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# The Relationship Between Individual Religious Freedom and the Effective Separation of Church and State: A Comparison of Constitutional Models

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## Introduction

The separation of church and state is a bedrock concept to Americans; an ideology so entrenched it ranks as fundamental. Though it receives scant contemporary consideration in society, it is something every American understands to be true and expects to be both enacted and defended. Yet is it common theme amongst fellow nations? Or are the protections afforded to religious freedom by the United States an anomaly?

The fact is that the idea of separation of church and state is present in the textual provisions of other countries, but the constitutional guarantees of this concept often fail in their enactment and adoption. The constitutional models are manifold and varied, but for the purposes of this study a few select systems will be compared to that of the United States: the United Kingdom, Spain, Greece, Turkey and China. It is the assumption of this work that the readers have some knowledge of the history of the United States and its Constitution, and so the information pertaining to the United States will only be as extensive as necessary to establish a basis for comparison.

Before the textual provisions of each country can be fully understood, it is necessary to analyze the historical antecedents that produced such text and what precisely fueled the adoption of one model over another. Having established the factors that contributed to the development of each country's textual provisions, the actual language of such texts can be properly analyzed.

Finally, this article will establish which models are currently failing in practice through a review of current events. For the purposes of this article, failure is a term to be defined by the degree to which a country deviates from its textual guarantees, based on governmental regulation and human rights violations. All of this, however, is aimed at one central hypothesis: counter-intuitive though it may be, effective separation of church and state inheres in the grant and

protection of individual religious freedom, and this is why certain models function better in theory than in practice. What follows will endeavor to demonstrate that critical theory.

### United States: The Baseline for Separation of Church and State Comparisons

As mentioned in the Introduction, the United States will receive only as much attention as necessary to establish a baseline for comparison purposes. The words “separation of church and state” are not present in the Constitution. Rather, the concept has its roots in the language provided by the First Amendment of the Bill of Rights:

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”*<sup>1</sup>

The genesis of the text of the First Amendment is better understood when placed in context. Established European sects in the Americas compelled the support of only government-endorsed churches, and the expounding of beliefs contrary to those of the established religion were often punishable by loss of property and imprisonment.<sup>2</sup> Despite the fact that the settlers had come to the New World to avoid such religious persecution, it nonetheless persisted.<sup>3</sup> So it was that the founders of the United States, despite not mentioning religion in the original constitutional text, subsequently added a defense against government infringement on religious activity via the First Amendment. The concept of the separation of church and state inheres in what is now referred to as the Establishment Clause of the First Amendment.

The Supreme Court further defined just what protections the Establishment Clause is intended to offer in *Everson v. Board of Ed. of Ewing Tp.*. In the opinion, Justice Black stated that, “Neither a state nor the Federal Government can, openly or secretly, participate in the

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<sup>1</sup> U.S. Const. amend. I

<sup>2</sup> First Amendment Religion Clause: Historical Metamorphosis, 61 Nw. U. L. Rev. 760, 762 (1966-67)

<sup>3</sup> *Id.*

affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”<sup>4</sup> Further on in the opinion, Justice Black summarized the point succinctly: “The Constitution requires, not comprehensive identification of state with religion, but complete separation.”<sup>5</sup>

In more contemporary times the United States Supreme Court has zealously protected this safeguard against infringement in a variety of decisions. The Supreme Court has given strong effect to the Establishment Clause in recent times through such decisions as *Lemon v. Kurtzman* (1971), *Stone v. Graham* (1980), *Wallace v. Jaffree* (1985), *Edwards v. Aguillard* (1987), *Allegheny County v. ACLU* (1989), *Lee v. Weisman* (1992) and *Church of Lukumi Babalu Aye v. City of Hialeah* (1993). In each case the government action was held to be an unconstitutional violation of the Establishment Clause.

Similar to the protection against government infringement on religion the United States is also one of the most speech-protective nations in the world with regard to individual religious freedom. Not only is the government prohibited from regulating or imposing religious exercises, but also individual religious expression is granted comparatively high protection. While religious expression by the State is almost *per se* unconstitutional, there are practically no limits to what the individual may do in either public or private. It is this grant of individual religious freedom that is the foundation of a functional separation of church and state, as the ensuing examples of differing constitutional models will attempt to establish.

#### The United Kingdom: The Recent Changes in Religious Freedom and the Role of the Anglican Communion

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<sup>4</sup> *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878))

<sup>5</sup> *Id.* at 60

## I. Historical Synopsis

The Anglican Communion is prevalent throughout the majority of the United Kingdom's history. Prior to the *Act of Toleration* in 1689, the Parliament had generated legislation that was generally antagonistic to practicing Catholics.<sup>6</sup> The *Act of Toleration* was formed in an era in which there was a fear that the Crown would fall in to the hands of the Catholic Church. The marriage of King James II to a Catholic woman, and his subsequent conversion to Catholicism, resulted in what is known as the "Glorious Revolution."<sup>7</sup> King James II's oldest daughter from his first wife, Mary, was brought in to claim the throne and was then married to William of Orange, a known Protestant leader of the times.<sup>8</sup> A condition to the rule of Mary and William of Orange was the *Act of Toleration*, which extended "legal recognition" and "official tolerance" to non-Anglican Protestants, while maintaining the establishment of the Church of the England.<sup>9</sup> Catholics, still being viewed as political threats and the antithesis of the Protestant faith, were not afforded the same relief.<sup>10</sup> It was not until nearly two hundred years later, with the *Catholic Relief Act of 1829*, that Catholics were afforded a similar level of tolerance.<sup>11</sup>

Once again almost two hundred years later, the English legislature enacted the *Race Relations Act of 1976*, which made it unlawful to discriminate on racial grounds in fields such as education and employment.<sup>12</sup> The caveat to the Act, however, was the fact that it only protected those persons who were members of individual races in addition to being members of religious

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<sup>6</sup> Religious Symbols in the Classroom: A Controversial Issue in the United Kingdom, Javier García Oliva, *BYU L. Rev.* 877 (2008)

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

groups.<sup>13</sup> Non-racial minority groups such as Catholics, Muslims, and Methodists remained unprotected, and would not be afforded broad protection until over two decades later in the *Human Rights Act of 1998*.<sup>14</sup>

## II. Textual Provisions

Having no official printed constitution, the United Kingdom's laws regarding the separation of church and state and individual religious freedom are derived from two primary sources: the incorporation of Article 9 of the European Convention on Human Rights and the *Human Rights Act of 1998*. As many of the provisions in the *Human Rights Act* are rooted in Article 9, it is necessary to examine the protections afforded by Article 9 first.

