Université Paul Cézanne - Aix-Marseille III
Faculté de Droit et de Science Politique

**Laboratoire Interdisciplinaire Droit des Médias
et Mutations Sociales
(LID2MS)
EA 4328**

DROIT ET RELIGIONS

Annuaire

VOLUME 5

Année 2010 - 2011

Ouvrage publié avec le concours du Conseil Régional
de la Région P.A.C.A.

PRESSES UNIVERSITAIRES D'AIX-MARSEILLE - PUAM
-2010-

LAW AND RELIGION IN CHILE: ECCLESIASTICAL LAW IN TRANSITION

Ana María CELIS BRUNET[1]
Sebastián ZÁRATE ROJAS[2]

SUMMARY: 1. Introduction. – 2. Overview of the Chilean situation. 2.1. Laicity in Chile. 2.2 Religion and the Constitution. 2.3 Religious entities and the State – 3. Chilean society, education and religion. 3.1 Society and religion. 3.2 Ministers of religion under the Chilean law. 3.3 Religion and Labour law. 3.4 Faith Schools. – 4. Conclusion.

I. INTRODUCTION

Chilean ecclesiastical law is in a stage of transformation. We do not have yet the historical perspective to argue that these changes are due to the changes in society or even the consolidation of democracy within the last 20 years. However, it is a matter of fact that ecclesiastical law as a discipline has become more relevant subject during the last decade.

Today we have more scholars and publications in the field than ever before[3]. More importantly, judges and lawyers are more aware about the reality of this discipline. As a result, there is a considerable better understanding of religious freedom, and courts have started to work in a more serious doctrine, like the case law in areas such as education and labour law within different issues in law and religion.

The flourishing state of the Chilean ecclesiastical law can be also demonstrated by the offer of optional unit courses in law faculties at an

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[1] Associate Professor of Canon Law, Director of the Canon Law Department and the Centre for Law and Religion (Centro de Libertad Religiosa – Derecho UC), Law Faculty at the Pontificia Universidad Católica de Chile. President of the Consorcio Latinoamericano de Libertad Religiosa.

[2] Assistant Professor of Public Law, Pontificia Universidad Católica de Chile. Associate member of the Centre for Law and Religion (Centro de Libertad Religiosa – Derecho UC), Pontificia Universidad Católica de Chile.

[3] The leading academic using the name of Ecclesiastical law has been Professor Jorge Precht, who has contributed with two books in the field: Jorge Precht Pizarro, *15 Estudios Sobre Libertad Religiosa En Chile* (Lecciones; Santiago, Chile: Ed. Univ. Católica de Chile, 2006). Article 3, Jorge Enrique Precht Pizarro, *Derecho Eclesiástico Del Estado De Chile: Análisis Históricos Y Doctrinales* (Lecciones; Santiago, Chile: Ediciones Universidad Católica de Chile, 2001). Professor Carlos Salinas, from the Universidad Católica de Valparaíso published in 2004 C. Salinas Araneda, *Lecciones De Derecho Eclesiástico Del Estado De Chile* (Valparaíso: Ediciones Universitarias de Valparaíso, Pontificia Universidad Católica de Valparaíso, 2004). Besides these general books, many other books and journal articles have been published in specific topics within the discipline within the last decade.

undergraduate level[4]. In a country in which doctoral studies in law (PhD) have been running for only a decade, a small group of research students have started to work inspired by academics related to the discipline.

These developments are going to be considered in this article, along with the general overview of law and religion in Chile. The article is organised as follows. The first section will describe the legal and historical background, taking into consideration the more relevant constitutional changes of religious freedom, and the relationship between the state and religious organisations. The second section of the article will analyse the recognition and regulation of religious organisations under the Local Communities Act 1997, the Civil Code, the Religious Entities Act 1999 and the public entities that had previous recognition. In the third section we will consider three important issues within law and religion in the country: first, religion and society; secondly, ministers of religion; thirdly, labour law and religious freedom, and finally, faith schools.

II. OVERVIEW OF THE CHILEAN SITUATION

A. LAICITY (*LAICISM*) IN CHILE

When we talk about a secular state, it has to be highlighted that the term is relatively new in Chile. Secondly, the distinction between the confessional and non-confessional state does not lie in a conflict between religions, but in the acceptance of liberal and anticlerical views. Indeed, the term "confessional state" was not used until 1925, long after the historical peak of the debate between the Catholic Church (1856) and the state.

Even the term "laicity" was not invoked at that time (1925). The non-establishment of religion at a Constitutional level in 1925 was meant to cover two aspects: first, to confirm that the Catholic Church would not be longer the official religion of the state; secondly, to acknowledge the freedom of religion along with the rest of the Civil Liberties recognised in the Constitution. As Professor PRECHT puts it:

> *"Chile has never been a secular state. If someone study the origin of this separation between the Church and the State, agreed in 1925 between the Chilean state and the Holy See – and imposed to the Archbishop of Santiago Monsignor Crescente Errázuriz, knows that the word 'laicity' is not mentioned, and the de sense of the term is not present in the text oriented practice (...) The Catholic Church never understood this separation as a creation of a new secularist state, but rather as a matter of jurisdictions..."*[5].

Nowadays, there is no political conflict between religious authorities and the state. At a social level, there is no serious debate about laicity either, despite the incipient idea among some NGOs[6], or academic centres[7].

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[4] Optional units in the discipline are currently offered at the Pontificia Universidad Católica de Chile (Law and Religion) and at the Pontificia Universidad Católica de Valparaíso (Ecclesiastical law of the Chilean state) as well as the Universidad de Talca.

[5] J. Precht Pizarro, "La Laicidad Del Estado En Cuatro Constituciones Latinoamericanas", *Estudios constitucionales*, 4/2 (2006), 697-716 at 709.

[6] E.g. the Instituto Laico de Estudios Contemporáneos and the "Programa de Equidad y Género", Facultad Latinoamericana de Ciencias Sociales (FLACSO).

