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STATE AND RELIGION: AGREEMENTS, CONVENTIONS AND STATUTES

CINZIA PICIOCCHI
DAVIDE STRAZZARI
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(eds.)

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PART III

INTRODUCTION

Cinzia Piciocchi

In 2020 my colleagues – Davide Strazzari and Roberto Toniatti – and I received some good news: a research project we had applied for, together with other Universities, had been funded by the Italian Ministry of Research. The project dealt with the mainly ideal concept of the "intercultural State". When we had thought about what should be explored when dealing with this topic, one of the first words that came up was "instruments". It seemed important to consider both already existing instruments as well as new ones, with the potential of bringing the ideal concept of the intercultural State closer to real, contemporary, historical practice.

The analysis of instruments provided by legal systems to dialogue with identities is crucial for understanding the legal implications of cultural pluralism: the "toolkit" conceived by the States gives a picture of the legal framework dealing with identities. Looking at instruments, we see how legal systems outline the space of groups which do not fit within the majority identity, the problems encountered and their evolution over time. The analysis of the legal instruments provided by States to regulate the relationship between law and "diversities" also contributes to identifying the meaning of words, which are situated on the border between disciplines, such as "multiculturalism" (on the decline, at least in the last few years) and "interculturalism" (on the rise), for example. These definitions are employed in different fields – sociology, anthropology, or political science, just to mention a few – but in the last few decades they have also started being used together with legal concepts such as citizenship, State, or rights. Old words combined into new definitions, which now belong to lawyers' wealth of knowledge.

Instruments are symptoms of the fact that a State is dealing with the issues surrounding identities, in particular minority identities, although

they are not *per se* a guarantee of the respect and implementation of constitutional principles.

Among the instruments, some of the most relevant ones are the agreements and laws adopted by the States, to regulate the relationship with religious groups and denominations. First of all, they acknowledge the existence of minority creeds: the "other" religions. Secondly, looking at the provisions of these acts, it is possible to understand the role played by pluralism and its evolution, the challenges it poses to legal instruments and the innovations it introduces. The dialogue between law and religious creeds, for example, is a key to understanding special rights: the "exceptions" granted to religious identities to protect their religious freedom, when it is not covered by the "rules" based on the majority paradigm. Laws and agreements with religious communities contribute to the definition of the attitude of the State towards the religious phenomenon and, in a more general perspective, towards pluralism.

This book is the first outcome of the idea that instruments are an important field to explore, and it owes a lot to the attitude of its authors, who accepted to contribute to it. They all have different backgrounds, ranging from constitutional to administrative and ecclesiastical law, but with a common interest in the relationship between law and religion. They are all used to comparing different legal systems and are multilingual (we chose to collect the papers in both English and French). It is interesting to note that some of the contributions collected in this book analyze legal systems beyond the ones in which their authors live and teach.

It is my personal view that what I called attitudes – interdisciplinarity, the use of legal comparative methodology and multilingualism – are prompted by the topics that are at the center of our research interests. Dialogue and exchange between experts from different disciplines and countries are necessary to understand the issues surrounding cultural pluralism and, more generally, the legal implications of identity rights. Besides, the issues surrounding religion and culture require the ability to deal with definitions – *kafala*, *ghet*, *kippah*, *niqab*, *kirpan*, for example – whose meaning depends on values and the context of which they

are an expression: words that are to be approached in the light of their cultural significance.

First-year law students would probably never imagine that, during their future career path, they might have to deal with the significance of religious rituals, or with the understanding of the meaning of holy days, or of witchcraft. Instead, those aspects might be part of the job of a judge, when assessing an employee's request for extra days off for religious reasons, or when dealing with the recognition of a refugee status.

Exploring religious and cultural identities from a legal perspective, in other words, has several implications and requires a certain degree of flexibility in attitude. Among others: the ability to look at issues from different perspectives and to put oneself in others' shoes, with a strong willingness to understand how it feels to wear them. It is a kind of "exercise", where it is normal (a word that comes from the term norm, i.e. rule) to ascribe more than one significance to the same behavior and to think that there is always someone for whom "we" are "the others".

Most of all, to address the topics covered by this book, I would say that a fair amount of curiosity is required.

As mentioned, the authors have different backgrounds and perspectives and take into consideration different countries; however, it is possible to identify some golden threads, which come up in the different chapters. First of all, the topic addressed: all authors have focused on the regulation of the relationship between States and religious groups, investigating both agreements and statutes.

They often took as a starting point the analysis of the social context, offering a picture of what Mélanie Trédez-Lopez has effectively defined as *paysages religieux*. The understanding of the religious landscape, through the analysis of numbers and percentages of adherents to the various creeds among the population, is the precondition for understanding the State's approach towards the adherents to religious groups, in a majority-minority perspective. The role played by pluralism with regard to agreements and/or religious laws, in fact, can be understood only in light of the social mosaic.

The legal regulation of the relationship between States and religious denominations deeply affects the "us-them" dynamics: it describes the legal consequences of belonging to a religious group, in terms of rights.

There is a fundamental divide between denominations that have signed agreements with the State and the ones lacking this opportunity, in light of the constitutional principle of equality.

The importance of the constitutional framework is discussed by Roberto Toniatti, who compares the legal systems of Spain and Italy with regard to the concept of legal pluralism. He reminds us that the relationship between the State and religious minorities is also a dialogue between legal systems. Seen in this perspective, bilateral agreements (with all their light and shade) are possible instruments for introducing some forms of «consensual legal pluralism».

The chapters of this book are linked by another common thread: history. The identification of the stakeholders in the process of negotiating agreements with the State is at least in part determined by historical developments, which undoubtedly contribute to the building of religious identities and their interactions. The legal regulation of the relationship between the State and religious denominations is also a product of history: it is no coincidence that many authors take into consideration historical events, which deeply affected majority-minority interactions and the approval of agreements with local religious communities. The adoption of an historical perspective shows that majority and minorities are variable concepts, which fluctuate around historical events, such as the disaggregation of multinational States (as discussed in the chapter by Kerstin Wonisch with regard to the Austro-Hungarian Empire), or the annexation of territories (as in the examples mentioned by Adriaan Overbeeke). These historical events remind us that populations take with them a heavy baggage of culture, history, customs and traditions, in a "journey" from one State to another, even when it is not due to migratory flows, but to changing borders. Most of all, people take with them the self-perception of their identity, which is inevitably affected by the shift from belonging to the majority (regulated by rules), to becoming a minority group (in potential need of exceptions).

The definition of rules and exceptions is another crucial issue, which has been addressed by the authors of this book, and not only from an historical perspective. They are all familiar with the definitions of "special rights": a lexicon which is not necessarily so common in other branches of law. Rossella Bottoni offers many precious examples to

this effect, with regard to the German legal system, analyzing how these rights originated, the reasons why they were provided by the State and what the problems encountered were.

The lexicon of experts dealing with the relationship between law and religion and, from a more general point of view, with the issues surrounding cultural pluralism, includes the definitions of the rule-exception relationship. Today, these words are part of the toolkit of lawyers also dealing with disciplines other than law and religion, since cultural pluralism affects many legal fields such as, for example, commercial law, family law or inheritance. Instruments are needed to deal with cultural identities, especially in countries where cultural heterogeneity is a relatively recent phenomenon. "New" words are needed and sometimes borrowed from other disciplines: terms such as "identity", "culture", and "accommodation" require interdisciplinary expertise, which is already part of the tools of scholars, who are constantly engaged with religious norms and thus accustomed to the use of comparative methodology.

Among the "special rights", "exemption" is a recurring definition in the contributions to this book, being inherent in the idea of the agreements themselves. State laws on religion and agreements, in fact, are adopted to provide for "special rights" which, in point of fact, are "special" only in relation to majority rights, customs or traditions. From the constitutional point of view, rather, these rights are not "special" at all, falling under the protection of religious liberty, which instead requires "special instruments" to ensure it.

The volume addresses this issue very clearly: religious liberty is a constitutional right, guaranteed to everyone, regardless of the creed professed majority, minority or ultra-minoritarian. All the authors, in fact, look at agreements and laws in light of the constitutional protection of fundamental rights. All chapters, in other words, pay great attention to the special norms provided by denominational agreements, but they also stress the importance of constitutional principles.

This is a key step, also in the wider perspective of the relationship between law and cultural identities, including (but not limited to) religious groups. The debate surrounding identity rights is often placed in terms of the need for special rights: the field of religious symbols is

paradigmatic in this sense. The rights surrounding religious symbols of minority groups have often been identified in these terms: the right to wear a *hijab*, the right to wear a *kirpan*, the right to wear a turban and so on. This approach is questionable, since the right to wear a religious symbol is a constitutional right and it does not depend on "the" symbol in question, be it a crucifix or even a colander (as in the case of the *Pastafarians*).

This book reminds us of the importance of distinguishing cases where specific rights are needed, from cases which fall under the constitutional protection of religious liberty. Rights, in this perspective, are not always "special" and it is important to draw a distinction: in some cases, exceptions or special rights are needed to guarantee the exercise of religious freedom.

In some other cases, conversely, the fact that a minority's behaviors are different from the majority's assumptions, does not necessarily mean that they need exceptions or special rights.

It is also important to remember that religious rights are not only a minority issue: they are also an *affaire* of the majority. Davide Strazzari offers the example of festivities, which are at the crossroads of religion and culture, where the holidays of the majority do not always respond to the holy days of minorities, in a complex interweaving of history, tradition and national identity. Statutory holidays inevitably reflect the existence of a majority, with its customs and traditions: denominational agreements, in fact, provide for the regulation of holy days which are not recognized as public holidays by the State. Yet even the adherents to the majority creed might not share the official State calendar, invoking the possibility of observing further holy days. In this case, there is no agreement or special norm to rely on and it becomes clear that if the accommodation of minorities is a complex issue, the "accommodation of the majority" is even more complicated.

That is another reason to pay great attention to instruments, since the groups they target might change over time and the "exceptions" provided for minorities might prompt new "rules", to be extended to further stakeholders. From another perspective, when special rights are invoked outside the group they were aimed at, the result may be the adoption of a more "neutral" and inclusive rule. This might be the case, for

example, of the possibility of taking some days off regardless of any religious creed, and enjoying holy days or just holidays (an opportunity which is actually offered by some private companies in different countries).

Another recurring theme is the attention paid to Islamic communities: if instruments are crucial to the understanding of the "we/others" dynamics, among the "others" Muslim communities play a prominent role.

The Austrian Islam Law is an interesting example of legal regulation that is not to be found in other countries (such as Italy, for example). Nevertheless, Kerstin Wonisch reminds us that even communities that historically belonged to the *paysages religieux* can be problematically underrepresented. Both laws and agreements with denominations are the outcome of negotiations between States and stakeholders. The latter might not include all identities that define themselves on the basis of the same creed, and some of them might be left out. Juridification entails a process of definition of stakeholders, and it can draw a line between identities, which share the same religious roots. Seen in this perspective, agreements affect the perception of religious identities, from the point of view of who is assumed to be (more or less) representative, at least in a public dimension.

Identities and stakeholders are two different concepts: both are affected by juridification, in a complex intertwining of history, politics and possible discrimination. The authors of this book often highlight the stigma that sometimes interferes with processes of negotiation and dialogue with Muslim communities. Instruments are important, but they are not sufficient: an inclusive society is based on the willingness to dialogue, bearing in mind that political action is prompted by social demand.

The religious phenomenon contributes to outlining a social framework, and not only from a metaphorical point of view. It deeply affects the public spaces of daily life: cities and neighborhoods with religious buildings, monuments, and gathering places. It nourishes the sense of belonging and of national identity, but it also depicts the attitude of the State towards pluralism, with regard to both historical minorities and

"new identities". We can tell a lot about a social context, for example, by looking at the space assigned to religious creeds in cemeteries.

Agreements contain a lot of norms regarding daily life, including very practical issues, such as the space and time for prayer, for example. Francesco Alicino reminds us that legal regulation of religious communities also includes the definition of another "public space": the political arena. Laws and agreements with religious communities, in fact, are also the result of the political role they play, which is the public space where identities are seen as stakeholders.

Beyond history, this book also looks inevitably at the contemporary situation: it would be very unlikely for a book published in 2021 not to mention the issue of the pandemic. Erminia Camassa and Francesca Oliosi recall a date which marked recent Italian history: 8 March 2020, when the Government announced a national lockdown, the first of more to come all over the world. Constitutional rights were limited, as always in times of emergency, such as freedom of movement, working rights and religious freedom.

A national lockdown was imposed during a period of particular significance for Catholics, Jews and Muslims: their holy days, which could not be celebrated with collective rites, being incompatible with social distancing required to contain the alarming spread of the virus. Restrictions immediately entered into force, due to the emergency, while all denominations urged for dialogue, also in light of the social role played by religions in facing difficult times in their communities. Camassa and Oliosi recall the criticism surrounding the first limitations of religious celebrations, which led to the definition of "health jurisdictionalism". Otherwise, after an initial period, a dialogue was established and the denominations seemed to converge on an equal footing, in the name of religious liberty provided by Article 19 of the Italian Constitution.

