

## Financial and Taxation Issues Related to Religions<sup>\*</sup>

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*ABSTRACT: The author reviews the historical and political framework of the development of the financial policies governing religious bodies. Because the study of relations between financial law and religions cannot be reduced to the study of relations between States and Churches he focuses much more on an analysis of the legal and financial frameworks of religious activities in order to measure their meaning and extent. In the conclusion he states that the relationship between the legal regulations governing religions and the fiscal power reveals the difficulties in reconciling constitutional principles, such as those concerning legality and the equality of religions, with the facts in evidence.*

### Introduction

The study of relations between financial law and religions requires expertise and experience. It allows little room for improvisation and approximation. The subject matter is historical, sociological, juridical and fiscal, in a word: political. It can not be reduced to the study of relations between States and Churches, or to the sole presentation, in the form of a descriptive account of the direct or indirect financial sources of religious bodies and their activities. The perspective adopted here focuses much more on an analysis of the legal and financial frameworks of religious activities in order to measure their meaning and extent.

This area of study regards the religious domain not only from the point of view of its structures but also as regards the activities of its personnel, through the cold prism of the realism and autonomy of financial law. This relation is characterized by several aspects. On the one hand, the legal aspect is shaped by the always difficult relations between the State and religious structures. On the other hand, the financial aspect maintains its

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difference and normative singularity through the power of interpretation and supervision granted to the State and its administration.

The taxation of religious activities involves political choices that the State carries out in several areas<sup>1</sup>. This is the case for the framework of the exercise of religious activities: for example, the law of associations governs fiscal solutions by means of the complex legal and fiscal arrangements it imposes.<sup>2</sup> In many countries this is true of the framework put in place for the tax exemptions enjoyed by certain religions through a political and administrative procedure known as “recognition”. The subtlety of the financial rules in play here is the result of a political and historical development (I) which today shapes a financial policy governing religious bodies which is both technical and complex. In play are the decisions that religious bodies adopt in the fiscal area under the constraints of the State’s supervisory power. (II)

## **I. The Historical and Political Framework of the Development of the Financial Policies Governing Religious Bodies**

### *1. Reflections on the Formation of the Financial Policies Governing Religious Bodies*

The financial policies governing religious bodies are the result of a vast movement of “political laicization”, that is, of secularization and state neutrality. Pierre Rosanvallon has explained how “the Welfare State expresses the idea of substituting for the uncertainty of religious providence the certainty of State providence. It is in this way that the State completes its secularization by transferring to its regular prerogatives the random benefits that only divine power was thought to be able to dispense... The Welfare State is the final stage of the secular State: after the Protector-State had declared its sovereignty by freeing itself from religion it erased the latter’s last traces by integrating it into the State. To the uncertain gifts of charity and divine providence succeeded the predictable contributions of the State.”<sup>3</sup> From this point of view financial and fiscal norms appear therefore as mechanisms of societal regulation through the effects they have on the forms of redistribution of resources.

The autonomy of tax law establishes the power of public institutions responsible for its workings and its sanctions. In this way the “power to tax”, by acting on religious finances, influences the ways in which religious movements exist and develop.<sup>4</sup> Now the “power to tax”, managed in this way, is not neutral. Blandine Chelini-Pont in an article entitled *The Religious Origins of French Secularism* has explained that “Even if the Republic no longer finances the exercise of the Catholic religion (...), it has maintained in practice (through the law of associations, fiscal policy, etc.) the habits of

the past: its preference always goes to the same religion as its own, and which can therefore obtain from it support and protection. For the historic religions, the alliance between altar and throne discretely continues (...) Public policy in France in the religious area is still tainted by mistrust, close scrutiny and resistance. Arguments over issues of disturbance to public order, inalienable church-state separation, and discoveries of tax fraud are today the instruments of this long-standing attitude of indifference towards spiritual activities.<sup>5</sup>

## *2. The Foundations and Extensions of the "Fiscal Power" Revisited*

The foundation of "fiscal power", the condition of the contemporary exercise of state sovereignty that has freed itself from religious bodies in many countries, relies for the constituents on an obvious social imperative. This situation derives from article 13 of the Declaration of Human Rights adopted in France on August 26 1789, one of the very first democratic charters of the modern era:

*"Universal taxation is indispensable; it must be equally shared by all citizens according to their resources."*

The fiscal doctrine of the French constituents of 1789 [the member of the Constituent Assembly], which inspired the constituents of many other nations, derives from a reaction against the fiscal aberrations of monarchical and religiously- or quasi-religiously based governments. The French revolutionaries intended to shatter religious privileges and inequalities. In the name of justice, "*under the auspices of the Supreme Being*" (see the Preamble to the Declaration of 1789), they imposed the principle of universal taxation. Previously the clergy had managed in large part to escape taxes.

