

Religion and the Secular State in Malta

I. SOCIAL CONTEXT¹

According to tradition, and as recorded in the Acts of the Apostles, St. Paul founded the Church in Malta before 65 AD, following his shipwreck on those Islands. Malta is to this day one of the most Catholic countries in the world: about 95 percent of the population (more than 400,000 people living in an area of over 300 km²) is Roman Catholic, and about the 53 percent attend Sunday services regularly. Almost all of the country's political leaders are practicing Roman Catholics. The Maltese Church is frequently referred to today as the only extant Apostolic See, other than Rome itself (making allowances for a possible break in the appointment of Bishops to Malta during the period of Arab rule – 869 to 1127 AD).

On the three islands of the Maltese archipelago (Malta, Gozo, and Comino) there are 365 Catholic churches; the parish church is the architectural and geographic focal point of every Maltese town and village. Various Roman Catholic religious orders are present.

The Constitution of Malta establishes Roman Catholicism as the State religion, but at the same time provides for freedom of religion. Full liberty of conscience and freedom of worship are guaranteed, so other faiths have been imported to Malta and some of them have been embraced by various Maltese people.² A number of Christian and non-Christian faiths have places of worship on the islands. In the congregations of the local Protestant Churches most members are not Maltese; they are British retirees living in the country and vacationers from many other nations. Jehovah's Witnesses are approximately 500; the Church of Jesus Christ of Latter-day Saints (Mormons), the Bible Baptist Church, and the Fellowship of Evangelical Churches have about 60 affiliates. There are also some Churches of other denominations, such as St. Andrew's Scots Church in Valletta (a joint Presbyterian and Methodist congregation) and St. Paul's Anglican Cathedral, as well as a Seventh-day Adventist Church in Birkirkara. A union of 16 groups of Evangelical Churches comprising Pentecostal and other nondenominational Churches are also present.

The Jewish population of Malta reached its peak in the Middle Ages under Norman rule. In 1479, Malta and Sicily came under Aragonese rule; in 1492, the Alhambra Decree forced all Jews to leave the country, permitting them to take away only a few of their belongings. Many Maltese Jews may have converted to Christianity in order to remain in the country. Today, there is one Jewish congregation. Members of Zen Buddhism and of the Bahá'í Faith are about 40. Muslims in Malta are approximately 3,000 (about 2,250 of which are foreigners, about 600 are naturalized citizens, and about 150 are native-born Maltese). There is one Muslim mosque. A Muslim primary school recently opened; its existence remains a point of some controversy. An estimated 2 percent of the population does not formally practice any religion. There are respectful and cooperative relations between the Catholic Church and non-Catholic religious groups. Practitioners of non-Catholic religious groups proselytize freely and openly.

II. CONSTITUTIONAL AND LEGAL CONTEXT - RELIGION AND THE AUTONOMY OF THE STATE

In 1964, Malta achieved full independence from the British Empire (of which it had been part since 1814, after the French were defeated), becoming a member of the British

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1. Some information taken from the United States Department of State, 2008 *Report on International Religious Freedom - Malta*, 19 September 2008, available at <http://www.unhcr.org/refworld/docid/48d5cbdf5c.html>. See also <http://en.wikipedia.org/wiki/Malta>.

2. VV.AA., *Religion (in Malta)*, available at <http://www.aboutmalta.com/RELIGION/index.shtml>.

Commonwealth, the Council of Europe and the United Nations. In 1970, it signed an Association Agreement with the European Union and in 1974 became a constitutional Republic, whilst retaining membership in the Commonwealth of Nations. In 1990 it applied for full membership in the European Union. As a member of the EU since 2004, Malta is a party to the Schengen Agreement (since 2007) and is a member of the Eurozone (since 2008).

Article 2 of the Constitution of Malta³ states the following:

- (1) The religion of Malta is the Roman Catholic Apostolic Religion.
- (2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong.
- (3) Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.

At the same time, Article 32 recognizes to every person in Malta (whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest), amongst the other fundamental rights and freedoms of the individual, the right to freedom of conscience.

More specifically, Article 40 provides for freedom of religion, prescribing that “All persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship.”

A corollary to the right of religious freedom is the principle of equality at law (Article 45 of the Constitution): no law shall make any discriminatory provision, where “the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex.”

The Government at all levels⁴, being strongly committed to human rights, seeks to protect the right of religious freedom in full and do not tolerate its abuse, either by governmental or private actors. An independent judiciary upholds the Constitution’s protections for individual rights and freedoms.⁵

The presence and the influence of the Catholic Church in everyday life is very strong; however, non-Catholics, including converts from Catholicism, do not face legal or societal discrimination. All religious organizations have similar legal rights. Religious organizations can own property including buildings, and their ministers can perform marriages and other functions.

