gave certain powers to the churches. We may thus say that following 1944 while it is true that state power (through financial control) extended into the church schools, church influence spread into the LEA schools. It was this aspect of mutual influence which was regarded as a settlement of the problem of the dual system. (See Diagram 3)

The influence of the churches upon the LEA or county schools took place (a) through administration and (b) through the curriculum. The administrative influence was secured through the Church of England as the established church having a right to be represented on the local education committee, thus having an influence over the local education system as a whole. The curriculum influence was exercised through the agreed syllabus structure. Religious education in county schools was to take place in accordance with an agreed syllabus prepared by a Conference convened by the LEA for the schools in this area. This conference was to consist of four Committees, one of which would consist of representatives of the Church of England, another of the "other denominations", the third representing the teachers' organisations, while the fourth and final committee

would consist of the Local Education Authority itself as being the owner of many or most of the schools and as being the employer of all the teachers. Each of these four committees had one vote, and voting on the agreed syllabus had to be unanimous in order to secure a recommendation that the LEA as a whole should adopt it. The Church of England had its own committee precisely because it was (and still is) the established church, and the "other denominations" committee normally consisted on representatives of groups such as Methodists, Baptists, Presbyterians, Congregationalists, Salvation Army, Quakers and so on at the discretion of the LEA bearing in mind the characteristics of the locality. The position of the Roman Catholic Church was exactly the same as that of the Protestant free churches, although as a matter of fact Roman Catholic participation in agreed syllabus conferences tended to be rather rare, partly because ecumenical solidarity was not strong enough and partly be-

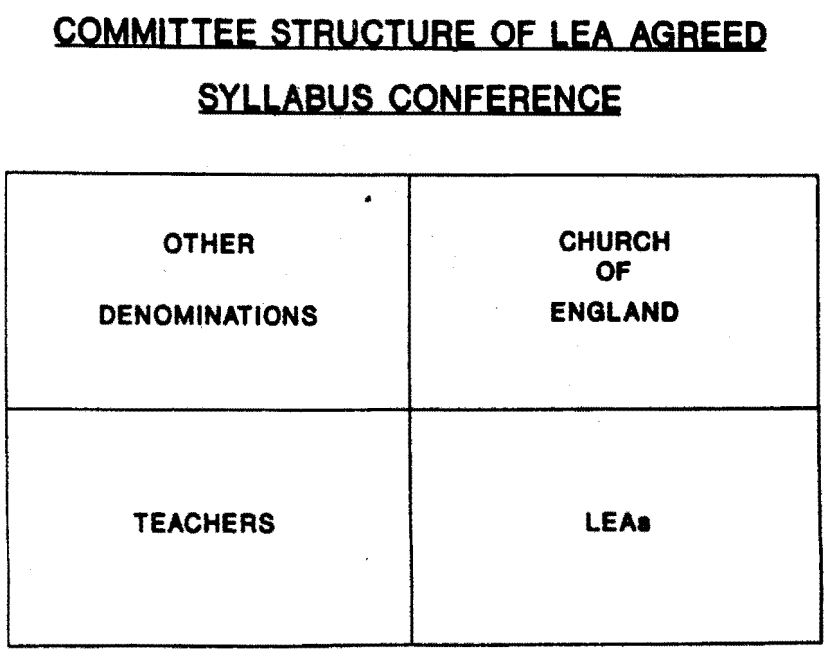
DIAGRAM 3.



cause Roman Catholic energies tended to be absorbed in the maintenance of its own denominational (although LEA maintained) school system. (Diagram 4).

It is important to realise that although these arrangements gave the churches access into the religious education curriculum of the ordinary LEA schools, they were forbidden to exercise this influence in a denominational manner. In the 1870 Act a special clause (called the Cowper Temple clause) had forbidden the use of any "catechism or formulary distinctive of a denomination" in cases where a school was exercising its option to provide school worship and religious education. This anti-denominational clause was retained in 1944 and thus the now compulsory daily acts of school worship could not be denominational in character nor could the agreed syllabuses be denominational in their instruction. What was required was a common

DIAGRAM 4.



or basic Christian education which generally tended to be of a broad, ecumenical, liberal, Protestant character.

It may also be said that the Church of England continued to have an influence upon and a voice within the State educational system through its many maintained controlled schools. These schools were only distinguishable in practice from the ordinary maintained LEA schools because their governing bodies were required to have minority representation from the providing church. This gave an opportunity for representatives of the Church of England to work on school governing bodies alongside the more numerous representatives of the LEA and thus created a kind of co-operation school by school as distinct from the co-operation on the general Education Committee of LEA.

3. THE TEACHING OF RELIGION IN SCHOOLS UNDER THE 1944 ACT.

As has already been pointed out, religious education in the maintained sector was to be in accordance with an agreed syllabus created by a representative conference. There was, however, a significant distinction between the voluntary aided schools and the voluntary controlled schools, both of which were, of course, part of the maintained system. The controlled schools were required to teach the agreed syllabus of the LEA, although they were permitted to offer denominational instruction in accordance with their trust deeds (i.e. Church of England or whatever the church might be that owned the school) upon the request of parents. This almost never took place, and this is why it is possible to say that in general terms the voluntary controlled schools were indistinguishable from the ordinary LEA schools. In the case of the voluntary aided schools, however, the agreed syllabus was not compulsory. These church schools were permitted to offer denominational instruction in accordance with their trust deeds but were required to make agreed syllabus religious education available to parents who requested it. The situation in the aided schools was distinctive in a significant sense, although they remained part of the maintained sector.