The system established by the French revolutionaries set aside any consideration of the social status or personal situation of those subject to taxation. In this way they neutralized religious privileges. Our contemporary fiscal system is a result of this universal and egalitarian concept of taxation. "Fiscal power and political power go hand in hand. On the one hand, taxation has always been an essential aspect of State sovereignty. It is one of the royal rights that express the power of the Prince (...). Conversely, whoever controls taxation controls the State".<sup>6</sup>

It is in relation to this major political evolution, this historic break, that one can understand today the financial situation of religious bodies from the point of view of the requirements of the State. In such a "liberal" context, as compared to the absolutist past

of monarchic regimes, one can ask the question: what powers do religious bodies possess in the financial and fiscal realms?

## **II. What Powers of Decision Do Religions Possess in the Financial Realm?**

### *1. The Choice of Organizational Arrangements and of Statutes and its Fiscal Effects Remains strictly Subject to the Norms of the State*

The religious practices guaranteed by most national constitutions are generally free, as long as they are in conformity with public order. This liberty is matched by freedom in the financial and fiscal realms, which means not only individual freedom, but also freedom of commerce and industry.

In many countries the legal system governing the organization of religious activities rests upon a complex juridical framework within which the choice of statutes entails important consequences. This legal system requires religious bodies to choose structures based on rules of associative contract which commit them to democratic imperatives which some religious groups have difficulty accommodating, such as the selection of leaders, general assemblies, oversight of its members, etc. The legal arrangement of the associative policy for religions follows in fact a certain bureaucratic and administrative logic. Moreover, the fiscal policy for religious bodies can influence the material conditions of the exercise of their religious practices. Taxation of religious bodies is an indicator making it possible to measure the “*degree of freedom*” that legislators and governmental authorities may grant them or not. We know how fiscal technique can also become an instrument of repression by referring to methods of fiscal control. As a tactical fiscal weapon, the means of fiscal control give the Fiscal Administration exorbitant powers to make provocative distinctions between “*religious associations*” and “*associations claiming to be religious*”. The fiscal choices of the State are not neutral. In many countries the state decision to confer on a group the legal status of “*religious association*”, independently of the freedom it gives to the faithful, removes financial obstacles that could compromise the survival of their religious group. Olivier Schrameck and Xavier Delcros maintain, in an article entitled *The End of Fiscal Laicity*, that “tax law has always been the mirror and the revealer of the evolution of political society”.<sup>7</sup>

Thus, association law has considerable influence on the fiscal status of religious activities.<sup>8</sup> It conditions the choice of statutes and juridical structures by religious institutions. The tax system in consequence submits the activities in question to particular regulations which have led many institutions to opt for elaborate fiscal and

legal arrangements, compartmentalized into distinct sectors or into separate structures. Such is the case with the activities of the religious economy sector: publishing, agricultural and vinicultural production, tourism services which require recourse to complex legal and fiscal organizational schemas. In these conditions what kind of powers of decision can religious bodies have?

## *2. The Power of Decision of Religious Bodies is Reduced in the Face of the Constraints of Financial Complexity*

Finance law concerning religious bodies, which is little studied and often poorly understood, can appear complex, opaque and narrowly drawn. Moreover the technicality of fiscal norms is combined with the fiscal administration's discretionary power. This combination can cause reservations, fears, even withdrawals, or worse yet, absurd solutions. So one can appreciate how weak and narrow room for maneuver is for religious institutions in this area. The power of decision of religious bodies in the

financial realm therefore requires particular skills and expertise, but also permanent relations and contacts with the Administration.

In France in its report published in November 2000 devoted to *Islam in the Republic*, the High Council for Integration, through the voice of its President, emphasized that "*Abuses, if they exist, do not challenge the legislation, but the vigilance of the officials responsible for enforcement of the laws*". The High Council recalled that the implementation of the legal regulations regarding religious bodies has been determined historically by factual and legal differences among religions.<sup>9[9]</sup>

A series of examples related to the taxation of religious bodies can demonstrate the extent of the contradiction:

- differences of treatment by the Administration in refusing tax exemptions or denying religious status to certain movements;
- recourse to taxation as a tactical weapon (see above).

Must we introduce some form of so-called "affirmative action" to bridge the gap described above? Does the absence of formal fiscal equality between religions call for some form of compensation? Must these inequalities lead to the introduction of a series of "compensatory" measures meant to restore the balance that has been disrupted by the history of the law governing religious bodies? <sup>10[10]</sup>

In many countries the debate continues today due to changes in the financial regulations affecting religious bodies and discriminatory applications of the principle of equality of religions before the law. This debate is based on the never-ending questions about criteria relying on the historical presence, representative nature and social utility of religions, issues that have been the object of legal distinctions. These developments are all the more interesting since the European Court of Human Rights, following its decision in *Darby v. Sweden* on October 23, 1990, has opened the way to a European supervision of the respect for the principle of equality in national tax legislation by choosing to challenge fiscal discrimination related to what is called “ecclesiastical” taxation.<sup>11</sup>

### Conclusion

The laws and fiscal policies relating to religions are often poorly understood.<sup>12</sup> The relationship between the legal regulations governing religions and the fiscal power reveals the difficulties in reconciling constitutional principles, such as those concerning legality and the equality of religions, with the facts in evidence. This regime oscillates between a system of taxation described as “denominational,” resulting from legal arrangements beneficial to religions, and a system that distinguishes, on the one hand, between religious bodies and other administered bodies, and on the other hand, between established religions and new religious movements.

