Constitutional Court Judgment No. 38/2007, of February 15 (Unofficial translation)

CONCLUSIONS OF LAW

1.

In this constitutional review proceeding the First Panel of the Labor Division of the Superior Court of Justice of the Canary Islands questions the constitutionality of several norms. On the one hand, three precepts included in the Agreement between the Spanish State and the Holy See concerning Education and Cultural Matters of January 3, 1979, ratified by Instrument 4 of December, 1979 (Official State Gazette no. 300, of December 15), which states:

Article III

" At the educational levels referred to in the foregoing article, Catholic religious instruction shall be provided by persons who are appointed, for each school year, by the academic authorities from among those proposed by the bishop of the diocese for such instruction. At a sufficiently early date, the bishop of the diocese shall announce the names of the teachers and persons considered competent to provide such instruction.

At the public centers for pre-school education, EGB level education and professional training at the lower level, the persons appointed in accordance with the foregoing procedure shall, preferably, be applicants who are EGB teachers.

No one shall be under any obligation to provide religious instruction.

Teachers of religion shall, in all respects, form a part of the teaching staff of their schools".

Article VI

" The ecclesiastical hierarchy shall specify the content of Catholic religious courses of instruction and training and shall also propose the textbooks and teaching materials for that subject.

The ecclesiastical hierarchy and the institutions of the State, in their respective fields of competence, shall ensure that such instruction and training are provided in a suitable manner, teachers of religion being subject to the general disciplinary regulations of each school."

Article VII

" At the various educational levels, the remuneration rates for teachers of Catholic religion who are not State teachers shall be established by agreement between the Central Administration and the Spanish Conference of Bishops, so that they may be applied upon the entry into force of this Agreement".

On the other hand, the proceeding questions the Second Additional Provision of Organic Law 1/1990, of October 3, Regulating the General Educational System, as restated in Article 93 of Law 50/1998, of December 30, on Fiscal, Administrative and Labor Measures that sets forth the following:

"Religious education shall follow the provisions of the Agreement between the Spanish State and the Holy See concerning Education and Cultural Matters and, if applicable, any others that may be signed with other religious groups. To that end, and pursuant to the provisions of those agreements, religion shall be included as a subject or course matter in the corresponding educational levels, which schools shall be obliged to offer, but which shall be optional for students.

Professors who are not civil servants and who teach religion courses in the public schools that offer the courses of study regulated in this Law, shall be hired under full-time or part-time employment contracts for the duration of the school year. These teachers will receive the remuneration paid substitute teachers at their respective educational levels, and shall achieve equal pay with them within four budgetary periods commencing in 1999".

However, the State Attorney limits the object of this question to the second paragraph of the Second Additional Provision of Organic Law 1/1990, added by Article 93 of Law 50/1998, and to the first two paragraphs of Article III of the Agreement with the Holy See, since in his opinion,

and for reasons set forth in the Findings of Fact in this Judgment, not all of the precepts questioned by the court are relevant for the decision of the proceeding a quo. Obviously, this is an objection that must be addressed first, without having to cite the well-known abundant case law that insists on the necessity of limiting this specific constitutional proceeding to reviewing norms having the force of law on which the judicial decision required to resolve this specific and concrete controversy inevitably depends.

2.

With a view to defining the object of this of this constitutional proceeding it is necessary to confine ourselves to the exact terms of the question examined by the court a quo which is, as indicated in its order requesting a ruling, none other than a possible violation of fundamental rights in the process of selecting Catholic religion professors. This implies that paragraphs three and four of Article III of the Agreement with the Holy See are completely irrelevant, since they are not applicable to this case, given that the latter provides that no one is obliged to provide religious instruction, while the former indicates that teachers of religion shall form a part of the staff of their respective schools. Neither of these is related to the dispute that the Superior Court of Justice must resolve concerning the possible unconstitutionality of the system of public hiring of teachers of Catholic religion, which confers on an entity other than the state and subject to another authority the powers of decision with respect to access and permanence in public employment, based on criteria that may be incompatible with the fundamental rights guaranteed in the Constitution.

No less relevant is the first paragraph of Article VI of the Agreement with the Holy See, pursuant to which the ecclesiastical hierarchy is vested with the power to determine the content of its religious instruction and to propose the pertinent textbooks and teaching materials. And the same may be said of the second paragraph, since, although the provision that within the scope of its powers the ecclesiastical hierarchy shall ensure the orthodoxy of Catholic religious instruction may provide a basis for exercising powers such as those challenged in the proceeding a quo in which the ecclesiastical hierarchy refused to nominate a religious teacher who, in their opinion, no longer had the personal qualifications required to adequately provide Catholic religious instruction, it is true that it is this power to propose teachers pursuant to paragraph one and two of Article III that is the basis for the bishop's decision, and the doubt concerning constitutionality on which the proceeding a quo depends is that power to propose teachers and not other powers of control.

Likewise, and without having to examine whether Article VII of the Agreement with the Holy See is applicable in this case, it is obvious that the article should necessarily be excluded from this proceeding since, as indicated by the State Attorney, the Superior Court of Justice did not seek the opinion of the parties with respect to the pertinence of questioning that precept, as is required pursuant to Article 35.2 of our Organic Law. In effect, although the judge's request for a ruling identifies Article VII of the Agreement among those in issue, in the order issued on May 8, 2002 pursuant to Article 35.2 of the Organic Law of the Constitutional Court this specific precept was not included among those with respect to whose unconstitutionality the opinions of the parties to the lower court proceeding were sought. Thus, we must inevitably cite our case law (representative of all of them, Constitutional Court Decision 164/2006, of May 9) concerning the fact that the hearing provided for in Article 35.2 of the Organic Law of the Constitutional Court is mandatory, and underscore that it is required in order to delimit the object of this constitutional proceeding, which may only be defined based on the questions concerning constitutionality raised by the parties in the proceeding a quo, their being thus able to participate indirectly in the proceedings brought before this Court on whose decision the outcome of the proceeding that so directly concerns them depends.