Some important Agreements have been reached between the Church and the State:

(1) *Agreement between the Holy See and the Government of the Republic of Malta regarding the incorporation of the Faculty of Theology in the University of Malta* (signed on 26 September, 1988).⁶

Such incorporation and the functions of the Faculty of Theology are also regulated by the Laws of Malta and by the Statutes of the same University. It is interesting to note that Article 2 of the Agreement states that “Academic degrees and diplomas conferred by the Faculty of Theology shall have canonical and civil value.” On the same date was signed a *Financial Agreement between the Government of Malta and the Archdiocese of Malta for the financing of the Faculty of Theology in the University of Malta*⁷, on the basis of whose Article 1 the “Government of Malta shall finance the Faculty of Theology according to the same criteria which it applies for the financing of the other Faculties.”

3. CONSTITUTION OF MALTA (*The Malta Independence Order* issued in 1964, as amended by several Acts, from XLI of 1965 to XIV and XXI of 2007), available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf (consulted 6 July 2010).

4. Political parties in Malta, referring to March 2009, are the following: Nationalist Party, Labor Party, Alternative Demokratika (Green Party), Azzjoni Nazzjonali (National Action).

5. VV.AA., *Government And Politics (in Malta)*, available at http://www.aboutmalta.com/GOVERNMENT_and_POLITICS/

6. See <http://www.cepes.ro/hed/policy/legislation/pdf/malta.pdf> (consulted 6 July 2010).

7. Id.

(2) *Agreement between the Holy See and the Republic of Malta on the temporal goods of the Church* (signed on 28 November 1991)⁸, whereby the Church transferred to the State such immovable ecclesiastical property as was not required for pastoral purposes and whereby certain issues pertaining to the relations between the Church and the State as regards matters of patrimony were determined.

The Agreement was implemented by the Government by means of the *Ecclesiastical Entities (Properties) Act (Act 358 of 1992)*⁹. The properties transferred to the State were listed in a number of Annexes attached to the Agreement.

This Act also provides for the establishment of the Joint Office to administer the properties transferred to the State.

(3) *Agreement between the Holy See and the Republic of Malta on Church Schools* (signed on 28 November 1991).¹⁰

(4) *Agreement between the Holy See and the Republic of Malta on the recognition of civil effects to canonical marriages and to the decisions of the ecclesiastical Authorities and tribunals about the same marriages* (3 February 1993).¹¹

The last two themes shall be more deeply examined in Section IV and V.

These Agreements, the products of a long but constructive dialogue, strengthened the relations between the Church and the State and permitted the Church - especially following the Agreement on Church property - to concentrate better on its pastoral mission.¹²

III. THEORETICAL AND SCHOLARLY CONTEXT

As already mentioned, Article 2 - sub-Article (1) - of the Constitution of Malta declares that the Roman Catholic Apostolic Religion is the religion of Malta. Sub-Article (2) establishes that the authorities of the Catholic Church have “the duty and the right to teach which principles are right and which are wrong,” giving to the Roman Catholic Church unfettered constitutional authority in matters of ethics and morality, and making its values an evaluative basis of legal order.¹³ A significant consequence of this is the prohibition of divorce; however, the State generally recognizes divorces of individuals domiciled abroad who have undergone divorce proceedings in a competent court.¹⁴

Sub-Article (3) involving teaching of the Roman Catholic faith is self-explanatory.

This raises the very important question as to whether Malta is truly secular, or is a confessional State instead. One might insinuate that Article 2 is incompatible with the nature of a lay State. But it is important to reflect on the fact that “confessionality” is to be understood not only in the formal sense, nor only in its material meaning, but also according to its sociological dimension. So, although in principle a State is a lay and autonomous institution, its non-confessionality may be subtly tempered owing to a sociological factor.

From the sociological point of view, the granting of a special juridical position to the Roman Catholic Religion in Malta can be considered a simple acknowledgement of the fact that the majority of Maltese citizens belong to that religion. Recent sociological

8. See http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930218_s-sede-rep-malta-beni_en.html.

9. Chapter 358, *Ecclesiastical Entities (Properties) Act*, 28 November, 1991, available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_9/CHAPT358.pdf