B. RELIGION AND THE CONSTITUTION

The Chilean Constitution recognises freedom of religion as follows:

> "*Article 19 n° 6.- Freedom of conscience, manifestation of all creeds and the free exercise of all worships which are not opposed to morals, good customs or public order.*
>
> *Religious communities may erect and maintain churches and their facilities in accordance with the conditions of safety and hygiene as established by the laws and ordinances.*
>
> *With respect to assets, the churches and religious communities and institutions representing any worship shall enjoy the rights granted and acknowledged by the laws currently in force. Churches and their facilities assigned exclusively for religious activities shall be exempt from all taxes*".

When constitutional scholars analyse this provision, it is not unusual that they deal mostly with the historical context of the separation between the state and the Catholic Church in 1925, and its legal and political implications a Constitutional level[8]. However, it does not lead to the analysis of the liberty contained in this constitutional provision. Moreover, any student of constitutional law would have difficulties in looking for a treatment of religious freedom from a perspective of international law of human rights.

One of the main points of the separation between a developing discipline and a developed one, is the understanding of ecclesiastical law founded on the grounds of the system of freedoms, instead of paying too much attention on the historical separation between religious and state institutions. We are not dismissing the importance of institutional arrangements in the discipline, but we rather believe that they should not be overestimated in detriment of religious freedom.

Related to this point, any comparative reader of religious freedom when looking for the body of case law on law and religion issues, should not be surprised that some of the cases are presented by the plaintiffs to the courts on the grounds of the violation of another fundamental right recognised in the Constitution, but not directly as a violation of freedom of religion. One of the main examples of this trend was *"The Last Temptation of Christ" case*[9], in which the plaintiffs instead of arguing that the exhibition of the film would affect the religious beliefs of many Christians in the country, they chose as the main argument the Catholic Church and Christ himself would be affected in their reputation by the film. Today, it would have been be easier to invoke the religious freedom directly to the court in order to

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[7] Eg. the Centro de Libertad Religiosa – Derecho UC (Pontificia Universidad Católica de Chile), and the Instituto de Estudios Religiosos (Universidad Miguel de Cervantes).

[8] J. L. Cea Egaña, *Derecho Constitucional Chileno* (Santiago: Ediciones Universidad Católica de Chile, 2004), H. Nogueira Alcalá, "La Libertad De Conciencia, La Manifestación De Creencias Y La Libertad De Culto En El Ordenamiento Jurídico Chileno", *Ius et Praxis,* 12 (2006), 13-41, A. Silva Bascuñán, *Tratado De Derecho Constitucional, Tomo Xi. Ed. Jurídica De Chile* (Santiago: Editorial Jurídica de Chile, 2006) 15, A. Vivanco, *Curso De Derecho Constitucional. Aspectos Dogmáticos De La Carta Fundamental De 1980* (Santiago: Ediciones Universidad Católica de Chile, 2006) 31.

[9] The case was argued before the Supreme Court in 1997, "García Valdés, Sergio Y Otros C/ Consejo De Calificación Cinematográfica", (Corte Suprema, 1997). And then, before the Inter American Court of Human Rights in 2001.

apply to a Constitutional protection, and the court would have to balance the two rights in conflict in this matter (freedom of speech and religious freedom).

Another topic that has caused an extensive legal debate is the conscientious objection on the grounds of religious beliefs[10]. There is no constitutional or legal provision recognising the right of conscientious objectors, although it has been understood as part of the freedom of conscience. Nonetheless, being an exceptional situation in order to comply with the legal obligations, in principle it would be necessary or at least desirable to have an express recognition of the most relevant cases.

Conscientious objection has been understood mainly as a way to exempt the person from the mandatory military service, and as such has been accepted by constitutions and statues in other countries[11]. In Chile, there has not been a mention of religion[12] mentioned as a qualified exception in the military service, nor in other cases related to medical procedures or even pharmaceutical distribution of products. In those cases, however, we understand that religion freedom itself can be enough to support an application to a judicial relief mechanism.

C. RELIGIOUS ENTITIES AND THE STATE

Religious entities do not have a relationship based solely on the respect of autonomy. Autonomy and freedom are the basic elements of religious freedom in Chile. Mainly because of the reality of large population of citizens belonging to a religious belief, Parliament and governments have acknowledged the need to go beyond the respect of autonomy, and to build a collaborative relationship between state institutions and religious entities.

This has produced legal effects to the recognition of a religious entity, such as tax exemptions and the possibility of school subsidies. In practice, it also means that public authorities are aware of the needs of religious organisations. At an institutional level, the government created a religious liaison office, the Oficina de Asuntos Religiosos[13], which plays a formal communication channel between political authorities and religious groups. At an informal level, it has become a mandatory activity of each presidential candidate (and of course, of the President of the Republic) to hold meetings with the main religious organisations. In regards to public policies (e.g. elementary housing policies), humanitarian help disasters (e.g.

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[10] A. M. Celis Brunet, "Libertad De Conciencia Y Derecho Sanitario En Chile", in Isidoro Martín Sánchez (ed.), *Libertad De Conciencia Y Derecho Sanitario En España Y Latinoamérica* (Granada, 2010), L. Casas Becerra and C. Dides Castillo, "Objeción De Conciencia Y Salud Reproductiva En Chile: Dos Casos Paradigmáticos", *Acta Bioethica*, 13/2 (2007), 2, J. Couso, M. Guiloff, and R. Delaveau, "Notas Sobre La Objeción De Conciencia Y La Venta De Productos Farmaceúticos", *Revista chilena de derecho*, 34 (2007), 599-603.

[11] For instance, under Spanish law, it is recognized in the Constitution (article 30.2) See A. Figueruelo Burrieza, "Garantías Para La Protección Del Derecho La Objeción De Conciencia", *Revista de estudios políticos,* /45 (1985), 213, R. Soriano Díaz, "La Objeción De Conciencia: Significado, Fundamentos Jurídicos Y Positivación En El Ordenamiento Jurídico Español", *Revista de estudios políticos*, (1987), 61-110, J. Camarasa Carrillo, "Aspectos Críticos Y Jurisprudencia Contencioso-Administrativa En Torno Al Derecho Constitucional a La Objeción De Conciencia Al Servicio Militar", *Revista española de derecho constitucional*, 13/38 (1993), 117-65.

