

The "Direct" Financing of Religious Minorities in Spain

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I. INTRODUCTION

In Spain, the launch of the Foundation for Pluralism and Coexistence ("the Foundation") entails an entirely new experience and utilizes a new instrumentality—that of a private religious foundation in the public sector—in an as yet untried venture not only in Spain's legal system, but also in similar systems around the world. Until now, in Spain and in neighboring countries, state budgets have supported non-profit religious groups' non-worship activities so long as those activities involved social welfare, charity work, and education. Religious groups have traditionally received these fiscal benefits as each nation individually deemed appropriate.

Because it receives public funding, the Foundation represents an entirely new *modus operandi* in this field and consequently involves the incurrance of some uncertainties. Nevertheless, the Foundation's mission may prove to be of interest and may ultimately improve how Spain's constitutional system treats religion. The Foundation's objective is to "contribute to the implementation of programs and projects of a cultural, educational, and social-integrational nature."¹ Specifically, the Foundation seeks to achieve equality by supporting measures designed to fully integrate religious minorities into Spanish society. This goal will be met as the Foundation's resources are used to help minority religions conduct social-welfare and charity programs, to provide education and diffusion of information about minority cultures, and to train and educate members of minority cultures.

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1. Bylaws of the Foundation for Pluralism and Coexistence art. 7 (2005) [hereinafter Bylaws of the Foundation].

Because of the Foundation's unique nature, its establishment requires it to give (1) a clear explanation of its aims and societal objectives and (2) the legal framework under which its activities will take place. The objectives and aims of the Foundation appear in its governing bylaws and in two normative documents that served to establish them: the 2004 agreement of the Council of Ministers and the law regarding general budgets for 2005.

Regarding the Foundation's legal framework, we should begin with two key legal elements: first, the agreement of the Council of Ministers,² which established the Foundation; and second, Law 2/2004,³ a provision in the 2005 national budget designating three million euros to fund the Foundation's social projects. Along with these legal provisions, we should be equally aware of the Foundation's bylaws and enabling act, Law 50/2002,⁴ which concerns foundations, and Royal Decree 316/1996,⁵ which approved the Regulations for Foundations of State Competency.

Despite these provisions, and remembering that Spain has decided to spend part of the national budget to fund projects that contribute to improving social and cultural integration of religious minorities in the country, an overview of Spain's constitutional framework regarding religion must first be presented. Part II will provide this overview and will seek to accomplish two tasks: (1) determine to what extent the principles informing religious policy provide a basis for integration projects; and (2) identify to what extent those same principles limit, or may limit, the Foundation's conduct, with special reference to the justifications for using public monies to subsidize the Foundation's activities, programs, and projects. Part III will address the legal framework under which the various foundations operate and, consequently, by which the Foundation will be bound. Finally, Part IV will outline the scope of the Foundation's activities and explore the type of groups that will be affected by the Foundation. In so doing, Part IV will keep in mind the Foundation's aims and social objectives and outline a series of key priorities that it needs to address immediately. Finally, Part V

2. Agreement of the Council of Ministers Approving the Creation of the Foundation of Pluralism and Coexistence (Oct. 15, 2004).

3. General Budgets of the State for the Year 2005 (B.O.E. 2004, 312).

4. Foundations Act (B.O.E. 2002, 310).

5. Regulations for Foundations of State Competency (B.O.E. 1986, 57).

includes a brief conclusion, summarizing the peculiar form of the Foundation and its potential influence in Spain and the world.

II. CONSTITUTIONAL FRAMEWORK REGARDING RELIGIOUS MATTERS

A. Constitutional Principles of the Spanish Political System Relevant to Religion

1. General guiding principles

The Spanish Constitution of 1978 creates a new social and political context characterized by consensus and the surmounting of historical factions concerning the “religion question” in Spain.⁶ The present study therefore requires that one assemble a number of both general and specific principles that figure directly into the Foundation’s activities. The general principles that will inform this analysis are personalization, pluralism, and participation.

a. Personalization. Personalization is the guiding principle of fundamental rights generally and, therefore, of the right to freedom of belief, religion, and worship in particular.⁷ Application of this principle requires that the individual person be viewed, in constitutional law, as an independent subject—a natural origin of those fundamental rights which are inherent in human dignity.⁸ This proposition situates groups—and in our case, churches, faiths, and religious communities—as derivative subjects, insofar as fundamental rights are exercised by persons collectively. Consequently, and as far as religious matters are concerned, the 1978 Constitution embodies the core elements of personalization, because it designates as fundamental those relationships that link the State to its citizens.⁹ Simultaneously, the Constitution also posits that these relationships must exist between public powers and the several religious and ideological communities whose social organizations become the

6. See Constitución [C.E.] art. 16.1–3 (Spain).

7. See *id.* art. 10.1.

8. See STC, Apr. 11, 1985 (R.T.C., No. 53, FJ 8).

9. See C.E. art. 16.1–3.

means of serving individual persons and preserving their religious liberty.¹⁰

b. Pluralism. In order for citizens to exercise and fully maintain their basic human rights, a government must recognize and ensure the value of pluralism.¹¹ Because there can be no liberty without freedom of choice, each individual must be able to choose among a variety of options, beliefs, ideas, ideological convictions, perspectives, and philosophical or religious worldviews. The existence of ideological or religious pluralism, therefore, becomes the sole adequate guarantor of complete self-actualization, personal development, and education. In this way, plurality of choice makes us completely and truly free, and it ensures a real and efficacious democratic system.

As applied to religion, this principle requires that the State's position be one of scrupulous respect: it must protect and ensure ideological and religious pluralism. As the State does so, diverse religious and philosophical beliefs can coexist, as can different religious groups or philosophical associations, without any special privileges or unnecessary constraints, except those that are established legally and that may be necessary in a democratic society.

c. Participation. Finally, a positive view of the ideological-religious factor correlates most directly with the principle of participation by religious groups and individuals.¹² This participation should not be understood as solely negative or passive; it is also active. Consequently, this constitutional principle presupposes participation in decision-making not only by individual citizens, but also by social organizations—including religious and philosophical groups—at least in such cases or questions that may affect them directly or that may involve the activity of such groups (e.g., the right to autonomy). Importantly, such participation should in no way imply that the State has relinquished its legislative authority.

10. *See id.* art. 27.3.

11. *See id.* art. 1.1.

12. *Id.* art. 9.2.

2. Specific guiding principles of the Spanish system with respect to religion

In addition to understanding general constitutional principles, we should also examine the guiding principles concerning religion that specifically inform Spain’s political and judicial system. The principles flow from several sources: the recognition and protection of freedom of belief, freedom of religion, and freedom of worship;¹³ the assurance of equality for all before the law, without discrimination of any kind for religious reasons;¹⁴ and the injunction that “[n]o denomination shall have the character of a state religion.”¹⁵ One should also add to this list the higher principles established in Article 1.1 of the Constitution and the promotional function of public powers.¹⁶ Thus, the following principles may be highlighted as the guiding constitutional principles informing matters of religious law: a) freedom of conscience, b) equality of belief, c) state secularism, and d) cooperation with religious denominations and communities.

a. The principle of freedom of conscience. Article 16.1 of the Spanish Constitution ensures the right to freedom of belief, religion, and worship. This right is understood to exist as a sphere of *agere licere* for individuals and groups, which rightly places limits upon public powers.¹⁷ Thus, the right to freedom of conscience is inherently guaranteed. From this right, the right to freedom of belief is generically derived, while the freedoms of religion and worship are specific examples of this freedom.¹⁸ Freedom of conscience is therefore a fundamental right of immediate application as well as a guiding principle regarding questions of belief in the Spanish political system.

13. *Id.* art. 16.1.

14. *Id.* art. 14.

15. *Id.* art. 16.3.

16. *Id.* art. 9.2.

17. See STC, July 18, 2002 (R.T.C., No. 154, FJ 6); STC, July 19, 1990 (R.T.C., No. 137, FJ 8); STC, June 27, 1990 (R.T.C., No. 120, FJ 10); STC, Feb. 13, 1985 (R.T.C., No. 19, FJ 2); STC, May 13, 1982 (R.T.C., No. 24, FJ 1).

18. See 1 DIONISIO LLAMAZARES FERNÁNDEZ, DERECHO DE LA LIBERTAD DE CONCIENCIA 24–25 (2d ed. 2002).

As a guiding principle, the freedom of conscience creates a social and civic construct that defines the State in a unique way.¹⁹ Specifically, the State is an entity in which freedom of conscience represents a standard of conduct directed toward a principle of justice governing public powers. This standard becomes concrete when it is considered in two ways: on one hand, as a parameter of assessment to evaluate actions and conduct; and, on the other hand, as a constitutional guarantee of the legality of executive functions and a mandate for justice in the actual creation of law.²⁰ Therefore, the State's assumption of freedom of conscience as a guiding principle carries a double implication: one negative, the other positive. The negative implication requires a further distinction into two parts. First, public powers have no authority in religious matters; neither to intervene by way of coercion or replacement of individuals, nor to coexist or associate with these groups as potential co-participants in worship, religious practice, or ideology.

Therefore, the Spanish State defines itself as the guarantor of individual fundamental rights in general and of rights to freedom of conscience in particular. This leads the State to ensure an environment of immunity from coercion for those holding these rights.²¹ This fact precludes public powers from making any kind of declaration of religious belief, including a sociological declaration. Likewise, public powers cannot endorse any particular solution to the religion question, whether that solution is negative in content (atheism), agnostic, or indifferent, since in any such case, the State would be coercing, replacing, or associating with citizens in adopting its own beliefs, convictions, or religion.

The second aspect of this negative implication of freedom of conscience concerns limits on public powers. Such powers cannot require any citizen to reveal his or her faith, religion, beliefs, or ideological convictions.²² The exception to this rule is that one may

19. See Pedro J. Viladrich, *Los principios informadores del Derecho eclesiástico español*, in *DERECHO ECLESIASTICO DEL ESTADO ESPAÑOL* 169, 193 (2d ed. 1983).

20. See GREGORIO PECES-BARBA MARTÍNEZ, *DERECHOS FUNDAMENTALES* (4th ed. 1984); ANTONIO ENRIQUE PÉREZ LUÑO, *DERECHOS HUMANOS, ESTADO DE DERECHO Y CONSTITUCIÓN* (1984).