Lastly, the State Attorney rightly alleges that nothing in the judge's request for a ruling suggests that there is any doubt as to the constitutionality of the first paragraph of the Second Additional

Provision of Organic Law 1/1990.

In summary, since they are the only ones relevant to a ruling in the labor proceedings, the precepts that are the true object of this request for a ruling concerning constitutionality are the first two paragraphs of Article III of the Agreement with the Holy See concerning Education and Cultural Matters signed on January 3, 1979, and the paragraph added by Article 93 of Law 50/1998, of December 30 to the Second Additional Provision of Organic Law 1/1990, of October 3, Regulating the General Educational System, repealed by Organic Law 2/2006, of May 3 on Education, but applicable to the proceeding addressed herein and, thus, following our established case law concerning the prosecution of constitutional proceedings after the norms in dispute have been repealed (representative of all of them, Constitutional Court Judgment 178/2004, of October 21), which is the true object of this proceeding. In effect, the resolution of the problem at issue in the pending proceeding requires the application of the specific articles that vest in the bishop of the diocese the power to propose the teachers to be hired and excludes, in an initial interpretation, the possibility that the public authorities may do anything other than accept this proposal without expressing an opinion. In the opinion of the court, this model for hiring teachers violates Articles 9.3, 14, 16.3, 23.2, 24.1 and 103.3 of the Constitution.

3.

Having thus defined the issues in dispute, it is necessary to remove any doubt as to whether the content of a treaty can be the object of constitutional review. The opinion that it can be, accepted without reservation by the Chief Public Prosecutor, is not indisputable in the opinion of the State Attorney, who maintains that, in the abstract, one may question whether treaties fall within the category of "norms having the force of law" used in Article 165 of the Spanish Constitution and Article 35.1 of the Organic Law of the Constitutional Court to define the possible object of such proceedings. However, immediately thereafter the State Attorney affirms that if Articles 27.2 c), 29.1 and 25.1 of the Organic Law of the Constitutional Court are considered as a whole, one could conclude that international treaties may be declared unconstitutional in either of the proceedings provided for in Article 29.1 of the Organic Law of the Constitutional Court (through an appeal or through a judge's request for constitutional review). Even so, he refers to Article 27.2 c) of the Organic Law of the Constitutional Court in terms that indicate that he suspects it is unconstitutional, and if he says he does not care to elaborate further, it is only for ratione officii.

We are not called upon here to judge the constitutionality of a precept of our Organic Law that no one has formally questioned; nor should we even abstractly render an opinion with respect to the procedural feasibility of such a question. It is only of interest to say that if the State Attorney's doubts with respect to the constitutional orthodoxy of Article 27.2 c) of the Organic Law of the Constitutional Court derive exclusively from the fact that, in his opinion, international treaties cannot formally be considered laws, those doubts must be extended to the content of Article 27.2 of the Organic Law of the Constitutional Court that also includes parliamentary bylaws among the norms submitted to our jurisdiction, that is, norms that are not formally laws but that for their close connection with the Constitution, as is likewise the case with treaties (Article 95.1 of the Spanish Constitution), qualify them as primary norms, that specific qualification being precisely what defines in this context the expression "norms having the rank of law" in accordance with our case law (representative of all of them, Constitutional Court Judgments 118/1988, of June 20 and 139/1988, of July 8). In other respects, the possible declaration that a treaty is unconstitutional obviously implies a material assessment of its content in the light of the Constitution's provisions, but not necessarily the immediate nullity of the treaty itself (Article 96.1 of the Spanish Constitution). Further comment in that regard cannot be offered at this time, nor is it pertinent to consider the solutions proposed by the State Attorney with respect to the effects and scope of a possible declaration of unconstitutionality of

the precepts of the Agreement with the Holy See questioned herein. Only if that declaration were effectively forthcoming would it be pertinent to set forth the consequences, if for some reason those consequences were, for some motive, not strictly limited to those which in principle can be derived from a literal reading of the provisions of our Organic Law.

4.

To more precisely define the constitutional conflict set forth herein, it is necessary to examine the background of the legal regime regulating teachers of Catholic religion from the moment the Constitution entered into force. That regime was based on the Agreement between the Spanish State and the Holy See concerning Education and Cultural Matters of January 3, 1979, ratified in an Instrument of December 4, 1979, whose Article III, questioned herein, provides that in preschool, basic elementary education (EGB) and secondary education (BUP) and in vocational training for students of those same ages "Catholic religious instruction shall be provided by persons who are appointed, for each school year, by the academic authorities from among those proposed by the bishop of the diocese for such instruction. At a sufficiently early date, the bishop of the diocese shall announce the names of the teachers and persons considered competent to provide such instruction". In contrast to the model in force under the Concordat of 1953, the new regime was expressly founded on respect for freedom of thought, providing that Catholic religious instruction "shall not be compulsory for pupils", who are nevertheless guaranteed "the right to receive it" (Article II) and, moreover, that no one shall be obliged to teach it (Article III).

The provisions of the Agreement were initially implemented by the Order of July 28, 1979 (Official State Gazette no. 184, of August 2), which in the area of preschool and elementary education provided that Catholic religious instruction should "preferably" be taught by teachers in the schools who voluntarily assume that task and who are considered competent by the ecclesiastical hierarchy (Article 3.1 and 2). In the event teachers from the school are not available, provision is made for the classes to be taught by "persons considered competent by the ecclesiastical hierarchy and who are, in any case, chosen by them" (Article 3.2). In this specific case, the subsequent Order of July 16, 1980 (Official State Gazette no. 173, of July 19), issued after the ratification of the Agreement with the Holy See, provided that "with regard to those teachers, the Ministry of Education shall not enter into any contractual relationship, without prejudice to the application of Article VII of the Agreement between the Spanish State and the Holy See" (Article 3.5). In any event, it was ensured that if "the ecclesiastical hierarchy deems the dismissal of any religion teacher warranted, the bishop of the diocese shall propose that measure to the Provincial Delegate to the Ministry of Education or, in non-public schools, the principal of the school or head of the entity" (Article 3.7 of Ministerial Orders of July 28, 1979 and July16, 1980).