Invariably the notion of a religious body that requires the application of a given fiscal policy is at the center of the debate. Must we therefore contemplate a redefinition of the legal and financial regulations for religious bodies? Or should we, while respecting the laws, favor arrangements that are decided on a case-by-case basis within the framework of “consultations” or “meetings” between representatives of the State and religions? However, this pragmatic approach brings into sharp focus the issue of access to the authorities who make these decisions in the fiscal administration. How to avoid going down that contentious path? According to what modalities is institutional mediation organized? Within a framework of legitimate organization and transparency, conditions necessary for the benefit of freedom of religion? Do religions really have the choice of ways to resolve tensions and litigations as expressed by the permanence of distinct financial regulations? Professor Pierre Soler-Couteaux reminded us in that regard that since we cannot expect everything from a judge, who cannot remedy the deficiencies of normative law alone, this kind of “*claim...is perhaps the best opportunity to reintroduce moral, philosophic and religious values into the temporal power.*”<sup>13</sup>

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### Reference:

- <sup>1</sup> For a very synthetic perspective on financial legislation as applied to religions, see "Guidelines for Review of Legislation pertaining to Religion or Belief", including the chapter "Financing of Religious/Belief Groups/General Economic Activity", prepared by the Advisory Panel of Experts on 1. Freedom of Religion or Belief (OSCE) in consultation with The European Commission for Democracy and Law (Venice Commission), pp.5-9, July 2004.
- <sup>2</sup> Alain Garay, "National Fiscal Policies and their Influence on Religious Policies", in *What Religious Policy in Europe and the Mediterranean? Issues and Perspectives*, Proceedings of the International Colloquium organized in May 2003 by the University Paul Cezanne-Aix-Marseilles III, Law and Religions Collection, University Press of Aix-Marseille, 2004
- <sup>3</sup> *The Crisis of the Welfare State*, Seuil, Paris, 1981
- <sup>4</sup> Several recent decisions rendered by the European Court of Human Rights insist on the fact that "In the exercise of its regulating power... and in its relations with various religions, the State is obliged to be neutral and impartial... The Court must take into account what is at stake, namely the necessity of maintaining a true religious pluralism, which is inherent in the notion of a democratic society. Moreover, it must give great weight to this necessity when it is a matter of determining... if the interference corresponds to an imperative social need and if it is proportionate to the legitimate intended goal": *The Metropolitan Church of Mesopotamia and Others v. Moldova*, December 13, 2001 (cf. also the decision in the case of *Hassan an Tchaouch v. Bulgaria*, October 26, 2000.
- <sup>5</sup> *Revue des Deux Mondes*, Paris, April 2002, p.33
- <sup>6</sup> Gilbert Tixier, Guy Gest, *Tax Law*, Librairie Generale de Droit et Jurisprudence, 1983, 1983, p.6.
- <sup>7</sup> *L'Actualite Juridique Droit Administratif*, April 20 1988, pp.267.
- <sup>8</sup> W. Cole Durham, Jr. *Facilitating Freedom of Religion or Belief through Religious Association Laws*, in *Facilitating Freedom of Religion or Belief: a Deskbook*, Martinus Nijhoff Publishers, Leiden, The Netherlands, 2004, p.320-405
- <sup>9</sup> In France the High Council for Integration has recommended, regarding the law of December 9 1905 on the separation of Church and State, and by virtue of the principle of equality, orienting administrative practices so as to solve the most pressing problems... That can provide the opportunity to "modernize the actions of public officials in regards to the religious as a whole". On the subject of taxation, the question of associative statutes is touched upon. (pp.62-64).
- <sup>10</sup> On the introduction of measures of so-called "affirmative action" to benefit Muslim activities, see the analysis by Alain Garay, *Funding Religious Activities: The Example of Islam in France*, Selected Papers from the International Conference on Law and Religion in Transitional Societies, 2-3 December 2006, Oslo-Norway.
- <sup>11</sup> See the note on that decision by Jean-Francois Flauss, *Freedom of Religion and Taxation*, *Revue Trimestrielle des Droits de l'Homme*, Brussels, 1992, pp. 181-199.
- <sup>12</sup> Among the rare publications on this subject see the works of the European Consortium Church and State published under the title *Church and State in Europe – State Financial Support, Religion and the School*, Giuffre Editore, Milano, 1992.
- <sup>13</sup> *Les Petites Affiches*, Paris, no.95, August 10, 1994, p. 72. On an international approach to the forms of "international juridical dialogue" with religions, see the works of the European Commissioner for Human Rights of the Council of Europe under the title "The Commissioner's Dialogue with Religious Communities", Strasbourg, France, 2003 (CommDH-2003-6).