21. See STC, Feb. 15, 2001 (R.T.C., No. 46, FJ 4); STC, Nov. 11, 1996 (R.T.C., No. 177, FJ 9); STC, Oct. 28, 1996 (R.T.C., No. 166, FJ 2); STC, May 13, 1982 (R.T.C., No. 24, FJ 1).

22. See C.E. art. 16.2 .

need to reveal religious beliefs when the protection and exercise or practice of certain rights—teaching religion or providing religious assistance, among others—necessitates knowing or professing these beliefs,²³ so long as no possibility exists of establishing or producing any kind of discrimination.

Spain’s constitutional foundation regarding freedom of conscience imposes a dual responsibility on the public powers: removing barriers and promoting freedom.²⁴ As a result of this responsibility, the State has created regulations addressing the social exercise of the right to freedom of conscience and belief, thereby ensuring objective social conditions for this fundamental right. Such conditions allow the right to freedom of conscience to be not only recognized and protected, but also promoted. The Spanish State thus finds in freedom of conscience a principle that simultaneously restricts action while broadening freedom to its maximum extent. Consequently, concerning freedom of conscience, Spain’s constitutional system reflects the following axiom: “maximum freedom possible, minimum restriction necessary.”

b. The principle of equality with respect to belief. Article 14 of the Constitution recognizes equality both “in the law” (preventing laws from creating unequal or discriminatory situations among citizens) as well as “of the law” (meaning that the legal consequences resulting from any laws must also be equal).²⁵ Simultaneously, Article 14 recognizes equality in the negative sense, prohibiting discrimination based on ideological or religious grounds. Hypothetically, therefore, if the law were to adopt such a position, that adoption would require a break between the individual and his or her personal and collective status as a natural origin of fundamental rights. Equality thus represents a fundamental right that completes and deepens our rights and freedoms. It is also the principle that produces the connecting element between freedom in a general sense and freedom of conscience specifically. Therefore, a break in the legal principle of equality occurs when, given the previous requirements of equality of situation among those affected by a particular law, differential treatment based upon religious or ideological beliefs is applied

23. See Case 130/75, Prais v. Council, 1976 E.C.R. 1589.

24. See C.E. art. 9.2.

25. See STC, Nov. 22, 1983 (R.T.C., No. 103, FJ 5).

arbitrarily or capriciously.²⁶ In such cases, the unequal treatment causes curtailment or termination of possession as well as the abridgment of the right to freedom of conscience or of the other fundamental rights.²⁷

Along with formal equality, the Constitution also establishes substantive equality.²⁸ Substantive equality requires the State to take action to protect equality and enforce it at the same time. This dual character imposes two entirely different responsibilities upon the public powers: one negative, the other positive. The positive responsibility requires the public powers to intervene in order to promote the necessary conditions for real and effective equality between individuals and the groups they comprise. Meanwhile, the negative component of substantive equality requires removing those obstacles that prevent or hinder full equality. In this way, affirmative action and other similar programs are constitutionalized. As a result, we believe that one cannot view the Constitution as prohibiting such positive discrimination on the grounds that it violates the principle of formal equality itself.

Consequently, the relationship between equality and freedom of conscience should not be based on a hierarchal interpretation between them but rather on their reciprocal interdependence. In this vein, Hernández Gil emphasized the importance of the principles of freedom and equality within the constitutional structure: “[W]ithout equality there is no freedom, and without freedom equality has no meaning, because equality and freedom in law . . . mean equal treatment for all, but always within freedom and within what freedom means for individuals and society.”²⁹

c. The principle of secularism. The third of the guiding principles regarding religion in Spain’s political system appears in Article 16.3 of the Constitution, which establishes that “[n]o denomination shall have the character of a state religion.”³⁰ The absence of an express constitutional reference to an ideology or religion has been labeled “secularism by omission.” Still, we should note that ideological or

26. See STC, Mar. 30, 1981 (R.T.C., No. 8).

27. See STC, May 13, 1982 (R.T.C., No. 24, FJ 1).

28. See C.E. art. 9.2.

29. Antonio Hernández-Gil, *Dictamen de la Comisión mixta Congreso-Senado*, in 4 CONSTITUCIÓN ESPAÑOLA DE 1978, at 4945 (1992).

30. C.E. art. 16.3.

religious ideas, beliefs, and convictions form no part of the Spanish State's actual nature.³¹ As required in a neutral state, Spain's public powers serve both positive and negative functions. Concerning the positive function, the public powers agree to serve human dignity and the freedom of personal development so that citizens can achieve a real and effective exercise of their fundamental rights.³² Meanwhile, the negative function implies that the State—as a radically non-totalitarian entity—is absolutely incompetent to take a position in matters of religious faith, whether affirmatively or negatively. Neutrality thereby becomes a product not only of the principle of equal treatment—among religious and philosophical communities as well as among individual believers and non-believers—but also of impartiality concerning citizens' religious convictions and practices. Additionally, this separation appears as a *conditio sine qua non* of neutrality in order to obtain and assure mutual independence and autonomy between the State and religious faiths.³³ Therefore, the extent to which the public powers exercise positive neutrality concerning beliefs should be no different from their consideration of declarations of religious beliefs or convictions. Consequently, in order to fully realize the principle of freedom of conscience, secularism must be recognized, guaranteed, and exercised equally for and by all.³⁴

These two elements, neutrality and separation, reflect the principle of secularism,³⁵ a principle that has four primary characteristics. First, the Spanish State is prohibited from sponsoring any particular religious dogma, belief, or conviction.³⁶ At the same time, any attempt to place public life under the mark of any specific religious conception is similarly disallowed, as is assuming any faith, creed, or conviction to be uniquely privileged. This holds true even if such a religion is professed by the majority of citizens. Second,

31. See STC, June 2, 2004 (R.T.C., No. 101, FJ 3); STC, Feb. 15, 2001 (R.T.C., No. 46, FJ 4); STC, Nov. 11, 1996 (R.T.C., No. 177, FJ 9); STC, Nov. 16, 1993 (R.T.C., No. 340, FJ 4).

32. See generally C.E. art. 10.1.

33. See STC, Dec. 22, 1988 (R.T.C., No. 265, FJ 5).

34. See STC, Nov. 22, 1983 (R.T.C., No. 103, FJ 5); STC, Aug. 5, 1983 (R.T.C., No. 76, FJ 2.A); STC, Nov. 10, 1981 (R.T.C., No. 34, FJ 3); STC, July 2, 1981 (R.T.C., No. 22, FJ 3). See generally C.E. art. 14.

35. See STC, July 18, 2002 (R.T.C., No. 154, FJs 5, 7); STC, Feb. 15, 2001 (R.T.C., No. 46, FJs 4, 5, 7).

36. See C.E. art. 16.3.

secularism prevents “any possible confusion of religious aims or interests with state aims or interests,”³⁷ and at the same time, prohibits the possibility that “religious values or interests may be used as parameters to measure the legitimacy or justice of the legal standards or actions of the public powers.”³⁸ Third, religious denominations may not take part in public administration or be considered comparable to public entities.³⁹ Finally, in a positive sense, secularism is an instrument directed toward realizing the equality of all citizens with respect to the possession and exercise of the right to freedom of conscience.⁴⁰ With this goal in mind, the State establishes cooperative relationships with religious denominations.⁴¹

Consequently, in order to fully comprehend the aim of the Foundation one should first understand that the principle of secularism operates in concert with the principle of freedom of conscience, which is ultimately an important part of higher principles of freedom.⁴² Under this approach, the principle of secularism prevents “religious values or interests [from being] used as parameters to measure the legitimacy or justice of the legal standards or actions of the public powers.”⁴³ However, the relationship between freedom of conscience and secularism in Spain’s constitutional system presumes that the principle of secularism be understood as a key operator on behalf of pluralism.⁴⁴ In this way, secularism may be considered the maximum possible guarantor of religious liberty.⁴⁵ From this perspective, the principle of freedom of conscience defines state identity in relation to religious faith, while the principle of secularism defines state conduct respecting such

37. See STC, June 2, 2004 (R.T.C., No. 101, FJ 3); STC, Nov. 11, 1996 (R.T.C., No. 177, FJ 9).

38. STC, May 13, 1982 (R.T.C., No. 24, FJ 1); see also STC, June 4, 2001 (R.T.C., No. 128, FJ 2).

39. See STC, Nov. 16, 1993 (R.T.C., No. 340, FJ 4).

40. See 1 LLAMAZARES FERNÁNDEZ, *supra* note 18, at 260.

41. See STC, Feb. 15, 2001 (R.T.C., No. 46, FJs 4, 6, 7).

42. See generally C.E. art. 1.1.

43. See STC, May 13, 1982 (R.T.C., No. 24, FJ 1).

44. See STC, Nov. 11, 1996 (R.T.C., No. 177, FJ 9).

45. See STC, Nov. 16, 1993 (R.T.C., No. 340, FJ 4.D).

faith.⁴⁶ Secularism embodies the inherent quality of the social and democratic “rule of law,” operating not as a limit on the principle of freedom of conscience and belief (as does the French model⁴⁷) but rather as a limit on state conduct.

d. The principle of cooperation with religious groups. A fourth guiding principle is state cooperation with religious entities. This principle is not intended to directly and positively validate religious interests or religion itself; rather, it exists only as a necessary instrument to ensure that citizens obtain the full enjoyment and exercise of the right of freedom of conscience.⁴⁸ This cooperation, therefore, ironically entails a negative concept of “cooperation” because the public powers and religious groups can never unite in order to meet certain aims or common objectives. Thus, the only positive cooperation that the Spanish State can exercise is protecting and promoting the equality of citizens’ entitlement to, and exercise of, freedom of conscience and belief, along with establishing the legal status of religious denominations and communities in the Spanish legal system.⁴⁹

Therefore, the State’s authority in religious matters is controlled by the principles of personalization and pluralism, as well as by specific concepts of freedom, equality, and secularism. Personalization and pluralism also prevent the latter three from being used to legitimize attempts to institutionalize relationships between the Spanish State and religious faiths, as any such attempt would entail a break from the Constitution. In addition, the principles of freedom, equality, and secularism demand to be interpreted such that none of them is weakened. Regarding cooperative relationships,

46. See Dionisio Llamazares Fernández, *Actitud de la España democrática ante la Iglesia*, in *IGLESIA CATÓLICA Y REGÍMENES AUTORITARIOS Y DEMOCRÁTICOS* 159, 192 (Ivan C. Iban ed., 1987).