[12] It has been recognised as an exception in case of some relatives of victims of human rights during the military regime.

[13] http://servicios.minsegpres.cl/onar/.

the earthquake of February 2010), and education, religious entities have played part of fluid collaboration with governmental authorities.

The Constitution recognises the freedom of association[14]; under which any entity can obtain the legal personality from the state complying the requirements of the corresponding statute (e.g. company law, charity law, etc.). As far as religious freedom is concerned, the Constitution recognises the right of any 'church, confession and religious institutions of any religion'[15] to obtain a legal personality according to the law.

1. Local Communities Act 1997

At a legal level, there are three main ways in which a legal entity can obtain legal personality. The first one is under the Local Communities Act 1997, which establishes the creation of a local community organisation "with the aim of promoting and representing specific values and interests of the community"[16]. Even though this framework is applicable to all kinds of entities, religious or not, it has been used by many small religious communities, which has been benefit by an indeed simple procedure. The community is registered in the respective City Council.

2. Civil Code entities

The second form of legal recognition of a religious entity is the one regulated by the Civil Code, and applicable to any non-profit foundation or corporation. This civil law mechanism is available for associations with any kind of purposes (as long as it is not a for-profit institution) and, before enactment of the Religious Entities Act 1999, this was the legal form to obtain the personality from the Chilean authorities (with the exception of the Catholic Church and the Catholic Apostolic Orthodox Church, which have a legal recognition).

The procedure is undertaken before de Ministry of Justice, and the entity is officially approved by a decree of the President of the Republic. At the Ministry, it will be necessary to give evidence of financial sufficiency to support the objectives of the entity. An important element to bear in mind regarding this kind of legal entities is the legal provision that states that the President of the Republic can dissolve the entity if it is considered to be acting against the generally accepted customs of good conduct, morals and public order, when it does not fulfil the objective defined to the entity, or when there is a serious breach of the terms of the articles of incorporation.

An important concern appears from the text of the Civil Code, in which the President of the Republic can dissolve a legal entity. The problem was discovered by the dissolution of "Colonia Dignidad" (1991), when the President dissolved such non-profit corporation by arguing that the fact of the series of economic activities undertaken by the entity did not comply with the articles of incorporation, in breach of the non-profit nature of the entity. It is publicly known that the real reasons given by the President of the Republic were related to the links between the leader of

[14] Article 19 nº15, Chilean Constitution.
[15] Article 19 nº6, Chilean Constitution.
[16] "Local Communities Act 1997".

"Colonia Dignidad" with the military government, and human rights violations at the premises of the entity. The Supreme Court declared that the presidential decree of dissolution was unconstitutional, because the Constitution expressly eliminated the presidential power to dissolve legal entities. Because of the constitutional control, the norm of the Civil Code enabling the President of the Republic to dissolve a legal entity was not repealed, but only taken as unconstitutional for that specific case.

Even though the "Colonia Dignidad" case is not related to a religious organisation, it is relevant for a religious entity in order to choose whether to opt for this form of legal recognition. At any time the President of the Republic might consider that the religious entity does not comply with the rule of law. The reasons required by the Civil Code are the following: 'to compromise the national security or the state interests, or breaching the terms of the articles of agreement[17]. Nonetheless, the limitation clauses set up by the Constitution for the freedom of religion –"the generally accepted customs of good conduct, morals and public order"[18]– do not respond to those reasons. Secondly, it is doubtful that the President of the Republic by himself is able to give the necessary guarantees of due process. Thirdly, the legal provision of the Civil Code does not fit into a system built by the 1980 Constitution in which only the Congress is able to regulate or limit the exercise of fundamental rights. For these reasons, the Presidential dissolution has been generally considered as unconstitutional[19].

As a result, the regulations contained in the Civil Code for creating a legal entity for religious purposes does not grant them with the minimum constitutional requirements for stability over time, nor due process in case the President of the Republic decides to dissolve the entity.

3. Religious Entities Act 1999

The third and most important form to create a legal entity is by way of the Religious Entities Act 1999. The Act is one of the most important developments on the discipline, given the public debate, the academic analysis and the role of public servants (particularly from the Ministry of Justice) regarding the importance of religious entities.

Of course, the parliamentary debate with the enactment such Act was not easy[20], and still some provisions can be somewhat confusing. However, as a legal discipline, Chilean ecclesiastical law has not been the same since then. Last year we celebrated tenth anniversary of the Act, which gave us the possibility to hold an

[17] Article 559, Civil Code.
[18] Article 19 nº6, Chilean Constitution.
[19] "Supreme Court, Colonia Dignidad Case", (1992).c. 18º and 19º, M. A. Fernández González, "Régimen Constitucional De Las Iglesias", *Estudios constitucionales*, 1/1 (2003), 229-54 at 244.
[20] See R. Cortínez Castro, "La Personalidad Jurídica De Las Iglesias En El Derecho Público Chileno Y La Nueva Ley Sobre Su Constitución Jurídica", *Il diritto eclesiástico*, 1 (2001), Precht Pizarro, *15 Estudios Sobre Libertad Religiosa En Chile*. Third part, J. Precht Pizarro, "La Ambigüedad Legislativa Como Práctica Parlamentaria: La Iglesia Católica Y La Ley De Iglesias En Su Artículo 20", *Revista de Derecho de la Universidad Católica del Norte*, 10 (2003), 181-98.

academic debate about the benefits and problems that need to be solved in its regard[21].

The Religious Entities Act 1999 has several advantages over the other two ways to obtain the legal entity recognition, described above. First, the Ministry of Justice cannot reject the registration, despite the fact that it can request more information if there is an unfulfilled requirement in the application (unless there is a missing legal requirement in the application)[22]. Secondly, the dissolution of the religious entity is decided with a judicial ruling, after the case has been brought before the Court of Appeal by the Attorney General[23]. Therefore, as opposed to the Civil Code legal entities, it cannot be decided by the President of the Republic. Thirdly, in case of rejection by the Ministry of the application to legal recognition, the religious organisation can apply to judicial review directly to the Court of Appeal, and the decision made by the Court of Appeal is subject to review before the Supreme Court[24].