10. See http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930218_santa-sede-rep-malta-scuole_en.html.

11. See http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930203_s-sede-malta_en.html.

12. G. Falzon, *The Catholic Church in contemporary Malta*, available at <http://www.aboutmalta.com/grazio/church.html>.

13. *Encyclopedia of religious freedom*, Catharine Cookson Editor, 2003, available at http://books.google.it/books?id=R0PrjC1Ar7gC&pg=PA56&lpg=PA56&dq=Church-State+relations+malta&source=bl&ots=8wMK-E5tF&sig=Ub5B6juIR9m6q16Wd7QkyK5iYc&hl=it&ei=SpHUSumRNciNsAbp8PTYCw&sa=X&oi=book_result&ct=result&resnum=6&ved=0CCQQ6AEwBQ#v=onepage&q=ChurchState%20relations%20malta&f=true

14. United States Department of State, *supra* n. 1.

findings confirm the ubiquity of the Catholic Church in the Maltese islands¹⁵ and, although the process of secularization did not spare them, adherence of the Maltese to the Catholic Church is still very strong.

Without expecting that the State become confessional in the formal and material meaning of the word, it is only fair that in this sort of sociological reality the State and the Catholic Church cooperate on an institutional level.

The establishing of the Roman Catholicism as the State religion apparently runs counter to Article 45 of the Constitution, in which is embodied the principle of equality at law. But in enacting laws, the legislator can make legitimate distinctions between its subjects, which in practice amount to “differentiation”; equal treatment does not necessarily exclude different legislative treatment, justified and reasonable, of the concerned subjects. Impartiality forbids illegitimate distinctions which devolve into “discriminations,” but it does not preclude normative differentiation.

Specifically about religion, we realize that “religious equality” implies that each and every individual, including confessional groups who have a juridical personality, enjoy full religious freedom and have the right to free exercise their respective mode of religious worship (as prescribed by Article 40 (1) of the Constitution of Malta). In fact, though the Constitution of Malta reflects the social reality of the country, this can never justify the limitation of the right to religious freedom exercised within the bounds of a just public order. Nevertheless, this does not signify that there should be uniformity in the way the law deals with the religious factor.

Thus, it seems to be incorrect to conclude that the mentioning of the particular religion in the Constitution discriminates against other religions.¹⁶ Neither the Catholic Church nor the Republic of Malta acknowledge this strict interpretation of confessionalism. John Paul II, in his message for 1991 World Day of Peace, warned against the abuse of confessionalism, remarking that “even in cases where the State grants a special juridical position to a particular religion, there is a duty to ensure that the right to freedom of conscience is legally recognised and effectively respected to all citizens.”¹⁷

Ugo Mifsud Bonnici, President of the Republic of Malta from 1994 to 1999, during a State visit to the Pope, gave a qualified, perhaps even authentic, interpretation of the Maltese confessionalism, explaining that “the State exists in Malta as in other nations with all its structures for the benefit of the citizens. But without doubt, a primary end of these structures is the guaranteeing of the liberty of conscience and the free expression of religious faith, but not the imposition of any creed”¹⁸; furthermore, referring to the different Agreements concluded between the Republic of Malta and the Holy See, Bonnici indicated that:

the Maltese Authorities have been guided by the Constitution which in an explicit way recognizes the Catholic Religion as the religion of Malta, but also guarantees liberty of conscience and of cult with equal right to all citizens of whatever religious creed and also to those who do not profess any at all. In fact, the Constitution incorporates the principles of natural law, and so in essence it is never in conflict with the doctrine of the Church.¹⁹

But we must mention a competing theoretical view about this theme.

Many people in Malta (in philosophical, legal and political milieus), though they respect and would also defend the Church’s right to participate in social discourse as well

15. C. Tabone, *Maltese families in transition*, Malta 1995.

16. M. Grech, *The Harmonization of the Religious and Civil Dimensions of Canonical Marriages in Malta (An Exegetical Study of the Agreement between the Holy See and the Republic of Malta on the Recognition of Civil Effects to Canonical Marriages)*, Malta, 2001.

17. John Paul II, “*Message for World Day of Peace 1991*,” in *Osservatore Romano* (English Edition), 24.12.1990.

18. U. Mifsud Bonnici, *Discorso in occasione della sua visita ufficiale al Santo Padre* (04.02.1995), in *Bullettin ta’ l-Arcidjocesi u Liturgija tal-Kelma*, Malta 85, 1995.

19. *Id.*

as its right to publicly preach its values through its institutions, believe that the Roman Catholic faith, despite the fact that it is the most popular religion, should not be singled out by a secular State, that has to take decisions without recourse to religious doctrine.²⁰ It is considered “categorically improper to legislate any one Church as the State religion.”²¹

Some arguments for a secular Malta contend that the involvement of the Church in Malta’s public life is harmful as far as human rights are concerned, pointing especially to the issues of the crucifix appearing in all the offices and in the Schools, the refusing of divorce even for those who are not Catholic and married by civil law, and the rejection of abortion and of single sex marriages.