47. On December 11, 2003, the Commission Stasi—a commission established to reflect upon secularity in France—rendered their conclusions, which eventually led to the French law on secularity and conspicuous religious symbols in schools, which is now the basis for the French model. See Jane Freedman, *Secularism as a Barrier to Integration? The French Dilemma*, 42 *INT’L MIGRATION* 5, 5 (2004).

48. See STC, June 2, 2004 (R.T.C., No. 101, FJ 3); STC, Feb. 15, 2001 (R.T.C., No. 46, FJ 4); STC, Nov. 16, 1993 (R.T.C., No. 340, FJ 4); STC, Dec. 22, 1988 (R.T.C., No. 265, FJ 4); STC, June 8, 1988 (R.T.C., No. 109, FJ 2); STC, Nov. 8, 1983 (R.T.C., No. 93, FJ 5); STC, Nov. 12, 1982 (R.T.C., No. 66, FJ 2).

49. See JOSÉ ANTONIO SOUTO PAZ, *DERECHO ECLESIAÍSTICO DEL ESTADO: EL DERECHO DE LA LIBERTAD DE IDEAS Y CREENCIAS* 93–94 (Marcial Pons ed., 1992).

religious discrimination is just as damaging to the principle of state secularism as unjustified restrictions of freedom of conscience and belief. Nonetheless, only those activities necessary for realizing citizens' fundamental rights deserve help from the State and its laws. The State is therefore prohibited from cooperating in any manner that runs contrary to the principles of neutrality and separation, which are embodied in the doctrine of secularism. Consequently, if cooperative relationships conflict with the principle of secularism, the latter should be given primacy. Similarly, the principle of cooperation is limited in a positive manner when it threatens the Spanish State's secularity.⁵⁰

Lastly, it is important to note that the public powers must not understand these cooperative relationships as optional, but rather as imperative requirements. Article 16.3 of the Constitution, which refers to the Catholic Church, must be interpreted in this way, rather than as the constitutionalization of that church's bilateral agreements with the Spanish State or as a sociological recognition of Catholicism. Because of the potential misunderstanding that may result from this constitutional reference, we believe it should be eliminated if future constitutional amendments are to occur. In any event, cooperation ultimately appears to be a projection of Article 9.2 of the Constitution; a projection which establishes that the right of freedom of conscience and belief is fundamental and is to be administered equally to all.

e. Conclusion. Justice, as spoken of in Article 1.1 of the Constitution, is conceived as equality in liberty. In other words, personal development and human dignity are inherent to individual freedom and apply equally and naturally to all people. Such freedom is only possible if individuals have within their reach and their educational environment the opportunity to choose among several ideological-religious options. Individuals must also be free to make decisions in their own lives and function in society according to their chosen ideological beliefs or convictions. The other guiding principles of the legal system, such as secularism and cooperation, should be understood in this light.

50. See STC, June 2, 2004 (R.T.C., No. 101, FJ 3); STC, Feb. 15, 2001 (R.T.C., No. 46, FJ 4); STC, Nov. 11, 1996 (R.T.C., No. 177, FJ 9).

Based upon the foregoing, we conclude that the Constitution establishes a political system that adopts a secular formula within the basic principles of freedom of conscience and equality of belief. The Spanish model, then, is a neutrality-based system comprised of secularized states. All such states follow a model based on neutrality, recognizing citizens’ fundamental rights as the primary basis for state conduct. Consequently, the model attempts to maintain the values of freedom, justice, equality, and pluralism⁵¹ so as to fully realize human dignity and personal development.⁵² Achieving these goals necessarily requires participation and cooperation with individuals and groups.⁵³ The Foundation operates within this constitutional framework as it strives to promote equality, freedom of conscience, and freedom of belief by supporting the activities of certain religious minorities.

B. Constitutional Principles and the Foundation for Pluralism and Coexistence

The establishment of the Foundation poses an essential question: Can the public powers provide direct financial assistance to support worship activities without violating the guarantee of religious freedom? An affirmative response to this question would serve as the foundation for the Spanish State’s financing of religious faiths. Such financing does not appear to directly relate to the substance of religious freedom, and only with difficulty does it adhere to the principle of secularism. Therefore, such collaboration should only take place in certain cases. These would include, for example, cases that satisfy Article 2.3 of the Organic Law of Religious Freedom (“LOLR”), which states the following:

For the real and effective application of these rights, the public powers shall adopt the means necessary to facilitate religious teaching in public education centers as well as to support religious assistance in public establishments, military institutions, hospitals, social welfare centers, prison facilities, and any other establishments on the premises of such institutions.

51. See C.E. art. 1.1.

52. *Id.* art. 10.1.

53. *Id.* art. 16.3.

In harmony with this principle, the Foundation does not finance worship services; rather it seeks to benefit religious groups as they carry out activities relating to education, cultural development, and community service.

In addressing the question of public economic policy and religious faiths, the ultimate problem concerns the financing of worship generally, and paying the salary of ministers and clergy specifically. We must make this clarification: the State's financial support of the Catholic Church is usually justified on the basis of the church's healthcare and charitable contributions, the teaching done in its education centers, the need to restore assets representing religious heritage to the church, and salary payments for religion teachers or clergy who give religious assistance in public establishments. These activities play no role in the public economic policy at issue in this paper because Spain has its own system for providing financial aid for these activities.⁵⁴

With regard to other religious denominations and their worship activities, Article 7.2 of the LOLR establishes the following for those listed in the Registry of Religious Entities and having *notorio arraigo*:⁵⁵ "In Agreements or Covenants, and always respecting the principle of equality, the fiscal benefits provided in the legal system for non-profit and other charitable entities *may* be extended to said Churches, Denominations, and Communities."⁵⁶ This provision refers to a "privileged" fiscal policy that deals only with strictly religious activities. That is, any fiscal exemption must have a direct relationship to the exercise of the fundamental right to religious

54. With respect to this point, it is profitable to review the 1995 budget data, as it is the most recent official publication that reflects how the resources of government ministries subsidize services and activities of the Catholic Church. In 1995, the Church received 87,787 billion pesetas for the following activities: educational centers; religion teacher salaries; assistance to Church organizations that participate in social programs (included in "other purposes" in the Personal Income Tax Act or "IRPF"); religious assistance in hospitals, prison facilities, and military establishments; preserving assets of historical value; and broadcasting programs about the Church on Spanish television. *See generally* General Budgets of the State for the Year 2005 (B.O.E. 2004, 312). All these funds are separate from the nearly twenty billion pesetas that the Church received for the clergy under the Agreement Between the Spanish State and the Holy See on Economic Matters. *See generally* Art. 4.1.C of the Agreement Between the Spanish State and the Holy See on Economic Matters (B.O.E. 1979, 30).

55. The phrase *notorio arraigo* means "conspicuous and well-established presence," but it is often translated as "well-known, deeply-rooted beliefs."

56. Art. 7.2 of the Religious Freedom Act (B.O.E. 1980, 177) (emphasis added).

freedom. Furthermore, the law should be interpreted in a restrictive way; it has no application to even indirect non-religious activities because the basis for the exemption or deduction may only be that of facilitating citizens’ exercise of their fundamental right.

The above requirements are reflected in the fiscal policies of those faiths that have signed agreements with the State, as codified in Laws 24, 25, and 26/1992.⁵⁷ The specifics of each agreement are practically identical, differentiated mainly by their Jewish, Evangelical, and Muslim beneficiaries. Specifically, Article 11 of the above-mentioned laws establishes that the strictly religious activities these denominations carry out “will have the right to the other fiscal benefits that the Spanish State’s tax code provides at all times for non-profit entities and, in any case, to those benefits granted to private charitable organizations.”⁵⁸ Additionally, those faiths that sign bilateral agreements with the State improve their tax and fiscal situations by becoming non-profit entities. Specifically, they are not subject to certain taxes, which would normally be considered taxable corporate income and which would apply to income received from collections, offerings, and fixed contributions. Likewise, religious groups are not subject to taxes when they distribute religious publications to group members free of charge. The same applies to distribution of text for religious and theological instruction in religious education centers. Finally, we should point out that those faiths that sign cooperation agreements are also exempt from other special taxes; for example, the living quarters of evangelical and Muslim ministers are exempt from property taxes.⁵⁹

Given the religious tax structure in Spain, the creation and constitution of the Foundation places it on a radically different plane not only from the perspective of supporting religions, but also from

57. See generally Art. 6 of the Agreement of Cooperation Between the State and the Federation of Evangelical Religious Entities of Spain (B.O.E. 1992, 272); Art. 6 of the Agreement of Cooperation Between the State and the Federation of Israelite Communities in Spain (B.O.E. 1992, 272); Art. 6 of the Agreement of Cooperation Between the State and the Islamic Commission of Spain (B.O.E. 1992, 272).

58. See Art. 6 of the Agreement of Cooperation Between the State and the Federation of Evangelical Religious Entities of Spain; Art. 6 of the Agreement of Cooperation Between the State and the Federation of Israelite Communities in Spain; Art. 6 of the Agreement of Cooperation Between the State and the Islamic Commission of Spain.

59. Jean-Loup Herbert, *Spain: al-Andalus Revived*, LE MONDE DIPLOMATIQUE: ENGLISH EDITION, Nov. 2002 (Luke Sandford trans.), available at <http://mondediplo.com/2002/11/08spain>.

that of providing financial assistance for religious groups. This position ought to be analyzed in detail, although at present we cannot possibly have at our disposal all possible variables. Most importantly, we cannot know all the effects such an instrumentality may produce. Accordingly, we simply cannot fully determine the Foundation's development and future at this time. Instead, we can only superficially outline the possibilities ahead within the limits of the legal framework governing the Foundation's activities and in conjunction with the specific aims designated for the Foundation.