The relevant textual portions of Article 9 are as follows:

*“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

*2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”<sup>15</sup>*

While Section 1 appears to grant an explicit right to freedom of religion and conscience, this right appears to be limited by the proviso in Section 2 that allows the government to proscribe limitations when necessary for public safety or order in a democratic society. The European Court of Human Rights interpreted the text of Article 9 in the decision *Sahin v. Turkey*, which allowed Turkish authorities to prohibit the wearing of the Islamic veil in classes, lectures

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222

and examinations.<sup>16</sup> The decision limited the religious freedom proscribed in Article 9 by acknowledging that the specific situation of an individual may justify certain religious restrictions.<sup>17</sup> The court identifies members of the armed forces, prison inmates, and university students in particular as parties that might be subject to the specific situation rule.<sup>18</sup> The Court, in reaching its conclusion that the interference by Turkish authorities was justified, stated that, “there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference.”<sup>19</sup> This appears to be an adoption of something like the United States Supreme Court’s standard of rational basis review, and since there was a legal basis in Turkish law for the restriction and the ban was necessary to protect Turkey’s democratic and secular interests, the law was not in violation of Article 9.<sup>20</sup> This is an important limiting of Article 9’s power in that it is the European Court of Human Rights that determines its scope, and the Court tends to give heavy deference to the legislature of the country in question.

The *Human Rights Act of 1998* was actually the first piece of legislation in British history that granted express religious freedom as a positive right, but just what exactly the right entails remains undecided.<sup>21</sup> The relevant textual portion is in Section 13, paragraph 1:

Section 13: Freedom of Thought, Conscience, and Religion.

*“(1) If a court’s determination of any question arising under this Act might affect the exercise by a religious organization (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.”*<sup>22</sup>

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<sup>16</sup> *Sahin v. Turkey*, App. No. 44774/98, 41 Eur. H.R. Rep. 8 (2005)

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Human Rights Act 1998, § 13(1).

Also in the *Human Rights Act* is the legislature's declaration that any claim arising out of Convention rights must be decided by taking in to account any judgment, decision or advisory opinion of the European Court of Human Rights.<sup>23</sup> As such, a watershed case such as *Sahin v. Turkey* does not automatically become controlling law in the United Kingdom, but rather it need only be considered in arriving at a decision.

It is this language, or rather the lack thereof, that has fostered uncertainty regarding just what rights are protected. Article 9 has been incorporated, but Section 2 limits the grant of religious freedom by Section 1, and any decisions interpreting the language of Article 9 by the European Court of Human Rights have no binding effect, but rather receive only consideration. Similarly, the language in the *Human Rights Act* only provides guidelines for a court's determination of Convention issues within the United Kingdom.

In short, though freedom of religious practice and conscience are expressly granted in the United Kingdom, the scope of such rights remains uncertain. The future of these rights will be determined by a combination of further legislation and both decisions by courts of the United Kingdom and the European Court of Human Rights.

### **III. Practical Effect – Current Events Perspective**

The historical animosity toward Catholics persists in several facets of modern English society. For instance, while members of the royal family can indeed be Catholic, or choose to marry a Catholic, they forfeit their place in the line of the succession in doing so.<sup>24</sup> This is a remnant of the fear in the time of King James II that the Catholic Church would inherit the

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<sup>23</sup> *Id.*

<sup>24</sup>“Succession”, The Official Website of the British Monarchy, <http://www.royal.gov.uk/ThecurrentRoyalFamily/Successionandprecedence/Succession/Overview.aspx> (2013)

Crown. While this factoid serves an exemplary point, however, it does not evidence whether there is an effective separation of church and state in a practical sense.

The European Court of Human Rights ruled on the effect of Article 9 in the United Kingdom in the case *Eweida and Others v. The United Kingdom*. The case combined four different complaints regarding an infringement on religious freedom, specifically the wearing of a cross in the workplace.<sup>25</sup> The Court adopted a proportionality examination, stating that different factors must be balanced in determining whether the workplace restriction is proportionate to the interest it claims to represent.<sup>26</sup> Such factors expounded by the Court include whether the practice in question is a mandate of the religion, whether obtaining another job would be feasible, and the nature of the job imposing the restriction.<sup>27</sup> The Court also defined the term “manifestation” within the context of Article 9, stating that the act in question must be intimately linked to the religion or belief to fall within Article 9’s meaning.<sup>28</sup>

The Court found an Article 9 violation in the instance where an employee was not allowed to wear a cross as a British Airways flight attendant, but found no Article 9 violation with regard to a geriatrics nurse employee working at a hospital.<sup>29</sup> In distinguishing the two cases, the Court stated that in the case of a hospital, the institution had a more legitimate interest in preserving a certain image and fostering security among the patients.<sup>30</sup> The proportionality test adopted by the Court is an important step in further defining religious rights in the United Kingdom. The finding of an Article 9 violation where the employee could not wear a cross as a

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<sup>25</sup> App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, E.C.H.R. 012 (2012)

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

British Airways employee also exemplifies the move toward more comprehensive tolerance of the Catholic faith.

Still, it would be remiss to make the assumption that the government in United Kingdom has completely severed itself from the Anglican Communion. Michael McGough, in his article titled “In England, there’s no separation of church and state,” highlights some of the blurred boundaries between Parliament and the Protestant faith.<sup>31</sup> England maintains an established church, and some of its bishops even retain seats in Parliament.<sup>32</sup> McGough states that the “the absence of a wall of separation between church and state in England has led to situations in which members of Parliament, including non-Anglicans, have made essentially religious decisions” regarding legislation.<sup>33</sup>

In summation, while the United Kingdom has come a long way in terms of parity in its protection of religious practices, there is much uncertainty over precisely what rights are afforded and protected. While Article 9 of the Convention has been incorporated in to English law, and the *Human Rights Act of 1998* has its roots in Article 9, both laws provide only guidelines for decision-making as opposed to express protectionist measures. In addition, decisions made by the European Court of Human Rights need only be taken in to consideration by the legislature, and thus have no binding effect on English law. The vagueness of the textual provisions and the blurred boundaries between the Anglican faith and Parliament has resulted in an unknown degree of religious freedom and a very limited separation of church and state.

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<sup>31</sup> “In England, there’s no separation of church and state”, Michael McGough, Los Angeles Times (November 27, 2012), *available at* <http://articles.latimes.com/2012/nov/27/news/la-ol-bishops-england-constitution-20121127>

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

## Spain: The Historical Prevalence of the Catholic Church and the Move Toward Religious Freedom

### **I. Historical Synopsis**

In stark contrast to the above study of the United Kingdom, it would be difficult to find a nation whose history is more entwined with the Catholic faith than Spain. Historically there has been heavy cooperation with the Vatican starting primarily with the Concordat of 1753, which stated that the Catholic Church within Spain was both state-established and state-controlled.<sup>34</sup> This belief persisted in the adoption of the first written constitution of Spain in 1812, which stated outright that the religion of Spain was Apostolic Roman Catholicism, while calling it the only “true religion” and prohibiting the exercise of any other whatsoever.<sup>35</sup>

A second constitution was developed in 1837 but little had changed with regard to the religious provisions. The 1837 constitution stated that, “The nation is obliged to maintain the cult and the ministers of the Catholic religion which Spaniards profess,” again affording no protection to other beliefs.<sup>36</sup> Seven years later, in the constitution of 1844, this idea was further perpetuated by the language that, “the religion of the Spanish nation is the Apostolic Roman Catholic religion. The State binds itself to maintain the cult and its ministers.”<sup>37</sup>

Another Concordat with the Vatican in 1851 provided the following language: “The Apostolic Roman Catholic religion, which with the exclusion of all other cults continues to be the only one of the Spanish nation, will be conserved always in the domains of His Catholic Majesty, with all the rights and prerogatives which it should enjoy according to the law of God

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<sup>34</sup> The Spanish Experience in Church-State Relations: A Comparative Study of the Interrelationship Between Church-State Identification and Religious Liberty, George R. Ryskamp, *BYU L. Rev.* 616 (1980).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

and the prescriptions of the sacred Canons."<sup>38</sup> The era of Francisco Franco continued to preserve the prevalence of the Catholic Church within Spanish law.<sup>39</sup>

It is clear from the evolution of constitutional law in Spain that the Catholic Church remained first and foremost in the eyes of the State, and that little protection would be afforded to other viewpoints. In fact, the Vatican adopted an encyclical on religious freedom in the 1960s prior to Spain doing so.<sup>40</sup> It was not until the constitution of 1978, the one that still controls today, that church and state were severed from one another in Spain.