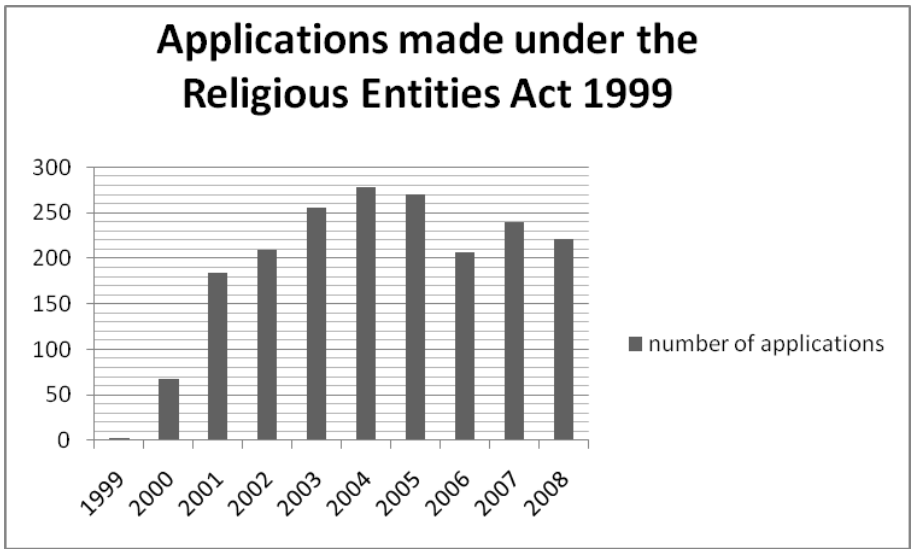
Nonetheless, as it has happened in other jurisdictions[25], the requirements to create a legal entity (and the rejection of application to create a legal entity) have been debated over the years since the enactment of the Religious Entities Act. There are two cases relevant to this issue: the first one is the *Church of God case (2001)*[26], in which the Ministry of Justice asked for further details in the application, supported by the Decree 303 (secondary legislation enforcing the Religious Entities Act). The Church of God sought judicial relief (Reclamación) against the Minister and the register of the Ministry on the grounds that the governmental authority cannot reject an application if the information missing (sought by the Ministry) is not required by the Religious Entities Act 1999. The Court ruled in favour of the plaintiff, on the grounds that the Ministry should have registered the Church, and then required further information.

However, the leading case in this matter is the *Unification Church case (2005)*[27] in which the Supreme Court had to decide –as it has been the case in other jurisdictions– in relation to the religious nature of an entity applying to a legal recognition. In this case, the Ministry of Justice rejected the registration and recognition of the Unification Church arguing the lack of religious content in the organisation and the fact that the behaviour of the movement in other countries might be considered a risk to public order. To support their argument, the Ministry showed the legal situation of the movement around the world, particularly taking into consideration alleged criminal activities of the leader of the movement. The majority opinion at the Supreme Court (3/5) considered that the decision of the Minister was lawful and proportional in respect to the limitations of the reader of religions recognised in the Constitution. The dissenting opinion (2/5) of the Court considered that the Minister has no power to reject an application and recognition,

[21] The Universities Católica de Chile, Católica de Valparaíso, de Talca and Los Andes organised the workshop "Libertad de Creencias" last November of 2009.
[22] "Religious Entities Act 1999". Article 11.
[23] *Ibid*. Article 19.
[24] *Ibid*. Article 11.
[25] In Spain, see M. Alendas Salinas, "La Inmerecida Degradación De Un Registro Jurídico", *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, /19 (2009), 1-28, "Scientology Case, Spanish Audiencia Nacional", (2005).
[26] "Iglesia De Dios En Chile C/ Ministro De Justicia, Concepción Court of Appeal", (2001).
[27] "Iglesia De La Unificación Con Subsecretaría De Justicia, Supreme Court", (2005).

and that the only way to state that a given religious organisation has acted beyond the religious freedom is by a petition to dissolution made by the Attorney General.

Therefore, the difference between the majority vote and the dissenting opinion consists in the *ex-ante* control of the religious organisation allegedly acting against the rule of law. The second and most important difference of criteria in this decision is whether the Ministry of Justice is able to analyse the religious nature of any organisation applying to registration and recognition. In this regard, the Religious Entities Act 1999 did not define precisely the meaning of religion, as far as the legal recognition is concerned. As it has been argued in other jurisdictions, it would be virtually impossible to do so in a legal provision.



Despite the legal debate in respect of the legal recognition made by the Religious Entities Act 1999, the Ministry of Justice has received an explosive number of applications, considering that Chile is a small country with a great proportion of Catholics. As shown in the figure above, until the beginning of 2009 the Ministry registered 1741 religious organisations.

4. Public legal entities

Under Chilean law, the public legal entity is the one having an explicit statutory recognition, and therefore it can only be dissolved or modified by another statute. The Civil Code recognises into such category other entities such as the Treasury and the City Councils[28]. In this category there are two religious entities expressly recognised as such[29]: the Catholic Church and the Catholic Apostolic Orthodox Church[30]. This distinction is confirmed by article 20 of the Religious

[28] Article 547, Civil Code.
[29] Ley 17.725.
[30] About the legal problems in this matter, see Salinas Araneda, *Lecciones De Derecho Eclesiástico Del Estado De Chile* at 280, J. Precht Pizarro, "El Ámbito De Lo Público Y La Presencia De La Iglesia