It is probably partly rhetorical to note that every crisis is also an opportunity, although I think that it is an inherent truth and not only a phrase that is uttered to provide encouragement and to help look beyond the present situation. In fact, the authors who took into consideration the pandemic contemplated its impact on religious rights as an interesting testing ground, as mentioned also by Adriaan Overbeeke.

After looking back at history and at the current challenging times, our book also looks to the future, exploring possible upcoming forms of legal regulation. Carla Reale considers the Italian framework and explores the possibilities that would be opened by the adoption of a law on religious liberty. This is not only a speculative exercise, since it looks at a project by Italian scholars (the think tank called "Astrid"), which is to be seen as an expression of a need, precisely in light of the constitutional protection of religious freedom and rights. Francesco Alicino reminds us that bilateral agreements signed by non-Catholic denominations can be seen as two sides of the same coin. On the one hand, they have often been criticized, especially because of their standardization, which has led to the expression "photocopy agreements". On the other hand, they are instruments that can give effect to constitutional principles. The project analyzed by Reale, in the proponents' intentions, would go in this latter direction: the implementation of constitutional principles on religious freedom.

Even the concluding remarks by Marco Ventura look to the future of «the reinvention of concordats» and of new forms of agreements, with reference, for example, to the recent 2020 Rome Call for AI Ethics, a document aimed at supporting an ethical approach in the field of artificial intelligence. Among the shifting paradigms, a prominent role is played by a concept, which Ventura puts at the center of his chapter: dialogue.

Dialogue is seen as a «dominant contemporary feature» of the relations between States and religious organizations, which can affect, with its creative force, the categories of conventions and agreements.

There is another common thread, not dissimilar to the concept of dialogue, which lies in a word which is used only by one of the authors, Davide Strazzari, but which pervades all the chapters of this book (at least to my understanding): empathy.

Maybe this is the right definition of what I called the attitude to put oneself in someone else's shoes which, for a lawyer, describes the ability to feel what it means to belong to "other" groups, in terms of rights. Our authors show a great sensitiveness to this extent and are able to narrate the meaning (and the burden) of "being different".

Books do not generally have a goal, but one possible result of this volume might be the creation of a network of scholars: the ones who contributed to this book and the readers who will appreciate it; at least this is our hope.

PART I

EU ANTI-DISCRIMINATION LAW AND DOMESTIC NEGOTIATED LAWS AS LEGAL INSTRUMENTS TO PROTECT RELIGIOUS FREEDOM AT WORK IN EUROPE: OVERLAPPING OR CONFLICTING?*

Davide Strazzari

SUMMARY: *1. Introduction. Religious Freedom at Work: Which Protection? 2. The "logic of difference" applied in antidiscrimination law and its limits with regard to the religious dimension. 2.1. Defining what a religious group means. 2.2. The swinging test of proportionality. 3. Special rights and derogatory treatments for religious groups in domestic legislation. 4. Reconciling the opposite? 4.1. The Achatzi case. 4.2. The Egenberger (and IR) case. 5. Conclusion.*

1. Introduction. Religious Freedom at Work: Which Protection?

Freedom of religion includes not only the right to religious belief or lack of it – the so-called *forum internum* – but also the freedom to manifest it, both in private and in public – the so-called *forum externum*[1]. In the workplace, this may typically comprehend requests for time off in order to celebrate religious festivals, the wearing of religious symbols,

* An earlier version of this paper is published in DPCE-online, n. 2, 2021.

[1] For this terminology as implemented by the CJEU see decision 14.03.2017, Case C-188/15, *Bougnaoui-Micropole*, § 30. The distinction between the two tenets of freedom of religion derives from art. 9 of the ECHR, according to which «Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance». While the internal component of religious freedom is not subject to limits, the second paragraph of art. 9 provides a different discipline for the external dimension: «Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others».

and exemptions from certain job functions when these are against religious rules[2].

The enjoyment of *forum externum* of religious freedom may be problematic in the workplace. Employers have the right to organize their working staff and to set those rules they think suitable for their business. However, these rules may conflict with the religious rules of the employees. Should the law or the judge sustain employees' claims to manifest their religious identity? After all, employment is also a matter of choice and accommodating religious rules in the workplace may imply a cost or burden for the employer. Granting employees days off for celebrating religious festivals is just an example. Employers themselves may pursue a policy of neutrality with regard to religion or belief: this choice may be functional to business, as customers may feel uneasy when a given religion is exhibited. Moreover, religious neutrality in the workplace may be a practical way to avoid complaints from other employees who might feel uncomfortable because of the manifestation of their colleagues' religious identity.

These brief remarks may offer a quick understanding of why the enjoyment of freedom of religion in the workplace is subject to considerable debate and has become so contentious[3].

As regards the current European legal landscape, the issue of freedom of religion in the workplace can be assessed by taking into account three main legal sources. The first is the perspective of fundamental and human rights. Freedom of religion and belief is enshrined in the constitution of each European country and it is also set in art. 9 of the European Convention on Human Rights[4].

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[2] See L. VICKERS, *Religion and the Workplace*, in *The Equal Rights Review*, 14, 2015, pp. 106 ss.; EAD., *Religious Freedom, Religious Discrimination, and the Workplace*, Oxford-Portland, 2008.

[3] See K. ALIDADI, *Religion, Equality and Employment in Europe - The case for reasonable accommodation*, Oxford-Portland, 2017; M. HUNTER-HENIN, *Why Religious Freedom matters for democracy*, Oxford, 2020, spec. pp. 119-174; L. VICKERS, *Religious Freedom, Religious Discrimination, and the Workplace*, cit.

[4] See for an overview C. EVANS, *Freedom of religion under the European Convention on Human Rights*, Oxford, 2001.

One limit that characterizes the fundamental/human rights approach is the fact that, traditionally, these provisions apply vertically, i.e. to state and public authorities only. The UK is the best example in this regard: according to art. 6, the Human Rights Act 1998, which incorporates the rights set out in the ECHR into British domestic law, applies only to the acts of public authorities.

Some domestic legal systems do theorize the horizontal effect of fundamental rights[5]. However, this may occur on a selective basis[6] and consequently the scope of protection can be different from that currently applied when a public authority is involved.

With regard to the European Convention, its rights and freedoms apply only to the public authorities of the states parties. Nevertheless, the European Court has elaborated the notion of "positive duties", according to which the Court has the jurisdiction to review how domestic

[5] The horizontal effect of Constitutional rights is a subject which has been particularly elaborated by German legal scholarship (so-called *Drittwirkung*) and Italian legal doctrine as well (see A. PACE, *Problematica delle libertà costituzionali*, vol. I, III ed., Padova, 2003, 17-19; G. LOMBARDI, *Potere privato e diritti fondamentali*, Torino, 1970). Indeed, the Italian Constitution explicitly provides that some rights may also be claimed in the private sector (see for instance art. 36 and 37 of Italian Constitution). For a comparative overview, see R. GOSWAMI, *Human Rights and the private sphere: a Comparative Analysis*, in *National University of Juridical Sciences Law Review*, 1, 2008, pp. 185 ss.; J. KRZEMINSKA-VAMVAKA, *Horizontal effect of Fundamental rights and freedom - Much ado about nothing? German, Polish and EU theories compared after Viking Line*, Jean Monnet Working Paper 2009, available at *centers.law.nyu.edu*.

[6] In the Netherlands, the Supreme Court applied the fundamental right to freedom of religion and non-discrimination to a private dispute, holding that an employer may not deny a request for time off in order to celebrate an important religious holiday, unless this would imply too heavy a burden for the employer (see Supreme Court of the Netherlands, 30.03.1984, Inan/de Venhorst, NJ, 1985, 350, referred to by K. ALIDADI, *op. cit.*, p. 176). A contrary position has emerged in Spain. The Spanish Constitutional Tribunal has denied that from art 16 of the Spanish Constitution the duty can be derived for a private employer to accommodate an employee's religious practice (in relation to the request of a member of the Seventh-day Adventist Church to have Saturday as a day off). See Tribunal Constitution, n. 19/1985, «Podrá existir – no hay inconveniente en reconocerlo – una incompatibilidad entre los deberes religiosos, en cuanto impongan la inactividad laboral y la ejecución del trabajo o el cumplimiento de obligaciones laborales, pero no una coercibilidad contraria al principio de neutralidad que debe presidir, en la materia, la conducta del empresario».

courts grant protection to provisions of the Convention in disputes which involve private parties as well. Despite this, the European Court has traditionally adopted a narrow approach in relation to art. 9 claims which arise in the workplace, considered an area where a wide margin of discretion should be left to the States parties. Moreover, the Court has traditionally framed these claims within the filter of the "freedom to resign" doctrine, according to which, whenever the employees find that an internal rule conflicts with their religious belief, they are free to relinquish their post[7]. This position was finally set aside in the well-known *Eweida* case[8], where the Strasbourg Court found that the UK courts had not fairly balanced the rights of the employer to conduct business and the religious freedom of the employee who wished to wear a small cross[9].

The second instrument through which freedom of religion is today protected in Europe is EU antidiscrimination law[10]. With the adoption of Council Directive 2000/78/EC (the so-called Framework Directive), the EU has offered an important instrument to fight religious discrimination in the workplace, allowing a more structured remedy than that based on the above-mentioned human rights approach[11]. The directive has also allowed circumvention of the main shortcomings of the fundamental/human rights approach to the protection of religious freedom, namely its traditional vertical application, as it is precisely designed to be applied both vertically and horizontally[12].

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[7] See EComHr, 12.03.1981, *X/Ahmad v UK* (appl. N. 8160/78); EComHr, 03.12.1996, *Kontinen v. Finland* (appl. N. 29107/95).

[8] ECtHR, *Eweida v UK*, 15.01.2013.

[9] See later in the text. For a detailed analysis and for further bibliographical references, K. ALIDADI, *op. cit.*, pp. 40 ss.

[10] See M. HILL (ed.), *Religion and Discrimination Law in the European Union*, Trier, 2012; R. MCCREA, *Religion and the Public Order of the European Union Oxford*, Oxford, 2010; M. BELL, *Antidiscrimination Law and the European Union*, Oxford, 2002.

[11] Besides religion or belief, the 2000/78/EC directive grants protection to age, disability and sexual orientation.

[12] The issue of the horizontal direct effect of non-discrimination provisions through the instrument of the general principle of EU law was established by the CJEU in the *Mangold* and *Kücükdeveci* decisions, with regard to age, and in *Egenberger* with regard

The EU directive prohibits both direct and indirect discrimination. The former arises when a person is treated less favourably than another on one of the enumerated protected grounds (religion, age, disability and so on). Setting aside the positive action framework, direct discrimination cannot be justified unless a characteristic related to one of the protected groups constitutes a genuine occupational requirement, i.e. the work, because of its nature and/or context, cannot be carried out without having that requirement.

Indirect discrimination occurs when a seemingly neutral provision, requirement or practice puts persons of a particular religion or belief (or members of one of the group/factors protected by the directive) at a particular disadvantage. However, the employer can still justify the measure, provided it seeks to pursue a legitimate aim and is appropriate and necessary to fulfil this aim.

The directive also contains important provisions aimed at making the prohibition of discrimination effective through a strengthening of the legal position of the victim of discrimination. This is done by lightening the burden of proof for the alleged victim of discrimination and the granting of *locus standi* to associations, organisations or other legal entities which may engage either on behalf or in support of the complainant with his or her approval in any judicial procedure providing for the enforcement of obligations under the directive.

Finally, a third instrument to protect employees' religious claims in the workplace can be used in some European states. This hypothesis occurs when the legislator recognises that members of certain religious group have special rights or are given derogatory treatment with regard to otherwise generally applicable rules. In these cases, protection is structural, basically permanent and directly provided by the law with the aim of protecting the specificities of a given religious minority.

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to religion. See D. LECZYKIEWICZ, *Horizontal Effect of Fundamental Rights*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK (eds.), *General Principles of EU Law and European Private Law*, Alphen aan den Rijn, 2013, pp. 174 ss.; EAD., *Horizontal Application of the Charter of Fundamental rights*, in *Eur. L. Rev.*, vol. 38, 4, 2013, pp. 479 ss.; M. DE MOL, *Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law*, in *European Constitutional Law Review*, vol. 6, 2, 2010, pp. 293 ss.

Usually such an approach is enforced in countries such as Italy and Spain that regulate relations between the state and religious denominations by means of agreements concluded by the state government and representatives of the religious denominations. However, derogatory rules and/or special rights in favour of certain religious groups may also be granted unilaterally by the legislator, outside the framework of previous and systematic agreements. Think of the case of section 11 and 12 of the British Employment Act 1989, as amended by art. 6 of the Deregulation Act 2015, which exempts turban-wearing Sikhs from any legal requirement to wear head protection in the workplace.