The Foundation represents a radically new and different model that combines two elements having special significance to the relationship between the Spanish State and religion: (1) no direct state funding for worship activities and (2) public control of the Foundation's funding and economic policy. Both elements have special significance because it follows logically that as a secular entity, the Spanish State should not contribute financially to worship activities, even by means of a private foundation. Nonetheless, through such a foundation, the State may help to fund another kind of activity directed toward the educational, social, and cultural integration of certain groups—in this case, religious groups. To this we might add, as has been made clear in the UNESCO Declaration of Principles on Tolerance, the following: "Tolerance . . . requires just and impartial legislation, law enforcement and judicial and administrative process," but "[i]t also requires that economic and social opportunities be made available to each person without any discrimination," given that "[e]xclusion and marginalization can lead to frustration, hostility and fanaticism."⁶⁰ This same declaration later states that in order

to ensure equality in dignity and rights . . . particular attention should be paid to vulnerable groups which are socially or economically disadvantaged so as to afford them the protection of the laws and social measures in force, in particular with regard to housing, employment and health, to respect the authenticity of their culture and values, and to facilitate their social and

60. See U.N. Educ., Sci., & Cultural Org. [UNESCO], *Declaration of Principles on Tolerance*, Gen. Conf. Res. 5.61, art. 2.1, UNESCO GC, 28th Sess., vol. 1, Doc. 28 C/Res. 5.61 (Nov. 16, 1995), available at <http://unesdoc.unesco.org/images/0010/001018/101803e.pdf> [hereinafter *Declaration of Principles on Tolerance*].

occupational advancement and integration, especially through education.⁶¹

These should be the basic objectives the Foundation seeks to promote. At the same time, the Foundation should avoid doing anything that might be misconstrued as secretly attempting to fund worship activities or pay ministers of beneficiary religious groups. In our judgment, this view is wholly consistent with the Foundation's governing documents: both the Foundation's statutes and budget allocations impose this limitation.⁶² Despite the foregoing limitation, this prohibition does not apply when a private individual makes a donation to the Foundation for the express purpose of supporting worship activities. There are no constitutional principles that prevent such a donation from being made. In fact, Article 1 of the Foundation's bylaws states that "its resources are intended to promote religious freedom in Spain under the terms that the Constitution and the law establish for this fundamental right."⁶³ This statement makes clear that private individuals' financial support of religious bodies fully complies with both the Spanish Constitution and the right to religious freedom as established in the LOLR,⁶⁴ both on the individual and collective levels.

Whether constitutional and LOLR principles comprise part of the Foundation's mandate is another question entirely. A systematic interpretation of both principles brings us to view the subject from the perspective of the two concepts' compatibility, for which we must understand the overarching objective of the Foundation. That objective is, as has been indicated, to promote religious freedom by fulfilling the Foundation's mandate. Therefore, while efforts to promote religious freedom can embrace a very broad range of activity, as they do in the LOLR, they are much more restricted with respect to the Foundation. Specifically, the Foundation promotes religious freedom by seeking to remove obstacles blocking such freedom.⁶⁵ This is done by helping religious minorities of *notorio arraigo* to conduct social-welfare and charity programs and to provide education about their own culture. Because these activities

61. *Id.* art. 3.3.

62. *See infra* Section IV.B.

63. Bylaws of the Foundation, *supra* note 1, art. 1.1.

64. This refers particularly to Art. 2 of the Religious Freedom Act (B.O.E. 1980, 177).

65. *Cf.* C.E. art. 9.2.

create another set of questions, we will take this topic up when we address the groups affected by the Foundation's activities.⁶⁶

It is important to note that public control of the Foundation's finances parallels the public control of finances in Spain's democratic political system, which also permits public control of its money and of money donated from private individuals. Because it operates in close conformity with the law, the Foundation's structure embraces security, openness, and transparency in close conformity with the requirements of the rule of law. In addition, the Foundation is subject to the Intervención General del Estado⁶⁷ and provides accounting reports to the Tribunal de Cuentas.⁶⁸ This becomes not only the means of controlling the Foundation's spending, but it is also a form of safeguarding state security. Additionally, we should remember the fiscal incentives the law establishes in this regard: a special tax policy that is justified precisely by the Foundation's ultimate purpose, as well as its non-profit status. Providing accountability and oversight in meeting these ends is the role of the Foundation's Protectorate, which falls under the purview of the Ministry of Justice.⁶⁹

Because of the purpose of the Foundation's creation and because of its public character, it must answer the call to meet a social need. The Foundation should not, however, be understood as an instrument of cooperation established in accordance with Article 16.3 of the Constitution.⁷⁰ Neither should the Foundation be seen as a determining element in the positive secularism of the public powers. Consequently, the Foundation's creation is not intended to be, nor should it be viewed as, compensation to other religious groups for what the Catholic Church receives from the Spanish State. As we have previously stated, the Foundation should be understood as an instrumentality that serves to achieve equality. This goal is pursued by supporting measures designed to fully integrate religious minorities into Spanish society, by helping those minority cultures become known and diffused, and by training and educating their members. Along these lines, the principle of equality also

66. See *infra* Part IV.B.3.

67. The "Intervención General del Estado" is roughly equivalent to the U.S. Office of Planning and Budget.

68. The "Tribunal de Cuentas" is similar to a Court of Auditors.

69. See Bylaws of the Foundation, *supra* note 1, art. 4.

70. C.E. art. 16.3.

demands that every individual enjoy economic, social, cultural, and educational opportunities free of discrimination. To that end, the public powers are obligated to ensure equality of treatment and opportunities for all groups and individuals present in Spain.⁷¹

Of course, equality should not be confused with uniformity. All individuals and groups have the right to be different and to have that difference recognized and guaranteed. Therefore, there can be no program directed towards assimilating different groups into the majority or predominant group; also disallowed are any measures tending towards discrimination, intolerance, exclusion, or marginalization. Instead, the Foundation’s activities seek to overcome these potential problems with the intent that such situations not result in frustration, hostility, and fanaticism. Permissible Foundation activities would therefore include those kinds of affirmative action that reflect a policy of reverse discrimination, which cannot be considered breaches of the principle of equality.

III. THE LEGAL FRAMEWORK REGARDING FOUNDATIONS: WITH SPECIAL REFERENCE TO THE FOUNDATION FOR PLURALISM AND COEXISTENCE

A. The Benefits of a Foundation

Although the Foundation represents a novel instrumentality in terms of the groups affected as well as the actual scope of activity, similar foundations are not entirely new in Spain’s legal system. The use of such foundations has been criticized by some⁷² and supported by others.⁷³ Nevertheless, foundations are a growing reality in Spain’s legal system, and their use has increased considerably in recent times.

Though their disadvantages cannot be avoided—especially the Foundation’s control of public monies—the advantages of foundations are ultimately relevant. These advantages are relevant not only because they allow more direct and efficient management of foundation funds, but also because they allow a private entity—

71. See *Declaration of Principles on Tolerance*, *supra* note 60, arts. 2–4.

72. See José Luis Piñar Mañas, *Fundaciones constituidas por entidades públicas. Algunas cuestiones*, 97 REDA 37 (1998).

73. See TOMÁS GONZÁLEZ CUETO, *COMENTARIOS A LA LEY DE FUNDACIONES. LEY 50/2002, DE 26 DE DICIEMBRE 339* (2003).

rather than the State itself—to subsidize religious activities. This arrangement eliminates any hint of confusion between public and religious matters, thereby achieving a better separation of powers and avoiding possible compromises of the constitutional model regarding religion, which would otherwise occur if the State directly funded these activities.

B. The Creation of a Foundation

The basic legal standard guiding foundations is Law 50/2002, which recognizes and ensures the rights of foundations and reflects legislative implementation of Article 34 of the Constitution.⁷⁴ This right should be understood as the logical manifestation of freedom of choice and the right to use personal assets.⁷⁵ Thus understood, the right of foundation has been construed as a fundamental constitutional right, which allows for the creation of a subtype of “judicial entity.”⁷⁶ The specific character of this judicial entity is comprised of two elements: (1) the objective, which must always be non-profit; and (2) the role of financial resources, which cement the foundation’s constituent elements together and distinguish it from an association.⁷⁷ In this respect, Law 50/2002 proceeds from the following definition of foundation: “Foundations are those non-profit organizations that, by will of their creators, permanently dedicate their assets to realizing purposes of general interest.”⁷⁸ This legal definition establishes three elements that characterize a foundation: financial resources, organization, and purpose.⁷⁹ In addition, we note that the following are required to identify the judicial entity known as a foundation: (1) the existence of capital that a founder has provided for an organization and which is linked to

74. Law 50/2002, Foundations art. 1 (B.O.E. 2002, 310).

75. See STC, Mar. 22, 1988 (R.T.C., No. 49, FJ 5).

76. See Eduardo García de Enterría, *Constitución, Fundaciones y Sociedad civil*, in LAS FUNDACIONES Y LA SOCIEDAD CIVIL 21, 23 (Rafael de Lorenzo & Miguel Angel Cabra de Luna eds., 1992).

77. See Juan Jesús Raposo Arceo, *La constitución de fundaciones en la Ley 30/1994, de 24 de noviembre: análisis del capítulo II, del Título I (arts. 6-11)*, in MANUAL DE FUNDACIONES: RÉGIMEN JURÍDICO, FISCAL Y CONTABLE, CON ANEXO DE LEGISLACIÓN ESTATAL Y AUTONÓMICA 25, 25-34 (Alberto Ruiz Ojeda ed., 1999).

78. Art. 2 of the Foundations Act (B.O.E. 2002, 310).

79. See ENRIQUE CORONA ROMERO ET AL., FUNDACIONES: ANÁLISIS PRÁCTICO DE LA LEY 30/1994 Y COMPENDIO LEGISLATIVO CONCORDADO 33 (1995).

meeting a goal, and (2) government recognition through the requirement of registration.