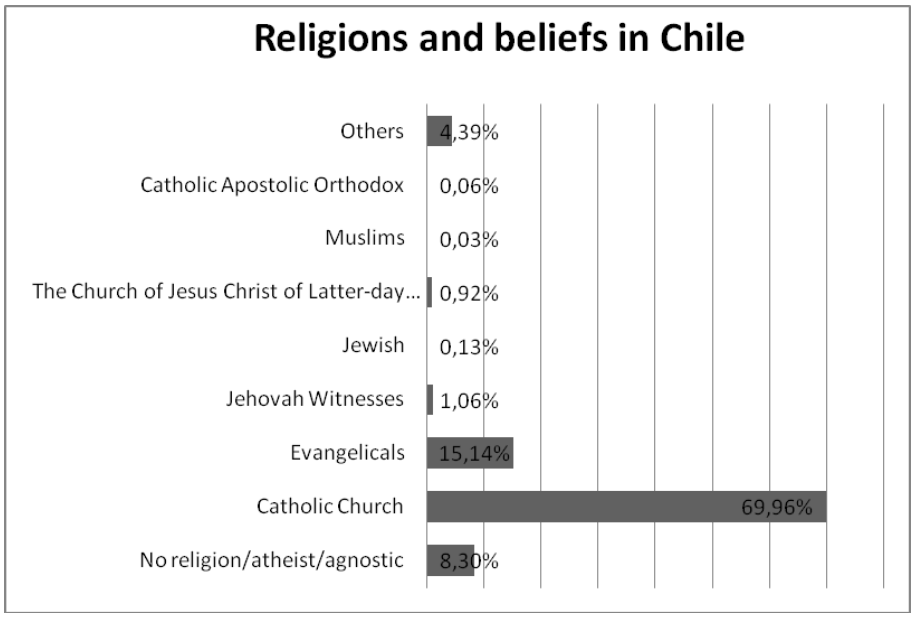
Entities Act 1999. There is also the constitutional recognition of the Catholic Church since the Constitution of 1833, until the separation between Church and state by the Constitution of 1925, and the concordat celebrated between the Chilean state and the Holy See in the same year.

To sum up this section, it can be concluded that one of the main transformations of ecclesiastical law in Chile was represented by the opening of two very important ways to obtain a legal recognition by the state for religious organisations. The Local Communities Act 1997 and the Religious Entities Act 1999 have represented an important step towards the consolidation of the body of legal provisions enforcing the constitutional freedom of religion. At a case law level, since 1997 there has been a flourishing academic and legal debate in the discipline, probably pushed by these two statutes. The topics we are dealing with in the next section of this article are precisely referred to the impact of these pieces of legislation.

III. CHILEAN SOCIETY, EDUCATION AND RELIGION

A. SOCIETY AND RELIGION

The great majority of the Chilean society has always been identified with the Catholic Church. In the last census (2002), the 69.9% of the population self-identified as Catholics, the second group is represented by Evangelical denominations, while Jewish, Muslims and Orthodox represent less than 15,000 inhabitants each.



Católica En Chile: De La Ley 19.638 a La Ley 19.947", *Anales de Derecho Uc. Actas del IV Coloquio del Consorcio Latinoamericano de Libertad Religiosa*, Colombia 2005, (2005), 101-21.

Finally, it is interesting to analyse what happens with the group self-recognised as atheist, agnostic or without religion. Some experts argue that the next census in 2012 will show that the number of inhabitants recognising close to religion will decrease. If that is the case, there would be an apparent paradox, in that the development of ecclesiastical law as a discipline will come in a time will less people recognise themselves as part of a religion. It might be true that a secular society is pushing people apart from religion. Nonetheless, it might be argued as well that the increasing amount of public awareness of religious rights in Chile will have a more significant impact in the Chilean society. Religion will become more present in the daily legal and political debate.

Whatever the explanation of this phenomenon, there are other statistical results to complete description of society and religion in Chile. First, according to a national survey updated each year[31], there is an enormous support of the social value of religion in society (79.4%). Additionally, another change in the Chilean society can be seen in the fact that 80.7% would prefer that their children would choose on their own their religious beliefs without too much interference from the parents.

B. MINISTERS OF RELIGION UNDER THE CHILEAN LAW

Under Chilean law, there is not a clear concept of a minister of religion, and the regulations are spread in different statutes[32]. Nonetheless, this is also an aspect with a considerable transformation during the past decades.

It is impossible for today's scholars to imagine that not long ago, until 1943, the Civil Code regulated the "civil death" of ministers of religion in case of "solemn profession executed according to the law, in a monastic Institute recognised by the Catholic Church"[33]. This was a legal fiction which aimed to exclude ministers of religion from the "legal commerce".

Besides this extinct institution originated from Roman law, and also applied in common law jurisdictions (at least in English law[34] and in the Unites States[35]), the importance for a contemporary scholar is to analyse the changes regarding the role of ministers within society, as well as the legal reference only for Catholic ministers of religion.

Today there are at least two prohibitions, which affect only the Catholic clergy: a) a Catholic member of the clergy cannot be appointed as a judge[36]; b) the last Catholic confessor of the deceased cannot inherit him[37]. Should these prohibitions be interpreted to other ministers of religions other than Catholics[38]? It might be argued that these provisions of the Civil Code need to be taken into

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[31] Pontificia Universidad Católica and Adimark, "Encuesta Nacional Bicentenario", (2006) at 32-44, Pontificia Universidad Católica and Adimark, "Encuesta Nacional Bicentenario", (2007) at 27-49, Pontificia Universidad Católica and Adimark, "Encuesta Nacional Bicentenario", (2009) at 71.81, Pontificia Universidad Católica and Adimark, "Encuesta Nacional Bicentenario", (2008) at 80-101.

[32] M. E. Pimstein, "Ministers of Religion in Chilean Law", *BYU L. Rev.*(2008), 897-918.

[33] Article 96, Civil Code (repealed).

[34] S. W. Blackstone, *Commentaries on the Laws of England: In Four Books* (Volume I; London: Childs & Peterson, 1860) at 128.

[35] "Civil Death Statutes—Medieval Fiction in a Modern World", *Harv. L. Rev.*, 50 (1937), 968, H. D. Saunders, "Civil Death-a New Look at an Ancient Doctrine", *Wm. & Mary L. Rev.*, 11 (1969), 988.

[36] Articles 256 and 332 nº2, Judiciary Code.

[37] Article 965, Civil Code.

[38] Precht Pizarro, 15 Estudios Sobre Libertad Religiosa En Chile at 166.

consideration along with the principle of equality[39] recognised a constitutional level; however, there is not a clear idea among scholars regarding the interpretation of these provisions. This is an interesting topic that deserves attention in the future. In Spain for example, it has been argued that the incapacity to inherit would undermine the constitutional principle of the secular state[40].