For this privilege of offering denominational instruction and of retaining a majority on their governing boards, these aided church

schools paid a price. The LEA bore the entire cost of running the schools day-by-day, including the salaries of all the teachers and the internal upkeep and maintenance. In the case of external maintenance of new buildings, however, the LEA would only provide 85 % of the costs, leaving the voluntary body (i.e. the church) to raise the remaining 15 % from its own resources.

The actual religious education provided by the voluntary aided schools different greatly from denomination to denomination, from area to area and even from school to school. On the whole, the Catholic Schools are the property of the Catholic Diocese and the religious education in the Catholic Schools has accordingly been more systematic, and has almost always been in accordance with a syllabus adopted by or created by the local Roman Catholic Diocese especially for use in its aided schools. In the case of the Church of England, however, the Dioceses own but few of the schools.

Most of them are independent schools governed by their own trust deeds which provide for representation by the local Anglican Parish church or the Bishop. The Church of English Diocese itself therefore often has little real control, especially in cases where a Church of England school is well endowed and thus does not have to call upon the Diocesan funds for help with the 15 % it needs to raise should it need to have a new roof. A recent enquiry reveals that while some Anglican Dioceses do have very thorough and recently revised syllabuses which are recommended for use in the aided schools of the Diocese, other Dioceses do not have a special Syllabus of their own, but recommend that the schools do in fact use the local agreed syllabus although not required by law to do so (1). The argument would be that since the local Diocese has been represented on the LEA conference which created the agreed syllabus it might as well be used in the Diocesan schools, in spite of the fact that the agreed syllabus cannot be denominational. this illustrates the fact that in general the policy of the Church of England in its schools has *not* been of a denominational character. While the Catholic school system has explicitly been intended for the education of

(1) JOHN HIGGIN, *Aspects of Distinctiveness: An analysis and comparison of some key aspects of current Church of England diocesan syllabuses*. Unpublished M. Ed. Diss., University of Birmingham, school of education, 1989.

Catholics, the Church of England schools have, by and large, been conceived of as the Church's contribution to the national education system as a whole. This has been part of the historic mission of the established church and may be traced back at least as far as the thought of Samuel Taylor Coleridge (1772-1834) (2). Similarly, in the aided church schools the daily act of worship could be of a denominational character, whereas in the controlled church schools it could not be denominational. Once again, it would be generally true to say that the Roman Catholic aided schools did provide worship which was characteristically Catholic including catechesis and First Communion, the daily worship in many Church of England aided schools has *not* been characteristically Anglican and has often been indistinguishable from the acts of worship offered in the rest of the maintained sector (i.e. the LEA and controlled schools).

4. STATISTICS.

According to the most recently available government statistics (3), of the approximately 8 million pupils in all types of maintained schools in England and Wales, 1 million are in the voluntary sector. Turning from the number of pupils to the number of schools, we find that of all maintained schools 32% are voluntary. Of these voluntary schools 58% are aided and 42% are controlled.

As we have seen, the two largest providers of voluntary schools are the Church of England and the Roman Catholic Church. Of all voluntary schools, 30% are Roman Catholic and 67% are Anglican. Of the Roman Catholic voluntary schools, 97% are aided, while of the Anglican schools 40% are aided and 60% are controlled. If we look at the proportions of primary and secondary schools, we see that of all Catholic schools 81% are primary while 19% are secondary. Of the Church of England schools 95% are primary but only 5% are secondary. The Anglican influence is at its

(2) See particularly his On the Constitution of the Church and State.

(3) Statistics of Education: 1988 Schools. Produced by Department of Education and Science.

Table A12/88, pp. 127 + 128.

Table A13/88 D, P.132.

greatest in the primary sector, because of the large number of Anglican schools in small villages, whereas in the secondary sector the Catholic Church is as well represented as the Church of England, or even more so, because of the larger number of new Catholic secondary schools in the cities.

5. The 1988 Education Reform Act.

In 1988 Mrs Thacher's government with Kenneth Baker as Secretary of State for Education introduced new legislation which not only gives central government sweeping powers but makes important modifications to the situation regarding religion in schools. The relationship between the church and the state as such has not been changed much, and may have become more intimate.