Importantly, establishment of a foundation requires compliance with legal formalities or transactions. This usually occurs as the principals create a statement in which they propose a goal. The law grants special protection to this transaction, whether it be on the basis of the statement or through some other act or ceremony.⁸⁰ The law also allows this formality to be expressed by means of other acts or ceremonies. The creation of a foundation also involves another transactional component. In addition to a statement of intent made by one of the foundation's founders, a foundation requires the allocation of assets—in other words, the granting of property to it.⁸¹

Because the Foundation belongs to the public sector, the declaration of intent was made by the public powers—in this case, the Council of Ministers. In addition, the foundation's assets (at present, 100% of those assets) also come from the public powers—specifically, the national budget.⁸²

IV. SCOPE OF ACTIVITIES AND AFFECTED GROUPS OF THE FOUNDATION FOR PLURALISM AND COEXISTENCE

A. Scope of Activities

Concerning the objectives of the Foundation, Article 7 of the Foundation's bylaws establishes the Foundation's objectives: "to contribute to the implementation of programs and projects of a cultural, educational, and social-integrational nature."⁸³ Thus, the

80. See FEDERICO DE CASTRO Y BRAVO, *EL NEGOCIO JURÍDICO* 29–30 (1985).

81. See RAMÓN BADENES GASSET, *LAS FUNDACIONES DE DERECHO PRIVADO: DOCTRINA Y TEXTOS LEGALES* 59 (Bosch ed., 1986).

82. Other necessary legal references include the following: Bylaws of the Foundation, *supra* note 1; Enabling Act of the Foundation for Pluralism and Coexistence (2005); Religious Freedom Act (B.O.E. 1980, 177); Regulations for the Registry of Foundations of State Competency (B.O.E. 1996, 77); Regulations for Foundations of State Competency (B.O.E. 1986, 57); Organization and Operation of the Registry of Religious Entities Act (B.O.E. 1981, 27); General Budgets of the State for the Year 2005 (B.O.E. 2004, 312); General Subsidies Act (B.O.E. 2003, 276); Foundations Act (B.O.E. 2002, 310); Agreement of Cooperation Between the State and the Islamic Commission of Spain (B.O.E. 1992, 272); Agreement of Cooperation Between the State and the Federation of Israelite Communities in Spain (B.O.E. 1992, 272); Agreement of Cooperation Between the State and the Federation of Evangelical Religious Entities of Spain (B.O.E. 1992, 272).

83. Art. 7 of the Foundations Act (B.O.E. 2002, 310).

Foundation supports activities that pursue these goals. It is important, therefore, to evaluate the scope of each of these purposes. In so doing, we will differentiate between each category in order to determine the scope and content of each.

1. Typical activities

a. Cultural activities. From an anthropological perspective, culture is defined as a group of material and immaterial elements (language, science, technology, customs, traditions, values, behavioral norms, etc.) that are socially transmitted and assimilated and characterize a given human group in relation to others.⁸⁴ This first notion of “culture” was explained by Edward B. Tyler who stated that culture is “[a] complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.”⁸⁵ Both of these definitions convert culture into a “social inheritance,” which, along with genetic inheritance, shapes human nature. Consequently, culture is configured as “an instrumental apparatus” that gives men the ability to resolve specific problems which confront them in the framework of their particular social groups.⁸⁶ Given the diversity of the human experience, we cannot speak of a generic and universal culture but rather of particular and specific cultures. Nor is there a single normative hierarchy that justifies discrimination between “superior cultures” and “inferior cultures”; rather, a plurality of diverse groups exists to meet the common necessity of inhabiting one’s own cultural universe.⁸⁷ Therefore, we should begin by rejecting ethnocentrism

84. See, e.g., THE DICTIONARY OF ANTHROPOLOGY 100 (Thomas Barfield ed., 1997) (“One choice has been to treat culture as a system of symbols that includes language, art, religion, morals, and (in principle) anything else that appears organized in human social life.”); Josef Šmajš, *Culture*, in 2 ENCYCLOPEDIA OF ANTHROPOLOGY 636 (H. James Bix ed., 2006) (“Culture is . . . a human-created, artificial system with its own internal information—the spiritual culture, that is, human knowledge, opinions, convictions, values, and beliefs.”); Archie Zariski, *Disputing Culture: Lawyers and ADR*, MURDOCH U. ELECTRONIC J.L., June 2000, available at http://www.murdoch.edu.au/elaw/issues/v7n2/zariski72_text.html (“The anthropologist Clifford Geertz would have us recognise that culture has both material and immaterial elements . . .”).

85. 1 EDWARD B. TYLER, PRIMITIVE CULTURE 1 (3d ed. 1889) (1871).

86. Bronislaw Malinowski, *A Scientific Theory of Cultural and Other Essays* 150 (1944).

87. See, e.g., 1 ENCYCLOPEDIA OF CULTURAL ANTHROPOLOGY 291–93 (David Levinson & Melvin Ember eds., 1996) (discussing the historical changes in anthropological thinking regarding culture and explaining that in the past anthropologists categorized all

but without falling into an extreme and exaggerated cultural relativism which results in treating each culture as a world closed in on itself, with its own *raison d’être* and ethical code.⁸⁸ In light of this, we should recognize that cultures have their own historicity as well as a dynamic and changing nature. Furthermore, we should recognize that a natural characteristic of pluralistic democratic societies is intercommunication between cultures.

Speaking of culture in anthropological terms requires discussing a permanent integration process that is never fully completed. This process develops on two planes: (1) that of integrating a particular group’s cultural system into the complex and diverse society, and (2) that of integrating individuals with psychic and psychosocial personalities into their own culture. Culture thus involves a complex interplay of elements—simultaneously internal and external, explicit and implicit, primary and secondary—all of which shape groups and either differentiate them or make them similar to one another. The diffusion, teaching, and promotion of all of these culture-shaping elements constitute “cultural activities,” which in turn represent the basic objective of the Foundation.

The only problem left to address is how these cultural activities coincide with, or are realized by, worship activities. As has already been shown, religious beliefs also shape the concept of culture. Therefore, another essential element of the Foundation’s purpose concerns the mode by which groups or their members relate to the sacred through their worship.

b. Educational activities. Within this section we include all those activities that serve not only to train people, but also to educate them regarding the ideas, beliefs, and traditions that determine a culture’s composition. That composition should be broadened by all other measures that also serve to develop those people who belong to the Foundation’s beneficiary groups. Therefore, within the present realm, the promoted activity should not only be understood

civilizations as either “primitive” or “advanced”).

88. See, e.g., Charlotte Seymour-Smith, *MACMILLAN DICTIONARY OF ANTHROPOLOGY* 65 (1986) (“An arbitrary division may divert the anthropologist from investigating important relationships which cross-cut such boundaries.”); *THE DICTIONARY OF ANTHROPOLOGY*, *supra* note 84, at 101 (“[T]he idea of culture has often led anthropologists to a series of illusions: that cultures are homogeneous, that the world is divided into atomistic societies, or “peoples,” or that societies studied by anthropologists are traditional and unchanging.”).

from a perspective of education and diffusion of the culture but from a more integrated view of persons. That is, this section includes all possible formative, educational, or other activities that benefit religious groups receiving aid from the Foundation.

In order to understand these benefits, we must distinguish between three important activities: education, teaching, and training. By “educating,” we mean any activity oriented toward achieving full personal development. “Teaching” refers to the total process by which a person assimilates and develops knowledge and values on a general level. Finally, “training” consists of the acquisition of skills needed to perform a certain task. With this distinction in place, we must clarify that the activities financed by the Foundation should not be those dedicated solely to education. After all, we consider education to be a fundamental right of every person. Government authorities have a specific responsibility to provide education without discriminating by sex, race, philosophical or religious conviction, nationality, or social or economic status.⁸⁹ This right is most fully realized when students attend a publicly funded school, thus preventing children from being limited by their social, racial, ethnic, religious, or other origins.

The Foundation should therefore support activities and programs oriented toward providing initial and continuing training and instruction to help people enter or re-enter the job market. These programs should not be oriented solely toward education, except for those that use education to integrate at-risk groups. They should also reinforce values like democracy, social justice, and respect for human rights, especially among young persons, because education contributes significantly to reducing xenophobia, racism, anti-Semitism, and intolerance. To realize these objectives, the following actions may be proposed by the Foundation:

1. Creating teaching materials (manuals, textbooks, audiovisual aids, etc.) that reflect the cultural diversity of Spanish and European society as well as the exchange of experiences in this field;
2. Creating integration initiatives—especially specific programs for areas where the rate of social exclusion is highest—principally targeting students who, due to their

89. *See* C.E. art. 27.

- social situation, may act under racist and xenophobic influences;
3. Supporting educational content that can help to better comprehend the characteristics of a multicultural society, especially in areas or subjects like history, human sciences, or languages; and
 4. Promoting the formation of associations, for young persons in particular, with the purpose of encouraging activities meant to slow the growth of racist and xenophobic attitudes.

c. Social integration activities. Social integration activities are the most difficult to define because they include a large and diverse set of activities. They include not only economic matters but also personal services and assistance, such as healthcare, housing assistance, childcare or family benefits, aid for socially excluded groups, and activities of social reintegration. Within this realm, two kinds of activities fit best with the Foundation’s goals: (1) activities and programs directed at the social inclusion of immigrants; and (2) assistance for groups living in situations of inequality or who are at risk of social exclusion, particularly women and youth. All of these activities seek to ensure a sufficient and dignified quality of life for individuals and groups. The Foundation’s beneficiary entities would develop the activities or programs related to these two goals. Consequently, the Foundation seeks to promote and integrate programs that aim to prevent exclusion, help people gain greater personal autonomy, and help immigrants or minority groups reinforce their social ties—especially in sensitive or vulnerable situations—all the while contributing to the expansion of activity and infrastructure projects. In this regard, Article 14 of the European Social Charter of 1961 is especially significant, as it establishes the right to receive social welfare benefits and services.⁹⁰ Article 14 emphasizes that these social services are intended to “contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment.”⁹¹ Indubitably, such programs should be fundamentally aimed at

90. European Social Charter art. 14, Oct. 18, 1961, Europ. T.S. No. 35, 529 U.N.T.S. 89.

91. *Id.* art. 14.1.

eliminating poverty, encouraging full social integration, and transforming structures in order to confront numerous relational or social problems. Such problems result, *inter alia*, from inadequate education, poor sanitary conditions, lack of housing, lack or weakness of familial support, marginalization of social life, or the absence of opportunities.

Social integration activities include projects that support employment, leisure, free time, and social life—especially for women and youth—as well as orientational and informational activities that promote volunteer service. Social integration can also stabilize a society's infrastructure by funding orientation, information, and cultural centers; training and instruction centers; employment workshops; and youth shelters. One can also appropriately include the aid directed toward acquiring, establishing, refurbishing, and maintaining the social centers of those entities which seek such aid. These centers would necessarily include the federation headquarters of the different religious entities.

d. Other possible activities. The communications media is one area of special significance and sensitivity. We believe that communication activities should shape objectives supported by the Foundation. The communications media has acquired an undeniably significant and constructive importance regarding training and integration. It also serves as a necessary and indispensable instrument for terminating a culture of hate, confrontation, and conflict between civilizations where intercultural conflict acquires special meaning. If we want to end conflict between civilizations, we must promote dialogue, free and open debate, and knowledge and understanding between cultures and religions. Because the communications media plays a crucial role in this area, initiatives should be supported when they propose using the media as an instrument for promoting tolerance and coexistence among religions, cultures, peoples, and nations of the world. Such activities should seek to promote societal sensitivity by providing knowledge about different groups and their culture. In this respect, the Foundation should support activities and programs that promote a more integrated vision of different religions, beliefs, or convictions. In this vision, religion should not only be considered as a collection of beliefs, but it should also be presented in terms of its relationship to human rights, ethics, and other social issues, concepts, and values.