## II. Textual Provisions

Though the constitution of 1978 remains in Spain today there have been revisions since its inception. The rights and guarantees with regard to both religious freedom and the separation of church and state are found in Chapter 2 of the constitution:

Chapter 2, Section 14:

*“Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”<sup>41</sup>*

Chapter 2, Section 16:

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

*2. No one may be compelled to make statements regarding his or her ideology, religion or beliefs.*

*3. No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.”<sup>42</sup>*

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Constitution of Spain, *available at*

[http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf)

<sup>42</sup> *Id.*

It is noteworthy that, despite the fact that explicit separation of church and state is granted by Section 16 of Chapter 2, the Catholic Church maintains its presence in the language “appropriate cooperation relations with the Catholic Church and other confessions.”<sup>43</sup> Whether this implicitly suggests a higher degree of cooperation between the Catholic Church and the state or if it is simply a tip of the hat to the Church’s role in Spanish history, the fact remains that Catholicism has a place within Spain’s constitution.

There is an explicit grant of individual religious freedom within the text of Spain’s constitution, however the *Cortes Generales* (Spain’s legislature) approved a new Law of Religious Liberty on July 2<sup>nd</sup>, 1980.<sup>44</sup> The Law of Religious Liberty further defines the specifics of the constitutional guarantee of religious liberty and avoids any mention of the Catholic Church.<sup>45</sup> It provides such guarantees as the freedom to profess, express, manifest and practice any religion, to receive and impart religious teachings, to meet with others publicly for religious purposes, to establish places of worship freely and the grant of legal entity status to such places.<sup>46</sup>

### **III. Practical Effect – Current Events Perspective**

As Spain moves toward a more permissive and progressive system of religious liberty, the schism between historic Catholicism and modern secularism becomes more apparent. There exists a generational gap of sorts; one in which the younger members of society push for a complete severance from the Catholic Church (and a subsequent adoption of progressive laws such as gay marriage) and the older members of society adhere steadfastly to the tenets of the Catholic faith.

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<sup>43</sup> *Id.*

<sup>44</sup> Church, State, and Religious Liberty in Spain, J.D. Hughey, 23 J. Church & St. 485 (1981).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

The relationship with the Vatican persists, as evidenced by the fact that the first European leader to meet with the newly appointed Pope Francis was the Premier of Spain, Mariano Rajoy.<sup>47</sup> The overwhelming trend in Spain's modern society, however, is a push toward a more secularist model.

In her article entitled "Separation of church and state at a crossroads in Spain," Christine Spolar discusses the collective effort by both the government and society to distance Spain from its Catholic heritage.<sup>48</sup> "Public schools are being told by judicial order to pull crucifixes from their walls. City buses with billboards espousing atheism have been rumbling through the streets here, prompting yowls of blasphemy from Catholic leaders."<sup>49</sup> A former deputy in the center-right Convergencia Party, Joseph Miro, stated that the government was "trying to systematically change the anthropological nature" of Spanish society.<sup>50</sup> As Spolar highlights in her article, "Spanish history and identity are at the core of this face-off. Spain's longtime fascist leader Francisco Franco was so closely allied with the church that 34 years after his death, hackles are still raised when parsing the domains of church and state."<sup>51</sup>

Whether or not the push toward secularism can be seen as an extreme response, the current trend in Spain is one of distancing itself from the Catholic Church. The government is undertaking efforts to keep religion out of the public sphere, and the textual provisions of the Law of Religious Liberty and the constitution of 1978 provide strong guarantees of individual religious freedom. What the ultimate result of Spain's current efforts at a secularist model will be

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<sup>47</sup> "The Separation of Church and State in Spain", Charlotte White, MBC Times (May 10, 2013), *available at* <http://mbctimes.com/en/separation-church-and-state-spain>

<sup>48</sup> "Separation of church and state at a crossroads in Spain", Christine Spolar, Chicago Tribune (February 8, 2009), *available at* [http://articles.chicagotribune.com/2009-02-08/news/0902070425\\_1\\_crucifixes-catholic-spain-jose-luis-rodriguez-zapatero](http://articles.chicagotribune.com/2009-02-08/news/0902070425_1_crucifixes-catholic-spain-jose-luis-rodriguez-zapatero)

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

remains to be seen, but given the heavy historic prevalence of the Catholic Church Spain appears to have achieved a relatively effective system of religious freedom and separation of church and state.

## Greece: The Heavy-Handed Greek Orthodox Church and the Suppressive Result on Religious Freedom

### **I. Historical Synopsis**

Out of the countries contained within this article, Greece is perhaps the one with the heaviest degree of a church and state interrelationship. The Greek Orthodox Church extends its roots far in to Greece's past, starting with the War of Independence in 1821. In a time of difficulty, fear and uncertainty, the Greek Orthodox Church provided a form of solidarity and solace that stiffened the resolve of the people.<sup>52</sup> The constitution of 1827, created during the war, understandably contained some hesitation toward the idea of religious freedom given the stability that the Orthodox Church had provided. However, it was the first time that a constitutional text guaranteed freedom for all people to exercise every religion.<sup>53</sup>

The constitution of 1827, however, would prove to be an outlier when compared with subsequent texts. The constitution of 1844 deemed Greek Orthodoxy the "prevailing religion," a term that persists to this day, and gave practice of other religions "allowable" status as opposed to unencumbered freedom.<sup>54</sup> Subsequent revisions in 1864 and 1911 preserved the language with regard to freedom of religion.<sup>55</sup>

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<sup>52</sup> "The Constitutional Development of Religion in Greece", Konstantinos G. Margaritis, *The New Jurist* (August 19, 2011), *available at* <http://www.newjurist.com/religious-freedom-in-Greece>

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

It was not until the Constitution of the Third Hellenic Republic in 1975 that religious freedom was expressly granted once more, however the Greek Orthodox Church remained entwined with state rule and legislation.<sup>56</sup> It has been revised three times since its inception, but it is the 1975 constitution that controls in Greece today.<sup>57</sup>

## II. Textual Provisions

The prevalence of the Greek Orthodox Church is immediately visible upon review of the constitution. The following language prefaces the very text itself: “In the name of the Holy and Consubstantial and Indivisible Trinity.”<sup>58</sup> Greece’s constitution contains explicit provisions for both religious freedom and church-state relations. The church-state religion portions, however, are not regarding their separation but rather their connection. This merger of church and state is codified as follows:

### Section II, Article 3, Paragraph 1

*“The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.”<sup>59</sup>*

This is not the sole example of a relationship between the government and the Orthodox Church, however. Section III of the constitution contains language regarding parliamentary procedure, including the below requisite oath of office in order to take a seat in parliament:

### Section III, Article 59

*“1. Before undertaking the discharge of their duties, Members of Parliament shall take the*

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Constitution of Greece, *available at* [www.hellenicparliament.gr](http://www.hellenicparliament.gr)

<sup>59</sup> *Id.*

*following oath in the Chamber and in a public sitting.*

*'I swear in the name of the Holy Consubstantial and Indivisible Trinity to keep faith in my Country and in the democratic form of government, obedience to the Constitution and the laws and to discharge conscientiously my duties.'*

*2. Members of Parliament who are of a different religion or creed shall take the same oath according to the form of their own religion or creed.*"<sup>60</sup>

The grant of individual religious freedom is contained in Article 13:

Section II, Article 13

*"1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs.*

*2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited.*

*3. The ministers of all known religions shall be subject to the same supervision by the State and to the same obligations towards it as those of the prevailing religion.*

*4. No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.*

*5. No oath shall be imposed or administered except as specified by law and in the form determined by law.*"<sup>61</sup>

Though the text states that religious conscience is inviolable in paragraph 1, the subsequent paragraphs appear to place various limitations on this right. It is worth noting that Greece leaves itself open to international law through Article 28 of its constitution, and thus Article 9 of the European Convention on Human Rights once more becomes important.<sup>62</sup>

The language in Article 28 is of particular importance with regard to paragraph 2 of Article 13 (shown above). The European Court of Human Rights has ruled on Greece's constitutional ban on proselytism in *Kokkinakis v. Greece*. In *Kokkinakis*, the Court held that the laws against proselytism constituted "limitations prescribed by law" within the meaning of Article 9, Section 2 of the European Convention on Human Rights.<sup>63</sup> The Court also held that

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Freedom of Religion Under the Greek Constitution, Ismini Kriari-Catranis, 47 RHDI 397 (1994)

Greece's ban on proselytism was a legitimate aim pertinent to the protection of the rights and freedoms of others.<sup>64</sup> However, the law's legitimate means were only reconcilable with Article 9 in so far as they punished improper proselytism, and the Greek courts had not sufficiently specified in what way Mr. Kokkinakis' attempted convincing of his neighbor was improper.<sup>65</sup> Therefore, it had not been established that the applicant's conviction was justified by some social need, and the contested measure did not appear proportionate to the legitimate aim expounded by the Greek government.<sup>66</sup> In a broader sense, the judgment also holds that religious freedom is primarily a matter of an individual's conscience, and that freedom of teaching religion is not only exercised in public and in community with others, but can also be exercised "alone" and in private, outside out of the community circle.<sup>67</sup> The ultimate result found a violation of Article 9 of the Convention.<sup>68</sup>

In short, the right to religious freedom is expressly granted, and subsequently limited, in the text of Greece's constitution, and the Orthodox Church as the "prevailing religion" maintains heavy cooperation with government and state affairs. This is ensured, in fact, by the text of the constitution itself.

### **III. Practical Effect – Current Events Perspective**

While it would appear by constitutional language that the Greek government promises religious freedom, the reality is that the government simultaneously falters in the protection of such a guarantee. According to the United States Department of State in its 2012 International Religious Freedom Report, out of an estimated population of 9.9 million approximately 98-

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Proselytization in Greece: Criminal Offense vs. Religious Persuasion and Equality, Kyriakos N. Kyriazopoulos, 20 J. L. & Religion 149 (2004-05)

<sup>68</sup> *Id.*

percent of the population self-identifies as Orthodox.<sup>69</sup> However, members of non-Orthodox religious groups reported instances of societal discrimination, some of which violent.<sup>70</sup> In particular, many of the Muslim population are viewed with suspicion, particularly those who recently immigrated.<sup>71</sup> Though the government has publicly condemned such incidences, there were no legislative undertakings to attempt to remedy the situation, and subsequent reports claimed police passivity and inactivity when it came to crimes against Muslims.<sup>72</sup>

As far as church-state relations in modern times, the Greek Orthodox Church remains inextricably joined at the hip with the government. According to the above-referenced report from the United States Department of State, in 2012 “the Greek Orthodox Church exercised significant social, political, and economic influence.”<sup>73</sup> Members of the minority religious groups continue to be underrepresented in public sector employment and state-owned industries.<sup>74</sup> The Orthodox Church, through its support from the government, retains an exclusive institutionalized connection to the Ministry of Education, Lifelong Learning, and Religious Affairs.<sup>75</sup> Orthodox religious instruction in public schools funded by the government is mandatory for all students.<sup>76</sup> Finally, the church receives certain tax exemptions, and in fact appears to be exempt from Greece’s recent austerity measures.<sup>77</sup>

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<sup>69</sup> International Religious Freedom Report, United States Department of State (2012), *available at* <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2012&dliid=208320>

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> “Orthodox church appears to be exempt from austerity measures”, Alain Salles, *The Guardian Weekly* (October 4, 2011), *available at* <http://www.theguardian.com/world/2011/oct/04/greece-orthodox-church-economic-crisis>

To summarize, the grant of individual religious freedom stated in the constitution is both limited by the text itself and the subsequent lack of protection and endorsement from the government. Part of the reason for this failure in protection is the fact that the Orthodox Church maintains heavy influence within politics, and with the overwhelming majority of the population identifying itself as Orthodox, crimes against religious minorities seem to go unnoticed by local or state-wide authorities. In short, the practical implementation of Greece's constitutional guarantees falls far short of the ideals expounded within the text.

### Turkey: A Study of the Secular Model

#### **I. Historical Synopsis**

The majority of Turkey's secularist ideals can be attributed to one man: Mustafa Kemal Atatürk. After occupying Western forces divided up the Ottoman Empire following the war of liberation, the Republic of Turkey was officially founded in 1923.<sup>78</sup> Atatürk was the leader of the nationalist movement against the occupying Allies, and he believed it was necessary for the new Turkey to distance itself from the imperial legacy that was heavily influenced by Islamic culture and Shari'a law.<sup>79</sup> Atatürk was quoted at the time as saying, "Look at our history. Those who hid their real beliefs under the disguise of religion deceived our innocent nation with big words like Shari'a. You will see that what destroyed this nation, what caused its collapse, was always the deception hidden under the curtain of religion."<sup>80</sup> Accordingly, the majority of Atatürk's reforms were aimed at the division of religion from state.