The most significant change is that whereas previously the legislation did not specify the content of the local agreed syllabuses but only prescribed the procedures by means of which they were to be adopted (i.e. the Conference of four committees), the 1988 Act introduces a requirement that any new agreed syllabus "shall reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of the other principal religions represented in Great Britain" (section 8). The decision to put Christianity "on the face of the Bill" was introduced at a fairly late stage, when the Bill was passing through the House of Lords in the spring and early summer of 1988. It was inspired by a number of Christians who were, on the whole, conservative in both religion and politics and was brought about mainly by a concern that the current trend for multi-cultural and multi-faith teaching had let to a neglect of the teaching of Christianity. The new wording was thus intended to restore the central place of Christianity in school religious education. There was no change in the arrangement whereby any new agreed syllabuses which might in due course be adopted would be required in the controlled schools whereas denominational teaching (i.e. teaching in accordance with the trust deeds) could take place in the aided schools. This form of words was thought of as promoting an advance of Christianity into the schools. It was also intended to clarify the rather vague words of

the 1944 Act. The 1988 wording was also thought to mark a new collaboration between church and state, since on the whole the bishops of the Church of England who had seats in the House of Lords tended either to support the proposed wording or to remain neutral.

A somewhat similar change has taken place in the law regarding the daily acts of worship in schools. In the 1944 Act the worship was not described as being Christian or even as being religious. It was merely to be "an act of collective worship", nothing being said at all about what it should consist of. It was only being required that it should not be characteristic of any particular denomination.

The new wording is convoluted and it is not possible here to give a full description of it. The main feature, however, is that school worship is to be "wholly or mainly of a broadly Christian character" but not denominational, and the Act says that collective worship shall be deemed to meet this description if it "reflects the broad traditions of Christian belief". These traditions must not, however, be of a denominational character. The Act goes on to declare that these acts of collective worship (i.e. the kind which is to be wholly or mainly of a broadly Christian character) need not take place every day (although every pupil must attend an act of collective worship every day). It is sufficient if, in any single school term, a MAJORITY of the acts of worship meet this description. Nothing is said about the content or character of any act of collective worship which might take place on the other days. This means, for example, that in any one term ay least 51% of the acts of worship must be wholly or mainly of a broad Christian character, wile no definition is offered of the remaining 49% of the acts of worship.

Head teachers and governing bodies have to consider the age, aptitude and family background of pupils in deciding the ways in which and the extent to which these acts of a broadly Christian kind are to take place. If, after consideration, they decide that such acts would not be appropriate for some or all of their pupils, they may make application to their local Standing Advisory Council on Religious Education which has the authority to issue a "determination" respecting this application from the school.

The SACRE may, if it decides that the case is reasonable, release the school from the obligation to provide worship which is wholly or mainly of a broadly Christian character. In such cases, the school will still be left with the responsibility of providing daily acts of collective worship of some other kind. These could be characteristic of a particular faith (e.g. Islam, Hindu, Sikh, Jewish or Christian etc.) but many not be characteristic of a denomination of one of these religions.

A word must now be said about the SACREs. In 1944 the LEAs were permitted but not required to establish these standing advisory councils. Very few took advantage of this provision, and in 1987 there were probably not more than half a dozen or so in the whole of England which were working with any regularity or effectiveness. The 1988 Act *requires* each LEA to constitute a SACRE. The structure of the SACRE is modelled upon the constitution of the agreed syllabus Conference which remains mandatory in any case when an LEA decides to revise its agreed syllabus. The SACRE, as the word "standing" suggests, would be a permanent body, whereas on agreed syllabus conference would only exist during the period when syllabus revision or creation was actually under way.

The SACRE thus consists of four representative groups, these being the Church of England, the other denomination and/or religions, the teachers organisations and the LEA itself. For the first time, it is accepted that religions other than Christianity have a right to be represented in the "other denominations" group. There was a move to amend the Bill so as to require that in this "other denominations" group representatives of Christian churches (other than the Church of England which has its own committee) should be in the majority, but this move was ineffective. It would therefore be quite possible for religions other than Christianity to control this particular group, although the group as a whole continues to have but one vote. In Wales, where there is no established church, the SACRE like the agreed syllabus Conference would consist of but three committees, i.e. one committee for all of the religions represented in the locality.

One of the most important powers of the SACRE is that of determining the outcome of any application which it may receive from a local school regarding permission not to have collective worship.

Some SACREs have established a "determination-sub-committee" in order to consider applications from the schools, and some have issued guide-lines to governing bodies and head teachers on how to present their requests. Some SACREs have already received many applications for determination, especially in multi-cultural areas such as the large industrial cities, but in other parts of the country, including some of the cities, SACREs are still in process of being formed and have not even met yet.

SACREs also have the power to require their LEA to conduct a review of the agreed syllabus. The LEA must comply with this demand by setting up a special Conference, as already described. The general expectation is that any such Conference of the future would probably be the same persons as already form the SACRE, but meeting under a different constitution. This situation has not yet arisen, since although one LEA has published a new agreed syllabus the Conference was set up *before* the 1988 Act came into force.

These SACREs have various other powers including the right to receive complaints about religious education, the right to offer advice on the methods of teaching religion and of training religious education teachers, and in general to advise on all matters to do with the teaching of religious education and the conduct of collective worship in LEA and voluntary controlled schools. It must be remembered that whereas before 1988 responsibility for religious education and collective worship lay with the LEA, under the 1988 Act responsibility is shared by the LEA, the head teacher and the governing body. The differences between the governing bodies of controlled and aided schools remain the same, i.e. in controlled schools the majority of the governors must *not* be "foundation governors" whereas in aided schools the majority *must* be "foundation governors", (i.e. representatives of the owning church body).