The training of public officials and other public employees is a second area of interest. Such training would particularly include educators, judges and magistrates, prison administrators, officials of the Spanish State, leaders of autonomous communities, and members of city councils. Ideally, this training would prevent these officials from acting in a discriminatory way toward people, or groups of people, because of their participation in a belief or creed—particularly a minority religion. We should emphasize that the guarantee of freedom of conscience, religion, and thought, which is recognized in Article 16 of the Constitution,⁹² demands justice and impartiality in legislation, in the execution of the law, and in the exercise of judicial and administrative powers.

2. Excluded activities

While the Foundation embraces many activities and purposes, one activity remains well outside of its domain: worship. This restriction requires us to establish boundaries where limits are not always clearly defined and are at times simply porous.

a. Worship activities. Although dictionaries give varying definitions of the term “worship,” two definitions seem highly relevant within the context of this article. We have opted to choose two definitions that seem closely related: (1) “reverent and loving homage that man offers to what he considers sacred,” and (2) “a group of rites and ceremonies by which man presents this homage.”⁹³ Thus, the term “worship” is directly linked to the ritualistic and ceremonial element that religious groups perform to offer homage to, or communicate with, what they consider sacred or divine. We can include within this definition the place that groups or individuals designate for the veneration or “prayer” to their deity or deities and the person or persons who provide service or spiritual assistance to group members.

In this regard, the bilateral cooperation agreements that religious minorities have made with the Spanish State become especially significant and relevant to the purposes of this report. Specifically, the Agreement of Cooperation Between the State and the Federation

92. C.E. art. 16.

93. DICCIONARIO DE LA LENGUA ESPAÑOLA (22D ED. 2001), available at <http://buscon.rae.cs/draeI>.

of Evangelical Religious Entities of Spain states the following: "For all legal purposes, duties of worship or religious assistance shall be those directed expressly to worship, the administration of the Sacraments, attending the faithful, preaching the Gospel and religious teaching."⁹⁴ Jewish faiths have a very similar agreement which states that "functions set out under Jewish law and tradition shall be considered to be the functions characteristic of the Jewish religion, including the religious functions deriving from the rabbinic office, worship, administration of ritual services, rabbi training, teaching the Jewish religion, and tendering spiritual support."⁹⁵ Lastly, Muslims designate their worship functions as "those set out under Islamic law and tradition, as found in the Koran or the Sunna."⁹⁶ Along these same lines, it is fitting to mention the 1979 agreements signed by the Spanish State and the Holy See, wherein the Catholic Church's functions are defined as "those of worship, jurisdiction, . . . religious teaching,"⁹⁷ and "religious assistance."⁹⁸ These accords also establish tax exemptions for "any rights or goods acquired for worship purposes, for maintaining the clergy, for maintaining the sacred apostleship, and for acts of charity."⁹⁹

These agreements illustrate that all activities performed to fulfill a religious faith's duties or "unique functions,"¹⁰⁰ such as pastoral or apostolic functions, qualify as worship activities. In this regard, it is interesting to note that the Catholic Church's Code of Canon Law assigns both parochial and religious teaching duties to ministers of religion. Canon 528 divides these duties into three main groups of activities: preaching the word of God, providing catechism training and religious education, and administering the sacraments.¹⁰¹ We

94. See Art. 6 of the Agreement of Cooperation Between the State and the Federation of Evangelical Religious Entities of Spain (B.O.E. 1992, 272).

95. See Art. 6 of the Agreement of Cooperation Between the State and the Federation of Israelite Communities in Spain (B.O.E. 1992, 272).

96. *Id.*

97. See Art. 1.1 of the Agreement Between the Spanish State and the Holy See on Judicial Matters (B.O.E. 1979, 300).

98. *Id.* art. 4.1.

99. See Art. 4.1.C of the Agreement Between the Spanish State and the Holy See on Economic Matters (B.O.E. 1979, 30).

100. See Instruction on the Inscription of Associations and Foundations of the Catholic Church (Feb. 5, 1999). This Instruction was also published in Official Bulletin of the Spanish Episcopal Conference, vol. 60 (March 31, 1999).

101. See 1983 Codex Iuris Canonici [CODE C.] 528.

should also note that the concept of worship includes not only group rituals, but also any individual ritual activity whereby the faithful communicate with a superior being, transcendent or otherwise.¹⁰²

In conclusion, “worship” activities should be excluded from the Foundation’s ambit. Such activities include anything directly related to religious assistance and spiritual guidance of minority religious groups—worship being understood as a communicative act or ritual, either individual or collective, with a superior being or force, which being or force need not be transcendent. Furthermore, all acquisitions of real estate and personal property designated for worship, maintenance of the clergy, and maintenance of the apostleship should also be excluded from Foundation support.

b. Distinguishing “religious purpose” and “worship purpose.” Although religion and worship appear to be inextricably related, there are subtle differences between “religious purpose” and “worship purpose.” We must address this question because the terms appear as synonyms in some instances, while on other occasions they are unequally defined. Concerning the present report’s objectives, these terms should not be understood as equivalent or synonymous because, in our judgment, not all “religious purposes” are coincidental with “worship purposes,” although all “worship purposes” may well be “religious purposes.” Because “religious purposes” include facets that go beyond worship, we must identify the different components that make up a “religious purpose.” In doing so, we must specify as worship activities all those activities pertaining uniquely to religious faiths and that, in one way or another, fit within the context of their autonomy as recognized by law. Therefore, other lawful activities conducted by particular faiths that are not typically religious, but are conducted or can be conducted with non-religious associations—including charitable, educational, cultural, or social assistance activities—should not be considered worship activities. Faiths should be able to freely participate in all such activities without the activity being considered worship, or of apostolic function. In this regard, Article 5 of the Catholic Church’s Agreement on Economic Matters becomes significant when it distinguishes “religious activities” from those

102. See Resolution of the General Directorate of Religious Affairs, § 4, ¶ 7 (Dec. 22, 1992).

providing “education, medical or hospital services, or social welfare.”¹⁰³ Consequently, although Foundation funds will not be used to support worship activities—consistent with the distinction between worship purposes and certain types of religious purposes—the Foundation will support activities that serve cultural, educational, and charitable ends.

B. Affected Entities

The Bylaws of the Foundation state:

Applications for grants should be presented by the representative federations of non-Catholic religious denominations that have signed a cooperation agreement with the Spanish State or that have been declared as having *notorio arraigo*, or such applications may be submitted directly by religious communities, as long as they are endorsed by a federation and registered in the Register of Religious Entities.¹⁰⁴

This provision should be seen in relation to Article 7.1 of the bylaws, which establishes that “[t]he Foundation has as its purpose to contribute to the implementation of programs and projects of a cultural, educational, and social-integrational nature for the non-Catholic denominations that have an Agreement of Cooperation with the Spanish State or that have ‘*notorio arraigo*’ in Spain.”¹⁰⁵ Because these provisions restrict the Foundation’s beneficiaries to only those mentioned in these rules, an important number of religious groups are excluded.

1. Beneficiaries

Before analyzing in detail each of the groups mentioned above, we must consider whether an activity conforms to Law 50/2002, which states that a “foundation’s goals should benefit generic groups of people.”¹⁰⁶ While we do not dispute this fact, we are also persuaded by Garcia-Andrade who clarified this issue by stating that “the purposes of the Foundation are not to benefit a particular

103. See STC, June 14, 1996 (R.T.C., No. 1391).

104. Bylaws of the Foundation, *supra* note 1, art. 9.2 (emphasis added).

105. *Id.* art. 7.1 (emphasis added).

106. See Art. 3.2 of the Foundations Act (B.O.E. 2002, 310).

group, but rather to aid particular activities.”¹⁰⁷ Nonetheless, under either interpretation, establishment of a special interest foundation to benefit persons that can be identified *a priori* is prohibited. In the case of this Foundation, such an *a priori* identification does not seem plausible.

A second clarification relating to beneficiaries is found in Law 50/2002, which states that

foundations cannot be constituted with the main purpose of designating their benefits to the founder or to the sponsors, to their spouses or persons related in a similar manner, or to their relatives up to the fourth degree, nor to specific judicial entities who do not pursue objectives of general interest.¹⁰⁸

Thus, foundations are specifically prohibited from benefiting their own founders, board members, or family members having a relationship established by blood or law up to the fourth degree. At the same time, this section prohibits a foundation’s resources from benefiting specific judicial entities when such persons do not pursue goals of general interest. If such persons pursue general interests, however, resources can be given to them. This exception to the prohibition seems logical as long as the beneficiaries are generic groups; attempts to benefit an individual judicial entity, however, should be considered against the law. Some may believe that the Foundation actually violates the prohibition against providing resources to individual judicial entities. That is, because the Foundation supports only groups having *notorio arraigo*¹⁰⁹—a status enjoyed only by a particular group of religious federations¹¹⁰—the Foundation’s resources are destined for individual judicial entities.

To counter this argument, and as we have already pointed out, the prohibition applies only against particular kinds of individual judicial entities: those “who do not pursue objectives of general interest.”¹¹¹ Because the Foundation’s beneficiaries do in fact pursue objectives of general interest, this prohibition does not disqualify the Foundation. Furthermore, the Foundation identifies no beneficiary

107. JORGE GARCIA-ANDRADE GÓMEZ, *LA FUNDACIÓN: UN ESTUDIO JURÍDICO* 46 (1997).

108. *See* Art. 3.3 of the Foundations Act.

109. The concept of *notorio arraigo* will be discussed in greater detail *infra* Part IV.B.1.a.

110. At the present time, only four federations enjoy this status.

111. GONZÁLEZ CUETO, *supra* note 73, at 62.

as individualized or singular. That is, while one can understand the requirement of *notorio arraigo* as a kind of specificity, this requirement should not be understood as a kind of individuality, because no religious group is excluded in principle. More importantly, the real and direct beneficiaries are not strictly religious minorities but rather those people who participate in the activities of general interest that religious minorities conduct.