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<sup>78</sup> Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example, Adrien Katherine Wing & Ozan O. Varol, 42 Tex. Int'l L.J. 1 (2006-07)

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

While the Allied forces were still in power in 1920, the Turkish Grand National Assembly (“TGNA”) was formed.<sup>81</sup> Over time, it would become the primary source for secularist law. The first step was the 1921 constitution, which echoed Atatürk’s words that “sovereignty is fully and unconditionally vested in the people.”<sup>82</sup> What made this language so extraordinary was that, prior to the creation of this constitution, sovereignty was vested in Allah and designated to the Sultan.<sup>83</sup> Atatürk would then abolish the country’s stated quest for *jihad*, and instead shift the focus of the nation toward social and economic development.<sup>84</sup>

Atatürk and the TGNA would go on to create many more significant changes: the removal of the Sultanate position in 1922 (thus ensuring that executive and religious authority no longer rest in the same hands), the abolishment of the caliphate position in 1924 (which had been in place for over 400 years), the abolishment of Shari’a law in 1926 and its replacement with a Civil Code modeling that of the Swiss (forbidding polygamy and granting equal status to men and women), the adoption of Latin and the abolishment of Arabic script in 1928, Islam being removed from the constitution as the official religion in 1928, and finally the word “secular” being added to the constitution in 1937 as one of the fundamental characteristics of the Turkish Republic.<sup>85</sup> Following a military coup in 1980 a new constitution was implemented in 1982. The TGNA amended this constitution in 2001 to comply with European Union requirements, but it is the 1982 constitution that controls today.<sup>86</sup>

## II. Textual Provisions

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

As mentioned above, following the removal of Islam as the primary religion of Turkey secularism was inducted as one of the fundamental characteristics of the republic. The Preamble to the constitution is given authority and effect by Article 176 of the Constitution, and contains the majority of the secularist ideals:

*“In the direction of the concept of nationalism defined by Atatürk...and his reforms and principles;”*<sup>87</sup>

*“In recognition of the absolute supremacy of the will of the nation, whereby sovereignty is vested fully and unconditionally in the Turkish nation...”*<sup>88</sup>

*“...as required by the principle of laicism (secularism), sacred religious feelings can in no way be permitted to interfere with state affairs and politics...”*<sup>89</sup>

The first quotation’s mention of Atatürk’s “reforms and principles” is an implicit adoption of secularist ideals, as those were the foundation of Atatürk’s new republic. The second quotation’s vesting of sovereignty in the Turkish nation again is a departure from the prior vesting of sovereignty in Allah. The third quotation explicitly requires secularism, stating that religion has no place in state affairs and politics.

In Article 2, titled “Characteristics of the Republic,” it is again stated that Turkey is a secularist state, loyal to Atatürk’s conception of nationalism that is based on the fundamental tenets set forth in the Preamble.<sup>90</sup> Article 7 then vests legislative power in the Turkish Grand National Assembly and states that this power cannot be delegated.<sup>91</sup> Finally, Article 13 states that

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<sup>87</sup> Constitution of the Republic of Turkey, *available at* [http://global.tbmm.gov.tr/docs/constitution\\_en.pdf](http://global.tbmm.gov.tr/docs/constitution_en.pdf)

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

any restrictions imposed by the government must not be in conflict with the Constitution and the requirements of a secular republic.<sup>92</sup>

The grant of individual religious freedom inheres in Article 10:

Section X – Equality Before the Law, Article 10

*“All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.*

*No privilege can be granted to any individual, family, group or class.*

*State organs and administrative authorities act in compliance with the principle of equality before the law in all their proceedings.”*<sup>93</sup>

Despite this grant, it must be remembered that the secular interest is superior to all others expounded in the constitution, as is stated on a number of occasions. As a result, the text of Article 10 is then limited by the text of Article 14, which states:

Article 14

*“None of the rights and freedoms embodied in the Constitution can be exercised for activities undertaken with the aim of violating the indivisible integrity of the State with its territory and nation, and endangering the existence of the democratic and laic (secularist) Republic based on human rights.*

*No provision of the Constitution can be interpreted in a manner that would grants the State or individuals destroying the fundamental rights and freedoms embodied in the Constitution, or staging an activity with the aim of restricting rights and freedoms more extensively than is stated in the Constitution.*

*The sanctions to be applied against those who undertake activities in conflict with these provisions are prescribed by law.”*<sup>94</sup>

In summation, Turkey’s constitution appears to put the ideal of secularism above all else, including individual religious freedom. In terms of understanding the model, an apropos analogy is given by the following quote: “If one thinks of secularism as two adjacent but separate fenced-off areas, the Western notion of secularism as a general matter allows neither the state nor religion to violate the territory of the other. In contrast, in the Turkish version of secularism, the

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

state can access and regulate the fenced-off area of religion, whereas religion does not have the same reciprocal right. One example of such an action on the part of the state is the ban against the wearing of the Islamic headscarf in Turkish educational institutions. The purpose of this system is to ensure that religion does not completely dominate the state like it did less than ninety years ago.”<sup>95</sup>

### **III. Practical Effect – Current Events Perspective**

The analogy provided above is an accurate example of how the system works in actual practice. In the constitution, power is granted to a Religious Affairs Department in Article 136, and through this department the state exerts total control over Islam.<sup>96</sup> Still, the country unequivocally remains predominantly Muslim, and in this sense it is difficult for the secularist model to achieve its lofty aims. In a country that describes itself as “99-percent Muslim,” there is a lack of legal status for non-Sunni Muslim religions.<sup>97</sup> One such religion is the Alevi faith, an Anatolian religion similar to Sufi Islam but possessing of its own ideals and beliefs. Izzettin Dogan, the honorary president of the Federation of Alevi Foundations, provided an illustrative quote on the subject: “Turkey may look like a secular state on paper, but in terms of international law it is actually a Sunni Islamic state.”<sup>98</sup> Dogan continues by saying that the state collects taxes from the entirety of the population, but spends billions on the Sunni Islam faith without providing a penny for Jews, Christians, Alevis or other faiths.<sup>99</sup>

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<sup>95</sup> Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example, 42 Tex. Int’l L.J. 1 (2006-07)

<sup>96</sup> *Id.*

<sup>97</sup> “Turkey’s Elephant in the Room: Religious Freedom”, Susanne Gusten, The New York Times (September 28, 2011), *available at* <http://www.nytimes.com/2011/09/29/world/europe/turkeys-elephant-in-the-room-religious-freedom.html>

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

Whether or not Dogan’s accounting of the state’s expenditures is factual, there is still some confusion regarding just how secular Turkey may actually be. Mustafa Akyol, author of *Islam Without Extremes: A Muslim Case for Liberty*, stated, “the present constitution states that Turkey is laic, secular, but does not define the term.”<sup>100</sup> Akyol goes on to say that traditionally secularism has meant a complete absence of religion from the public sphere, but that perhaps Turkey has not achieved this level of separation.<sup>101</sup>

To conclude, despite the repetitious language regarding secularism in Turkey’s constitution, it appears that achieving secularism is easier said than done in a practical sense when the population remains so overwhelmingly possessed of a single religion. As with Orthodoxy in Greece, whether or not individual religious freedom is expressly granted, it is exceedingly difficult to sever religion from the state and consequently just as difficult to protect the guarantees of religious freedom.