These changes, significant though they are, must be put into perspective by the realisation that they form but a small part of the 1988 Education Reform Act as a whole. Three very significant features of the new Act must be mentioned, because they put the religious sections into context.

(*i*) The Act introduces a "national curriculum" the contents of which is to be determined by the government. The government has

assumed the authority to describe not only the subjects which shall form part of the national curriculum but to determine the actual content of these subjects to be taught at every age of compulsory schooling and to define targets of achievement and methods of assessment at ages 7, 11, 14 and 16. The government have accordingly created a National Curriculum Council which has set up subject committees as determined by the Secretary of State to advise him on these matters. There was a general desire on the part of the churches and the religious education teachers that religious education should become one of the subjects of the National Curriculum but the government rejected this, creating the legislation which we have described above as a kind of a compensation. The government, in other words, said in effect that although religious education would not be included in the National Curriculum, its place in the legislation would be strengthened. This was done by creating a "basic curriculum" plus other "foundation subjects". The core consists of English, Mathematics and science. (See Diagram 5).

(*ii*) *"Grant maintained status" for schools.*

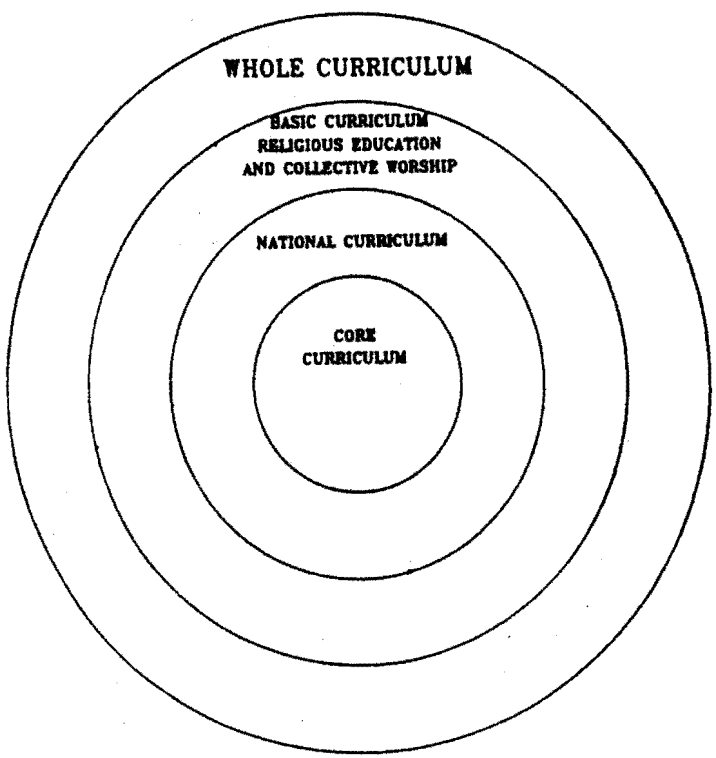
Schools are now permitted to opt out of control by the LEA. In response of the wishes of parents, the governors of the school may make application to the Secretary of State for permission to be supported financially by a single annual grant from central government funds, rather than being maintained by the LEA. These schools would continue to be *owned* by the LEA but would not be controlled by the LEA. Both LEA or country schools *and* church related schools (i.e. voluntary controlled or aided schools) may make application to become grant maintained. This provision thus applies to the entire maintained sector. There is considerable discussion about whether it would be in the interests of church schools to seek grant maintained status or not. It must be realised that the opponents of the government regard the grant maintained provision as being part of the government's sustained attack upon the authority and scope of local government, while supporters of the government argue that it is a move in the direction of greater parental (and thus *really* local) control of schools.

(*iii*) *Financial delegation*

The third significant factor to be mentioned here has to do with local financial delegation. Each maintained school (with certain exceptions, e.g. in the case of very small schools) will receive its LEA support in the form of an annual grant, to be determined by an agreed formula, and the school governors will be responsible for the spending of the grant as agreed in the formula. Thus the school becomes responsible for its own financial administration, and is required to balance its own books and to prepare its own budget for submission to the LEA.

Responsibility for the employment of teachers thus passes to a significant degree from the LEA to the governors of individual schools. Once again, this local financial delegation applies to church schools within the maintained sector just as it does to LEA schools

DIAGRAM 5.



themselves. It remains to be seen, when this system comes fully into operation, how much of their income schools will devote to the appointment of religious education teachers and the resourcing of the subject, both in the classroom and through collective school worship. Of course, all schools are required, as we have seen, to offer religious education as part of the basic curriculum, and to do so (unless they are voluntary aided) in accordance with the local agreed syllabus, but the interpretation of this is in the melting pot.