The three approaches, in granting legal protection to religious freedom, are often cumulative and, to a certain extent, they complement each other[13]. For instance, when it comes to cases concerning religious freedom in the workplace, the protection offered under the framework of fundamental rights and that offered under the antidiscrimination approach are mostly overlapping. To give an example, the issue of the wearing of the veil in the workplace can be framed both in terms of the fundamental right of the employee to manifest her religion – to be balanced with the right of the employer to freely conduct their business – or as an issue involving the non-discrimination principle[14].

However, under the antidiscrimination approach, direct discrimination cannot be justified according to a general clause, whereas this possibility is always applicable under art. 9.2 of the European Convention, which explicitly provides for the possibility to limit the manifestation of freedom of religion when this competes with other public interests or with the rights or freedoms of others[15].

[13] See for a comparison of CJEU and ECtHR approach to freedom of religion, R. MCCREA, *Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State*, in *Oxford Journal of Law and Religion*, 5, 2016.

[14] However, it is still unclear whether this situation amounts to direct or indirect discrimination. See *infra* in the text and CJEU case law in *Bougnaoui* and *Achbita*.

[15] See L. VICKERS, *Freedom of Religion and Belief, Article 9 and the EU Equality Directive: Living together in Perfect Harmony?*, in F. DORSSEMONT, K. LÖRCHER, I. SCHÖMANN (eds.), *The European Convention and the Employment Relation*, Oxford, 2013, pp. 1 ss.

This difference in treatment explains why, in domestic and CJEU courts, there has been heated debate on the possibility to classify an internal rule prohibiting the wearing of head coverings as direct discrimination, at least in those cases where the employers explicitly mention the wish to avoid the display of religiously motivated symbols.

This paper aims to emphasize the situations where the three legal approaches, in granting legal protection to religious freedom, may come into conflict. More precisely, we want to consider the hypothesis whereby the enforcement of EU antidiscrimination law contrasts with domestic laws that provide special treatment to some religious groups.

We consider that this possible clash is likely to occur given that the two legal approaches are based on different conceptual frameworks: while antidiscrimination law is based on the premise of "sameness of treatment" – discrimination arises because of differential treatment based on one of the protected characteristics – the third approach emphasizes the right to difference and aims to promote distinctiveness.

For instance, granting special treatment to members of one religious group (the possibility for Jews to abstain from work on Saturday rather than on Sunday), without granting the same treatment to members of other religious minorities, may amount to direct discrimination: as a matter of fact, members of a religious group are treated more favourably than others. Since this is direct discrimination, no justification is admissible. On the contrary, under constitutional law analysis, the special treatment granted to a given religion rather than to others may survive constitutional review: one may argue that the special legal treatment is justified by the need to grant protection to a traditional historical minority group in the country.

Thus, the logic of sameness underpinned by antidiscrimination law may be in contradiction with the logic of difference which is implied in domestic legislations providing the positive recognition of religious claims in the workplace.

Given that antidiscrimination law is today a strong basis for EU law, the issue also becomes a question related to EU primacy and its relations with the constitutional traditions of those countries which consider that state secularism does not necessarily mean strict separatism. Is the

CJEU fully aware of the potential clash with member states' constitutional identity which is at stake?

2. The "logic of difference" applied in antidiscrimination law and its limits with regard to the religious dimension

2.1. Defining what a religious group means

The general premise of antidiscrimination law is that the protected characteristics are rarely relevant to the employer's decision and therefore should be ignored[16]. The sameness of treatment logic, which is enforced by antidiscrimination law, clearly emerges from the fact that discriminatory treatment arises through a comparison of the legal treatment received by a person holding the protected factor and that of another person in a similar situation to the alleged victim, but for the possession of the relevant and protected characteristic.

This approach is perfectly adequate as an instrument to give protection to issues related to the *forum internum* of freedom of religion, but it is not in relation to the *forum externum*, the protection of which does require the adoption of positive steps that recognise the specificity of the person holding a certain religion or belief.

Religion is not the only factor whose protection may require positive duties, as this feature also characterizes disability. However, the EU framework directive does expressly consider this aspect only in relation to disability, by providing the concept of reasonable accommodation[17].

[16] On this, I will recommend the reading of Advocate Poiares Maduro's Opinion in the Coleman case (CJEU, Case C-303/06, 31.07.2008), spec. §§ 11-16. See also J. GARDNER, *Discrimination as Injustice*, in *Oxford J. Leg. Stud.*, 16, 1996, pp. 355 ss.; S. FREDMAN, *Discrimination Law*, II ed., Oxford, 2011.

[17] According to art. 5 of 2000/78/Ce Directive, entitled Reasonable Accommodation for Disabled Persons, «In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate

On the contrary, the right of the employee to request and to obtain, where practicable, reasonable accommodation from their employers on the basis of religion or belief has been developed in North America, both in the US – where it has a statutory basis – and Canada, where it has, at least originally, a judiciary basis[18].

How, then, does European antidiscrimination law provide protection to religious freedom with regard to its *forum externum*?

The antidiscrimination law framework is not totally indifferent to the substantial dimension of the equality notion and, as a consequence, to the logic of difference[19]. Apart from the positive action notion, which is certainly a component of the traditional tools of antidiscrimination law, a more focused reference is to be made to the indirect discrimination notion.

Indirect discrimination relies on the idea that dissimilar cases should be treated differently. Thus, a neutral rule, which is respectful of formal equality, can nevertheless be considered discriminatory insofar as it does not consider the different situation into which members of a social group, identified by the protected characteristic, are placed. Thus, employers may be required to change their internal rules, despite their apparent neutrality and respect for formal equality.

However, the indirect discrimination notion is based on two features whose judicial enforcement may be problematic. First, in order to trigger it, a claimant must show that the challenged provision, criterion or practice affects more, actually or potentially, the members of a *group* identified by a protected characteristic.

When applied to religion, defining what a religious group is, for the purposes of the application of the indirect discrimination notion, may

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when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned». See L. WADDINGTON, *Reasonable accommodation* (chapter) in D. SCHIEK ET AL. (eds.), *Cases, materials and text on national, supranational and international non-discrimination*, Oxford, 2007; L. WEDDINGTON, A. HENDRIKS, *The Expanding Concept of Employment Discrimination in Europe: From Direct to Reasonable Accommodation Discrimination*, in *International Journal of Comparative Labour law and Industrial Relations*, 2003, pp. 403 ss.

[18] See K. ALIDADI, *op. cit.*, pp. 62 ss.

[19] See C. BARNARD, B. HEPPLE, *Substantive Equality*, in *Cambridge Law Journal*, vol. 59, 2000, pp. 562 ss.

be a difficult task, as religion has different dimensions. Religion may be identified by a precise belief, with a given and structured doctrine. However, religion also has a social and cultural dimension, identifying members of a group irrespective of their adhesion to the given religion. In this second dimension, religion tends to overlap with race/ethnicity protection. Finally, religion is also a way of life *i.e.*, each individual may decide to live their religiosity in their own way[20].

Limiting the *forum externum* of freedom of religion to those manifestations that are generally and formally recognised by a given religious group has two negative consequences. First, it undermines the fact that freedom of religion pertains to the individual, who to a certain extent may live his or her religiosity through conducts that are not necessarily imposed by the given religious group as strict and mandatory religious rules. Second, such an approach would oblige the judge to establish which practices or acts of worship are truly cogent for the given religious group. This may be difficult to ascertain when the religious group has no hierarchical structure and there are different traditions within the same religion.

However, even the adoption of a broad approach in the definition of what constitutes a religious group, somehow detaching this notion from religious mainstream practice, is problematic as it may open the door to any claims based on an intimate conviction of the individual.

The Framework Directive provides protection against discrimination on the grounds of religion *or belief*. This reference to belief, as an alternative to religion, may be seen as an attempt to provide protection to the worldview and conduct that are genuinely pursued by the individual, despite them not being imposed by the doctrine of a given established religion.

The Directive does not provide any guidance on the term "belief", although it is likely that the EU legislator wanted to grant protection to those philosophical worldviews that are not founded on the idea of the supernatural, such as humanism and atheism. This interpretation relies on the fact that recital 24 of 2000/78/EC Directive mentions Declara-

[20] See J.T. GUNN, *The complexity of Religion and the Definition of "Religion" in International Law*, in *Harvard Human Rights Journal*, vol. 16, 2003, pp. 189 ss.

tion 11, annexed to the Amsterdam Treaty and today converted into art. 17 of the TFEU, according to which member states equally respect the status of philosophical and non-confessional organizations.

The terms religion and belief have not been defined even at domestic level[21]. The UK is an exception. Under the current sec. 10 of the 2010 UK Equality Act, «Religion means any religion and a reference to religion includes a reference to a lack of religion» and «belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief». Under the previous Employment Equality (religion or belief) Regulation 2003, the explanatory notes required, in order to qualify as a belief, «a certain level of cogency, seriousness, cohesion and importance, provided that the beliefs are worthy of respect in a democratic society and are not incompatible with human dignity».

These principles have been substantially enforced by the Employment Statutory Code of Practice, realised by the Equality and Human Rights Commission. While the Code does not impose any legal obligations, nor is it an authoritative statement of the law, it can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings[22].

According to the Code, the notion of belief may be divided into religious and philosophical belief. The former goes «beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion»[23]. The latter refers to a belief that is not related to the existence of the supernatural, such as humanism or atheism. A belief, whether religious or philosophical, «need not include faith or worship of a God or Gods, but must affect

[21] See J. CORMACK, M. BELL, *Developing Anti-Discrimination law in Europe: the 25 EU Member State compared*, European Network of Independent Experts in the non-discrimination field, 2005. In Italy, the word belief has been translated as "convinzioni personali" (personal convictions). According to the Cassation Court, this covers trade-union membership. See Italian Cassation Court, 1/2020, 2nd January 2020.

[22] See § 1.13, p. 23, Employment statutory code of practice, 2011 available at *https://www.equalityhumanrights.com/sites/default/files/employercode.pdf*.

[23] See 2.56, p. 40.

how a person lives their life or perceives the world»[24]. For a philosophical belief to be protected under the Act, the Code states that it must be genuinely held; it must be a belief and not an opinion or viewpoint based on the present state of information available; it must be a belief as to a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness, cohesion and importance; it must be worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others[25].

Thus, both in the case of philosophical or religious belief, the point of reference is the individual and his or her sincere adhesion to a certain worldview that concerns a substantial aspect of human life.

While adopting quite a wide approach to defining a philosophical belief[26], British judges have shown some inconsistencies in protecting religious practices when these are not shared by the other members of a well-established religious group. In this sense, they have narrowly construed the notion of religious group for the purposes of the application of the indirect discrimination notion.

This narrow approach clearly emerged in the *Eweida* case, where the Court of Appeal had to decide whether a policy adopted by British Airways, according to which any item of visible jewellery could not be worn by employees (unless the wearing of the item was imposed by religious rules and permitted by the management) amounted to indirect discrimination on the grounds of religion and belief. The claimant, Mrs Eweida, was dismissed after refusing to conform to the internal policy rule and continuing to wear a small cross on a necklace as a sign of her Christian faith[27].

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[24] See 2.58, p. 40.

[25] See 2.59, p. 40.

[26] For instance, veganism has been recognized as a philosophical belief. See Employment Tribunal, decision 03.02.2020, *J. Casamitjana Costa v. the Leagues Against Cruel Sports*, n. 3331129-18.

[27] See *Eweida v British Airways* [2010] EWCA Civ 80, on which L. VICKERS, *Indirect discrimination and Individual Belief: Eweida v British Airways plc'*, in *Ecclesiastical Law Journal*, vol. 11, 2009, pp. 197 ss. The *Eweida* case has led to a decision by the ECtHR (see below in the text), where the ECtHR condemned the UK for the wrong balancing of the claimant's religious claim conducted by the UK judges.

The Court of Appeal, affirming previous UK employment court decisions, held that the claimant had not established that the neutral policy enforced by British Airways affected a religious group. The wearing of the cross was seen by the Court as a matter of personal choice and not as behaviour mandated by her religion. According to the Court of Appeal, indirect discrimination requires the identification of a group, defined in relation to one of the protected characteristics, which has been or would be disadvantaged by the challenged provision. Even if the EC Framework Directive adopted the words "would put" – thus making the comparison possible even if the comparator is merely hypothetical –, this cannot be interpreted as if it operated «wherever evidence showed that there were in society others who shared the material religion or belief and so would suffer a disadvantage were they to be British Airways employees». Adopting such a view would place «an impossible burden on employers to anticipate and provide for what may be parochial or even factitious beliefs in society at large»[28].

The Court of Appeal seems to reject any individualistic approach in the construction of the group disadvantage requirement and this may be an obstacle for 'sole believers' in establishing their case[29].