Some people consider it truly difficult not to be Catholic in Malta, to have another religion or no religion at all, so they frequently use the word “discrimination.”²² While no one wishes to deny the Church its rightful place in Maltese society, or to require the country to abandon her religious allegiance to the Catholic Church, the desire is to separate the Church from the affairs of State. The argument is that the Church should be mandated to exercise its spiritual rights in a diminished capacity, on a par with but not as an integral part of Malta’s constitutional government. This view sees contemporary Malta as a liberal parliamentary democracy which should maintain a rigid line of demarcation between clergy and laymen.

According to this opinion, the way of the future calls for a lessening of ecclesiastical involvement in government affairs. A very important step required to turn Malta into a secular State (or to empower secularization) would be to change the Constitution²³, deleting the formal affiliation with the Church.

IV. RELIGIOUS EDUCATION OF THE YOUTH - STATE FINANCIAL SUPPORT FOR RELIGION

As stated in Article 2 (1) of the above-mentioned *Agreement between the Holy See and the Republic of Malta on Church Schools*, signed in 1991, “the State recognizes the right of the Church to establish and direct its own schools according to their specific nature and with autonomy of organization and operation.” The general regulations envisaged by the State’s educational policy regarding the “National Minimum Curriculum” and the “National Minimum Conditions” put into effect in State Schools must be observed.

The Church in Malta offers to the community a major service through her schools, which cater to about one-third of the primary/secondary student population in the Maltese Islands. One of the premises of the Agreement is just “the public character of the service offered by Church Schools to Maltese society.”

The State recognizes as “Church Schools” those which are recognized as such in writing by the competent diocesan Bishop, and are subject to him according to Canon Law, even though belonging to or directed by various canonical legal persons (Art. 1). Church Schools are to provide fee-free tuition: teaching and non-teaching staff salaries are provided for jointly by Church and State, while other expenses are to be met by Church collections. In particular, the Church bound herself to use part of her income accruing from the transfer of her property to the State.

The Church also contributes through the services of her religious and priests in these Schools who receive a much reduced salary from that which they are entitled to and which they would have earned as lay employees. The Church is also responsible for the maintenance of her Schools. It is to collect the necessary funds to be able to meet these

20. A. Sciberras, Poll: Secular State or Subtle Theocracy? Art. 2 of the CONSTITUTION OF MALTA, Monday, 31 August 2009, available at <http://progressivemalta.blogspot.com/2009/08/poll-secular-state-or-subtle-theocracy.html>.

21. J. Vella, *The emergence of secularism In Malta*, available at <http://www.searchmalta.com/ezone/mouse/secularism.shtml>.

22. The Malta Independent, 21 April 2003, They fight for a secular Malta, “*Malta is a fundamentalist Catholic country*,” interview to John Zammit, President of the “Association for Men’s Rights,” available at http://www.emmybezzina.org/pdfs/secular_malta.pdf.

23. Id.

financial burdens. These include donations from parents and others, an annual collection in the Archdiocese of Malta and the Diocese of Gozo, and any other available source of income.²⁴

Article 20 of the Education Act²⁵ states that the Minister has the duty to establish the curricula for State Schools, to provide for the education and teaching of the Catholic Religion in those Schools, and to establish the curriculum for the education and teaching of that religion according to the dispositions of the Bishops in Ordinary of the Maltese Islands.²⁶

So, in accordance with Article 2 (3) of the Constitution, religious instruction in Catholicism is compulsory in all State Schools, though both the Constitution and the Education Act establish the right not to receive this instruction if the student, parent, or guardian objects. To promote tolerance, School curricula include studies in human rights, ethnic relations, and cultural diversity as part of values education.²⁷

V. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

A. *The Maltese Matrimonial Legal System*²⁸

1. The Obligatory Religious Marriage System (until 1975)

Until the Marriage Act of 1975 was promulgated, all marriages celebrated in Malta were regulated by Canon Law. No form of civil marriage was possible. This obligatory religious marriage system severely restrained the exercise of the right to religious freedom, with a strong discrimination against those Catholics who lapsed from their faith, against those individuals who wished to celebrate a religious but a non-Catholic marriage and also against those who did not profess any religious belief. Such persons did not have the possibility of contracting marriage in any form other than that of the Catholic Faith.

The Church continued to resist the introduction of any form of civil marriage in Malta; this extreme position not only was in contrast with the decree of the Second Vatican Ecumenical Council, *Dignitatis humanae* on religious liberty,²⁹ but also was completely out of tune with the emphasis on fundamental freedoms of individual, pervading all facets of social life in the country under the strong influence of international fora.