The remuneration of those teachers who were not state employees and were nominated each school year by the ecclesiastical hierarchy and appointed by the academic authorities to teach Catholic religion in public primary and secondary schools was regulated in an agreement with the Spanish Conference of Bishops, published as an appendix to Order of the Ministry of the Presidency of September 9, 1993 (Official State Gazette no. 219, of September 13). By virtue of this agreement, the State assumed the financing of the teaching of Catholic religion, transferring "monthly to the Conference of Bishops the global sums corresponding to the total cost of the services rendered by those persons" (Clause Two), likewise providing that "given the specific nature of the services provided by the persons who teach religion, the Government shall take the necessary measures to ensure that they are covered under the special social security scheme for self-employed workers, in the event that they are not already enrolled in any other social security scheme" (Clause Four).

With respect to secondary education and vocational training, after the 1979 Agreement Catholic religious instruction was conditioned by the Law on Secondary Education of February 26, 1953,

which provided for religion teachers appointed by the Ministry of Education and Science at the proposal of the Church and paid by the public administration at the salary level of first-year state-employed secondary teachers. Those teachers should be priests or members of religious orders or, in the absence thereof, lay persons who had to pass a series of exams, and who could be dismissed by the bishop pursuant to the Concordat of 1953. Their employment relationship with the educational authorities was that of temporary civil servants in accordance with Article 5.2 of the Law on State Civil Servants of 1964. The Orders of July 28, 1979 and July 16, 1980 assumed this initial status for religion teachers in the secondary schools, granting them remuneration equal to that of temporary state-employed teachers paid by the State, but appointed and dismissed as proposed and demanded by the Church. The subsequent Order of October 11, 1982 (Official State Gazette no. 248, of October 16) provided that those teachers would be appointed "on an annual basis and renewed automatically, unless a proposal to the contrary is received from the bishop before the commencement of the school year, or unless the Administration on serious academic or disciplinary grounds considers it necessary to cancel the appointment, after hearing the opinion of the ecclesiastical authorities who made the proposal".

Finally, and after a change in case law in 1996, the Supreme Court ruled that secondary school religion teachers should be deemed to be providing their services under an employment contract. By contrast, the uncertain legal status of teachers of Catholic religion at the preschool and elementary school levels who were not civil servants and had been proposed by the Church and appointed by the Administration was resolved by Article 93 of Law 50/1998, of December 30 on Fiscal, Administration and Labor Relations Measures, which added a new paragraph to the Second Additional Provision of Organic Law 1/1990, of October 3, Regulating the General Educational System, by virtue of which those teachers perform their teaching duties "under full-time or part-time employment contracts for the duration of the school year" receiving "the remuneration paid substitute teachers at their respective educational levels, and shall achieve equal pay with them within four budgetary periods commencing in 1999". Thus, commencing in 1998, either by legislative provision or by virtue of standing case law, all teachers of Catholic religion in public schools who are not civil servants at all levels of education are hired under temporary employment contracts by the Administration at the proposal of the Church.

Subsequently, but as already mentioned without any relevance in the present proceedings, Organic Law 2/2006, of May 3 on Education regulates the regime of teachers of religion in the terms set forth in its Third Additional Provision: "1. Teachers who provide religious instruction shall comply with the academic degree requisites of the different levels of education regulated in this Law, as well as those subscribed between the Spanish State and different religious groups; 2. teachers who provide religious instruction in public schools and who are not members of the civil service teaching staff will do so under employment contracts with the competent Administrations, in accordance with the Workers Statute. The regulation of their labor regime shall be undertaken with the participation of teachers' representatives. Teachers shall have access to a given post under objective criteria of equality, merit and capacity. These teachers shall receive the remuneration of temporary teachers in their respective levels of education; 3. In any event, the religious groups shall propose teachers for those posts, who will be renewed automatically each year. The competent administrations shall determine whether contracts shall be full time or part time, according to the necessities of the schools. Any dismissals, if warranted, shall be in accordance with the law".

5.

Although the question of constitutionality to which we must respond in these proceedings concerns the possible violation of several constitutional precepts, the rights and principles recognized in Article 16 of the Constitution are those that determine the degree and scope of any possible contravention of the other precepts invoked by the Labor Division of the Superior Court of Justice of the Canary Islands in its request for a ruling concerning constitutionality. In

effect, the question raised by that Court is none other than the constitutionality of the current system for hiring religion teachers, whose compatibility with a state having no official religion is problematic, in its opinion, even within the framework of the State's duty to cooperate with the Catholic Church and other religious groups (Article 16.3 of the Spanish Constitution). This duty to cooperate requires the public authorities to take a proactive position with respect to the collective exercise of religious freedom (Constitutional Court Judgment 46/2001, of February 15, Conclusion of Law No. 4), which in its individual dimension is manifested in the right to receive religious and moral education in accordance with one's own convictions. Inevitably, the definition of the content and scope of the rights and principles set forth in Article 16 of the Spanish Constitution in its internal and external, as well as its individual and collective dimensions, requires that it be pondered with the content and scope of other constitutional rights and principles; and these other rights and principles that contribute to that definition, are therefore affected in their very function as limits of the right that has been defined precisely on their basis.