C. RELIGION AND LABOUR LAW

Labour law has been one of the disciplines in which awareness has been present in recent case law. The two main issues debated in this matter were: first, whether ministers of religion can be subjected to Labour law; secondly, religious discrimination in the workplace.

A recent decision[41] issued by the Labour Standards Agency[42] has quashed a fine to the Christian Association of Jehovah Witnesses imposed by labour inspectors. The cases started when an inspector visited the premises of the Association in which a group of religious followers were working in the construction of the worship centre. They inspector fined the Association for not having a written working contract, as well as a time and attendance monitor system. The Association argued that religious volunteers were not within category of workers under Labour law; therefore, they were underpaid volunteers assisting the organisation with a religious mission. As a result of this, the Association asked the Labour Standards Agency Director to quash the fine on those grounds.

The Agency decided in favour of the Association, estimating that there was not enough proof of the working relationship in order to consider the unpaid work in breach of the Labour Code. Moreover, the Labour Standards Agency Director estimated that causation element of the volunteering activity was the "vow of obedience and poverty made according to the freedom of religion"[43].

A more explicit recognition of the religious nature of religious ministers was previously made by the same Agency in 2005[44] when the Undersecretary for the Presidency made an official consultation to the Agency of whether religious ministers of Evangelical churches were considered as workers subject to Labour law. The Labour Standards Agency Director decided that the religious content of the religious entities was a key factor to distinguish between a labour contract and the role of a minister within a religious organisation. As the Director stated:

> "*The work undertaken by vicars and bishops is directly related to their religion, that is, a dissemination of their faith, which existence is beyond the contractual circumstances. Therefore, those services are not given to a person or institution in particular*"[45].

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[39] Salinas Araneda, Lecciones De Derecho Eclesiástico Del Estado De Chile at 319.

[40] See M. A. Asensio Sánchez, "La Incapacidad Sucesoria Del Confesor: ¿Inconstitucionalidad Sobrevenida?", *Laicidad y libertades: estudios jurídicos*, /3 (2003), 45-72, D. Tirapu Martínez and J. Vázquez García-Peñuela, *La Incapacidad Sucesoria Del Confesor En El Artículo 752 Del Código Civil* (Madrid: Comares, 1996).

[41] "Dictamen Nº0058/001, Dirección Del Trabajo", (2010).

[42] Dirección del Trabajo.

[43] "Dictamen Nº0058/001, Dirección Del Trabajo".

[44] "Dictamen Nº649/022, Dirección Del Trabajo", (2005).

[45] Ibid.

Ecclesiastical law as a developing discipline is starting to build a body of case law in Labour law. Therefore, as it might be expected, the decisions have affected on the first stage to the religious entities themselves (including their legal structure, religious ministers, etc). Hence, the second stage of development is expected to include conflicts of fundamental rights concerning religious believers.

In that sense, a recent decision was ruled by a Labour Court with respect of religious discrimination against a Muslim worker[46]. The judicial ruling describes the discrimination suffered by a woman "founded specifically in her religion, something which took part by insults referred to her religion"[47]. It is indeed important to acknowledge the recognition by a court of law of the protection of the religious belief –and not solely the exercise of religion of a given person– and its importance for the human dignity.

The ruling ends up with references of specific constitutional rights affected by the discriminatory treatment in a workplace suffered by the plaintiff. These are the right to physical and psychological integrity (article 19 nº1 of the Constitution), and the right to honour and privacy (article 19 nº4 of the Constitution). It does not mention a violation to freedom of religion (article 19 nº6 of the Constitution), even though the judicial opinion was mainly confirming that violation.

The Muslim worker case demonstrates the developing stage of ecclesiastical law. Freedom of religion is starting to be argued by plaintiffs and recognised by Court judges; however the legal manifestation of this recognition is not yet a point in which the main issue is part of the problem and not a breach of the constitutional right. If we had developed recognition of the freedom of religion at a court level, the judge's opinion would have been based as well, into a breach of freedom of religion recognised under the Constitution, and not only to the right of privacy psychological integrity.

D. FAITH SCHOOLS

The last area we would like to show in this article is school education, in which Chile has a very long tradition of religious education. This is probably the part in which religious freedom in the Chilean society looks more developed, in terms of the state promotion of religious values at the school level, religious pluralism, public funding, and autonomy from religious entities to the selection of religion teachers in public schools.

The voucher system

The "voucher system" corresponds to a translation of the American system in which a private school receives public funding[48]. This means that the supporting institution or person will receive a subsidy for each registered student.

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[46] "Inspección Provincial Del Trabajo De Santiago C/ Tp Chile S.A., T-38-2010", (2010).
[47] Ibid.
[48] See P. J. Mcewan and M. Carnoy, "The Effectiveness and Efficiency of Private Schools in Chile's Voucher System", *Educational Evaluation and Policy Analysis*, 22/3 (2000), 213, P. J. Mcewan, "The Effectiveness of Public, Catholic, and Non-Religious Private Schools in Chile's Voucher System", *Education Economics*, 9/2 (2001), 103-28.

The Chilean Constitution recognises as separate rights the right of education (article 19 nº10 of the Chilean Constitution), as a social right; and the freedom to organise and maintain educational institutions (article 19 nº11 of the Chilean Constitution). With that in mind, both rights are served by this system, in the sense that the supporter institution or person has the autonomy to define its own mission, whilst the state can provide a subsidised access to a free or more affordable education. Finally, families have the right to opt for a system close to their beliefs[49].

There are for-profit and non-profit schools, and faith and non-faith schools under this scheme. Around 45% of elementary schools are managed under this scheme (representing 60% from the total number of elementary students), 20% of all schools are non-faith voucher schools (21% of the total number of students), 4.5% are a Catholic voucher schools (10% of students), and 1.2% are Methodist, Baptist, Seventh-Day Adventist, Lutheran, and others (1.5% of students).