Having noted that participants are the true beneficiaries of religious groups' activities, we should also note that in accordance with Articles 92 and 7 of the Bylaws of the Foundation, we can identify two groups who are intended to benefit from the Foundation's objectives. These groups include religious faiths having *notorio arraigo*¹¹² and religious communities for which the former provide a guaranty.

a. Notorio arraigo. This classification applies to all faiths that have, or may obtain in the future, an agreement of cooperation with the State of Spain according to Article 7 of the LOLR. Up to this point in time, there have only been three agreements of this nature, all of them occurring in 1992. They are as follows:

1. The Agreement of Cooperation with the Federation of Evangelical Religious Entities of Spain, codified in Law 24/1992;
2. The Agreement of Cooperation with the Federation of Israelite Communities of Spain, codified in Law 25/1992; and
3. The Agreement of Cooperation with the Islamic Commission of Spain, codified in Law 26/1992.

In principle, only those churches, religious confessions, or religious communities who belong to the above federations may be beneficiaries of the Foundation. Notwithstanding, the Bylaws of the Foundation extend such benefits to another kind of religious group: any group that obtains and is recognized as having *notorio arraigo*. Specifically, Article 8.1 of the Bylaws of the Foundation states the following: "The Foundation provides benefits to those non-Catholic religious confessions that qualify as having *notorio arraigo*, in accordance with that which has been established in Organic Law

112. As mentioned *supra* note 55, *notorio arraigo* means "conspicuous and well-established presence," but it is often translated as "well-known, deeply-rooted beliefs."

7/1980 (5 July 1980), which law addresses religious freedom."¹¹³ This provision introduces a new situation: the possibility that a religious entity may obtain *notorio arraigo* without signing an agreement of cooperation with the State. This provision actually creates a new religious entity that, until now, did not seem to fit within Spanish law. The new category falls somewhere between the entities that have an agreement of cooperation and those that have only had their character as judicial entities recognized in terms of being religious entities. Of course, faiths within the new category would not enjoy the legal status of religious confessions having agreements of cooperation. Nevertheless, such faiths would enjoy a better situation than those faiths without *notorio arraigo*, whose judicial personhood is recognized as that of a religious entity. Consequently, faiths without *notorio arraigo* are in a worse position because they cannot—in principal—receive benefits from the Foundation.

We should emphasize that *notorio arraigo* is an indeterminate legal concept. Nevertheless, the Advisory Commission on Religious Freedom has outlined the following elements of *notorio arraigo*: a sufficient number of members of the petitioning faith; an adequate legal organization that links all entities within the faith; a presence in Spain for sufficient time to show that the faith has historical roots, whether legally or clandestinely; the existence of social, cultural, service, and similar activities to a relevant degree; sufficient reach, as determined by the faith's territorial expanse, number of churches, places of worship, etc.; and finally, institutionalization of religious ministers.¹¹⁴ As we understand it, *notorio arraigo* should be interpreted on a case-by-case basis rather than as a demand that faiths satisfy certain concrete elements. We favor an approach that is broad and inclusive. That is, faiths qualify for this classification if they can demonstrate that they have a culture that is shared, permanent, and has the possibility of a future. This shared culture should produce evidence—conspicuous evidence—of a geographic, socio-economic, and cultural presence.

113. Bylaws of the Foundation, *supra* note 1, art. 8.1 (emphasis added).

114. See A. FERNANDEZ-CORONADO, *Estado y Confesiones Religiosas: Un Nuevo Modelo de Relación (Los Pactos con las Confesiones, leyes 24, 25 y 26 de 1992)*, Madrid 1995.

b. Secondary Foundation beneficiaries. The second category of Foundation beneficiaries are those religious communities for whom groups in the first category provide a guaranty. These groups must fulfill two requirements before the Foundation can fund their projects or activities. First, they must be registered in the Register of Religious Entities of the Ministry of Justice. Second, they must be members of a federation that has an agreement of cooperation with the State or that qualifies as *notorio arraigo*, or they must at least have a guaranty from one such federation.¹¹⁵

Some confusion has resulted regarding groups in this second category. It is unclear to some whether such groups must already belong to a religious federation or whether they simply need to be registered in the Registry of Religious Entities and have the guaranty of the federation representing their religion, without necessarily belonging to that federation. This confusion arises because of differences between Article 9.2 and Articles 7.1 and 8.1 of the Bylaws of the Foundation.¹¹⁶ The bylaws enlarge the Foundation's pool of potential beneficiaries, but this action does not appear to have been anticipated. However, this increase—a positive development in our judgment—is subject to an important requirement. When a religious community applies for project support, that project must be endorsed or guaranteed by a federation, meaning that the community does not have to be a member of that federation. Thus, when a religious community that does not belong to a federation makes a proposal, that proposal must have the approval or expressed support of a federation. If the religious community does not meet this requirement (whether *a priori* or *a posteriori*), the Foundation cannot provide financial assistance.

Additionally, groups desiring benefits must register with the Register of Religious Entities, which was created by the Ministry of Justice in conformity with the requirements of the LOLR.¹¹⁷ As a consequence, groups that have registered in any other public register cannot be beneficiaries of the Foundation, even if they enjoy the status of judicial or legal entities. Therefore, as far as the registration

115. See Art. 5 of the Religious Freedom Act (B.O.E. 1980, 177).

116. The problem arises from how the bylaws implement General Budgets of the State for the Year 2005 (B.O.E. 2004, 312), and the Agreement of the Council of Ministers Approving the Creation of the Foundation of Pluralism and Coexistence (Oct. 15, 2004).

117. See Art. 5 of the Religious Freedom Act.

requirement is concerned, the determining factor is not whether the religious group or community is a judicial entity under law, but rather whether it has obtained the status of a judicial entity by registering in the Register of Religious Entities.

c. Granting funds. Finally, because the Foundation operates in the public sector, its procedures for assessing proposals and granting funds should be informed by the principles of coordination, cooperation, public notice, and concurrence,¹¹⁸ in addition to the principles of independence, transparency, objectivity, impartiality, non-discrimination, and proportionality.¹¹⁹ In this way, we can safeguard the principle of equality *in* the law, even though, as we will later make clear, establishing a limited range of beneficiaries may cause difficulties with respect to the principle of equality *of* the law.

All of this is nothing more than a consequence of Article 23 of Law 50/2002, which states: “Foundations are required to . . . act with impartiality and non-discrimination in determining their beneficiaries.”¹²⁰ In addition to the basic guarantees and rules concerning the application, assessment, and approvals of assistance contained in the Bylaws of the Foundation, these actions should conform to Article 26 of Law 50/2002, which states that “[f]oundations can obtain income through their activities so long as such activity does not imply an unjustifiable limitation on possible beneficiaries.”¹²¹ We therefore recognize that the Foundation must be impartial in making its selections and should not discriminate unjustly between the various groups that qualify as legitimate beneficiaries.

2. Excluded entities

a. Individual persons. Both the Bylaws of the Foundation and the 2005 national budget specify which entities cannot be beneficiaries of the Foundation’s assistance. The excluded entities are as follows: physical persons; the Catholic Church and all its smaller entities; and

118. Compare Bylaws of the Foundation, *supra* note 1, art. 9.1, with Art. 46.6 of the Foundations Act (B.O.E. 2002, 310), and Art. 3.2 of the General Subsidies Act (B.O.E. 2003, 276).

119. See Bylaws of the Foundation, *supra* note 1, art. 8.2.

120. See Art. 23 of the Religious Freedom Act.

121. *Id.* art. 26.

all other groups, associations, foundations, or judicial entities that have not met the requirements of being a religious confession (not having *notorio arraigo* and not being registered in the Register of Religious Entities).¹²² In addition, religious communities that have not registered in the Registry of Religious Entities and received the guaranty of a religious federation having *notorio arraigo* are excluded from receiving Foundation benefits.¹²³ Individual persons are also excluded from becoming Foundation beneficiaries, notwithstanding the fact that they enjoy the right to freedom of conscience and can exercise their individual rights. Nevertheless, we can rightly consider the possibility of extending such assistance in the future to activities and programs conducted by individuals belonging to religious groups that qualify for assistance. Finally, even though proposals should be presented and implemented by groups, this requirement does not prevent individual persons from receiving the benefits of activities and programs that are financed by the Foundation and executed by beneficiary groups. Although in principle such activities are directed towards groups, the ultimate beneficiaries will be the individuals belonging to those groups.

b. The Catholic Church. We do not view the exclusion of the Catholic Church and its smaller entities as a violation of the principle of equality. As we have pointed out, the Foundation was created to help those religious groups who are disadvantaged by their minority status. Furthermore, through the subsidy system described above, the Catholic Church already has a general way to meet the Foundation's objectives under conditions equal to those of the other non-governmental organizations that participate in these types of activities.

c. Groups lacking notorio arraigo. Greater difficulties arise with the exclusion of religious entities that qualify and register in the Register of Religious Entities yet are nonetheless excluded because they do not have a conspicuous and well established presence in Spain. This exclusion gives us pause, for it represents a limit in the range of possible beneficiaries and eliminates minority religious groups who are equally capable of carrying out many of the

122. Bylaws of the Foundation, *supra* note 1, art. 8.

123. *Id.*

Foundation’s aims. Nevertheless, the limitation can be justified by the need for proportionality and the need to identify the most representative groups. Both of these restrictions are necessary because the Foundation distributes economic assistance from a pool of scarce resources. Therefore, there is ample justification for limiting economic resources to groups that, while minorities, enjoy special legal recognition such as *notorio arraigo*, despite the uncertainty this concept may have. While this exclusion could arguably be seen as breaking the principle of equality guaranteed in Article 14 of the Constitution, such differential treatment for religious groups has not been criticized as unconstitutional. Even so, the application of *notorio arraigo* to certain religious groups should be understood as transitory; in the future, all religious groups registered in the Register of Religious Entities will enjoy *notorio arraigo*.