Focusing now on the perspective of the rights and principles of Article 16 of the Spanish Constitution, it should be underscored that neither the court nor the parties to the proceedings question the presence of religious instruction in the educational system. Such instruction, which obviously can only be voluntary (Constitutional Court Judgment 5/1981, of February 13, Conclusion of Law No. 9), enables parents to exercise their right to have their children receive religious and moral instruction in accordance with their own convictions (Article 27.3 of the Spanish Constitution), as well as enabling churches and religious groups to exercise their right to disseminate and publicly express their religious creeds, which is the core content of religious freedom in its community or collective dimension (Article 16.1 of the Spanish Constitution). With respect to the duty of cooperation set forth in Article 16.3 of the Spanish Constitution, the inclusion of religion in school curricula is a possible means for expressing religious freedom, together with exercising the right to an education in accordance with one's own religious and moral convictions. At this point it should be noted that the content of the right to religious freedom is not exhausted by merely protecting the individual or collective sphere of freedom from outside interference, thus enabling citizens to act in accordance with the creeds they profess (Constitutional Court Judgments 19/1985, of February 13; 120/1990, of June 27 and 63/1994, of February 28, among others), since it has an external dimension reflected in the possibility of exercising, free of any coercion from the public authorities, any activities that are manifestations or expressions of the religious phenomenon, assumed in this case by collectives or communities, such as those set forth in Article 2 of the Organic Law on Religious Freedom, with respect to which the public authorities must take a proactive position, to assist or promote their exercise, pursuant to the provisions of section 3 of Article 2 of that law, according to which "for any real and effective application of these rights [which are set forth in the two preceding sections of that legal precept], the public authorities shall adopt the measures necessary to facilitate… religious instruction in the public schools".

Thus, the question is not whether the teaching of Catholic religion in public schools is constitutional, Nor is it whether the authority to define the religious creed taught in schools resides in the churches and religious groups or the public education authorities, since it is evident that the principle of neutrality set forth in Article 16.3 of the Spanish Constitution, as indicated in Constitutional Court Judgments 24/1982, of May 13 and 340/1993, of November 16, "precludes any confusion between religious and state functions" in the implementation of the relationships of cooperation between the State and the Catholic Church and other religious groups, but rather precisely serves as a guarantee of their separation, "thus actively promoting the idea of a secular state with no official religion" (Constitutional Court Judgment 46/2001, of February 15, Conclusion of Law No. 4). The religious creed taught must thus be defined by each church, community or religious group, the State having no other function than to fulfill the

obligations it assumes within the framework of the relations of cooperation referred to in Article 16.3 of the Spanish Constitution.

As a consequence of the foregoing, religious groups shall have the authority to determine the qualifications of those persons who will teach their respective creeds. The Constitution does not limit this determination strictly to a consideration of the teaching personnel's knowledge of dogma or pedagogical aptitudes, but rather it may likewise possibly extend it to their conduct, to the extent that for the religious community one's personal testimony constitutes a definitive component of his creed, being a determining factor of the aptitude or qualification for teaching, ultimately understood above all as a means and instrument for transmitting certain values. And in this transmission of values, personal examples and testimonies are an instrument that churches may legitimately deem unwaivable.

6.

Having underscored the foregoing, it is now time to analyze the doubts with respect to constitutionality which the court applying for a ruling poses with regard to the specific system set forth in the Agreement concerning Education and Cultural Matters subscribed between the Spanish State and the Holy See on January 3, 1979 and the second paragraph of the Second Additional Provision of Organic Law 1/1990. In the opinion of the court, the doubts reside in two specific normative options chosen in the configuration of that system: the resort to employment contracts and the fact that these contracts are entered into with the educational authorities, thus constituting public employment which, in the court's opinion, would make the Bishop's decisions with respect to the hiring and renewal of teachers immune to state law, and would make access to and continuation in public employment conditional upon criteria of a religious or confessional nature, in violation of Articles 9.3, 14, 16.3, 23.2, 24.1 and 103.3 of the Constitution.

7.

With regard to the question as to whether hiring decisions taken under this system can be subject to judicial review, given that they are decisions that pursuant to the 1979 Agreement are not made directly by a state entity, but rather by an outside authority, specifically the ecclesiastical authorities, which would make them immune vis-à-vis the courts, thus violating the right to due process recognized in Article 24.1 of the Spanish Constitution, we can only categorically reject this notion.

As the Chief Public Prosecutor indicates in his allegations, in Constitutional Court Judgment 1/1981, of January 26 this Court upheld the full jurisdiction of the civil judges and courts, as a requirement derived from the right to the protection of the courts (Article 24.1 of the Spanish Constitution), a right that "is qualified by its degree of effectiveness" (Constitutional Court Judgment 1/1981, of January 26, Conclusion of Law No. 11). The Court subsequently addressed this question in Constitutional Court Judgment 6/1997, of January 13, reiterating therein that the civil effects of ecclesiastical decisions, regulated by civil law, are the exclusive jurisdiction of the civil judges and courts, as a consequence of the principles of a non-denominational state with no official religion (Article 16.3 of the Spanish Constitution) and exclusive jurisdiction (Article 117.3 of the Spanish Constitution: Constitutional Court Judgment 6/1997, of January 13, Conclusion of Law No. 6).

Thus the civil effects of an ecclesiastical decision cannot be deemed to be immune from the jurisdiction of the courts of the State. That being the case, it must be determined whether the questioned regulation would necessarily lead to that conclusion.