6. *Evaluations.*

First, let us observe the good features of the English situation. The arrangement for the maintenance of religious schools by public funds is undoubtedly generous. As has been pointed out, although the State will only supply 85% of the costs of building a new church school, it will supply the entire costs of running and maintaining the interior, repair and decoration of that school. In spite of this almost total financial support, the church authorities have a majority of the governing body, can appoint their own head teachers and other staff, can create their own rules for admission of pupils, and can teach their own religion. These maintained religious schools, whether Catholic or Anglican, remain very popular with parents, and there are many stories of parents who have started to attend their local church in order to ensure that their children gained a place at the local church school. Applications for the creation of *new* maintained religious schools are subject to many conditions, but there is no bias in the legislation in favour of any particular church or, indeed, any particular religion.

Part of the Moslem community have been eager to obtain their own voluntary aided schools, and when we remember that such aided schools are *not* required to teach Christianity or to have schools worship which is wholly or mainly of a broadly Christian character, the attraction to Moslems is obvious. The advantages which the Church of England has by virtue of being the established church of the State are not of a financial nature, but are wholly to do with the Church of England presence on education committees and the statutory Church of England committee or group on SACREs and agreed syllabus Conferences. The Church of England

derives no financial advantage from its position as the established church although it may enjoy political advantages; Catholic and Jewish schools are maintained in exactly the same way, and so are the one or two Moslem schools which are now being established.

Secondly, it is true that the compulsory nature of religious education is an immense strength to the subject. Although prior to the 1988 Act it was often felt that the solitary position of religious education as the *only* compulsory subject was invidious, there is now general agreement that the subject would be pushed right off the timetable by the compulsory National Curriculum if its statutory position had not been strengthened. Indeed, there is still anxiety that this will still be the case. The government's policy at present seems to be that they have done their bit in setting up the legislation, and it is now up to LEAs, school governors and religious bodies to make the most of it. Although the government funds for the subjects of the National Curriculum are flowing quite freely, government funding for religious education research and development and teacher training appears to be diminishing. A lot will depend on how strong and vigorous the SACREs become, and to what extent LEAs, hard pressed financially by central government policy, will be able to make finance available for SACREs. It would be easy for an LEA to reduce the effectiveness of its own SACRE by allowing only a tiny budget. Perhaps it might be possible to take that LEA to court under the complaining procedure, but that is as yet untried ground. In general, the new position of SACREs is certainly a strength for religious education.

Religious education does have a higher profile in the schools, in local government and in the general awareness of the public, and this is all the good.

It is also true that the requirement for collective worship in schools is a strength of the English system, in some ways. It is noteworthy that the education provided by LEAs, governing bodies and head teachers must promote the "spiritual, moral, cultural, mental and physical development both of the pupils and of society. This is an important statement, and it is noteworthy that of five adjectives, "spiritual" and "moral" come first. The legislation for collective worship must be regarded as part of the provision for the spiri-

tuality of education (although it is equally important to notice that *all* subjects of the curriculum are required to have a spiritual and moral aspect), and it is very much to be hoped that the heightened profile of worship will mean fewer schools neglecting it or allowing it to become a perfunctory and unimaginative occasion, centred mainly upon the giving out of school notices.

It must also be said that the survival and the strengthening of local responsibility for religious education is an attractive feature of the arrangements, in spite of some feeling of anxiety about being omitted from the National Curriculum. Religious education is now the only part of the required (i.e. the basic) curriculum which is NOT under the direct and detailed control of the government. It is the only part of the required curriculum over which local communities including parents and teachers have a direct influence. This element of local accountability for the content of religious education was an outstanding feature of the situation before the new Act and continues to be so after it.

In spite of this commendable and encouraging features, important concerns and worries remain. The selections dealing with school worship are so complex that it must be a serious question whether they will prove to be workable. It would not be surprising if when the Conservative government is defeated at a General Election the next government will repeal Section 7 ("wholly or mainly of a broadly Christian character") if not Section 6 (collective worship in general) as well (4). More serious is the set-back to multi-cultural and multi-faith religious education. That Christianity is now referred to in the Act is now quite naturally thought to be repugnant by the non-Christian religions, especially Moslems, Hindus and Sikhs.

Community relations have deteriorated significantly in England in the past year, and the religious education legislation has undoubtedly played a part in this. Parents do have the right to withdraw their children from religious education and from collective worship, and many head teachers are now confronted by numerous requests for such withdrawal of children from the ethnic communities. It is tragic to see the excellent work of multi-cultural religious education,

(4) B.J.R.E. "School Worship and the 1988 Education Reform Act" Editorial Vol. 11 No. 3 (summer 1989) pp. 119-125.

praised so highly in the 1985 Swann Report (5), so overturned and denied. That this was done in the name of Christianity must cause offence to all Christians in education who seek to advance the cause of justice in the classroom and of dialogue between religions.

It is possible to interpret the new legislation in a multi-faith way, because the guide-line for the new agreed syllabuses demands that account should be taken of the teaching and practices of the other principal religions represented in Great Britain (not OF Great Britain!) (6).