2. The Obligatory Civil Marriage System (introduced by Marriage Act of 1975³⁰)

The Marriage Question in Malta had been simmering for decades, coming to a head after Independence in 1964. Sociopolitical forces strongly aimed to develop the country into a modern democratic State, necessarily pluralistic, and with a growing awareness of fundamental human rights and freedoms. This strengthened the voice of a minority that clamoured for the introduction of civil marriage.

The Church's authority in various spheres of its pastoral activity, including education

24. G. Falzon, *The Catholic Church in contemporary Malta*, supra n. 12.

25. Chapter 327, *Education Act* (Act XXIV of 1988. Last amendments: by Acts VI of 2001 and XVIII of 2002), available at <http://www.cepes.ro/hed/policy/legislation/pdf/malta.pdf> (consulted 6 July 2010).

26. See also *Agreement between the Republic of Malta and the Holy See on catholic education in public schools* (16 November 1989), available at http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19891116_s-sede-malta-educazione_it.html (consulted 6 July 2010).

27. United States Department of State, *2008 Report on International Religious Freedom - Malta* (see above).

28. M. Grech, *The Harmonization...* supra n. 16; M. Grech, *Marriage Legislation in Malta*, in Forum, A Review of the Maltese Ecclesiastical Tribunal, No. 1, Vol. 2, Malta, 1991; A.S. Pullicino, *The Church-State Agreement on the Recognition of Civil Effects of Marriage and Declaration of Nullity Delivered by Ecclesiastical Tribunals*, in Forum, A Review of the Maltese Ecclesiastical Tribunal, No. 1, Vol. 6, Malta, 1995.

29. A. Bettetini, *L'Accordo 3 febbraio 1993 tra la Santa Sede e la Repubblica di Malta sul matrimonio: brevi annotazioni*, in *Il diritto ecclesiastico*, CVIII, Parte prima, Milano, 1997.

30. Chapter 255, *Marriage Act* (Act XXXVII of 1975. Last amendment: by Act XXXI of 2002 and IX of 2004), available at <http://www.maltachurchtribunals.org/docs/chapt255.pdf> (consulted 6 July 2010).

and religious teaching, as well as the issue of marriage, was contested by the Socialist Government, elected in 1971. In these last thirty-five years, enormous changes were made in the Maltese marriage law.

The Marriage Act of 1975 introduced the civil marriage, bringing a transition from obligatory religious marriage to a facultative system on the Anglo-Saxon model, which in practice amounted to an obligatory civil marriage.

The previous position was thus somewhat corrected.³¹ But the new system, denying any legal recognition to canonical marriage, remained discriminatory against the majority of the population who still professed the Catholic faith with regards to marriage and the family.

Considering the fact that the Marriage Act of 1975 was introduced unilaterally by the Government as a reaction to what it perceived to be the Church's intransigence, it was foreseeable that it went to the other extreme with the introduction of compulsory civil marriage, denying recognition to all other forms of marriage except those contracted according to the formalities of that law. The Act also denied recognition of the decisions given by the Ecclesiastical Tribunals regarding declarations of nullity of marriage. It moreover declared that Canon Law, in so far as marriage was concerned, was not to have any effect for civil purposes.

Marriage held by Catholic citizens was subject to two different legal orders, the canonical and the civil matrimonial systems. Catholics practically had to celebrate two marriages, one in Church and the other in the presence of the Marriage Registrar. When doubt cropped up about the validity of their marriage, they had to file two marriage suits, one at the Civil Courts and another at the Ecclesiastical Tribunal. Catholics' right for religious freedom was not fully recognized by the State. It is not enough that Civil Law does not prohibit religious marriage for purely religious purposes. The right of religious freedom is wholly satisfied and safeguarded when a marriage contracted in a religious form is recognized in all effects of law.

Moreover, the discrimination was more keenly highlighted considering that the law allowed marriage to be contracted either by civil or religious formalities. By means of this provision, non-Catholics who did not have a proper religious matrimonial law, could contract a civil marriage in a religious form and it would be valid from both the religious and the civil viewpoint. Only the Catholics could not benefit from this provision, for Canon Law regulates not only the formalities but also the substance of marriage.

Furthermore, there is in the law another type of discrimination against Catholics, that has been described as "the greatest anomaly of this Act"³²: while it did not give any juridical value to decisions of the Ecclesiastical Tribunals, decisions of a foreign Court on the status of a married person or affecting such status were recognized for all purposes at Civil Law.