School reforms

The study of faith schools is indeed relevant to Chile. Even though the country has experienced a long period of economic and political stability, and an increasing level of international exchange (i.e. free trade agreements and memberships of international organizations such the OECD), there is a pending area of development in education, particularly in the quality of education and the gap between public and private education.

The changing need of the school system in Chile was pushed forward in 2006 when thousands of secondary students went out to the streets to protest against the schools system and its lack of opportunities. Students organised themselves to ask the government to reform the public school system. The so-called "Penguin Revolution" (because of the of the black-and-white school uniform) took place for more than eight weeks during the winter of 2006.

The impact of these protests was enormous for the Chilean society. The government ordered a public enquiry to study the state of the school system in Chile[50]. One of the aspects dealt in its report was the significance of non-profit religious entities participating in the school system as part of their school vouchers scheme that exists in Chile.

The second matter brought by the enquiry was the convenience of student selection in the school vouchers system. In this regard, there were confronting perspectives from the public enquiry committee: while some members considered justified to make a selection of students and their families according to their religious beliefs when they were applying to a faith school, others had the view that any kind of the selection was discriminatory for the student[51], and a contradiction of the principal of freedom of choice by the parents that is recognised in the Constitution and in the law. In this point, the report does not make any

[49] A. San Francisco Reyes, "Jaime Guzmán Y El Principio De Subsidiariedad Educacional En La Constitución De 1980", *Revista chilena de derecho*, 19/3 (1992), 527.
[50] Consejo Asesor Presidencial Para La Calidad De La Educación, "Informe Final Del Consejo Asesor Presidencial Para La Calidad De La Educación", (Santiago, 2006).
[51] About this debate, see J. E. García-Huidobro, "La Selección De Alumnos En La Ley General De Educación", *Revista Docencia*, 12 (2007).

recommendation, leaving a gap for further research about what view is more compatible with a system of rights.

In 2007, the President introduced a bill in Congress in order to amend the school legislation. The General Education Act was enacted in 2009. As far as religion in the educational process is concerned, the Act sets up the principle of religious pluralism, autonomy of the school mission, and social and religious integration[52]. The public system is declared as secular, defining the term as a "system in which the respect, integration and pluralism of different religions and beliefs is part of the goals of the educational process"[53]. This leaves to the vouchers system as the only possible way of providing faith school education publicly funded.

In this regard, the Act sets out the principle that every school is able to have its own mission and internal regulations, including a certain spiritual development plan. As a result, every student has to be respected in his/her religious beliefs according to their school internal regulations.

Religion courses in public schools

Regarding public schools, the requirement is that they must be non-faith schools. However, they must offer a religion course, with a minimum of two academic hours per week. Each religious authority has to send its syllabus to the Ministry of Education in advance, and each religious authority has to approve that the religion school teacher is suitable for the job (called the "competence certificate"). In use of their autonomy, the Catholic Church has revoked the certificate to teachers when it considered that they cannot undertake their job properly. In one case[54], the school teacher was dismissed and sought judicial review on the grounds of her respect to privacy, and her right of non-discrimination in the workplace. The Supreme Court ruled in favour of the Archbishop of San Bernardo, justifying the autonomy given by the law to the religious entities in order to provide or revoke the certificate[55].

Religion is an optional unit even in religious schools. Therefore, if this is the case, in public schools, parents have to send a written statement requiring the student to attend the religion course[56].

IV. CONCLUSION

When legal disciplines move forward, it is almost certain that there is no way back. We hope this is the case for ecclesiastical law in Chile, particularly because society is changing at the same speed.

What is coming next? We expect to see a more developed case law, and more people bringing cases to courts. Chile has not been a jurisdiction with a tradition of alternative dispute resolution mechanisms, quite the opposite. Nonetheless, many religious conflicts have been solved in informal ways. Even though this might be

[52] Article 3, "General Education Act 2009".
[53] *Ibid*., Article 4.
[54] Supreme Court, "Pavez Pavez, Sandra C. Y Otros C/ Aguilera Colinier, René", (2008).
[55] A comment of this case has been published in Revista Chilena de Derecho. See J. Precht Pizarro, "Idoneidad Del Profesor De Religión", *Revista chilena de derecho*, 35/3 (2008), 521-24.
[56] In faith schools, parents have the right to send a written statement requiring opting out their children from religion courses.

considered as positive by some lawyers, in ecclesiastical law means that someone has sought an alternative solution because there is no certainty that courts will apply a coherent criterion as far as religious freedom is concerned. From we have observed from this article, all of this is about to change.

What we have witnessed in this decade or so is something that any student of ecclesiastical law can recognise and be optimistic for the future. However, most Chilean scholars (as many other colleagues from Latin America) would agree with us that the future debates in law and religion will be even more complex, particularly because of the greater relevancy of religious issues in the political arena. In this respect, we need to look to the discipline in European jurisdictions as well as in some other countries (e.g. United States, Canada or Australia) and be prepared as scholars to these challenges, and see what have been the responses of ecclesiastical law to these problems. All that, can illuminate our own way to address the challenges for Law and Religion in Chile that respects and honor our past, and looks confident to handle our future, based on the way that we are dealing with the present issues in a way that respects human dignity.

BIBLIOGRAPHY

"General Education Act 2009".

"Local Communities Act 1997".

"Religious Entities Act 1999".

"Civil Death Statutes—Medieval Fiction in a Modern World", *Harv. L. Rev.*, 50 (1937), 968.

"Supreme Court, Colonia Dignidad case", (1992).

"García Valdés, Sergio y otros c/ Consejo de Calificación Cinematográfica", (Corte Suprema, 1997).

"Iglesia de Dios en Chile c/ Ministro de Justicia, Concepción Court of Appeal", (2001).

"Dictamen Nº649/022, Dirección del Trabajo", (2005).

"Iglesia de la Unificación con Subsecretaría de Justicia, Supreme Court", (2005).

"Scientology case, Spanish Audiencia Nacional", (2005).

"Dictamen Nº0058/001, Dirección del Trabajo", (2010).

"Inspección Provincial del Trabajo de Santiago c/ TP Chile S.A., T-38-2010", (2010).

ALENDAS SALINAS, M., "La inmerecida degradación de un Registro Jurídico", *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, /19 (2009), 1-28.