The London Borough of Ealing has produced the first new agreed syllabus which comes under this law, and we are now on the verge of an interesting controversy. The Ealing LEA (quite correctly in my opinion) is arguing that their new multi-faith syllabus is perfectly consistent with the requirements of the new Education Act, while a group of right-wing Conservatives is considering taking the LEA to court as a test case, maintaining that the new syllabus does NOT conform with the legislation. It is generally being said that the next few years will see court rulings on the interpretation of the new Act, and it is thus possible than this paper, addressed to a group of academics interested in the legal aspects of the relationships between church and state, could be even more charged with human interest and legal details if it were being given not in 1989 but in two or three years from now.

(5) *Education for All* (The Swann Report) Report of the Committee of Inquiry into the Education of Children from Ethnic Minority Groups. 1985 HMSO.

(6) In my booklet *The Act Unpacked, the meaning of the 1988 Education Reform Act for religious education* I have argued for a multi-cultural interpretation. The booklet is published by CEM:CEM Publications Department, Royal Buildings, Victoria Street, Derby, DE1 1GW. ISBN 185 100 0607. Price £ 3.50. For a review of the general situation before the 1988 Act, see the article "Gran Bretagna" in Dizionario Di Catechetica Elle Di Ci (Ed.), Università Pontificia Salesiana, 1986, pp. 310-314.

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THE RELATION BETWEEN CANON LAW AND CIVIL LAW

SUMMARY: I. Religious denominations and their branches. — II. Verification of decision-making in court.

I. RELIGIOUS DENOMINATIONS AND THEIR BRANCHES

Over the last few years a great interest was aroused in defining the concept of religious denominations as laid down in article 2 Book 2 of the Civil Code.

This article says:

1— Religious denominations as well as their independent branches and bodies in which they are united have legal status.

2— They are subject to their own statute in so far as these are not in defiance of the law. With the exception of art. 5 the following articles do not apply to them; application in conformity with this is lawful in so far this can be combined with their articles of association and with the nature of their interrelation.

The increasing interest was mainly caused by the legal proceedings started by the "religious order of the Sisters of St. Walburga", better known as the Church of Satan.

Another topic which came up for discussion in the same period was the problem of equal treatment of Christian denominations and non-Christian religions.

First I wish to deal with the case of the "religious order of St. Walburga" HR 31 October 1986, NJ 1987, 173. It is a premise for

the concept of religious denominations as a bond or organization which makes it as its object the corporate worship of God by its members based on common number of respects. For instance, it is of prime importance that the group of people intends to be a religious denomination and furthermore, that it intends to be an independent religious denomination.

These two elements can also be found with Asser-Van der Grinten (6th impression 1986, nr. 205). In the memorandum on account of the final report, 17725, no. 13, the Lord High Chancellor emphasizes the fact that other denominations on a spiritual basis do not fall into that category. With a plea to the long-standing between Church and State the exceptional position of religious denominations is justified.

The case of the "Order of St. Walburga" can be summarizes as it follows. A routine investigation showed that in the "church of Satan" sexual rites were performed by the "Sisters of the Order" which according to the leader formed an integral part of the religious activities which he defined as Satanism. The "church of Satan" considered the police investigation an infraction of article 123 Sv and therefore legal proceedings were started to force the State to stop routine investigations within the "walls of the convent". The "Order", invoking art. 2 Book 2 of the Civil New Code, considered itself an independent branch of the "world church of Satan".

The judge did not admit the claim because the law only refers to independent branches when the nature of the activities is exclusively or virtually exclusively religious or charitable. The Court of Appeal ruled that the criterion the judge has used with regard to the extent of the concept of independent branches was too qualified and drew a parallel with the economic activities of Roman Catholic orders.

Next the Court investigated whether the "church of Satan" fell within the purview of art. 2 Book 2 of the Civil Code and then followed another very important preamble in which the question whether the concept of religious denominations should be confined to the Christian and Jewish faith only was answered negatively. From this follows that everybody is free to invoke this article, though the court prescribed that the activities should be of a religious nature and the believers belong to a structured organization. The "church of Satan" failed to meet these requirements.

This wide interpretation of the concept of independent branch seems to incorporate the purely commercial activities undertaken by these branches (cf. the beer brewed by the "Order of Trappists"). This might lead to manipulations with art. 2, thus weakening the legitimated unique position religious denominations now have. This point of view leaves too little room for religious institutions which for principal reasons object to corporations like association and foundation. For instance, we may look upon a church-run old people's home as an economic activity, but we certainly cannot speak here of solely commercial activities.

That seems to be the point to me.

As I have already said, the question whether non-Christian religions must be qualified within the purview of art. 2, Book 2 of the Civil Code as religious communities also received much attention during the past few years. In the literature this view finds much support. So far this question had not been dealt with in court. It is true that the house of Lords and Supreme Court of Judicature (Court of Cassation) had taken a similar view with reference to art. 2 par. 1 subsection C BBA when an Imam had started legal proceedings because he had been dismissed (HR 30 may 1986, NJ 1986, 702).

Art. 2 par. 1 subsection C BBA makes an exception for any person holding an ecclesiastical position with regard to the application of BBA. The point is who falls into the category? We can think of ministers, priestsand rabbis. But does it stop there?