3. Benefactors

a. The Foundation’s unique status. Article 44 of Law 50/2002, which establishes the legal framework for foundations, states the following:

[P]ublic foundations are those in which one of the following circumstances applies:

- a) The majority of its contributions, direct or indirect, come from the General Administration of the State, its public institutions, or other entities of the state public sector.
- b) More than 50 percent of its permanent endowment is made up of goods or rights contributed or transferred by the above-referenced entities.¹²⁴

Importantly, the Foundation’s initial contributions came entirely from the General Administration of the State: the original endowment of thirty thousand euros was approved and established in the Foundation’s enabling act and three million euros were allocated in the 2005 national budget. For this reason, we must always remain aware of the goals for which the Foundation provides grants or subsidies (these are the same goals as those found in the Bylaws of the Foundation).¹²⁵ Moreover, the Law on Budgets expressly

124. See Art. 44 of the Religious Freedom Act.

125. See Bylaws of the Foundation, *supra* note 1, art. 7.

excludes worship activities as a suitable use of such financial resources.¹²⁶ In our judgment, this arrangement is perfectly compatible with the Constitution's demands of a secular state.

Because the Foundation manages public funds, it is unique in certain ways. In addition to its peculiar budgetary and auditing requirements, the Foundation is unique because its creation was approved by the Council of Ministers. Consequently, the Foundation's procedures must reflect the basic principles of publicity, transparency, and concurrency.¹²⁷ Regarding employees, the Foundation should function on the principles of equality, merit, capacity, and publicity. Finally, the Foundation should act according to principles of publicity, concurrency and objectivity when making contracts. Although all of these principles are necessary for a successful, publicly administered program, we should not forget, as has been noted by José Luis Piñar Mañas, that

such foundations are not administrative entities, nor are they organs of public administration. They are private judicial entities governed by foundation-related legislation and by the specific purposes for which they are approved, but not by administrative law (for example, regulations regarding government agencies' civil liability, employment practices, and jurisdiction, to name a few).¹²⁸

b. Donations and bequests. The Foundation can increase its income by conducting its own activities¹²⁹ or by receiving donations or bequests from third parties.¹³⁰ Two matters should be addressed regarding such donations or bequests from third parties: (1) the different types of gifts or rights that third parties may use to make contributions and (2) the intended use and limits of this donated property.

Law 50/2002 references the three kinds of gifts that a third party can make: donations, bequests, and inheritances.¹³¹ With respect to inheritances, Law 50/2002 establishes a guarantee: "The

126. See General Budgets of the State for the Year 2005 (B.O.E. 2004, 312).

127. See Bylaws of the Foundation, *supra* note 1, arts. 21–24.

128. José Luis Piñar Mañas, *El protectorado de Fundaciones: situación actual y propuestas de reforma*, in *MANUAL DE FUNDACIONES: RÉGIMEN JURÍDICO, FISCAL Y CONTABLE, CON ANEXO DE LEGISLACIÓN ESTATAL Y AUTONÓMICA* 81, 104 (Alberto Ruiz Ojeda ed., 1999).

129. See Art. 26 of the Religious Freedom Act.

130. See *id.* art. 22 (as it relates to art. 24.3).

131. See *id.*

acceptance of an inheritance by the Foundation will always be understood to be done with the benefit of inventory."¹³² This provision assures that "the heir may accept the inheritance such that liability for the debts and charges of the succession cannot exceed the value of the inheritance."¹³³ As an heir, the Foundation itself must protect this benefit by making an inventory of inherited property, which is a most significant obligation. The responsibility for losing the benefit of inventory¹³⁴ or renouncing the inheritance without liability lies with the Foundation's board. Such actions should be taken according to the provisions of Article 17.3.b, as modified by Article 18.2.d-e and Article 35.2 of Law 50/2002.¹³⁵

The acceptance of bequests (with their accompanying charges) has only one restriction: the board must communicate its acceptance to the Foundation's Protectorate within no more than ten working days.¹³⁶ A bequest is a type of donation made in a will.¹³⁷ As such, its effects can only be realized after the testator's death. The legal right to the bequest, however, is acquired *ipso iure*; the donee does not have to accept it or make any declaration of intent concerning it. But the donee can renounce the bequest and thereby avoid the accompanying charges. In any case, if the Protectorate determines that a loss or an excessive charge has occurred, or that the Foundation has suffered some unjustified damage or prejudice, then the Protectorate can take action against the board by following the procedures outlined in Article 17.3.b, in connection with Article 35.2 and Article 18.2.d-e of Law 50/2002.¹³⁸

132. *See id.*

133. José Javier Lopez Jacoiste, *Exégesis al artículo 1010*, in *COMENTARIO DEL CÓDIGO CIVIL* (1993); *see also* Código Civil [C.C.] art. 1023 (Spain).

134. *See* C.C. art. 1024.

135. Art. 17.3 of the Foundations Act (B.O.E. 2002, 310) states:

A claim for liability will be entered before the proper judicial authority and in the name of the foundation:

- a) By the appropriate governing body of the foundation, subject to an agreement concerning the same, in which the board member concerned will not participate.
- b) By the Protectorate, under the conditions established in Article 35.2.
- c) By the dissenting or absent board members, as defined in subsection 2 of this article, as well as by the founder, so long as the founder is not a board member.

136. *See id.* art. 22.2.

137. *See* C.C. art. 858.

138. *See supra* note 135; Art. 18.2.d-e of the Foundations Act.

Donations also fall under rules similar to those governing bequests. A “donation” is the award of a gratuitous benefit by one person to another without creating any obligation to give something in return. A donation, then, is “an act of generosity by which one person freely gives something to another, who then accepts it.”¹³⁹ If such a donation includes liabilities—that is, if it comes with encumbrances or charges¹⁴⁰—the board should communicate its acceptance to the Protectorate within the 10 day period and with the same responsibilities that apply to bequests.¹⁴¹

It is important to discuss whether third party donors can grant property or funds that further only one part of the Foundation’s objectives. It seems clear that there are no restrictions concerning such donations, especially given the many different activities the Foundation may perform. At the time they make a contribution, therefore, donors have complete freedom to support one particular activity (or multiple activities) and to not support others. Of course, donations can only be made to achieve or satisfy the Foundation’s objectives, since the Foundation is prohibited from accepting donations meant for purposes other than those envisioned in its own statutes. To this end—and for the purpose of fulfilling goals not expressly foreseen but that may become part of the Foundation’s objectives—we understand that to avoid confusion and uncertainty, the best course of action would be the prior and express inclusion of these other goals in the Bylaws of the Foundation. Such would be the case, for example, with objectives related to worship; these are not included among the Foundation’s objectives, although they undoubtedly could be according to Article 1 of the bylaws. Nevertheless, we understand that their inclusion would obligate a distinction, expressly included in the bylaws, regarding the beneficiaries of the property, rights, and subsidies the Foundation receives. Although goals related to worship activities could not be part of publicly financed programs, projects, or activities, such goals could be part of privately financed activities.

We should also emphasize that the Foundation must use gifts and bequests to further the aims and activities that the donor designates so long as those aims, as noted earlier, are consistent with

139. *See* C.C. art. 618.

140. *Id.* art. 619.

141. *See* Art. 22.2 of the Foundations Act.

the Foundation's objectives and the beneficiary is not the donor, the donor's spouse, or some other family member within four degrees of separation. Furthermore, a judicial entity—a religious minority group having *notorio arraigo*—may not be the beneficiary of the donation, as established in Article 3.3 of Law 50/2002, unless that entity uses the donation for the purposes of general interest.¹⁴² This assumes that in the case of an individual judicial entity, the Foundation can only finance those objectives currently enumerated in Article 7 of its bylaws.¹⁴³ However, the Foundation cannot under any hypothetical circumstance finance any objectives related to worship, for such objectives do not address a general interest.¹⁴⁴

142. *Id.* art. 3.3.

143. *Id.* art. 7.

144. Concerning this restriction, the following are especially relevant: (1) Art. 3.1 of the Foundations Act; and (2) the list of permissible purposes established by the Committee of the European Union and the Legal and Fiscal Task Forces of the Center for Foundations (the Center for Foundations being the creation of an association of non-profit organizations). For example, Art. 3.1 of the Foundations Act states the following:

Las fundaciones deberán perseguir fines de interés general, como pueden ser, entre otros, los de defensa de los derechos humanos, de las víctimas del terrorismo y actos violentos, asistencia social e inclusión social, cívicos, educativos, culturales, científicos, deportivos, sanitarios, laborales, de fortalecimiento institucional, de cooperación para el desarrollo, de promoción del voluntariado, de promoción de la acción social, de defensa del medio ambiente, y de fomento de la economía social, de promoción y atención a las personas en riesgo de exclusión por razones físicas, sociales o culturales, de promoción de los valores constitucionales y defensa de los principios democráticos, de fomento de la tolerancia, de desarrollo de la sociedad de la información, o de investigación científica y desarrollo tecnológico.

El Comité de la Unión Europea y los Grupos de Trabajo Legal y Fiscal del Centro de Fundaciones recogen los siguientes fines de interés general:

- a) atletismo o deporte aficionado;
- b) bellas artes, cultura, conservación del patrimonio;
- c) ayuda o protección a personas incapacitadas física o mentalmente;
- d) ayuda a refugiados o inmigrantes;
- e) derechos humanos; derechos civiles;
- f) protección del consumidor;
- g) ecología o protección del medio ambiente;
- h) educación, formación, ilustración;
- i) eliminación de discriminaciones basadas en la raza, lo étnico o lo religioso, o de cualquier otra forma de discriminación legalmente prescrita;
- j) eliminación de la pobreza;
- k) salud, bienestar físico, atención médica;
- l) alivio humanitario o en caso de desastres;
- m) promoción del entendimiento en Europa e internacionalmente;
- n) protección y apoyo de la infancia y la juventud;

V. CONCLUSION

Because the Foundation for Pluralism and Coexistence receives public funding that will be directly channeled to religious groups, it is unlike any other Spanish foundation. Nonetheless, the Foundation will not only operate in harmony with constitutional principles regarding the freedom of religion, but it will also aim to carry out constitutional principles by fostering equality of opportunity for qualifying religious minorities. Despite the uncertainties that are inevitably a part of any innovative and groundbreaking venture, the Foundation may serve as a model whereby States can aid religious minorities as they seek to continue developing and flourishing in today's world.

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- o) protección y apoyo de individuos excluidos;
 - p) protección o cuidado de animales heridos o vulnerables;
 - q) ciencia;
 - r) cohesión social;
 - s) desarrollo social y económico;
 - t) bienestar social;
 - u) cualquier otra finalidad declarada de interés general.