3. The "Concordatarian Marriage" (introduced in 1993)

The examined situation leads to the logical conclusion that once the political community and the Church are autonomous and independent of each other in their own field, and once they both have the authority, the interest and the right to regulate the marriages of their citizens and their members respectively, they both had to strive for healthy cooperation and consensus in this field for the common good. This theological and philosophical motivation encouraged both the Church and the State to persist in their efforts, against considerable odds, until the *Agreement between the Holy See and the Republic of Malta on the recognition of civil effects to canonical marriages and to the decisions of the ecclesiastical Authorities and tribunals about the same marriages* was finally reached (it was signed on the 3 February 1993, was sealed and approved on 25 March 1995 and came into force on the 15 May of the same year).

Under terms of this Agreement, the Republic of Malta recognizes for all civil effects

31. A. S. Pullicino, *The Church-State Agreement...* supra n. 27.

32. G. Frendo, *Is-sacerdot quddiem il-ligi l-gdida dwar iz-zwieg*, (03.02.1976), Malta (unpublished lecture).

marriages celebrated in Malta according to the canonical norms of the Catholic Church (Article 1), the judgments of nullity and the decrees of ratification of nullity of marriage given by the Ecclesiastical Tribunals and which have become executive (Article 3) and the decrees of the Roman Pontiff *super matrimonio rato et non consummato* (Article 7).

The principles enshrined in the Agreement were transposed into domestic law with the promulgation of Marriage Amendment Act 1995 (*Act I* of 3 March 1995) by the Maltese Parliament. This Act is the applicative law of the Agreement and incorporates the entire legislation on civil marriage.

With these modifications, marriage legislation in Malta has become a pluralistic one, now embodying two classes of marriages, the Anglo-Saxon system and the Latin system.³³

The Agreement, considered a landmark in the history of Maltese matrimonial legislation, has long been expected by the Catholic community to amend what might be described as anomalous situation. It is the result of collaboration between Church and State, an expression of loyalty to their mission of service to man, a legal instrument aimed at fostering marriage and the family.

The Agreement and the amended Marriage Act 1995 redressed the discriminatory situation against Catholic citizens with regards to the freedom of religion and the right for equal treatment. The benefits that citizens reap from this type of Agreement are quite significant. Any Catholic wishing to enter marriage has a real choice. If he wishes to be faithful to his Catholic doctrine, he can celebrate the sacrament of marriage in Church. This marriage will be valid to all effects at civil law. But the law also provides that any citizen may choose to contract marriage in a civil or religious form, apart from the canonical form.

Although Catholic marriage and civil marriage in substance are regulated by two different types of regulations, they both result in the same civil status before Civil Law.

The laws regulating jurisdiction over matrimonial matters also respect the principle of religious freedom. A canonically married couple can make recourse to the Ecclesiastical Tribunal in order to resolve doubts about the validity of their marriage. The decisions taken by this Tribunal may then be recognized to all effects and purposes at civil law by the Civil Court.

If the same couple chooses instead to have their case judged by a Civil Court, even if this constitutes a breach of Catholic doctrine, the State, honouring the principle of the *ius poenitendi*, upholds the right of the couple to do so. However, the Agreement stipulates that in case one party chooses to have recourse to a Civil Court and the other insists on having the case considered by an Ecclesiastical Tribunal, the right of the latter party prevails. In such a case the Ecclesiastical Tribunal is deemed fully competent to consider the case. This is one of the points that is peculiar to this Agreement, and which is not found in any other marriage concordats the Church has with several States.

One may easily conclude that this measure in favour of the Catholic party is an infringement of the right of religious freedom of the other party. But the logic of this principle lies in the fact that in marriage it is the couple as a "single unit," not the individual spouses, who holds the right of freedom of religion. It was by the conjoined will of the two spouses that marriage was celebrated according to the norms and formalities of Canon law. Hence, the conjoined will of both spouses is necessary to change the juridical system which had regulated the canonical marriage recognized for all civil effects. Only such consent would allow passing from a confessional system to a secular one. In this case the *ius poenitendi* belongs to the couple and not to the parties individually.

By introducing the "concordatarian marriage" (the canonical marriage recognized to all effects at Civil Law), the Agreement has harmonized the civil and canonical dimensions of marriages celebrated before the Church, in the respect of freedom of choice of the individual as a reflection of the fundamental freedom of conscience and respect for

33. A. Bettetini, *L'Accordo 3 febbraio 1993...* supra n. 28.

the dignity of the human person. The sovereignty of the will is the pivot of the entire Agreement. This harmonization was the result of fruitful collaboration between Church and State, of long and laborious discussion, conducted in the full awareness of the principle that both State and Church, within their respective competencies, have the right and the duty to regulate the marriages of their citizens and members respectively. In fact, while both the State and the Church understandably adhered to their declared positions, solutions were sought in the recognition of the basic principle that the spouses had the right to choose not only the regime under which the marriage was to be celebrated, but also which jurisdiction should be competent to deliberate and decide on the validity or otherwise of the marriage.