In the notice of appeal it is pointed out that the exception should be interpreted as referring to only clerics whose job it is to preach the Word and administer the Sacraments. In their judgement the House of Lords and Supreme Court of Judicature emphasize that qualifying this article would lead to an unacceptable discrimination among the various religions which are professed in the Netherlands and therefore did not admit the Imams's claim.

HR 30 march 1984 NJ 1985 350, makes clear that this "equality" cannot be applied indiscriminately as appears from the case of the Turkish employee who had taken a "day off" on account of an Islamic feast. The court ruled that the woman had been wrongfully

dismissed and adjudicated her claim. The House of Lords and Supreme Court of Judicature, however, quashed the decision of the court because of the fact that Christian festivals are among the generally accepted holidays and as such cannot be equated with the festivals of other religions.

II. Verification of decision-making in court

The power of the judge, in accordance with art. 2 Book 2 of the New Civil Code, on the subject of the verification of decision-making should be exercised with the necessary caution. The foundation of the religious community can only be the first touchstone here. Not that which is socially acceptable or reasonable can be used as a standard, but that which in the light of the confession of a church should be considered reasonable must be standard. The verification of decisions in court will only be relevant, if the possibilities of appeal within the ecclesiastical organization itself are exhausted. Furthermore, this verification can only refer to the procedure that was followed when a decision was taken.

The Goeree case demonstrated how from a different angle the State treads on the boundary between Church and State by either verifying the right application of art. 1401 Civil Code or art. 137e Penal Code.

The Goerees argued in various publications that the Jews only got themselves to blame for the holocaust during the Second World War. The legal question is whether such a statement, which is extremely offensive to the Jews, is socially acceptable. The judge adjudicated the claim made by CIDI (the centre for information and documentation about Israel) and based himself on the view held by a majority of Christendom, which rejects a causal relation between what is said in Matthew 27:25 and that which happened to the Jews afterwards (Rb. Zwolle, 13 September 1985, KG 1985, 301).

This does not seem valid to me, because when principles are at stake numbers (in this case a majority interpreting a text in the same manner) are of no significance. The Court of Appeal on the contrary ruled that the appellants were entitled to their own interpretation but emphasized that others were also entitled to a fair and prudent approach.

This decision seems a somewhat over - simplified approach of this problem, because when religious beliefs are disseminated the question of offending others is irrelevant (Hof Harnhem 29 September 1986 and HR 5 June 1987, NJ 1988, 702).

A judge can only verify whether the form of the message is in accordance with the law. It would testify to thought lessness when speeches or articles are unnecessarily offensive, F. T. Oldenhuis, WPNR 5870 (1988).

This is where the aforementioned couple transgressed when they pointed out that in their opinion there was a causal relation between homosexuality and Aids, Rb. Zwolle 6 May 1987, KG 1987, 236. In this case judgement was rightly given against them, I feel. But from a criminal point of view there was no infringement of the law, of art. 137e to be exact.

The Court of Appeal stressed that their intentions, controversial though these may be, were sincere and did not aim at offending others, Hof Harnem 29 May 1987, NJ 1987, 816.

Concluding we may say as long as from the wording of a text or speech that as no deliberate intention to offend is apparent the judge should not interfere with conceptions based on religious laws or regulations (cf. Simonis/COC Hof Amsterdam 10 September 1987, rolnr. 375/87 [not published] and also the interpretation of the Halacha 9HR 22 January 1988, NJ 988, 891).

Groningen, 15 October 1989.

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CONCLUSIONS

Within the nations that conform the European Community one may found a great variety of educational policies. Such diversity may even be found within a country itself, establish any patterns and general conclusions that may concern the current educational structures which exist in the countries that form the European Community. Most important topics regarding education, such as the role of private schools, the financing of education, religious education, etc.; are not solved by means of uniform criteria. Each opinion must be considered within the framework of the particular constitutional and educational system present in each country, and no specific attitude can be conclusive on its own.

A certain tendency towards a state-run educational system may be observed in all the countries concerned, though it does not imply secularisation in all cases. Until the beginning of the 19th century child education was, generally speaking, a task alien to the state, and it was mainly in the hands of religious institutions, either the established one, or those having a sufficient majority. Later on, however, political powers start claiming a full share in the organization of the educative system, or even to monopolize it.

The clash between some European states and the confessional institutions on the problem of schools has originated the so-called "school issue", which seems to present specific problems in each country. The problem of freedom underlies the polemics dealing with the "school issue". Educational freedom should be interpreted in relation to other fundamental rights and public liberties such as freedom of thought, as well as religious freedom and ideological freedom. A deeper view with respect to public liberties is necessary in

order to understand all positions regarding the problem of education better.

The European Convention on the Rights of Man does not specifically deal with the freedom of education. However, section 2 of the first additional protocol of the 1954 Convention, declares that the State, when implementing those functions which it must assume in the fields of education and teaching, must regard the right that parents have to secure both education and teaching be according to their religious and philosophical convictions.