### China: The Allowance of Religious Freedom and the Failure in its Protection

#### **I. Historical Synopsis**

China is a departure from the prior examples in the sense that, instead of contending with the issue of too much religion, there is instead an historical preference of no religion at all. Throughout much of China’s extensive history, Confucianism has been the most influential philosophical and religious movement in the country, with Daoism and Buddhism as the next most prevalent.<sup>102</sup> Confucianism has spawned a somewhat antireligious attitude, where the

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation, Eric Kolodner, 16 Hum. Rts. Q. 455 (1994)

majority of other religions are viewed as “superstitions.”<sup>103</sup> Such biases have their roots in Confucian philosophy, which placed an emphasis on “earthly existence, social structure, and filial obligations.”<sup>104</sup>

Until the end of the Qing Dynasty in 1912, Confucianists held political power over the practice of religious exercises through the Ministry of Rites.<sup>105</sup> Worship outside of officially recognized channels (essentially private worship) was punishable by “80 strokes of the stick,” private construction of temples was prohibited, and those who distributed literature deemed heretic were beheaded.<sup>106</sup> The Confucianist elite has historically held a bias toward religion, viewing it as a mere superstition of the less enlightened.<sup>107</sup>

In more recent times, religious exercise has been combatted by the advent of Marxism in China. Religion has stood as a natural antagonist to Marxism-Leninism in the past by abdicating an emphasis on materialism and instead focusing on the promotion of faith-based values.<sup>108</sup> The strength of the Marxist ideology is exacerbated in China by the presence of the historical emphasis placed on the collective over the individual.<sup>109</sup> The Confucianist and Marxist attitudes still hold sway in modern China, where religion is tolerated but by no means encouraged.

## **II. Textual Provisions**

Similar to the approach taken in Turkey’s constitution, China establishes a number of fundamental tenets in the Preamble that all following provisions are subject to. The Preamble first extols the efforts of Mao Zedong in overthrowing imperialism in 1949, and then proceeds to

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

define the country's communist ideology and goals.<sup>110</sup> The text outlining the goals that all subsequent provisions are subject to is as follows:

#### Preamble

*“Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important Theory of “Three Represents,” the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship, follow the socialist road, persist in reform and opening-up, steadily improve socialist institutions, develop a socialist market economy, advance socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defense and science and technology step by step, promote the coordinated development of the material, political and spiritual civilizations to turn China into a powerful and prosperous socialist country with a high level of culture and democracy.”<sup>111</sup>*

Through this text, it is clear that any subsequent grants of religious freedom will be subordinated by the requirement that socialism be the utmost priority. Put differently, as in China's history, the collective must come before the individual.

The grant of individualized religious freedom is found in Article 36:

#### Chapter II – The Fundamental Rights and Duties of Citizens, Article 36

*“Citizens of the People's Republic of China enjoy freedom of religious belief.*

*No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.*

*The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state.*

*Religious bodies and religious affairs are not subject to any foreign domination.”<sup>112</sup>*

It is important to note that, while there is an express grant of freedom of religion, the state will only protect “normal religious activities” and that religion may not disrupt public order or

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<sup>110</sup> 1982 Constitution of China (with Amendments through 2004), available at [https://www.constituteproject.org/constitution/China\\_2004.pdf](https://www.constituteproject.org/constitution/China_2004.pdf)

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

interfere with the state's educational system.<sup>113</sup> The text is vague as to what religious activities are precisely protected.

In addition to being subordinated by the Preamble, this grant of religious freedom is then further derogated by subsequent articles:

Article 51

*“The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.”*<sup>114</sup>

Articles 52-54

*“...it is the duty of citizens...to safeguard the unity of the country...observe public order and respect social ethics...and to refrain from acts detrimental to the security, honor and interests of the motherland.”*<sup>115</sup>

Once again, the free exercise of religion must not conflict with the concept of the collective. It is clear that though freedom of religious belief is guaranteed by the constitution, it is subject to a number of Marxist philosophies and whittled away by other articles to the point where the right actually appears quite narrow. This point is further evidenced in the below section.

### **III. Practical Effect – Current Events Perspective**

In actuality, the freedom of religion expounded in China's constitution appears to be rather hollow. Since the text is vague, and perhaps intentionally so, uncertainty persists as to what religious activities will be protected. More importantly, all the laws are subject to political ideology, and can be canceled or modified at the whim of the Chinese Communist Party

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

(“Party”).<sup>116</sup> The constitution is not judicially actionable, and in fact the absence of an independent judiciary ensures further Party control over the constitution’s interpretation.<sup>117</sup>

With regard to what constitutes “normal religious activities,” the Religious Affairs Bureau of China has issued a number of advisory opinions, none of which technically binding and none of which clarifying the issue.<sup>118</sup> Rather, these opinions are meant as an instructional guideline for regional governments; a means of informing the local decision-making authorities as to how best to adhere to the Party values while regulating religious practice.<sup>119</sup>

The 2012 United States Department of State’s International Religious Freedom Report for China better illustrates this point. The report begins by stating that the government applies the term “normal religious activities” in ways that do not meet international human rights standards for religious freedom.<sup>120</sup> The report further states that the government routinely enforces other laws that are restrictive on religious freedom.<sup>121</sup> In addition, despite the statement in the constitution that the people are free to believe in or not believe in whatever religion they choose, “only religious groups belonging to one of the five state-sanctioned ‘patriotic religious associations’ (Buddhist, Taoist, Muslim, Roman Catholic, and Protestant) are permitted to register with the government and legally hold worship services.”<sup>122</sup> Furthermore, when religious activities were perceived as a threat to Party interests, the government exercised heavy state

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<sup>116</sup> Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation, 16 Hum. Rts. Q. 455

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> International Religious Freedom Report, United States Department of State (2012), *available at* <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2012&dliid=208222>

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

control over religion and its practice.<sup>123</sup> The point that the Party uses local governments as a means of further regulating religious freedom is made evident by the following statement included in the report: “Local authorities often pressured unaffiliated religious believers to affiliate with patriotic associations and used a variety of means, including administrative detention, to punish members of unregistered religious or spiritual groups.”<sup>124</sup> Finally, since 1999 the country has been designated by the Secretary of State as a “Country of Particular Concern” under the International Religious Freedom Act for what were called “particularly severe violations” of the free exercise of religion.<sup>125</sup>

The above issues are evidenced by the Roman Catholic Church’s struggle for freedom in China currently. The Church, while attempting to gain a foothold in Chinese society, has routinely been subject to government regulation.<sup>126</sup> In fact, the government-controlled “puppet church” known as the Chinese Patriotic Catholic Association ordained a new bishop for Roman Catholics in the Xuzhou Diocese despite objections from the Holy See.<sup>127</sup> This took place over 400 miles south of Beijing, further illustrating the control the Party has over local governments. Richard Garnett, in his article “China’s Lesson on Freedom of Religion,” sums up the struggle for church and state in China effectively: “The struggle for the church's freedom in China reminds us that what the separation of church and state calls for is not a public conversation or social landscape from which God is absent or banished. The point of separation is not to prevent religious believers from addressing political questions or to block laws that reflect moral

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> “China’s Lesson on Freedom of Religion”, Richard W. Garnett, New York Times (March 25, 2007), available at [http://usatoday30.usatoday.com/news/opinion/2007-03-25-china-religion\\_N.htm](http://usatoday30.usatoday.com/news/opinion/2007-03-25-china-religion_N.htm)

<sup>127</sup> *Id.*

commitments. Instead, "separation" refers to an institutional arrangement, and a constitutional order, in which religious institutions are free and self-governing — neither above and controlling, or beneath and subordinate to, the state. This freedom limits the state and so safeguards the freedom of all — believers and non-believers alike.”<sup>128</sup>

In summation, China’s constitution makes no guarantee of the separation of church and state as some other models do. Rather, it repeatedly states that exercise of religion will always be subordinate to the interests of the Chinese Communist Party and Marxist ideology. The sleight of hand, so to speak, lies in the supposed guarantee of individual religious freedom. This right is seldom protected by the government, and is in fact often infringed upon by the state when it perceives a potential threat to its interests. Separation of church and state does not exist in China, and for practical purposes, it can be said that neither does true religious freedom.