4. Critiques about the Agreement and the Marriage Act

The Agreement will obviously have to withstand the test of time. Like all compromise solutions it is not a perfect agreement and neither side is completely happy with the final outcome. The State did not agree to recognize the exclusive competence of the Church in all judicial matters relating to canonical marriages. The Civil Tribunals retained the jurisdiction to determine questions relating to the validity of canonical marriages when both spouses submit themselves to their jurisdiction and in other cases.

Moreover, all marriages remain subject to the Civil Law regime on marriage regarding civil effects. It is only with respect to decisions of the Ecclesiastical Tribunals and in those cases when at least one of the spouses in a canonical marriage opts to have recourse before them that the Agreement recognized the exclusive jurisdiction of the Ecclesiastical Tribunals over concordatarian marriages and the State bound itself to recognize and register those decisions as binding for all civil effects on the parties.

So the Agreement and the Marriage Act inevitably came under criticism. But it must be said that most of the critique was either politically motivated or else had an antireligious and an anticlerical bias: the Agreement had been described as “anti-constitutional,” “anti-European,” “a breach of fundamental human rights,” “a setback in the country’s intellectual, cultural and democratic development,” “a fundamentalist religious structure,” and as “confused intermingling of Church and State roles and functions.”

Behind these accusations seems to lie an erroneous interpretation and application of fundamental juridical principles sustaining the whole Agreement. About the allegation that the Agreement is an imposition of some form of confessionalism of the State it has to be remembered that during the Parliamentary debates on the amendments to the marriage law, the Government repeatedly stressed that this law was being promulgated so as to satisfy by means of a juridical reality the social and religious needs of a society with a Catholic majority; it is purposely enacted by an autonomous and lay State to give civil recognition to the externalization of the religious sentiments of the citizens.

To some extent, it may be said that the State is not strictly speaking interested in whether its citizens are members of one Church or another. What really matters for the State is that whichever citizen wants to have a religious marriage – in our case in point a Catholic marriage – his or her rights are safeguarded according to Constitutional precepts.³⁴

5. Civil Law and Other Religious Marriages

It cannot be alleged that Marriage Act gives preferential treatment to the Catholic Church and discriminates against the other confessions. According to the law, the relation of the State with other religions and other non-Catholic Churches can be regulated by two principles.

1. Regarding civil marriages with a religious form, Section 17 lays down the following two criteria for the acceptance of the rites and religious usage:

34. M. Grech, *The Harmonization...* supra n. 16.

- a) if a church or religion is generally accepted as a church or religion; or
- b) if this church or religion is recognized for the purpose of this section by the State Minister.

Looking at the second criterion, it seems that the law attributes wide discretionary powers to the Minister, since it fails to establish an objective gauge for the evaluation.

2. Another very important element must be considered. Section 17 assumes the religious form of marriage, and Section 11 (3) clearly states that “the non-observance of any formality or any other similar requirement relating to the celebration of the marriage or preparation thereto” will give rise to a case of annullability limited by time. The church or religion are therefore required to provide the utmost guarantee of certainty demanded by the same law when they obtain recognition to all intents and purposes of this law.

The Marriage Act also stipulates that the State can have an Agreement with other Churches, religions, and denominations regarding the recognition of marriages celebrated in accordance with their rules and norms. These Agreements should conform substantially to the provisions of the Agreement between the Holy See and Malta (Section 37).

VI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

The presence of the crucifix in the classrooms of Maltese State Schools has been the subject of some polemic. It has been suggested that the presence of the crucifix to the exclusion of any other religious symbol is discriminatory.

To what extent a religious symbol offends the sentiments of other religions is debatable. It is however true that the presence of a religious crucifix in State Schools classrooms is evidence of the predominance and importance of Catholicism over any other religion in this country.

On the other hand, the presence or otherwise of the crucifix does not hinder the student of a different faith from practising his religion. It would be another matter when religious festivals recognized as public holidays interfere with important appointments in the calendar of other religious denominations.³⁵

The European Parliament, on the basis of an issue concerning crucifixes in most of Malta's public places, recently approved a regulation for the removal of religious symbols from public places that people may find offensive.³⁶ As we write, we are awaiting the outcome of the European Court of Human Rights Grand Chamber hearing of *Lautsi v. Italy*, the controversial “Italian Crucifix case, which was decided against Italy by the Court’s Second Section in November 2009.”³⁷

VII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION³⁸

Article 163 of the Maltese Criminal Code³⁹, expressly provides that:

Whosoever by words, gestures, written matter, whether printed or not, or pictures or by some, other visible means, publicly vilifies the Roman Catholic Apostolic Religion which is the religion of Malta, or gives offence to the Roman Catholic Apostolic Religion by vilifying those who profess such religion or its ministers, or anything which forms the object of, or is consecrated to, or is necessarily destined to Roman Catholic worship, shall, on conviction, be liable to imprisonment for a term from one to six months.