As education is indeed a source of utmost importance for the establishing of religious and ideological convictions within the individual and social frames, public education should never adopt any criteria leading to ideological or religious indoctrination, but instead follow a neutral attitude. The development of a neutral educational programme presents, however, several difficulties. The need of distinguishing between education and teaching has been emphasized. And in this sense, it has been stated that teaching is characterized by "transmitting scientific knowledge", whereas education consists of "communicating moral, philosophical and religious convictions". The parental right in relation to the education of their children refers fundamentally to their teaching process in which political power must remain neutral, while the transmission of scientific knowledge is not the main responsibility of parents, but instead a requirement imposed by political power and an obligation. However, it is evident that there is difficulty in providing a practical division of both fields, as the transmission of scientific knowledge and moral, philosophical and religious education go hand in hand.

Public education serves a very important purpose and allows public authorities to accomplish their educative mission. Nevertheless, it must be taken into consideration as opposed to or against private education. Both co-exist and one is a complement to the other. Private education preserves the intentionally recognized right, that enables parents to send their children to schools different from those created by public authorities. It also assures pluralism and a certain competition. Any educational system which does not contemplate private education would be unacceptable. Public education also guarantees easy access to learning for all children within the school-age range and a very solid educative infrastructure.

Closely linked to the previous topic is the one concerning the financing of schools. as far as this goes, the legislation of the Community countries adopt diverse criteria. Thus, in the Netherlands, art. 23 of its Constitution, as it also happens in some Lander of the German Republic, the criteria adopted tend to level completely the financing of public and private schools, providing a more effective possibility of choice among the different kind of schools. In other countries such as Italy, public financing of private schools virtually does not exist. The most common situation is that of partial financing of private educations by means of public funds.

It may be observed as a common feature of the different legislations that the more the public financing of private schools is granted, the more will these be controlled by the public power, up to the extent that there are cases in which it is remarkably difficult to oppose private school to public school; instead it is possible to detect an intermediate sort of private school in which public control is no noticeable that it has lead to naming it as semi-public school. Political control over private schools should not imply that their private character may disappear.

Freedom of creating schools, as an aspect of educational freedom, implies that these must have a certain degree of autonomy in the different areas that deal with education, such as the pedagogic approach, organization, selection of pupils and teaching staff, etc. and not merely in the aspect of ideology or religion.

A problem shared by public and private education is the study of religion as a subject in the curriculum. It is a most of religious freedom that such a subject be optional. In the task of parents to choose a particular confessional education for their children, or to avoid that they receive any religious education at all. In the case of religious faith accepted by a vast majority, it is quite simple to satisfy one specific religious education; however, when dealing with religious minorities it is very difficult to establish an adequate religious education as there is very little interest in it. On the other hand, it is the task of each religious confession to establish the contents of their confessional education, as it is not recommendable that this were fully organized by political power.

Bearing in mind all these factors: parental rights, the rights of religious confessions, and the attributions of political power concerning education in general, there are several models to satisfy their different rights and petitions. Therefore, the constitutional principles of every country are to be taken into account, and these range from the separation of Church and State, to the principle of religious confessionality, going through the principle of cooperation.

Consequently, in some countries the teaching of religion as a subject is implemented in public schools by teachers paid by public funds these may or may not be civil servants—, within the official school timetables. In other countries teachers of religion are not paid by public funds, they are not civil servants, and classes concerning religion are offered out of schedule. All solutions are acceptable, or rather they present advantages and disadvantages, but the important point is that they may allow parents to choose freely the kind of religious education at all.

It is the task of parents, when their children are under age, to choose a particular religious education. In this sense it can also be discussed when this parental guidance in religious education should be replaced by the personal choice of the recipients of education. The coming of age seems quite an advanced moment, as it is generally set at eighteen. However, it is difficult to agree on a younger age. In those legislations which establish a particular moment fourteen or sixteen- in order to enter a new educative stage or cycle, we could link that change to a student's more mature behaviour, and his being able to choose personally instead of parents the kind of education he wishes regarding religious matters. Clashes between the parent's opinion on religious education and their children's is a question which has a very difficult answer. It should be connected with the general problem of parental rights.

Religious, philosophical and moral convictions show problems not just in relation to pupils and their parents, but also concerning teachers. Public education, inasmuch as it should be neutral in these matters, compels teachers to avoid the indoctrination of their pupils in any determined direction. Academic freedom is to be reduced accordingly. The same happens in the case of private education when it answers to a specific set of ideas having a confessional character, or having any other nature. Teachers must then show their respect

for this set tenets. The breach of a teacher's contract on the grounds that he has not observed the principle of neutrality or the peculiarities of a school, requires a rather delicate treatment. In some extreme cases there is no doubt that any contract can be denounced for breaking the limits agreed on religious and ideological matters. However, in practice many different situations can be observed, situations that are very difficult to solve using general a priori criteria. On the other hand, as a consequence of the very nature of educational tasks, because pupils tend to identify themselves with their teachers or to reject them, it is hard to set limits to the teacher's professional activity his behaviour as a teacher- from his strictly private behaviour.

As it is a most polemic question, the school issue requires a careful and unsympathetic study based on a deep reflection upon the internationally recognized fundamental rights and public liberties.

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