However, the European Court of Human Rights did not share this line of reasoning. Basing its analysis on art. 9 of the Convention, the ECtHR stated as follows:

> in order to count as a "manifestation" within the meaning of art. 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worships or devotion, which forms part of the practice of a religion or belief in a generally recognised form. *However, the manifestation of religion or belief is not limited to such acts: the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the application to establish that he or she acted in fulfilment of a duty mandated by the religion in question* (italics added)[30].

[28] See *Eweida v British Airways* [2010] EWCA Civ 80.

[29] See K. ALIDADI, *op. cit.*, p. 97.

[30] ECtHR, *Eweida v UK*, 15.01.2013.

2.2. The swinging test of proportionality

The "group" requirement is not the only limit to the enforcement of the indirect discrimination notion in religious cases and, through it, to the recognition of a logic of difference in antidiscrimination law when applied to religion.

As noted, while direct discrimination is not subject to a general justification clause, indirect discrimination is: if the claimant succeeds in proving that the neutral criterion causes a disparate impact with regard to a given protected social group, it is up to the employer to show that the criterion is needed to pursue a legitimate interest. The threshold required to pass the proportionality test is high. The EU directive mandates that the challenged measure be necessary to meet the aim, which must be legitimate, and according to CJEU case law, economic cost arguments, especially linked to customers' preference, would fail to be considered as a legitimate aim[31].

Despite these findings, the legal and judicial enforcement of indirect discrimination has failed to ensure protection of the *forum externum* tenet of freedom of religion. CJEU case law concerning the wearing of the veil in the workplace is emblematic in this regard[32].

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[31] See CJEU decision 14.03.2017, Case C-188/15, *Bougnaoui-Micropole*.

[32] See CJEU decision 14.03.2017, Case C-188/15, *Bougnaoui-Micropole* and decision 13.03.2017, case C-157/15, *Achbita*. The decision in Achbita has raised much criticism. See E. HOWARD, *Islamic Head Scarves and the CJEU: Achbita and Bougnaoui*, in *Maastricht Journal of European and Comparative Law*, vol. 24, 2017, pp. 348-366; EAD., *Headscarves return to the CJEU. Unfinished Business*, vol. 27, 1, 2020, pp. 10 ss.; M. BELL, *Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace*, in *Human Rights Law Review*, 17, 2017, pp. 784-796; S. HENNETTE-VAUCHEZ, *Equality and the Market: the Unhappy Fate of Religious Discrimination in Europe*, in *European Constitutional Law Review*, 13, 2017, pp. 744-758; S. JOLLY, *Religious Discrimination in the Workplace: the European Court of Justice Confronts a Challenge*, in *European Human Rights Law Review*, 3, 2017, pp. 308-314; T. LOENEN, *In Search of an EU Approach to Headscarf Bans: Where to go After Achbita and Bougnaoui?*, in *Review of European Administrative Law*, 10, 2017, pp. 47-73; L. VICKERS, *Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace*, in *European Labour Law Journal*, 8, 2017, pp. 232-257; E. RELANO, *Pastor, Religious Discrimination in the Workplace: Achbita*

As already noted, it is highly controversial to establish whether a rule forbidding the wearing of religious symbols at work amounts to direct or indirect discrimination, as the answer may depend on factual circumstances[33].

According to some authors, when the employer rejects or dismisses an applicant due to the fact he or she wears a religious symbol and the employer directly refers to it or mentions the fact that customers do not feel at ease with it, this is direct discrimination. When the employer makes use of an internal rule prohibiting the wearing of head coverings or imposes uniform, this may be considered as indirect discrimination on the grounds of religion. The consequences of this legal qualification are not meaningless, as only in the first case can the measure not be justified, whereas in the second case it may be[34].

Because of this, in order to avoid religious claims in the workplace relating to the wearing of religious symbols, private companies have started to increasingly adopt alleged "neutral" policies concerning the employees' dress code that ban all religious, philosophical or political expression in the workplace.

Required by the Belgian Court of Cassation to decide whether a rule as such amounted to direct or indirect discrimination, the CJEU chose the second option. According to the Court, direct discrimination on the grounds of religion or belief exists only when the challenged measure targets *a single* religion or *a selection* of religions, but not when it targets *all* religions and beliefs. This is so despite the fact that the Directive speaks of discrimination on the grounds of religion and not on the grounds of a particular religion. Thus, the right comparison should not be with another person belonging to a different religion that does

and Bougnaoui, in U. BELAVUSAU, K. HENRARD (eds.), *EU Antidiscrimination Law Beyond Gender*, Oxford-Portland, 2019, pp. 183-202.

[33] See E. HOWARD, *Religious Clothing and Symbols in Employment, European Network of Legal Experts*, Brussels, 2017.

[34] See E. BRIBOSIA, I. CHOPIN, I. RORIVE, *Rapport de synthèse relatif aux signes d'appartenance religieuse dans quinze pays de l'Union européenne*, 2004, p. 13.

not require the wearing of religious symbols, but with a person not belonging to any religion at all[35].

Even admitting that the entrepreneurial measure was neutral and thus challengeable only under an indirect discrimination scheme, the Court would have had to apply a strict proportionality test, as required by the Directive. On the contrary, the Court considered it a legitimate goal for a private enterprise to pursue a policy of neutrality in the workplace, provided this is consistently and systematically applied to those employees who come into contact with customers. The dismissal of the employee does not go beyond what is necessary in order to meet the aim of the employer, at least when it is not possible – taking into account «the inherent constraints to which the undertaking is subject and without taking on an additional burden» – to give the applicant a post not involving any visual contact with customers.

In sum, the Court endorsed the logic of the private/public sphere: freedom to manifest religion is admitted in private, but in the public sphere religious neutrality is preferred. The wearing of religious minority symbols is accepted within the strict limits of the closet principle[36].

Advocate General Kokotte has adopted an even narrower view. While recognising that in past case law the Court of Justice has adopted a wide understanding of direct discrimination, admitting it whenever the challenged measure is inseparably linked to the relevant discriminatory grounds at stake, the Advocate General considers that this approach cannot be applied to religion. For her, this wide reading of the direct discrimination notion is

[35] See E. SPAVENTA, *What is the Point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case*, 2017, *http://eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-harmonization.html.201*; E. BREMS, *Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace*, 2017, Blog of the IACL, AIDC: *https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/*.

[36] See in general K. ALIDADI, *From Front-office to Back-Office: Religious Dress Code Crossing the Public-Private Divide in the Workplace*, in S. FERRARI, S. PASTORELLI (eds.), *Religion and the Public-Private Divide*, Aldershot, 2012.

> concerned with individuals' immutable physical features or personal characteristics – such as gender, age or sexual orientation – rather than with modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering at issue here.

The freedom of choice argument, which had for years been the main argument used by the ECtHR to paralyze any religious claims in the employment field, clearly re-emerged here, coupled with an explicit reference to the fundamental right of the employer to conduct their business, as enshrined in art. 16 of the Charter, a right which includes the employer's decision to determine how and under which conditions the roles within the organization are organized and performed and in what forms the products and services are offered. The two rights at stake – on the one hand, the individual right not to be discriminated against for religion and through it the protection of human dignity and, on the other hand, the freedom to conduct a business – are placed on the same footing, despite the fact that in certain constitutional traditions the latter clearly has a minor role[37].

Even the application of the proportionality test, according to the indirect discrimination scheme, raises criticism: for the Advocate General not only is it perfectly legitimate for the employer to pursue a neutrality policy that applies to all types of religious dress or symbols, provided that this policy is genuinely pursued in a consistent and systematic manner, but the goal of having a neutral religious work environment justifies the necessity of a general rule forbidding the wearing of any religious symbols, no matter whether the job implies interaction with customers, a view that even the Court of Justice did not subscribe to.

[37] For instance, under the Italian Constitution, freedom to conduct business is protected by art. 41 but it can never be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. As noted by the CJEU, in the famous *P v. S.* decision (30.04.1996, Case C-13/94), human dignity is the legal value that is protected by antidiscrimination law. For a detailed and fierce criticism of the balancing test conducted by the CJEU in the *Achbita* decision, see J.H.H. WEILER, *'Je suis Achbita'*, in *European Journal of International Law*, vol. 28, 2017, pp. 989 ss.

3. Special rights and derogatory treatments for religious groups in domestic legislation

The alleged limitations of antidiscrimination law as a remedy to give protection to the *external forum* of religious freedom can be usefully put into relation with those domestic approaches that do provide special legal arrangements to protect the external manifestations of religious groups.

In many European countries, secularism does not mean strict separatism of state authority from religious groups and indifference towards religious belief. Traditionally, state and religion relations in Europe are classified according to three main models: confessional, concordatarian and separatist[38]. The confessional model includes those states that recognize a given religion as the official religion of the state and consequently grant it a special position, also in terms of financing. However, this special protection implies the state's strict involvement in the religious institution to the extent that religious bodies are considered as quasi-public institutions. This is traditionally the case of Nordic countries and to a certain extent of England and Greece[39].

The Concordatarian model includes those countries that regulate their relations with the Catholic Church by means of a concordat, which is an international treaty. However, at least in Italy and Spain, a covenantal approach applies to other religious denominations as well[40]. State

[38] This classification is used by S. FERRARI, *Stato, diritti e libertà religiosa: un modello europeo*, in *Il Regno*, fasc. 18, 1996. See also a comparative perspective S. MANCINI, M. ROSENFELD (ed.), *Constitutional Secularism in an Age of Religious Revival*, Oxford, 2013; S. CECCANTI, *Una libertà comparata. Libertà religiosa, fondamentalismi e società multietniche*, Bologna, 2001; F. MARGIOTTA BROGLIO, C. MIRABELLI, F. ONIDA, *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, Bologna, 1997.

[39] According to art. 13 of the Greek Constitution, Greek Orthodoxy is defined as the prevailing religion. See K.N. KYRIAZOPOULOS, *The "Prevailing Religion" in Greece: Its Meaning and Implications*, in *Journal of Church and State*, vol. 43, n. 3, 2001, pp. 511 ss.

[40] According to the Italian Constitutional Court (decision 203/1989), secularism, which is part of the supreme principles of the Constitution not subject to constitutional amendments, does not mean indifference towards religious belief, provided this applies

authorities may conclude agreements with religious denominations that are transformed into statute law.

Finally, separatist countries are a residual category that includes those national experiences which have neither an official religion of the state, nor a concordat. However, this does not necessarily mean they apply a strict separation in their relations: for instance, under art. 181 of the Belgian Constitution, the salaries and pensions of ministers of religion and representatives of organizations recognized by the law as providing moral assistance according to a non-denominational philosophical concept are paid by the state.

Despite these differences and setting aside the French case[41], which is characterized by a strict neutral and militant separatism, European countries share the common understanding that the religious sphere, lived both individually and collectively, is relevant for the development of human beings. Because of this, state authorities have an interest in coming to terms with the representatives of the religious denominations

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equally to all religious denominations. Indeed, the Italian Constitution does not refer only to the individual dimension of freedom of religion (art. 19 Cost.), which as such pertains to every person and group of persons, but also to religious groups and denominations, recognizing that the relationship between these groups and the public authorities has to be currently framed according to agreements. According to art. 7 of the Italian Constitution the state and the Catholic Church are each within their own order independent and sovereign. Their relationships are regulated by a concordat, an international treaty subscribed to in 1929 and substantially amended in 1984. Art. 8 of the Constitution sets the principle according to which the relationship between the state and religious denominations other than the Catholic Church are regulated on the basis of agreement. While the Concordat is an international treaty with a quasi-constitutional rank, agreements are signed by both parties (the Italian government and the religious representatives) and then need to be transformed into law by the Chambers.

In Spain, art. 16.3 of the Constitution states: «There shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and shall consequently maintain appropriate cooperation with the Catholic Church and the other confessions». With a view to enforcing this, the legislator passed in 1980 the *Ley organica de libertad religiosa* whose art. 7 provides for a legal basis for state and church agreements. At present, Spain has concluded three agreements with the Jewish communities (Ley 25/1992), with the Seventh-day Adventist Church (Ley 24/1992) and with Islam communities (Ley 26/1992).

[41] See in this book the chapter of M. TRÉDEZ-LOPEZ.

and granting them some form of public support[42]. A process of negotiation, whether formalized or informal[43], takes place between the public authority and the relevant religious denomination, which, in turn, needs to be institutionalized, in order to be a credible and representative interlocutor.

As already noted in some experiences, such as Italy and Spain, these negotiations lead to the conclusion of agreements covering different issues that include, for instance, the procedure to be followed for a religious body to have/acquire legal personality, provisions regarding the teaching of religious doctrine in public schools, provisions relating to religious assistance for prisoners or members of the army, provisions relating to the celebration of religious marriage in order for this act to produce legal effect in the state order and so on. Despite having a common scheme, each agreement contains provisions that take into consideration the specificities of each religious denomination.