35. A. Grech, *Religion, tolerance and discrimination in Malta*, available at <http://aei.pitt.edu/6034/01/2.pdf>

36. European Parliament Information Office in Valletta, *Daily Press Review*, Sunday, 5 April 2009, about “religious symbols,” available at http://www.europarlmt.eu/ressource/static/files/MT_Press_Review_050409.doc.

37. *Lautsi v. Italy*, app. no. 30814/06, see http://www.strasbourgconsortium.org/cases.php?page_id=10#portal.case.php?tribunal_case_id=2.

38. A. Grech, *Religion, tolerance and discrimination in Malta* (see above).

39. Chapter 9, *Criminal Code* (Order-in-Council of 30 January, 1854. Last amendments: by Acts VIII of 2008 and XI of 2009), available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf.

This had been considered a fundamentalist approach towards the Roman Catholic Apostolic Religion, arguing that the influence of a State Church could also be seen in the ease of prosecution and Laws forbidding blasphemy against only one religion. To be objective, it is important to note that the following Section punishes vilification of any *cult* tolerated by law, but the punishment in this case is reduced to half of that mentioned in the previous Section.

But one can ask what is to be meant by “*cult tolerated by law.*” Section 165 provides against the disturbance of the performance of any function, ceremony or religious service of the Roman Catholic Apostolic Religion or of any other *religion* tolerated by law, which is carried out with the assistance of a minister of religion or in any place of worship or in any public place.

What is the criterion to distinguish a “cult” or religion “accepted” by the law from those that are not? Is this a distinction between a religion and a sect or are we referring to something more fundamental than that, such as those cults or small communities practicing deviant, sinister, and eccentric rites that are also detrimental to the members of the community?

Indeed “cult” means something less than established religion, and very often the term includes sects within the same or established religion. A cult that is not tolerated by the law should therefore be one that violates fundamental social values both as a matter of belief as well as a matter of actual practice. It would appear that persons of different religious denominations are allowed to practice their faith freely so long as the religious practice and manifestation does not infringe upon the public order.

VIII. THE ISSUE OF CONSCIENTIOUS OBJECTION

Conscription has never existed in Malta.⁴⁰ According to Article 3 of the Armed Forces Act, the Armed Forces of Malta can only be raised “by voluntary enlistment”⁴¹; they consist of professional soldiers only. Thus, as the Government stated in 1988, the question of “conscientious objection” does not arise.⁴² Malta does not recognize the right to conscientious objection for professional soldiers. But it has to be considered that, according to the Malta Armed Forces Act of 1970, the service of voluntary soldiers can be extended in an emergency or war (Article 9), or in case a war is imminent (Article 10) for up to twelve months. In fact, in this case any discharge is automatically postponed. Should conscription be introduced (in the cases of war or emergency), Article 35 (2) (c) of the Constitution would require substitute service for those refusing to perform military duties.⁴³ In fact, this Article states that no person shall be required to perform forced labour,” and excludes from the latter expression “any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service.

However, this does not guarantee a right to conscientious objection for conscripts, it only excludes a substitute service for conscientious objectors from the definition of forced labour. Article 14 of the Armed Forces Act allows for the purchase of discharge before the end of a contract, but this is not possible in case service has been extended according to Article 10. In any event, it is believed that soldiers may request discharge if they develop a conscientious objection to any further service in the Armed Forces.⁴⁴

40. War Resisters' International: Refusing to bear arms. 1998, available at <http://wriirg.org/co/rtba/archive/malta.htm>.

41. Chapter 220, *Malta Armed Forces Act* (Act XXVII of 1970. Last amendments: by Acts X and XII of 2000, and Legal Notice 411 of 2007), available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_5/chapt220.pdf.

42. UN Commission on Human Rights. *Report by the Secretary-General*. United Nations, Geneva, 1988.

43. E. Evans, *Conscientious objection to military service in Europe, a study submitted by the Quaker Council for European Affairs*. Council of Europe, Strasbourg, 1984.

44. G.Schmid, *Wehr- und Zivildienst in Europäischen Ländern, Informationen, Analysen, Unterrichtbausteine*. Wochenschau Verlag, Schwalbach, 1994.