#### Comparative Conclusion

As stated at the outset of this article, the above information is aimed at establishing and proving a central theory: that truly effective separation of church and state cannot exist without a simultaneous, meaningful grant of individual religious freedom. The interplay between religion and constitutional protections has been analyzed in several differing contexts: that of the Protestant Church in the United Kingdom, the Catholic Church in Spain, the Orthodox Church in Greece, the secular state in Turkey, and the Marxist-Confucianist state in China.

What this analysis has revealed is that, without an explicit grant of unlimited religious freedom that is actually protected, the government will always maintain a hand in regulating religion and vice versa. The constitutional models are better understood when placed in the context of the country’s historical antecedents. In the case of the United Kingdom, the historical

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<sup>128</sup> *Id.*

prevalence of the Anglican Communion necessarily resulted in a suppression of other religious beliefs. Specifically, Catholics were viewed as political threats and there was a fear that the Crown might fall in to the Roman Catholic Church's hands. British legislation would not put other religions on equal footing with the Anglican Communion, but rather only "tolerated" other faiths for a lengthy stretch of England's history. It was not until 1998 that religious freedom was granted as a positive right.

Part of the difficulty in keeping the Anglican Communion out of state affairs lies in the fact that British legislation is vague with regard to what personal religious freedoms are granted. Though Article 9 of the European Convention on Human Rights has been incorporated, and the *Human Rights Act of 1998* leaves England open to suggestion from the European Court of Human Rights, uncertainty persists as to what the promise of religious freedom entails. The rule of law from Article 9 need only be used a guideline in judicial decision-making, and rulings from the European Court of Human Rights need only be "taken into consideration." Thus, despite the fact that the United Kingdom has gone from outright disallowance of other faiths to granting religious freedom as a positive right, there is a significant degree of confusion about the meaning of that positive right. The lack of clearly defined individual religious rights and the continued prevalence of the Anglican faith in British society has resulted in an ineffective separation of church and state. It is worth noting, however, that there are relatively few human rights violations in the United Kingdom today, and the government is comparatively more conducive of individual religious practices when viewed in the context of other nations.

The evolution of constitutional theory in Spain has resulted in a generational gap of sorts, where the younger generation is clamoring for a more secularist model while the older generation adheres to Catholic values. Historically the cooperation between the state and the

Catholic Church was high, perhaps even the highest among countries with ties to the Vatican. Language of Spain's relationship with the Catholic Church, and the promotion of its practices, endured through several iterations of the country's constitution throughout history. Though the constitutional language still contains a reference to the Catholic Church, this appears to be more of a recognition of Spanish history than a binding textual ideal. Spain's constitution explicitly grants individual religious freedom, and unlike the United Kingdom the legislature made sure to further define this right in the Law of Religious Liberty. In contrast with the constitution, the Law of Religious Liberty in fact contains no mention of the Catholic Church, but rather enhances the constitutional grant of religious freedom. The younger generations of Spaniards have commenced a push to effectively eviscerate the Catholic Church's presence in state affairs, right down to removing crucifixes from public schools. In contrast older members of Spanish society steadfastly adhere to the Catholic faith, especially those who lived during Francisco Franco's time of rule.

Despite the generational conflict, the ultimate result is a functioning system of separation of church and state that remains a work in progress. It is unclear whether Spain will adopt an entirely secularist model in the future, which the current generation of Spaniards appear to be advocating, but the enhanced protection of religious minorities has kept Spain modern with regard to European culture and has resulted in few, if any, human rights violations. Though it took several constitutional attempts, the Spanish government has gradually distanced itself from the Catholic Church and adopted protections of individual religious freedom. The clear definition of these freedoms, and their actual protection by the government, has produced an effective separation of church and state. Free exercise of differing faiths is now a fundamental concept of Spanish society, and the Catholic Church's presence is all but eliminated from Spain's state

practices.

Greece is an example of a model where overwhelmingly skewed demographics have made the true grant of religious freedom almost impossible. The Orthodox Church provided a sense of solidarity and security in some of Greece's more trying times, and this sentiment persisted throughout the ages. With 98-percent of the population self-identifying as Greek Orthodox, it has been incredibly difficult for Greece to keep religion out of the public sphere, especially when Orthodoxy is declared the "prevailing religion" by the constitution itself. In line with the central hypothesis of this article, this can be ascribed to the limited religious freedom granted by the constitution. After individual religious freedom is granted textually in the constitution, subsequent articles then derogate the right so as to render it uncertain in its potency. There is persecution of religious minorities, specifically Muslims who are viewed with suspicion as potential terrorists, and the government appears to turn a blind eye toward these human rights violations. Muslims are underrepresented in state operations, and local authorities seemingly do not defend against their persecution. The government funds the teaching of Orthodoxy, and this practice is ensured by the Church's exclusive relationship with the Ministry of Education. The Orthodox Church receives tax exemptions, including being exempt from economic austerity measures. The relatively impotent textual grant of religious freedom in the constitution, and the failure in its protection, has resulted in human rights violations, combined with sanctions from fellow nations and condemnation from the European Court of Human Rights. This failure in protection of individual religious freedom has permitted the Greek Orthodox Church to maintain a heavy hand in government function unchecked, and such a system will only perpetuate the current persecution of minorities indefinitely. Thus, the textual grant of religious freedom, though not entirely meaningless, lacks effective protection and enforcement by the Greek

government, and the Orthodox Church maintains the firm presence it has long possessed in state affairs.

Turkey, like Greece, is possessed of a singularly overwhelming religious demographic. Mustafa Kemal Atatürk, a revolutionary hero and Turkish legend, identified the country's historical issues associated with Shari'a law and disagreed with the nation's stated purpose of *jihad*. Through the establishment of the Turkish Grand National Assembly and the abolishment of essentially Islamic government offices such as the Sultanate and the caliphate, Atatürk gradually distanced Turkey's government from Islam. Shari'a law was abolished, and secularism replaced *jihad* as the country's ultimate pursuit.