With regard to the second paragraph of the Second Additional Provision of Organic Law 1/1990, it is true that nothing therein implies any exclusion of jurisdiction. In the part concerned herein, the provision is limited to determining that the legal relations binding religion teachers and the education authorities shall be employment contracts, which far from any exclusion implies that the labor courts will have full jurisdiction, pursuant to Articles 1 and 2 of the Law of Labor

Procedure governing litigious matters arising "between employers and employees with respect to employment contracts", thus removing any doubt with respect to any other hypothetical classification of the legal nature of the services rendered by those teachers. Religion teachers are, by virtue of the questioned legal precepts, employees of the public education authorities and, as such, they receive the protection of the Constitution and Spanish labor laws, and have the same rights to seek relief from the Spanish courts.

With respect to the Agreement of 1979, neither is there anything contained therein to exclude the jurisdiction of the State courts, Article III simply stating, once again for the interest that it may have here, that religious instruction shall be provided each school year by persons appointed by the academic authorities "among those proposed by the bishop of the diocese for such instruction". However, based on this wording the court has raised a doubt as to its constitutionality, considering that the bishop of the diocese's exclusive and binding authority to propose religion teachers, and thus make hiring decisions based on religious or denominational criteria of suitability is defined by a legal system other than the State's (canon law), which would be unchallengeable before the state courts.

However, the fact that religion teachers must be appointed from among persons previously proposed by the bishop of the diocese, and that this proposal requires their being declared suitable based on moral or religious considerations, does not mean that these appointments cannot be the object of review on the part of state courts, with a view to determining whether they are in accordance with the law, as is the case with all discretional acts of any authorities when they have effects vis-à-vis third parties, as this Court affirmed with respect to other cases, either in relation to the so-called "technical discretion" (Constitutional Court Judgment 86/2004, of May 10, Conclusion of Law No. 3), or in the case of appointments made under the system of "discretional appointments" (Constitutional Court Judgment 235/2000, of October 5, Conclusions of Law Nos. 12 and 13).

The right of religious freedom and the principle of the religious neutrality of the State imply that the religious instruction assumed by the State within the framework of its duties to cooperate with religious denominations may be taught by persons who those denominations consider qualified to do so and with the religious content that they determine. Nevertheless, even though the criteria of the denominations must be respected when they choose the content of religious instruction and the qualifications required for hiring persons to teach their doctrines, that freedom is in no way absolute, as neither are the rights recognized in Article 16 of the Spanish Constitution nor in any other precept of the Constitution, since in any case there are inexcusable obligations to protect the constitutional system of values and principles set forth in the constitutional public policy clause.

In consequence, the questioned legal norms do not exclude the jurisdiction of the courts of the State, nor would such exclusion be possible. To the contrary, it is precisely the courts that must weigh the different fundamental rights in play. As the State Attorney noted in his allegations, when exercising its powers of review the courts, and when applicable this Constitutional Court, will have to find practicable criteria that in the specific case balance the demands of religious freedom (individual and collective) and the principle of the religious neutrality of the State with the judicial protection of the fundamental and labor rights of the teachers.

Thus, and without any attempt to be exhaustive, it is first clear that the courts will have to review whether the administrative decision has been adopted in accordance with the applicable legal provisions just mentioned, that is, essentially, whether the appointment was made from among persons proposed by the bishop of the diocese to provide religious instruction and, from among those persons proposed, if the appointments were made in conditions of equality and with respect for the principles of merit and capacity. Or in the negative, and to more closely address the circumstances of the case heard in the lower court proceeding, the reasons for not appointing a given person must be considered and, specifically, whether it is a result of the

person not being included among those nominated by the ecclesiastical authorities, or attributable to motives that can likewise be subject to review. In addition to this review of the actions of the educational authorities, the competent courts must likewise determine whether the person's not being included among those proposed by the bishop of the diocese is the result of applying criteria of a religious or moral nature to determine the person's suitability to provide religious instruction, criteria that the religious authorities are empowered to define by virtue of the right of religious freedom and principle of the religious neutrality of the State, or whether, to the contrary, it is based on motives other than the fundamental right of religious freedom and not protected thereby. Finally, once the strictly "religious" motives for the decision have been determined, the court will have to weigh the possible fundamental rights in conflict to determine what restrictions can the right of religious freedom exercised through the teaching of religion in the schools place on the fundamental rights of workers in their employment relations.

For the effects of the abstract review of constitutionality which we are called upon to provide, it suffices to conclude from the foregoing that neither Article III of the Agreement concerning Education and Cultural Matters entered into on January 3, 1979 between the Spanish State and the Holy See, nor paragraph two of the Second Additional Provision of Organic Law 1/1990 of October 3 exclude the judicial review of hiring decisions affecting religion teachers nor, thus, do they violate the right to the protection of the courts guaranteed in Article 24.1 of the Spanish Constitution.

8.

Having declared the compatibility of the system set forth in the questioned legal norms with Article 24.1 of the Spanish Constitution, since the decisions that may be adopted in the execution of those norms do not enjoy the alleged immunity from the law, our analysis must now focus on the content of the second paragraph of the Second Additional Provision of Organic Law 1/1990, which is deemed to violate several constitutional precepts as a consequence of the fact that public-sector employment contracts are made to depend on religious or denominational criteria.

In reality, any eventual conflict between the system under consideration and the Constitution would arise solely with respect to a violation of Article 14 as it relates to Articles 9.3 and 103.3 since, as this Court has declared on several occasions, these are employment contracts to which Article 23.2 of the Constitution is not applicable (representative of all of them, Constitutional Court Judgments 86/2004, of May 10, Conclusion of Law No. 4; and 132/2005, of May 23, Conclusion of Law No. 2), religion being one of the rights expressly protected from discrimination in Article 14 of the Constitution. For that reason, an analysis of the question posed must be made in accordance with the criteria derived from the right of equality guaranteed in Article 14, bearing in mind in that regard that it is only violated "by discrimination that introduces a difference in situations that may be deemed the same and that lacks any objective and reasonable justification, that is, the principle of equality requires that the same legal consequences be applied to the same factual circumstances, two factual circumstances being deemed equal when the use or introduction of differentiating elements is arbitrary or lacking in any rational motive (representative of all of them, Constitutional Court Judgments 134/1996, of July 22, Conclusion of Law No. 5; 117/1998, of June 2, Conclusion of Law No. 8; 46/1999, of March 22, Conclusion of Law No. 2; 200/1999, of November 8, Conclusion of Law No. 3; and 200/2001, of October 4, Conclusion of Law No. 4)" (Constitutional Court Judgment 34/2004, of March 8, Conclusion of Law No. 3)

Thus, the task is to determine whether religion teachers' employment contracts with the educational authorities, conditioned by the fact that teachers must previously be declared suitable by the ecclesiastical authorities, violate the right to equal access to public employment based on merit and capacity, by discriminating against possible candidates based on religious criteria.