These instruments are mainly meant to regulate the relations between public authorities and the relevant religious denomination. As a consequence, their provisions have mostly a vertical scope of application. However, the labour field is an exception since it may occur that these agreements do provide, for people who belong to the relevant religion, special rights in relation, for instance, to days off for celebrating religious festivals and/or in relation to the weekly day of collective worship[44].

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[42] See S. FERRARI, *op. cit.*, who speaks of 'selective collaboration' (collaborazione selettiva) as a characteristic of the European model of state and religion relations; see also S. FERRARI, I.C. IBAN, *Diritto e religione in Europa occidentale*, Bologna, 1996.

[43] For a comparative overview, see R. PUZA, N. DUE (eds.), *Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation between Sate and Religion in Europe*, Leuven-Paris-Dudley, MA, 2006.

[44] For the Spanish case see art. 12 of the ley 25/1992, the statute which codified the agreement between the Spanish government and the federation of Israelite communities. According to this, members of the Israelite communities may enjoy Saturday as their weekly day off and are granted a paid day off in order to celebrate religious festivals listed in the law, in substitution of those applicable to the generality of Spanish workers. However, this special treatment is subject to agreement between the worker and the employer. A similar provision is made by law 26/1991 with regard to Islamic communities and by Law 24/1992 with regard to the Seventh-day Adventist Church (art. 12).

Under the described model, it is the political actors, rather than the judiciary, who strike the balance between religious freedom and other competing interests or rights, including business freedom, and who grant a favourable, structural, legal treatment to one religious group.

Being based on a logic of distinctiveness, this approach may contradict formal equality. Recognising special rights to members of one religious group, but not to others in a similar position – for instance the possibility only for Jews, but not for Muslims, to abstain from work on a day other than Sunday – represents a breach of equal treatment and amounts to a direct discrimination situation under the EU framework directive.

The possible breach of formal equality, as a result of the preferential treatment granted to one religious group, may not in principle be alleviated by making use of analogy. Since these are special rules, the judge could not apply them to members of religious groups who are not covered by the law provision, despite them being in a similar situation[45].

For the Italian case, see Art. 14 of Law 101/1989 and art. 17 of Law 516/1988, which grant to employees that are members, respectively, of Jewish communities and of the Seventh-day Adventist Church the right not to work on Saturday, and for members of Jewish communities paid days off to celebrate religious festivals listed in the agreement. In both cases this right, which is enforceable *vis-à-vis* private companies as well, is made conditional to the working organization. For judicial application, see *infra* in footnotes. Similar provisions are also set in Austrian law. The *Achatzi* CJEU case, referred to below in the text, originated from the application of such a rule.

[45] In this regard, it is worth referring to the Italian case in relation to the weekly day of rest. Art. 36.3 of the Italian Constitution states the right of the employee to a weekly day of rest, with no explicit reference to Sunday. At statutory level only (Law n. 370/1934 and art. 2019, c. 1 of the Civil Code), Sunday was compulsorily set as the weekly day of rest for employees. However, derogations were provided in relation to certain categories of work. On many occasions, the Constitutional Court has ruled that the constitutional right to a weekly day of rest – as set in art. 36.3 of the Italian Constitution – does not necessarily correspond to Sunday (Const. Court n. 76/1962; n. 105/1972, n. 16/1987). Scholars and the judiciary (Court of Cassation n. 5923/1982; n. 6365/1985) agree that the primary aim of the above-mentioned constitutional provision is to protect the well-being of employees and not to enhance their religious convictions. The statutory choice of having Sunday as the weekly day of rest does not involve any alleged preference towards the Catholic religion. Rather, it is meant to be a functional solution to meet the current majoritarian social needs of the Italian population. Legislative decree 66/2003,

Moreover, unequal treatment may arise not only between religious denominations, but in relation to the manifestation of cultural rather than religious personal identity. For instance, relying on the agreement

which transposed into national legal order Dir. 93/104/EC and Dir. 2000/34/EC concerning certain aspects of the organisation of working time, introduced a new regulation. Art. 9 of this statute establishes that Sunday as the day of weekly rest is the rule, but the legislative decree provides a long list of occupations where the employer is authorised to rule differently. Moreover, in accordance with trade unions, the Minister of Labour may add other jobs to the list. Even an agreement between the employer and the local trade unions is enough to derogate the rule. As a consequence, the rule that Sunday is the day of weekly rest is subject to many derogations. If the conditions set in the law are met, employers may require their employees to work on Sundays and they are not under any legal obligation to accommodate the religious convictions of the *individual* employee. This is so despite the fact that art. 6 of the Concordat between Italy and the Holy See provides that the Italian Republic recognises Sundays and other religious festivities agreed by both parties as festivity days. Probably due to the loose wording of the clause, which does not explicitly confer a right to individuals and does not mention private sector employment, this clause has never been invoked in disputes concerning Sunday as the day of weekly rest and has not played any role at the interpretative level either, although the Concordat ranks higher than ordinary law and it is considered as having para-constitutional legal value. For a judiciary application, see Court of Cassation, n. 3416/2016, where, in assessing the proportionality of a disciplining sanction inflicted upon a Catholic employee who refused to work a Sunday shift, the Court did not give any consideration to the constitutional argument of the right to religious freedom advanced by the claimant. The decision is annotated by L. SCARANO, *Il potere datoriale di esigere il lavoro domenicale e i limiti giurisprudenziali nella determinazione delle sanzioni*, in *Riv. it. dir. lavoro*, 2016; C. GAGLIARDI, *Il diritto al riposo domenicale nel rapporto di lavoro subordinato. Brevi riflessioni a margine della sentenza Corte di Cassazione, 22 febbraio 2016, n. 3416*, in *Diritto e religioni*, 2, 2016, pp. 542 ss. A different solution applies with regard to Jews and members of the Seventh-day Adventist Church, two religious denominations with which the Italian state has concluded agreements that grant the right not to work on Saturdays to their members. In both cases this right, which is enforceable against private companies as well, is made conditional to the working organization. See, for a practical application, Tribunal of Rome, decision 26.03.2002, which, in pursuance of art. 17 of law 516/1988, declared illegitimate a dismissal of a Seventh Day member who refused to work on Saturdays. The result of this normative framework is patchwork protection, with some religious groups less protected than others or not protected at all (notably, those denominations that have not concluded any agreements with the Italian Republic, as is currently the case for Islam communities).

concluded between the Italian Government and the Jewish communities, the Italian Cassation Court considered that a Jewish ritual circumcision is compatible with Italian legal order, even if it is performed by a non-doctor. On the contrary, circumcision motivated by ethnic traditions is to be qualified as a crime, especially in cases where it is performed by a person without medical expertise[46].

Thus, the adoption of a positive approach towards religious freedom, through which the legislator grants protection of the special needs of some religious groups only, raises many problematic issues with the principle of equality. However, there may be legitimate grounds that, under an equal constitutional principle analysis, may justify these different levels of protection in relation to religion. For instance, in many European countries, public support is limited to those religious groups that are historically settled, or in consideration of the numbers of believers, or by reason of the compatibility of religious doctrine and practice with civic values.

To give some examples, in Austria, relations between the state and religious communities are regulated according to a system based on public registration. Since the entry into force of the Religious Communities Act on 10 January 1998, religious associations may be granted legal personality upon application. Religious associations may also be recognised as a "religious society" and thus obtain legal personality under public law. This may occur either by law or by a ministerial decree enforcing the law of 1874 on the recognition of religious societies. Being recognised as a "religious society" allows religious communities to enjoy certain rights, such as the right to provide religious education in public schools, exemption from real estate tax for religious sites, and the possibility to levy church taxes for members of the religious group, which are deductible. In order to be granted the status of religious soci-

[46] See Court of Cassation n. 43646/2011. The Court of Cassation had to decide whether a practising Roman Catholic Nigerian mother committed a crime for having the child subjected to circumcision for cultural reasons by a person not authorised to practise medicine. On the issue, see A. LICASTRO, *La questione della liceità della circoncisione "rituale" tra tutela dell'identità religiosa del gruppo e salvaguardia del diritto individuale all'integrità fisica*, in *Stato, Chiese e pluralismo confessionale*, n. 22, 2019.

ety under the 1874 Recognition Act several requirements must be met: the religious group has to have been registered as a religious community, according to the 1998 religious community act, for at least 20 years; a minimum number of adherents per thousand members of the Austrian population (at the moment, this mean about 16,000 members); the use of income and other assets for religious purposes, including charity activities; a positive attitude towards society and the state, and no illegal interference as regards the community's relationship with recognised or other religious societies[47].

In Spain, the 1980 *Ley Organica* on Freedom of Religion states that churches, religions and religious communities can acquire legal personality after enrolment in the Registry of Religious Entities (RRE). However, according to art. 7 of the above-mentioned statute, only those churches, religions and religious communities which are registered in the RRE and are known to be well-established in Spain in terms of their size and number of worshippers may enter into cooperation agreements with the state[48].

With regard to Italy, the opening of negotiations and the signing of the agreement with a relevant religious group, in pursuance of art. 8 of the Italian Constitution, is a discretionary decision that is left to the government and cannot be subject to judicial review. Moreover, even after the signing of the agreement, it may occur that Parliament does not ratify the intergovernmental agreement. The content of each agreement is meant to be different as the purpose of it is precisely for the state to grant the relevant religious denomination any treatment that is needed to protect or promote the specificity of that religious group[49]. The agreement grants a special status to the relevant religion, including public financing.

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[47] For an overview of the Austrian legal framework, see the chapter in this book authored by Kerstin Wonisch; see also R. POTZ, *Covenantal and non-covenantal Cooperation of State and Religion in Austria*, in R. PUZA, N. DOE (eds.), *op. cit.*, p. 11.

[48] For the Spanish case, see M. RODRÍGUEZ BLANCO, *Religion and Law in Dialogue: the Covenantal and Non-covenantal cooperation of State and religions in Spanish Law*, in R. PUZA, N. DOE (eds.), *op. cit.*, pp. 197 ss.

[49] In this sense, see Constitutional Court decisions n. 235/1997 and n. 52/2016.

Nevertheless, the lack of such an agreement cannot justify a violation of the individual and collective dimension of religious freedom. For instance, in relation to the building of places of worship, the Constitutional Court quashed several statutes passed by Italian Regions which limited financial support for religious buildings to the Catholic Church and to those religious communities with an agreement with the state, under art. 8 of the Constitution. This legal discipline had the effect of excluding Islamic communities, which have not concluded an agreement with the state, from getting financial support in order to build mosques. However, the Constitutional Court has recognised that it is legitimate for the public authorities to limit financial contributions to those religious communities that have an organised and stable presence in the local territory[50].

Thus, differential treatment granted by the legislator to a certain religious denomination may under certain conditions survive even a strict scrutiny of the equality principle insofar as this measure is applied reasonably and proportionately, with regard to the specificity of the given religious group.

However, under EU antidiscrimination law, differential treatment based expressly on religion can hardly be justified. The logic of sameness, underpinned by antidiscrimination law, and the logic of difference, promoted at the domestic level, have come into conflict.

To what extent, then, can the two legal instruments be reconciled?

4. Reconciling the opposite?

4.1. The Achatzi case

The possible clash between the two legal approaches has already emerged in CJEU case law. In the *Achatzi* case, the Court of Justice was asked to consider, in the light of the EU Framework Directive and art. 21 of the Charter of Fundamental Rights, the discriminatory character of Austrian labour legislation, which defined Good Friday as a pub-

[50] See Constitutional Court decisions n. 195/1993 and n. 63/2016.

lic holiday for the members of four small Christian minority churches (the Evangelical churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church)[51].

According to the provision, members of the four churches were entitled to a paid holiday or to an additional indemnity if they chose to work on that day. For members of other religious groups or non-believers, Good Friday was considered an ordinary day of work.

Achatzi, who was not a member of any of the four churches, requested additional pay from his employer for having worked on Good Friday. His employer – a private enterprise – having denied the benefit, Achatzi brought an action against him, claiming that denial of the additional indemnity amounted to direct discrimination on the grounds of religion and/or belief.

The Court considered the national provision incompatible with the EU Framework Directive and as a consequence it recognised the employee's right to obtain the requested indemnity from the employer. At the same time, the Court invited the domestic legislator to adopt measures aimed at reinstating equal treatment.

A first issue the Court had to address was the argument advanced by the Polish government, according to which the Court of Justice lacked jurisdiction in the matter, given art. 17.1 of the TFEU.

The Court, as it had already done in the previous *Egenberger*[52] and *IQ*[53] cases, gave a narrow interpretation of the clause. Art. 17 of the TFEU merely expresses the neutrality of the Union in relation to the different ways in which member states organize their relations with churches and religious bodies, but it cannot be claimed as grounds for avoiding the judicial review of domestic provision for non-compliance with EU norms. According to the Court,

> the national provisions at issue in the main proceedings do not seek to organize the relations between Member State and Churches, but seek only to give employees who are members of certain churches an addi-

[51] See CJEU decision 22.01.2019, case C-193/17, *Cresco-Achatzi*.