ASENSIO SÁNCHEZ, M. A., "La incapacidad sucesoria del confesor: ¿inconstitucionalidad sobrevenida?", *Laicidad y libertades: estudios jurídicos*, /3 (2003), 45-72.

BLACKSTONE, S. W., *Commentaries on the laws of England: in four books* (Volume I; London: Childs & Peterson, 1860).

CAMARASA CARRILLO, J., "Aspectos críticos y jurisprudencia contencioso-administrativa en torno al derecho constitucional a la objeción de conciencia al servicio military", *Revista española de derecho constitucional*, 13/38 (1993), 117-65.

CASAS BECERRA, L. and DIDES CASTILLO, C. , "Objeción de conciencia y salud reproductiva en Chile: dos casos paradigmáticos", *Acta Bioethica*, 13/2 (2007), 2.

CEA EGAÑA, J. L., *Derecho Constitucional Chileno* (Santiago: Ediciones Universidad Católica de Chile, 2004).

CELIS BRUNET, A. M., "Libertad de conciencia y Derecho Sanitario en Chile", in Isidoro Martín Sánchez (ed.), *Libertad de Conciencia y Derecho Sanitario en España y Latinoamérica* (Granada, 2010).

CORTÍNEZ CASTRO, R., "La personalidad jurídica de las iglesias en el derecho público chileno y la nueva ley sobre su constitución juridical", *Il diritto eclesiástico*, 1 (2001).

COURT, SUPREME, "Pavez Pavez, Sandra C. y otros c/ Aguilera Colinier, René", (2008).

COUSO, J., GUILOFF, M., and DELAVEAU, R., "Notas sobre la objeción de conciencia y la venta de productos farmaceúticos", *Revista chilena de derecho*, 34 (2007), 599-603.

EDUCACIÓN, CONSEJO ASESOR PRESIDENCIAL PARA LA CALIDAD DE LA, "Informe Final del Consejo Asesor Presidencial para la calidad de la educación", (Santiago, 2006).

FERNÁNDEZ GONZÁLEZ, M. A., "Régimen constitucional de las Iglesias", *Estudios constitucionales,* 1/1 (2003), 229-54.

FIGUERUELO BURRIEZA, A., "Garantías para la protección del derecho la objeción de conciencia", *Revista de estudios políticos*, /45 (1985), 213.

GARCÍA-HUIDOBRO, J. E., "La selección de alumnos en la Ley General de Educación", *Revista Docencia*, 12 (2007).

MCEWAN, P. J. and CARNOY, M., "The effectiveness and efficiency of private schools in Chile's voucher system", *Educational Evaluation and Policy Analysis*, 22/3 (2000), 213.

MCEWAN, P. J., "The effectiveness of public, Catholic, and non-religious private schools in Chile's voucher system", *Education Economics*, 9/2 (2001), 103-28.

NOGUEIRA ALCALÁ, H., "La libertad de conciencia, la manifestación de creencias y la libertad de culto en el ordenamiento jurídico chileno", *Ius et Praxis*, 12 (2006), 13-41.

PIMSTEIN, M. E., "Ministers of Religion in Chilean Law", *BYU L. Rev.*, (2008), 897-918.

PONTIFICIA UNIVERSIDAD CATÓLICA and ADIMARK, "Encuesta nacional", (2006).

---, "Encuesta nacional Bicentenario", (2007).

---, "Encuesta nacional Bicentenario", (2008).

---, "Encuesta nacional Bicentenario", (2009).

PRECHT PIZARRO, J., "La ambigüedad legislativa como práctica parlamentaria: La Iglesia Católica y la ley de iglesias en su artículo 20", *Revista de Derecho de la Universidad Católica del Norte*, 10 (2003), 181-98.

---, "El ámbito de lo público y la presencia de la iglesia católica en chile: de la ley 19.638 a la ley 19.947", *Anales de Derecho UC. Actas del IV Coloquio del Consorcio Latinoamericano de Libertad Religiosa*, Colombia 2005, (2005), 101-21.

---, "La laicidad del Estado en cuatro constituciones latinoamericanas", *Estudios constitucionales*, 4/2 (2006), 697-716.

---, "Idoneidad del profesor de religion", *Revista chilena de derecho*, 35/3 (2008), 521-24.

PRECHT PIZARRO, JORGE, *15 estudios sobre libertad religiosa en Chile* (Lecciones; Santiago, Chile: Ed. Univ. Católica de Chile, 2006).

PRECHT PIZARRO, JORGE ENRIQUE, *Derecho eclesiástico del Estado de Chile: análisis históricos y doctrinales* (Lecciones; Santiago, Chile: Ediciones Universidad Católica de Chile, 2001).

SALINAS ARANEDA, C. , *Lecciones de Derecho eclesiástico del Estado de Chile* (Valparaíso: Ediciones Universitarias de Valparaíso, Pontificia Universidad Católica de Valparaíso, 2004).

SAN FRANCISCO REYES, A., "Jaime Guzmán y el principio de subsidiariedad educacional en la Constitución de 1980", *Revista chilena de derecho*, 19/3 (1992), 527.

SAUNDERS, H. D., "Civil Death-A New Look at an Ancient Doctrine", *Wm. & Mary L. Rev.*, 11 (1969), 988.

SILVA BASCUÑÁN, A., *Tratado de Derecho Constitucional*, tomo XI. Ed. Jurídica de Chile (Santiago: Editorial Jurídica de Chile, 2006) 15.

SORIANO DÍAZ, R., "La objeción de conciencia: significado, fundamentos jurídicos y positivación en el ordenamiento jurídico español", *Revista de estudios políticos*, (1987), 61-110.

TIRAPU MARTÍNEZ, D. and VÁZQUEZ GARCÍA-PEÑUELA, J., *La incapacidad sucesoria del confesor en el artículo 752 del Código Civil* (Madrid: Comares, 1996).

VIVANCO, A., *Curso de Derecho constitucional. Aspectos dogmáticos de la Carta Fundamental de 1980* (Santiago: Ediciones Universidad Católica de Chile, 2006) 31.