However, the question that we must answer is not in reality whether the public administrations can or cannot hire workers, but more specifically, to determine whether the persons nominated by the ecclesiastical authorities to provide religious instruction in the schools can be bound by employment contracts with the educational authorities of the schools in which they are to teach or whether, to the contrary, this would contravene the constitutional precepts cited in the judge's request for a ruling of constitutionality. And, from this perspective, whatever the legislative policy supporting this hiring option may be, about which this Court need not express an opinion, there is no evidence that it violates Articles 9.3, 14, 16.3 or 103.3 of the Constitution.

9.

In effect, we do not find that the legislative option to have teachers who provide Catholic religious instruction in schools sign an employment contract with the public educational authorities affects the right of equality and the non-discrimination provisions of Article 14 of the Spanish Constitution. As this Court underscored in regard to the application to civil servants of the right recognized in Article 23.2, in terms that are equally applicable to Article 14 in the case of employment contracts, this right guarantees citizens equal access to civil service jobs, precluding any employment requisites that may be discriminatory in nature (Constitutional Court Judgments 193/1987, of December 9, Conclusion of Law No. 5; 47/1990, of March 20, Conclusion of Law No. 6; 166/2001, of July 16, Conclusion of Law No. 2) or individualized or specific references (Constitutional Court Judgments 50/1986, of April 23, Conclusion of Law No. 4; 67/1989, of April 18, Conclusion of Law No. 2; 27/1991, of February 14, Conclusion of Law No. 4; 353/1993, of November 29, Conclusion of Law No. 6; 73/1998, of March 31, Conclusion of Law No. 3; 138/2000, of May 29, Conclusion of Law No. 5). As we underscored in Constitutional Court Judgment 96/2002, of April 25, Conclusion of Law No. 7, the assessment of the principle of equality before the law in each case "must take into account the substantive legal regime of the scope of relations in which it is applied". With regard to the right to equal access to public employment, it should be underscored that Article 103.3 of the Constitution provides that such access should be based on principles of merit and capacity, and that any conditions or requisites of employment must be defined based on those principles, and any that are not and that differentiate among Spaniards can likewise be deemed to contravene the principle of equality (Constitutional Court Judgments 50/1986, of April 23, Conclusion of Law No. 4; 73/1998, of March 31, Conclusion of Law No. 3; 138/2000, of May 29, Conclusion of Law No. 5).

As evidenced in our established case law, the right of equal access to public employment does not deprive the legislature of its broad margin of discretion to regulate the selection process and determine the merits and capacities to be taken into account, but rather it establishes positive limits on that discretion that are unquestionable. From a positive perspective, the legislature is obliged to establish access requirements which, defined in terms of equality, solely and exclusively take into account merit and capacity (Constitutional Court Judgments 27/1991, of February 14, Conclusion of Law No. 4; 293/1993, of October 18, Conclusion of Law No. 4; and 185/1994, of June 20, Conclusion of Law No. 3, among others). As a consequence, from a negative perspective the regulation of the conditions of access cannot be made in specific or individualized terms that would be tantamount to selecting specific persons (Constitutional Court Judgments 269/1994, of October 3, Conclusion of Law No. 5; 11/1996, of January 29, Conclusion of Law No. 4; and 37/2004, of March 11, Conclusion of Law No. 4), carefully precluding any hint of arbitrariness that may exist when the motive or sense of the regulation is lacking" (Constitutional Court Judgment 11/1996, of January 29, Conclusion of Law No. 4).

In short, we have affirmed that the principle of equality is violated if the difference in treatment lacks an objective and rational objective with respect to conditions of merit and capacity, or in other words, when the differentiating element is arbitrary or lacking in rational grounds

(Constitutional Court Judgments 185/1994, of June 20, Conclusion of Law No. 3; 48/1998, of March 2, Conclusion of Law No. 7; and 202/2003, of November 17, Conclusion of Law No. 12). Thus, in the case already analyzed, the requisite for hiring those teachers, i.e., that they be deemed suitable by the ecclesiastical authorities, cannot be considered arbitrary or unreasonable, nor in violation of the principles of merit and capacity, and it certainly does not imply discrimination on religious grounds, given that these employment contracts are intended solely for the purpose of providing Catholic religious instruction during the school year.

The authority granted the ecclesiastical authorities to determine the persons qualified to teach their religious creed constitutes a guarantee of the freedom of churches to teach their doctrines without interference from the public authorities. That being the case, and having provided for cooperation in that regard (Article 16.3 of the Constitution) by means of the public authorities' hiring the corresponding teachers, we must conclude that the declaration of suitability is only one of the requisites of capacity necessary to be hired for that purpose, this requirement likewise being in conformance with the right to equal treatment and freedom from discrimination (Article 14 of the Constitution) and the principles governing access to public employment (Article 103.3 of the Constitution).