[52] CJEU decision 17.04.2018, Case C-414/16, *Egenberger*.

[53] CJEU decision 11.09.2018, Case C-68/17, *JQ*.

tional public holiday to coincide with an important religious festival for those churches[54].

It is not clear what the statement of the Court means exactly. It may be assumed the Court wanted to refer to situations where the state's legal order grants recognition to acts produced by the relevant church or religious group so that they could have public legal effect (for instance, marriage or the appointment of an individual as a religious minister). However, typical issues that are regulated by state-church agreements also include financial relations between church and state, including tax exemptions, which can fall within the scope of EU law[55]. Norms dealing with religious festival provisions, as in the *Achatzi* case, or dietary rules concerning, for instance animal slaughtering[56], are further examples of issues currently dealt with by such state-church agreements that may impinge upon EU norms. In light of this, it would be important for the CJEU to be more precise regarding the scope of application of

[54] See § 33, of the decision 22.01.2019, Case C-193/17, *Cresco-Achatzi*.

[55] See decision 27.06.2017, Case C-74/17, *Congregación de Escluelas Pías Provincia Betania* where the Court examined whether tax exemptions applied to a congregation belonging to the Catholic Church in Spain amounted to forbidden state aids, under art. 107 of the TFEU, without even questioning its jurisdiction in the light of art. 17 of the TFEU. Fiscal exemption for church bodies and activities, other than the economic one, are set in Art IV of the Agreement of 3 January 1979 between Spain and the Holy See.

[56] See decision 29.05.2018, case C-426/16, *Liga van Moskeeën en Islamitische organisaties provincie Antwerpen VZW and Others*. The Court was asked to consider the validity of art. 4.4 of Council Regulation n. 1099/2009 on the protection of animals at the time of killing in that the requirement – that animals may be slaughtered in accordance with special methods required by religious rites without being stunned only if such slaughter takes place in a slaughterhouse falling within the prescriptions of Regulation n. 853/2004 – is in breach of freedom of religion. This is according to art. 10 of the Charter, given the insufficient capacity in the Flemish Region to meet the annual demand for the ritual slaughter of non-stunned animals in approved slaughterhouses on the occasion of the Feast of Sacrifice. The Court rejected the preliminary reference.

art. 17 TFEU, also in light of the national identity provision set in art. 4.2 TEU[57].

As far as the merits of the case are concerned, the Court considered the employer's denial of the indemnity as direct discrimination on the grounds of religion and belief. Since the employer's discriminatory act arose because of the enforcement of a national legal provision, the Court considered whether this could be justified under art. 2.5 of the Framework Directive, according to which the Directive is «without prejudice to measures laid down by national law which, in a democratic society, are necessary […] for the protection of the right and freedoms of others».

This clause, which is not reproduced in the race and ethnic directive, allows the judge to justify direct discrimination, provided that the differential treatment is caused by a legal provision, and not only by behaviour. It was meant to provide the legislator with a certain margin of appreciation since the pursuance of certain public aims may justify a differential legal treatment in relation to one of the protected factors of the Framework Directive. Age is a classic example: the legislator, with the aim of favouring the inclusion in the labour force of certain categories, may limit certain benefits or grant special treatment, assuming a given age as a parameter[58].

Thus far, the Court has interpreted very strictly the exception set in art. 2.5 of the Framework Directive and *Achatzi* confirmed this previous case-law. While admitting that Austrian legislation pursued an objective included among those listed in art. 2.5 of the Framework Directive, the Court considered the measure to exceed what is necessary for the protection of freedom of religion. In particular, the Court found that for those employees whose religious festivals do not coincide with any publicly recognised Austrian holidays and/or who are not granted work days off by law on the occasion of religious festivals, Austrian law provides only the imposition of a duty of care on the employer vis-à-vis their employees. This may allow employees to obtain, if they

[57] This point is also stressed by P. FLORIS, *Organizzazioni di tendenza religiosa tra Direttiva europea, diritti nazionali e Corte di giustizia*, in *Stato, Chiese e pluralismo confessionale*, 12, 2019, pp. 27 ss.

[58] CJEU decision 19.07.2017, Case C-143/16, *Abercrombie & Fitch Italia*.

wish, the right to be absent from their work for the amount of time necessary to perform certain religious rules.

Thus, the inconsistency of Austrian legislation in granting protection with the same objective – namely to promote freedom of religion in its *forum externum* – was considered flawed under the proportionality test. Analogously, the Court considered as untenable the argument directed to classify the challenged provision as a positive measure. According to the Court, positive action is to be considered as a derogation from the equal treatment principle. Because of this, a strict proportionality test applies. Since the Austrian legislator treated a similar situation in a very different manner, with some religious groups having the right to a paid day off or indemnity in the case of working on a religious festival day, and others having the right only to the employer's duty of care, such inconsistency in legal treatment did not allow the domestic provision to survive the review.

Thus, the Court was clearly unfavourable to «rules that provide in a blanket fashion advantages or disadvantages to categories of people identified by their religion»[59]. However, this is exactly the logic underpinned by several domestic legislations that, either unilaterally or by means of agreements with the relevant religious groups, do grant special legal treatment to certain religious groups only.

Certainly, the Austrian provision, insofar as it granted to members of the four religious groups the choice either to have Good Friday off or an additional indemnity for working that day could be considered a disincentive to exercise freedom of religion and an inappropriate way to pursue the very aim it sought to pursue, namely to protect religious freedom. The Advocate General stressed this point[60] and the Court indirectly touched on it when it emphasized that the norm applies irrespectively of the effective wish of the employee to take part in the religious festivity.

However, the Advocate General's opinion includes a more nuanced position towards domestic provisions that, like the Austrian legislation,

[59] See R. McCrea, *"You are all individuals!" The CJEU rules on special status for minority religious groups,* available at *http://eulawanalysis.blogspot.com/2019/01/youre-all-individuals-cjeu-rules-on.html*.

[60] Opinion of Advocate General Bobek Opinion at § 100.

favour the *forum externum* of the freedom of religion of groups, although on a selective basis. While substantially agreeing on the discriminatory character of the Austrian provision, the Advocate General seems to suggest that the result would be different if the Austrian legislation had provided members of certain religious groups only a right to an unpaid day off rather than a paid day off or an indemnity if they chose to work. In such a situation, the Advocate General suggests that either the choice of the comparator and/or the proportionality test could lead to a different conclusion from the finding of direct discrimination[61].

As already noted, the existence of direct discrimination implies a comparison between the situation of the alleged victim of discrimination and that of another person in a similar position, but for the possession of the protected discriminatory grounds.

In the *Achatzi* case, the Austrian government suggested that the claimant was not in a comparable position to that of the members of the four religious minorities, since for him Good Friday was not the most important religious festival of the year. The Commission adopted a more nuanced position, according to which the comparison should be between the treatment received by the members of the four religious minorities and other employees for whom there is a "particular special" religious festival not coinciding with any other public holiday already recognised under national law. This would have probably led to the conclusion that the claimant was not in a similar situation to that of the members of the four religious groups, given that he was a non-believer. This approach would have meant recognising the specificity of the members of religious groups and their different position with regard to other non-believers or non-practising employees in enjoying days off for celebrating religious festivals, but admittedly it would not have addressed the question of the other religious groups or communities not covered by the legislative provision.

However, the Court decided differently and it seemed unwilling to recognise religious expression as being entitled to greater protection

[61] See § 84 of the AG Bobek Opinion.

than non-religious expression[62]. Indeed, the Court emphasized that the Austrian provision did not make the granting of the public holiday on Good Friday conditional on the fact that the employee had to perform a particular religious duty that day, but only on the fact that the employee formally belonged to one of these churches. As a consequence, the Court said, «that employee remains free to choose, as he wishes, how to spend his time on that public holiday, and may, for example, use it for rest or leisure purposes»[63]. However, the Court did not suggest how the employer or the law could effectively control the genuine intention of the employee to participate in the religious festival without breaching his right to privacy.

The effect of the Court's decision was to downgrade the protection granted to some historical religious minorities in Austria. Following the *Achatzi* case, the Austrian legislator amended the challenged provision in that it now allows employees to claim one day a year as a "personal holiday", which can be used to celebrate religious festivals but does not have to be. This is not an additional paid holiday but is deducted from the employee's usual paid leave quota[64].

4.2. The Egenberger (and IR) case

As the *Achtazi* case has shown, the enforcement of antidiscrimination law on the grounds of religion and belief might come into conflict with domestic provisions dealing with state and religion relations. Bearing in mind the huge differences existing in this regard between member states' constitutional traditions and the fact that this is an aspect that can arguably be considered as a component of the national identity of a member state, according to art. 4.2 TEU[65], one may expect that the CJEU would adopt a deferential attitude in relation to relevant national domestic provisions. This deferential approach would also be justified

[62] This is the view of C. McCrea, *"You are all individuals!"*, cit.

[63] See § 46, decision 22.01.2019, case C-193/17, *Cresco-Achatzi*.

[64] See M. Pearson, *Religious Holidays for the Non-religious? Cresco Investigations v Achatzi*, in *Industrial Law Journal*, vol. 48, n. 3, 2019, pp. 478 ss.

[65] On this nexus see Advocate General Kokott in the Opinion delivered for case C-157/15, *Achbita*.

in light of art. 17 of the TFEU, a provision inserted by the Lisbon Treaty which, as already mentioned, should be interpreted at least in the sense that the scale and intensity of the judicial review of domestic provisions for breaching EU law should take into consideration member states' specificities and legal traditions in promoting religious freedom.

However, thus far the Court of Justice has not shown any willingness to act in this way and, in doing so, it might raise conflicts with constitutional courts.

A concrete example where this possible clash is likely to emerge is represented by the enforcement of art. 4.2 of the Framework Directive, a provision which grants special treatment for churches and other public or private organisations whose ethos is based on religion or belief. According to art. 4.2, these organisations may treat persons differently on account of religion or belief where, by reason of the nature of the working activities or the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, with regard to the organization's ethos.

The provision refers twice to member states' constitutional traditions. First, the derogation only applies to those member states that either already had such a legal discipline at the date of the adoption of the Directive, or that will provide for future legislation, incorporating national practices existing at the date of the adoption of the Directive.

Second, art. 4.2 mentions the fact that when implementing this provision, member states' constitutional provisions and principles, as well as the general principles of community law, will be taken into account.

As a matter of fact, many national legal orders have adopted legislations and/or practices generated by case law that, with regard to the employment relationship, apply derogatory rules to working institutions which are based on a certain religious ethos.

By and large, at the European state level, we may recognise two different approaches[66]. According to the first, the breadth of derogation

[66] On the two approaches, F. RIZZI, *Soffia il vento del cambiamento: sapremo costruire i mulini?*, in *GenIus*, vol. 3, n. 2, 2016, p. 220, who refers to R. FAHLBECK, *Ora et Labora on the Freedom of Religion at the Work Place: A Stakeholder cum Balancing Factors Model*, in *International Journal of Comparative Labour Law and Industrial Relations*, vol. 20, 2004, pp. 20 ss.

from the equal treatment rule that is granted to religious organizations must be related to the type of labour activity at stake: the more crucial the employee's working position is within the organization for externally spreading the relevant ethos, the wider becomes the discretionary power of the religious organization in the disciplinary sanctioning of employees for breaching their duty of loyalty.

The second approach, which is called the organic approach, does not distinguish according to the position held by the employee within the organization as all employees, irrespective of the function they carry out, are required to follow the given religious ethos and behave consistently even in their private lives.

Under the first approach, we may briefly refer to the Spanish, Italian and British experiences. In Spain, the normative grounds for granting churches and religious communities the above-mentioned special treatment is art. 6 of the already referred to 1980 *Ley Organica de libertad religiosa*. The provision is articulated in an ambiguous way and leaves judges the final responsibility of striking the balance between the protection of religious freedom and other competing rights, especially non-discrimination. According to the Spanish Constitutional Tribunal (sent. 106/1996) religious group autonomy must prevail with regard to the rights of employees whenever the working position is of such importance that it directly brings into question the ethos of the religious organization. This typically applies in religious schools when the teaching position concerns religious matter[67].

In Italy, the granting of special powers to such organisations, allowing them to require employees to conform their private ways of life to the ethos of the relevant organization, was developed by case law.