Despite the frequent mentions of secularism in the constitution, and the stated subscription to Atatürk's ideals, Turkey remains "99 percent" Muslim and may even be considered a Sunni-Islamic state. The secular model allows the state to regulate religion as it sees fit but disallows any role of religion in state decision-making. The difficulty with the grant of individual religious freedom lies in the fact that, despite being explicitly stated in the text, no free practice of religion may contradict the secular interests of the state. In addition to being limited, the grant of religious freedom is made uncertain by the fact that secularism has not been given a specific definition in Turkey, regardless of how many times it is mentioned in the constitution itself. Perhaps it is impossible to keep the government secular when the population is so skewed toward one faith as its employees are necessarily drawn from the population. Yet the government does not follow its expounded secularist system, with state expenditures most frequently benefiting Sunni-Islam. Religious minorities in Turkey are exceedingly small, but the issue lies not in their size but the low protection afforded to their freedom of religious practice. Turkey's inadvertent preferential treatment of its predominantly Sunni-Islam population defeats its secular

interests in a sense. With regard to individual religious freedom the secularist ideal trumps all religious liberty interests, resulting in an actually limited right to religious freedom. Additionally, the fact that religious minorities such as the Catholic, Jewish, and Alevi faiths receive little governmental protection perpetuates the church-state relation. It may be a result of sheer demographics, but despite its lofty secularist ideals Turkey is still viewed by many as an Islamic state. Explicit Islamic positions in the government have been abolished, but the reality is that other faiths are underrepresented in both government positions and protections, and the secularist ideal further quashes the free exercise of minority religions. While perfect secularism in theory should entirely sever religion from state, until minority beliefs are permitted to flourish the Islamic faith will necessarily play a role in government functions. The secularist ideal, rather than removing religion from society, has ensured that individual practice is suppressed which in turn maintains the prevalence of Islam. The result is a government that preaches secularism but remains linked with the Islamic faith, and an impotent grant of free exercise to minority religions.

Out of the foregoing examples, China is the one with the greatest government regulation in religious affairs. Historically religion had always received little protection, given the predominantly Confucianist attitude that viewed religion as a practice of the unenlightened. The Confucianist elite placed faith in the human mind above all else and was more concerned with the development of society as a collective than the assurance of individual religious tolerance. As Marxism-Leninism worked its way in to society these Confucianists ideals were only enhanced.

As with Greece's constitution, the textual grant of religious freedom in China is limited by subsequent articles and is subject to the principles detailed in its Preamble. The exercise of rights granted in the constitution must never conflict with Marxist ideals and the idea of the

collective. The welfare of the country should always trump that of the individual. The fact that the state will only protect only “normal religious activities” is significant: it essentially translates to a protection of only government-sponsored religious practices. Though the right of religious freedom is granted textually, after the derogation of its power by other constitutional provisions it actually ends up being quite narrow, if not completely ineffectual. The International Religious Freedom Report published by the U.S. Department of State illustrates the extent of governmental control of religious practices. The Chinese Communist Party uses local governments within the various districts to ensure that religious activities do not conflict with the Party’s interests. As seen with the example of the Party’s appointment of a Catholic bishop, the majority of religious venues are government-controlled. The exceedingly limited right of individual religious freedom has ensured further control by the Chinese Communist Party, frequent and egregious human rights violations, and a seemingly non-existent separation of church and state. The unfortunate reality is that the individual grant of religious freedom is anything but, and the suppression of this practice allows further government influence in religious affairs. The government merely uses religion as a means of promoting the Communist ideal, and the result is a non-existent separation of church and state that creates an environment conducive to frequent human rights violations.

The achievement of the lofty aim of true separation of church and state is inextricably dependent on the grant and protection of individual religious freedom. History and religious demographics have played a role in the formation of the differing constitutional models, but the essential link is that if individual religious freedom is not protected the government will always have a role within state procedures. The United States has defended the free exercise of religion zealously over time, both judicially and legislatively. Though the constitution does not explicitly

guarantee separation of church and state, this concept is ensured by the broad range and power of the First Amendment's grant of religious freedom and its protection by the judiciary. The countries that are more permissive of religious minority practices are the ones that manage to keep the religion out of the public sphere. As seen with the United Kingdom, these rights, once granted, must be clearly articulated and defined or the resultant confusion regarding religious freedom actually inhibits its exercise. The Spanish example evidenced a simultaneous journey toward both religious freedom and separation of church and state. As the country gradually distanced itself from the Catholic Church, Spain further defined and enhanced the grant of individual religious freedom. The clarity regarding the protections expounded in the textual provisions has fostered the free practice of religion, thus aiding in the gradual removal of the Catholic Church from state affairs.

Greece evidenced the point that an overwhelming religious majority creates difficulties in keeping the Orthodox Church out of government practice. This was not the sole reason for a failed separation of church and state, however. Greece's grant of individual religious freedom was derogated by further constitutional text, and the reality is that both local and nationwide authorities do little to protect religious minorities. This ensures the vitality of the Orthodox Church and maintains its position within the government. The suppression of all religions as opposed to just the minorities is not a viable solution either. As seen with Turkey, the secularist ideal is desirable in theory, but when the country is already overwhelmingly skewed toward one religion the result only perpetuates that religion. Minority beliefs, having their public practices disallowed, are unable to gain a foothold in society. The result, in Turkey, is a government still linked with Islam despite its secularist claims to the contrary. The most glaring example of a country failing to adhere to its constitutional text was China, which in fact operated in almost

total opposition to the promises in its constitution. The manipulation of local municipalities allows only the practice of essentially government-endorsed religions, which are few if any due to the prevalence and demands of Communism. The collective takes precedence over the individual, and thus free exercise of religion is almost non-existent. The result is unavoidable and unbridled government influence on religious practices, and a “church” that is almost entirely controlled by the state.

It is not enough to just guarantee the rights of individual religious freedom and separation of church and state textually; constitutional text is not a “magic wand” that creates the rights it outlines. Rather, the textual grants must be clearly and specifically defined, and it is incumbent upon the country that it make good on its word to defend the right of individual religious practice strongly and effectively. The nation’s government must ascribe to the ideals it claims to represent in its constitution. In the United States, though there is no explicit constitutional guarantee of the separation of church and state, the zealous defense of individual religious practices by the judiciary ensures that no single religious belief system will influence government affairs. Similarly, the Supreme Court of the United States views government regulation of religion as almost *per se* unconscionable, requiring that it meet strict scrutiny. Spain, as perhaps the only other country analyzed in this work that has an effective separation of church and state, promises such separation explicitly within the constitution. Though this differs from the United States model, the countries are alike in their clearly defined, strongly protected grants of individual religious practices.

In conclusion, the relationship between the two concepts is essentially reciprocal: a lack of individual religious freedom ensures state influence in religious affairs, and the prevalence of a single religion in government functions guarantees that such a government will suppress

individual religious practice. With regard to individual religious freedom and the separation of church and state, the two concepts are necessarily linked: effective and meaningful separation of church and state cannot exist without the meaningful grant and protection of religious freedom. The countries that endeavor to protect the free individual practice of religion are those that avoid being run by one single form of religious law, and consequently avoid religion-related human rights violations. The government, being free of religious influence and in turn declining to influence religion, will be able to protect the fundamental and paramount ideal of the free exercise of religion. As a result its people are free to choose, and to practice, whatever religion they like, and they may peaceably rest assured that the government will not abrogate this right.