In effect, based on the guarantee of religious freedom for individuals and communities proclaimed in Article 16.1 of the Spanish Constitution, it is not imaginable that the public educational authorities could entrust the teaching of religion in schools to persons not deemed suitable by the respective religious authorities. Only the churches and not the State can determine the content of religious instruction and the requisites of the persons deemed capable of teaching religion, while observing, as we have noted, the fundamental rights and public freedoms and the system of constitutional values and principles. In consequence, if the State in fulfilling its obligation of cooperation set forth in Article 16.3 of the Constitution agrees with the corresponding religious communities to provide religious instruction in the schools, it must do so according to the content that the religious authorities determine and with the persons qualified to do so, within the necessary respect for the Constitution that we have underscored.

Moreover, it must be borne in mind that Article III of the Agreement of 1979 does not empower ecclesiastic authorities to "appoint" the persons who will provide religious instruction, being limited to specifying that they will be appointed by the academic authorities "from among those proposed by the bishop of the diocese". This means that, together with the qualification requirement, i.e., the ecclesiastical authorities' declaration of suitability and subsequent inclusion in their proposal, the citizens' rights to equal access to public employment based on merit and capacity continues in full effect.

In summary, the specific function of the employees hired for this purpose is a distinguishing factor that determines the different treatment challenged herein (i.e., the requirement that they be declared suitable) and may be justified as objective and reasonable, and deemed proportional and adequate for achieving the legislature's goals, which are likewise constitutionally relevant, without being described as discriminatory.

10.

With regard to the foregoing, we should reject that an objection to the questioned legal provision may be raised with respect to the alleged impossibility of the public administrations to act as an ideological company, which would be derived from the fact that the purposes that these companies serve, and doing so with objectivity, are only general (Article 103.1 of the Constitution), an argument alluded to in the judge's request for a ruling of constitutionality and some of the allegations presented.

It is first necessary to underscore that the relationships existing between the religion teachers and the Church are not strictly those of an ideological company, as has been examined on several occasions by this Court, but rather they fall within a specific and unique category that shares certain similarities, but also differences in that regard. Case law concerning ideological

companies is applicable in the scope of private employment relationships and, with respect to teaching, allows teachers' rights to be modified in consonance with the educational ideology of private schools (Constitutional Court Judgment 47/1985, of March 27), in which the freedom to establish such institutions implies the ability to provide them with there particular character or orientation (Constitutional Court Judgment 5/1981, of February 13, Conclusion of Law No. 8) as instruments at the service of the individual and collective freedoms guaranteed by Articles 16 and 27 of the Constitution. However, the condition of requiring an ecclesiastical declaration of suitability does not consist in the mere obligation to refrain from acting counter to the religious ideology, but rather implies determining the capacity for teaching Catholic doctrine, understood as a series of religious convictions founded on faith. Since the object of religious instruction is the transmission not only of certain facts, but of the religious faith of the person who teaches it, this may with all probability imply a series of requirements that exceed the limitations of an ideological company, commencing with the implicit requirement that the person who seeks to transmit a religious faith must likewise profess that faith.

In the abstract review of constitutionality that this Court must undertake within the framework of the present question, this is not the moment to analyze here what limits should be placed on the specific measures taken to implement those requirements in order to guarantee the fundamental rights of religion teachers, but rather to underscore that in this analysis not only should the established case law of this Court with respect to ideological companies be taken into account, but also the considerations derived from their affects on the right of religious freedom (Article 16.1 of the Constitution) and the double requisites of that right in its objective dimension (Constitutional Court Judgment 101/2004, of June 23, Conclusion of Law No. 3): the neutrality of the public authorities inherent in a State with no official religion, and the relationship of cooperation that the public authorities maintain with the different churches (Article 16.3 of the Constitution).

But in any case, what is certain is that the employment contract system set forth in the questioned legal provision does not make the public administrations an ideological company, which would, in effect, be incompatible with Article 103.1 of the Constitution. By employing religion teachers the public administrations to not promote any tendency or ideology, but rather comply with their obligations to cooperate with the churches in matters of religious education in the terms set forth in the agreements that regulate this cooperation, hiring for that purpose the persons previously declared suitable by the respective religious authorities, who are the only ones, from the perspective of a State with no official religion, who can evaluate suitability requirements that are strictly religious in nature.

11.

For that reason, neither is the approval of the ecclesiastical authorities as a requisite for access to employment as a religion teacher in public schools a violation of Article 9.3 of the Constitution. As this Court has underscored, a norm that pursues a reasonable objective and that is well-founded cannot be deemed arbitrary, although the specific measure adopted to implement it may be legitimately questioned, since judging what would be the proper measure would question an option chosen by the legislature which, although questionable, does not necessarily have to be arbitrary or irrational (representative of all of them, Constitutional Court Judgment 149/2006, of May 11, Conclusion of Law No. 6, and those cited therein). Thus, when judging a legal precept that has been deemed arbitrary, our assessment must focus on determining whether that precept actually is applied in an arbitrary manner, or if not, whether it is lacking in any rational explanation, without having to analyze all possible motives for the norm and all of its possible consequences (Constitutional Court Judgments 96/2002, of April 25, Conclusion of Law No. 6; 242/2004, of December 16, Conclusion of Law No. 7; and 47/2005, of March 3, Conclusion of Law No. 7). In accordance with the foregoing, the requirement of the ecclesiastical authorities' declaration of suitability to teach religion in schools cannot be deemed

irrational or arbitrary, since it is based on an objective and reasonable justification coherent with the principles of a State with no official religion and the religious neutrality of the State.

12.

In summary, this requirement cannot be understood as violating the individual right of religious freedom (Article 16.1 of the Constitution) of religion teachers, nor the prohibition that no one may be compelled to make statements regarding his religion (Article 16.2), principles that are only affected to the extent strictly necessary to make them compatible with the rights of churches to have their doctrines taught within the framework of the public education system (Articles 16.1 and 16.3 of the Constitution) and with the rights of parents with respect to the religious education of their children (Article 27.3). It would be simply unreasonable for religious instruction in the schools to be taught without taking into account as a criterion in selecting religion teachers the religious convictions of those persons who freely decide to apply for those jobs, this precisely representing a guarantee of religious freedom in its external and collective dimension.