In 1972, the Constitutional Court made a decision that is still regarded as an important point of reference in the field. According to a provision set in the Concordat, the Catholic Church has the right to give

[67] See Spanish Constitutional Tribunal, 12.06.1996, n. 106/1996. In the Spanish literature, see J. ROSSELL, *La no discriminación por motivos religiosos*, Ministerio de Trabajo y Asuntos Sociales, 2008, Madrid, pp. 92 ss.; C. ODRIZOLA IGUAL, *Relaciones de trabajo en el contexto de organizaciones ideológicas y religiosas: la Directiva 2000/78/CE del 27 de diciembre, sobre empleo y trabajo*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 6, 2004, pp. 3 ss.

its assent to the appointing of professors at the Sacro Cuore Catholic University. Cordero, a law professor at the Sacro Cuore University, was dismissed after the ecclesiastical authority withdrew its assent, following some Cordero writings that were considered as breaching Catholic doctrine. Asked to review the constitutional legitimacy of the above-mentioned Concordat provision, the Constitutional Court deemed the issue unfounded. According to the Court, pluralism in schooling and teaching is among the principles that the Italian Constitution has endorsed. In order to make it effective, schools which are directed by organizations grounded in a given way of thinking can select employees on account of their ideological beliefs and may require them to conduct a life in line with the ethos of the organization. The Constitutional Court did not distinguish on the grounds of the working position at stake and on its importance for promoting the ethos of the relevant working organization. Moreover, the reasoning of the Court was not limited to the specific case of the Sacro Cuore University but referred to confessional schools in general[68].

In 1990, the legislator provided a legal basis that granted special rights to private organizations whose ethos is based on religion or beliefs. It was a very loose definition that covered not only religious, but also other non-profit organizations conducting activities of a political, cultural, or educational nature and it applied to trade unions as well. The provision granted a derogatory treatment with regard to the otherwise general discipline of the cessation of labour relations[69].

In 1994 the Cassation Court had to decide about the dismissal of a professor of physical education who was removed by a Catholic School after he was married in a civil ceremony. While acknowledging that the Italian Constitution purports ideological pluralism in schooling, in line with the Constitutional Court in the Cordero case, the Cassation Court states that the 1990 statutory provision must be narrowly construed and be enforced in the light of a proportionality principle since it provides a derogation from the general rules dealing with dismissal. As a result, only in relation to those occupational activities that are specifically di-

[68] See Italian Constitutional Court n. 195/1972.

[69] See art. 4, L. 108/90.

rected to promote the relevant religious ethos may the organization legitimately require workers to conform their ways of life to the ethics of the religious groups. Teaching physical education cannot be interpreted as an activity which is strictly necessary to promote the religious ethos of a school. The transposition of directive 2000/78/EC, which substantially reproduced the directive text, seems to confirm the functional reading of the Cassation court[70].

In the UK, schedule 9 (3) of the Equality Act 2010 sets the principle according to which, when the employer is an organization with a religious ethos, it must be taken into account when assessing the proportionality of any work requirement.

The second approach we may find in the European states with regard to the legal treatment of working organizations based on a given religious ethos characterizes the German legal system. This is grounded in a very deferential approach, according to which it is essentially up to churches and religious communities to define "religious self-concepts" and these determinations are, to a certain extent, legally binding for state authorities. Referring to art. 137 of the Weimar German Constitution, a provision which is still applicable and under which «religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all», the Constitutional Tribunal limited the intensity of the judicial review in relation to the decisions of religious organizations, when they act as employer, with the aim of preserving their right to self-determination. Consistently with this approach, the judiciary applies only a plausibility standard of review and does not distinguish according to the position the employee has within the religious organization[71].

[70] In Italian legal scholarship, the so-called functional approach is subject to criticism or at least it is submitted that it should be up to the given religious groups to determine whether a worker's position or behaviour is important in order to express and publicize the relevant ethos of the organization. See R. SANTAGATA DE CASTRO, *Organizzazioni di tendenza (dir. lav.)*, in *Treccani, Diritto on line*, 2017; F. ONIDA, *Il problema delle organizzazioni di tendenza nella direttiva 2000/78/CE attuativa dell'art. 13 del Trattato sull'Unione Europea*, in *Dir. eccl.*, 2001, pp. 905 ss.; G. PERA, *Le organizzazioni di tendenza nella legge sui licenziamenti*, in *Riv. it. dir. lav.*, 1991, I, p. 455.

[71] See I. AUGSBERG, *Taking Religion Seriously: On the Legal Relevance of Religious Self-Concepts*, in *Journal of Law, Religion & State*, 1, 2012, pp. 291 ss.; R. SAN-

The ECtHR has already scrutinized cases originating from Germany which dealt with the balancing, on the one hand, of the right of an organization, whose ethos is based on a given religion, to require employees to conform their ways of life to the doctrine of the given religious organization and, on the other hand, the employee's right to respect for his or her private and family life. In *Obst*, the ECtHR stated that German judges did not violate art. 8 of the Convention[72]. Obst, who was the European director of public relations for the Church of Jesus Christ of Latter-Day Saints, was dismissed due to an extramarital affair. On the contrary, in *Schüth v. Germany*, the ECtHR found a violation of art. 8 of the Convention[73]. Schüth was a Roman Catholic parish and deanery musician, who was dismissed because of an extramarital affair.

The difference in the two cases seems to be based on a proportionality test, where the importance of the working position for the spreading of the doctrine of the relevant religious group plays a crucial role. This would confirm that also the ECtHR endorses a functional approach, although explicitly granting a wide margin of appreciation of the Convention to the states parties.

The CJEU has already had the chance to twice review the German approach towards the *Tendenzbetrieb*[74]. In the seminal *Egenberger* case[75], the CJEU was asked to answer a preliminary reference raised by the Federal Labour Court of Germany. The Protestant Agency for Dia-

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TAGATA, *Discriminazioni nel luogo di lavoro e "fattore religioso": l'esperienza tedesca*, in *RIDL*, 1, 2011, pp. 355 ss.

[72] See ECtHR, 23.09.2010, *Obst v. Germany* (n. 425/03).

[73] See ECtHR, 23.09.2010, *Schüth v. Germany* (n. 1620/03).

[74] After *Egenberger*, the Court of Justice decided with regard to the IR case (CJEU, 11.09.2018, Case C-68/17, IR), where it further implemented the necessary proportionality test elaborated in *Egenberger*. JQ was a doctor, covering a managerial role at IR, a Catholic hospital subject to the supervision of the Archbishop of Cologne. He was dismissed after he got married without his first marriage being religiously annulled. According to the Court, adherence to the Catholic notion of marriage – namely the sacred and indissoluble nature of religious marriage – does not appear to be necessary for the promotion of IR's ethos, bearing in mind the occupational activities carried out by JQ, namely the provision of medical advice and care in a hospital setting and the management of the internal medicine department which he headed (spec. 58 §).

[75] CJEU decision (GC), 17.04.2018, Case C-414/16, *Egenberger*.

konia and Development opened a fixed-term position for the preparation of a legal report on the UN International Convention on the Elimination of All Forms of Racial Discriminations. In the job offer description, it was clearly stated that previous affiliation to one of the German Protestant Churches was a precondition for the job. Egenberger, a non-believer, brought an action claiming religious discrimination: according to her, she was not selected due to her non-believer status.

The decision raised several issues, including the issue of the horizontal direct effect of directive provisions and general principles of EU law[76]. For the purposes of our work, it is important to highlight that the CJEU made it clear that the right to self-determination of churches and religious groups and the reference to art. 17 TFUE clause cannot be interpreted as limiting, in any way, the capacity of a judge to review the determinations of an ethos-based organization, taken in pursuance of art. 4.2 of 2000/78/EC directive. It would be a breach of the right to an effective remedy to conclude otherwise[77].

Having reaffirmed the full power of the judge to review compliance with art. 4.2 of the 2000/78/EC directive of these organizations' decisions, the Court enters into the merits of the case and it highlights that in order to consider legitimate a difference of treatment on the grounds of religion or belief, there must be a direct link between the occupational requirement and the type of activity at stake. Thus, it is legitimate for a church or religious organization to stipulate an occupational requirement that distinguishes on the grounds of religion or belief whenever the work activity involves, for example, taking part in the determination of the ethos of the church or religious organization or it contributes to the mission of externally proclaiming a given worldview or, again, it ensures a credible presentation of the church or religious organization to the outside world.

[76] See L. LOURENÇO, *Religion, discrimination and the EU general principles' gospel: Egenberger*, in *Common Market Law Review*, vol. 56, 2019, p. 193; A. COLOMBI CIACCHI, *The Direct Horizontal Effect of EU Fundamental Rights*, in *European Constitutional Law Rev.*, vol. 15, 2019, pp. 294 ss.; M.L. GENNUSA, *Libertà religiosa e principio di non discriminazione nel sistema costituzionale dell'Unione europea*, in *Stato, Chiese e pluralismo confessionale*, 2, 2019.

[77] CJEU decision (GC), 17.04.2018, Case C-414/16, *Egenberger*, § 57-58.

Thus, in the balancing test between, on the one hand, the right of churches and religious organizations to self-determination and the right of the employee to a private life, the Court adopts a functional approach, according to which the more the worker's position is important for the spreading of the doctrine of the relevant church or religious group, the greater the discretion granted to churches and religious groups. This seems consistent with the majority of the constitutional traditions we have illustrated above, with ECtHR case law and with the letter of art. 4.2 which requires that consideration be given in the balancing test to the nature of the labour activities or the context in which they are carried out.

However, the Court goes a step further, which, in our view, is more controversial. Art. 4.2 of Directive 2000/78/EC states that a difference of treatment which is based on religion or belief does not amount to (direct) discrimination if such a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement. It does not hold that the requirement must be proportionate[78]. Nevertheless, the Court considered that the directive provision must be read in conformity with EU general principles, among which proportionality is included. While this finding is acceptable, what is more controversial is the intensity of the proportionality test applied by the Court. This is a strict proportionality test:

> the church or organization imposing the requirement is obliged to show, in the light of the factual circumstances of the case, that the supposed risk of causing harm to its ethos or to its right of autonomy is *probable and substantial*, so that *imposing such a requirement is indeed necessary*.

[78] See on this point R. McCrea, *Salvation outside the church? The CJEU rules on religious discrimination in employment*, EU Law Analysis, 18 April 2018, available at *eulawanalysis.blogspot.com/2018/09/religious-discrimination-at-work-can.html*. In Italian legal scholarship, Pacillo has argued that despite proportionality not being mentioned in art. 4.2 of 2000/78/EC Directive, it could be applied as a general principle of EU Law. See V. Pacillo, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, Milano, 2003, pp. 294-295.

The burden of proof is entirely on the part of the religious organization that must show in objective terms that the working requirement is strictly necessary to avoid the probable – not merely possible – and substantial risk of causing harm to the relevant ethos of the religious organization.

It is a very high threshold to be met. A proportionality test based on reasonableness, rather than on necessity, would be more consistent and respectful of both, on the one hand, art. 17 TFEU clause and the self-determination right of churches and religious groups and, on the other hand, the different constitutional traditions of member states, such as the German one, whose importance is highlighted twice in art. 4.2 2000/78/EC Directive.

The position taken by the Court of Justice is nevertheless in line with the ECtHR. In *Martinez v. Spain*, while acknowledging that states parties enjoy a wide margin of appreciation (see § 122), the ECtHR adopted a proportionality test that echoes that used by the CJEU in the *Egenberger* decision[79].

The possible conflict between the *Egenberger* case and German Constitutional Court case law may soon arise. After the Federal Labour

[79] See ECtHR, 12.06.2014, *Fernández Martínez v. Spain*, concerning the right to private and family life under art. 8 of the European Convention of a secondary school teacher of the Catholic religion, whose labour contract was not renewed after publicity was given to his personal status as a married priest. Because of this, the ecclesiastical authorities withdrew their consent to the appointment, which in Spain is necessary in order to be employed by the state authority as a teacher of the Catholic religion. The Grand Chamber considered that Spanish Constitutional Tribunal did not err in concluding against the claimant. However, the ECtHR, at 131, highlights as follows: «a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake».

court implemented the *Egenberger* decision of the CJEU, stating in favour of the claimant, the *Diakonie*, which is part of the Protestant Church, lodged a constitutional complaint. It argued that the Federal Labour Court, by its decision, limited the autonomy of religious organizations, as guaranteed by German constitutional law. According to the complaint, the CJEU did not properly assess German constitutional law and it acted beyond its competences[80]. It is also worth highlighting that in its famous *Lissabon Urteil* the German Constitutional Court has clearly stated that the EU integration process cannot impinge upon certain powers that must be left to member states in order to allow them to exercise their democratic actions. Among these, the Constitutional Court included dealing with the profession of faith and ideology[81].