13.

It is pertinent to point out that what is really relevant with regard to the question under examination is the agreement by virtue of which the State assumes the teaching of religion in the schools and its financing, and not the manner in which, based on different considerations, compliance with the agreement is technically implemented.

It is true that the Agreement concerning Education and Cultural Matters of January 3, 1979 does not necessarily require the instruction to be provided by teachers employed by the public administrations. Evidence thereof is the fact that until 1998 teachers of Catholic religion were not employed by the Administration, but rather by the Catholic Church. The obligations undertaken in the Agreement, within the framework of the duty to cooperate with religious groups pursuant to Article 16.3 of the Constitution, can be deemed to have been satisfied by including the teaching of religious creeds in the public education curricula on a voluntary basis for students, and by including in the schools' faculties those persons designated by the respective religious groups based on criteria that is not subject to interference from the public authorities, but which are bound by the unrelinquishable obligation to protect the constitutional system of values and principles outlined in the constitutional public policy clause, and arranging with the Conference of Bishops the conditions with respect to remuneration of the teachers.

Thus, it is clear that the fulfillment of the obligations to include religion teachers in the schools' faculties and to finance their salaries could be achieved through means other than the Administration's hiring them under employment contracts, such as those used in the past during the first years in which the Agreement concerning Education and Cultural Matters was in force, as well as others. However, it cannot be denied that the use of employment contracts is equally a constitutionally-valid method to fulfill the obligations undertaken based on the constitutional precept, it being likewise clear that, in principle, this is an option that seeks to ensure the greatest degree of legal and economic equality between religion teachers and the teachers of other subjects, without prejudice to their specific differences. In this way, the State also fulfills its duty of cooperation and the Catholic Church is equally ensured that its doctrine will be taught within the framework of the public education system, thus guaranteeing parents the right to the religious education of their children. In that regard, the religion teachers will enjoy the inalienable fundamental and legal rights recognized workers in our legal system, from criteria of equality, with the modifications resulting from the peculiarities of religious instructions, whose scope and extent we are not presently called upon to comment, except to underscore once again that they cannot constitute an infringement of constitutional rights, principles and values.

In any case, the choice of either solution to implement the cooperation agreement does not in any way affect the underlying reality of the question, nor its constitutional consequences. And this is none other than determining the teaching of religious instruction in schools with the

requirements of personal suitability to be decided by the religious authorities. Whether that be achieved through employment contracts, and those contracts are signed with the ecclesiastical authorities or directly with the financing public administrations are legislative policy decisions relevant for different reasons, among which and most significantly are the recognition and greater protection afforded the economic and labor rights of the teachers, but which in principle are irrelevant in terms of the constitutionality of the system.

To the above a final consideration should be offered. If offering a given type of religious instruction in schools were eventually deemed unconstitutional, either based on the content of that instruction or the requisites required of the persons in charge of providing that instruction, what would have to be questioned would be the agreement pursuant to which that religious instruction is taught, not the means chosen to implement it. In that regard, and without questioning in any way the constitutionality of the Agreement by virtue of which Catholic religious instruction is offered in schools, what it seems cannot be questioned is that this instruction may be provided by teachers declared suitable by the bishop of the diocese or that those teachers may be hired under employment contracts by the corresponding educational authorities.

14.

In view of all of the foregoing, we must reject the alleged grounds for declaring unconstitutional the first and second paragraphs of Article III of the Agreement concerning Education and Cultural Matters signed on January 3, 1979 between the Spanish State and the Holy See, and ratified by an Instrument of December 4, 1979, those being the only parts of the Agreement deemed admissible and relevant included in the lower court's order requesting a ruling on their constitutionality, as well as the second paragraph of the Second Additional Provision of Organic Law 1/1990, of October 3, Regulating the General Educational System as restated in Law 50/1998, of December 30 on Fiscal, Administrative and Labor Measures, concluding that the legal precepts questioned do not violate Articles 9.3, 14, 16.3, 23.2, 24.1 and 103.3 of the Constitution. With reference to the analysis of the conflict between the questioned legal norms and the allegedly-violated constitutional provisions, it is appropriate to underscore that all of this should logically be understood as corresponding to the objective of rendering the abstract review of constitutionality warranted in the resolution of the present constitutional proceeding (representative of all of them, Constitutional Court Judgments 238/1992, of December 17, Conclusion of Law No. 1; and 161/1997, of October 2, Conclusion of Law No. 2), without taking into consideration, except to determine the feasibility of the question, the specific circumstances of the case from which this proceeding derives, about which we can say nothing. As has been previously underscored, concrete review of the measures taken in applying these legal provisions and a determination of whether they respect fundamental right is the task of the courts and, if warranted, this Constitutional Court in the context of an individual appeal for protection.

JUDGMENT

In view of the foregoing, the Constitutional Court, BY THE AUTHORITY CONFERRED UPON IT BY THE CONSTITUTION OF THE SPANISH NATION,

Has ruled

1

That the question as to the constitutionality of paragraphs three and four of Article III, Article VI and Article VII of the Agreement concerning Education and Cultural Matters signed on January 3, 1979 between the Spanish State and the Holy See, and ratified by an Instrument of December 4, 1979, as well as the first paragraph of the Second Additional Provision of Organic Law 1/1990, of October 3, Regulating the General Educational System as restated in Law 50/1998, of

December 30, on Fiscal, Administrative and Labor Measures is inadmissible.
2
That the remaining provisions are not unconstitutional.
This Judgment shall be published in the Official State Gazette.
Given in Madrid on February 15, 2007.