[80] See for a short factual report *European Equality Law Review*, 2, 2019, pp. 102-103. For an overview of the German legal scholarship reactions after *Egenberger*, see M. VAN DEN BRINK, *Is Egenberger next?*, in *VerfBlog*, 2020/5/15, who argues a possible reply by the German constitutional Court, *https://verfassungsblog.de/is-egenberger-next/*, DOI: 10.17176/20200516-013207-0. See also H.M. HEINIG, *Why Egenberger Could Be Next*, in *VerfBlog*, 2020/05/19, *https://verfassungsblog.de/why-egenberger-could-be-next/*, DOI: 10.17176/20200520-013153-0, who argues that the CJEU lacks dogmatic subtlety and sensitivity with regard to religion and cultural policy and claims for the intervention of supreme or constitutional courts. In the author's view, 'they can enter into dialogue with the CJEU and make it clear that a certain sense of religion and its manifold forms of inculturation is necessary in order to avoid a superunitarization of the Member States' religion law systems and at the same time to keep European institutions capable of acting in the long term on the normative basis of equal freedom'.

[81] See BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08, paras. 249, «*European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way* that *not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions*. […] Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. *These important areas also include cultural issues such as* the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and *the dealing with the profession of faith or ideology*» (italics added by author). The full text of the English translation of

5. Conclusion

Antidiscrimination law provides for instruments that allow for the recognition of the *forum externum* of religious freedom but their effectiveness relies on judicial enforcement which is keen to consider employment and occupation as «key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential»[82].

As an alternative, the protection of the positive tenet of religious freedom may be grounded at the domestic level, especially in those constitutional traditions that conceive of the relations between state and religion not in terms of strict separation but rather of institutional cooperation and that, although on a selective basis, grant to members of some religious group special protection of their religious needs. While it is true that this solution may result in differentiation on the grounds of religion that could disadvantage more recently settled religious groups, both domestic Constitutional Courts and the ECtHR seem to have the sensitivity to avoid discriminatory practices.

Thus far, CJEU case law in the field of religion and employment is disappointing.

On the one hand, the Luxembourg Court seems unwilling to strategically enforce indirect discrimination as an instrument to effectively grant religious minorities full participation in social life, without at the same time requiring them to renounce a part of their identity.

On the other hand, despite art. 17 TFEU, the national identity clause and other references contained in the Framework Directive with respect to the specificities of national legal orders regarding state and religion relations[83], the Court has not shown any deferential attitude in dealing with the review of domestic norms or practices in the field.

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the Constitutional Court decision is available at *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html*.

[82] See recital 9 of the Framework Directive 2000/78/EC.

[83] This is the case of art. 4.2 with regard to religious ethos organisations and art. 2.5 according to which «this Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the

The result has been a neutralization of religion in the workplace as if this were the only way to grant equal treatment to all forms of religion and beliefs[84]. However, this is not the approach towards religious freedom that is enforced in all the EU countries. In order to avoid possible clashes of constitutional intensity, it is advisable that the Court of Justice take a different stance and show more empathy towards religious claims at work. For instance, as suggested in the literature[85], the Court might develop, on its own, a rule imposing a duty for employers to reasonably accommodate the religious claims of their workforce, despite the fact that a provision as such is lacking in the EU Framework Directive. In doing so, the CJEU would emulate their North American counterparts. The reasonable accommodation duty has the advantage of applying to all religions and beliefs, at the same time leaving the two parties room for an adaptation of the rule to practical situations. Of course, in order to work, it needs to be judicially enforced consistently with a view to effectively protecting a fundamental right of primary importance, such as religious freedom.

maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others» that could be considered as a safeguard for domestic provisions protecting freedom of religion at work.

[84] See A. HAMBLER, *Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from Achbita and Bougnaoui*, in *Industrial L. Journal*, vol. 47, n. 1, 2018, pp. 149 ss.

[85] See K. ALIDADI, *op. cit.*

CONSENSUAL LEGAL PLURALISM: ASSESSING THE METHOD AND THE MERITS IN AGREEMENTS BETWEEN STATE AND CHURCH(ES) IN ITALY AND SPAIN

Roberto Toniatti

1. Introduction

The pluralist paradigm is likely to be recognised as a distinctive feature of contemporary 21st century constitutionalism, at least with regard to Europe[1]. Pluralism has been growing as an objective factual circumstance in all vital aspects of social life of a polity – in culture, religion and belief, language, family, gender identity and sexual orientation – and, consequently, it reflects the exponentially constant growing claims of social and legal recognition of different own identities[2]. The scenario

[1] See F. VENTER, *Global Features* of *Constitutional Law*, Nijmegen, 2010 who deals with a few "common constitutional themes" (such as citizenship, religion, equality, and the environment) in a framework of "global constitutional trends"; pluralism seems to belong properly to citizenship, religion as well as to equality. It is interesting to notice how religious pluralism is qualified as a source of "responsibility for the contemporary constitutional state", p. 152.

[2] See art. 22 of the Charter of Fundamental Rights in the European Union ("The Union shall respect cultural, religious and linguistic diversity") and interesting early comments on the vagueness and lack of precision of its substantive scope in C. PICIOC-

of constitutional pluralism in Europe – although with different premises and its own context – provides further assistance to the circulation of needs, requests, safeguards and solutions. The principles of equality and non-discrimination have experienced a substantial expansion and they now physiologically encompass and in fact are synonymous to the right *of* diversities and the right *to* diversity[3].

In Europe, immigrants are often regarded as one of the causes that has significantly contributed to the phenomenon. And yet – without denying their recent relevant role[4] – it would be like burying one's head in the sand to ignore its domestic roots: the consolidation of international and constitutional promotion and protection of national minorities and of regional and minorities' languages[5], of the plurality of family patterns[6], of the protection of the LGBTI community (with specific

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CHI, *La Carta tra identità culturali nazionali ed individuali*, in R. TONIATTI (a cura di), *Diritto, diritti, giurisdizione. La Carta dei diritti fondamentali dell'Unione Europea*, Padova, 2002, p. 119.

[3] On different understandings of the right to equality – although, in general terms, "equality is foundational to the idea of justice" and "in a sense, equality forms the bedrock of the rule of law and a key component of constitutionalism" – see S. BAER, *Equality*, in M. ROSENFELD, A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2013, p. 982. On various approaches to the 'categorization' of equality, see F. VENTER, *Global Features of Constitutional Law*, Nijmegen, 2010, p. 154.

[4] On the impact of South Asian immigrants' religious background on the European scenario, see E. GALLO (ed.), *Migration and Religion in Europe. Comparative Perspectives on South Asian Experiences*, Farnham, 2014.

[5] In the field, see the European Charter for Regional or Minority Languages (adopted in 1992) and the Framework Convention for the Protection of National Minorities (adopted in 1994), both under the sponsorship of the Council of Europe.

[6] See "los Estados están obligados, so pena la condena por parte del mismo Tribunal, a reconocer de alguna manera los derechos y regular los deberes de las parejas same-sex, pues se trata de dos personas que ejercen el derecho al respeto de la vida familiar protegido por el art. 8 del CEDH", in S. ROMBOLI, *La protección de las parejas homosexuales frente a la discriminación en la evolución de la jurisprudencia del Tribunal Europeo: Pasado, Presente y unas previsiones para el futuro*, in *Anales de Derecho*, 2020, pp. 27 ss. On the perspective of extending the qualification of 'family' to non-conjugal unions of friends or relatives, polyamorous relationships as well as to various religious-based families see N. PALAZZO, *Legal Recognition of Non-Conjugal Families. New Frontiers in Family Law in the US, Canada and Europe*, Oxford, 2021.

criminal law sanctions)[7] are widespread real social features and proper ground for legislation and case-law scarcely affected by immigration and thoroughly rooted in evolutionary trends that are entirely European. Immigration, in fact, often carries with it a set of values quite incompatible with innovative dynamics that impact the host countries.

Containing and somehow even controlling the development of the pluralist paradigm has become a matter of governmental concern in many if not in most or all national jurisdictions. The process is of a dynamic nature and to a large extent dependent on both the orientations of citizens and on the resilience of the political system. Policies of accommodation of diversities have been elaborated and implemented, with their own priorities, setbacks and accelerations, with a relevant intervention of European (both ECHR and EU) sources of law, with due attention to national peculiarities[8].

Generally, accommodation is achieved through measures of rationalisation, aimed at taking into consideration new claims and headed to going beyond ignoring them completely, with the purpose of enhancing the recognition of areas of pluralism and reaching balanced solutions by cutting off all the extremes requests. Such measures are mostly of a legislative character but it does happen that judicial rulings either anticipate political solutions or establish binding precedents that replace the *lacunae* left by political inertia.

Domestically, policies of accommodation are meant to provide a balanced coexistence between general rules, applicable to all citizens irrespective of their diversities and group identities, and special rules, that are enacted for the safeguard of the right to equality of those seg-

[7] See the *2019 Report on Hate Crime Data* by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe (OSCE), concerning 47 member states, available at *https://hatecrime.osce.org/*.

[8] An example is provided by the Explanation on Article 9 of the Charter of Fundamental Rights in the European Union (right to marry and right to found a family) where it is specified that "the wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family" and that "this Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides".

ments of society whose different character, distinguishing them from the rest of the population, is qualified as worthy of recognition and protection: thus, a national language for the majority of the population coexists along with language minorities' rights, the traditional family coexists along with other types of family-like unions, plural gender identities coexist along with established binary conceptions of opposite sexes. With a larger or more narrow extent, such approach – although still a battlefield between progressive and conservative attitudes in some jurisdictions – has become physiological and in fact quite typical of post-modern Western polities. Areas of legislative exemption from – as well as recognition and protection of conscientious objection to[9] – the duty to comply with certain state's regulations are also part of such body of special rules.

Religion – at large – is likely to be the component of pluralism in cultural and social life that has emblematically maintained more robust challenges to the application of states' general rules: which means that religion, while, on the one hand, has largely profited from policies of accommodation, on the other hand, and paradoxically, supposedly is the factor of diversity that has least profited from them, considering the quantitative and qualitative scope of claims for exceptions, special rules, explicit recognition of conscientious objection, or direct application of their own religious rules in many fields and in particular in matters of family law[10].

In other words, the European state, while showing to be fairly responsive to various instances of pluralism, raises a wall of separation not so much from religion *per se* but from religion as a source of rules that might interfere and compete with the effectiveness of the state's

[9] It is necessary to distinguished between the phenomenon of conscientious objection as regulated by legislation from the so called '*absolute* conscientious objection' which refuses any compliance with the law of the state irrespective of any legislative or judicial recognition and, rather, is prepared to receive a (criminal) sanction (as in the case of unwillingness to accept any substitutive alternative to mandatory military unarmed service as practiced by Jehova's Witnesses).

[10] See J. ADENITIRE, *A General Right to Conscientious Exemption. Beyond Religious Privilege*, Cambridge, 2020; J. MAIR, E. ÖRÜCÜ (eds.), *The Place of Religion in Family Law: A Comparative Search*, Cambridge, 2011.

legal system. In fact – at least in some time and space circumstances – individuals and groups' compliance with rules might prove to be influenced more by religious rules than by those enacted by civilian authorities. And, since late in the 17th century, religion has played an important competitive role in the early stages of the process of nation and state building and of the ultimate allocation of sovereignty as an absolute power. The nation-state's option for a strict legal monism is the outcome of the battleground for achieving its gradual emancipation from other sources of law and power, be they religious or territorial.

In the next paragraph the relationship between the state and churches will be briefly analysed as well as the scope of accommodation to substantive areas of religiously-based legal pluralism and its formal and procedural instruments. In fact, and in spite of the 'wall of separation', what we are facing in this context is an interesting phenomenon of interaction between states' basic legal monism and cautious and selective openings to a weak form of legal pluralism[11].

More in particular, the focus is on the consensual origin of states' special category of sources of law devoted to regulating state-church(es) relations and resulting in a *genus* such as covenantal law (*loi pactisée*)[12]. Such sources are specifically meant to set the limits of applicability of religious law within the state's jurisdiction and from this point of view they perform the function of rules on conflict of laws: not with regard to other states' legislation – as in international private law – but with reference to other legal families or traditions[13].

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[11] Legal pluralism in a weak sense depends on state's recognition whereas legal pluralism in a strong sense produces its effects irrespective of any endorsement from any other authority and is itself the source of its own legitimacy, as argued in J. GRIFFITHS, *What is Legal Pluralism?*, in *Journal of Legal Pluralism and Unofficial Law*, 2002, p. 1.

[12] For a broad specific survey of legislative arrangements and practice in Europe see R. PUZA, N. DOE (eds.), *Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation between State and Religion in Europe – Religion et droit en dialogue: collaboration conventionnelle et non-conventionnelle entre État et religion en Europe*, Leuven, 2006.

[13] See M. RHEINSTEIN, *Conflict of Laws*, in *Encyclopedia Britannica* ("the "law of the conflict of laws" pertains to the resolution of problems resulting from such diversity of courts and law"), with reference to patterns of regulation of legal diversity practiced

Two further paragraphs will then be devoted to an analytical and critical description of the functioning of the Italian and Spanish experiences in this regard and, finally, some final thoughts will suggest an assessment of such experiences, distinguishing between the method and the merits of them.

The focus of our reasoning is on the relational method, on the option for a bilateral dialogue, on the value of mutual recognition that may or may not lead to the adoption of negotiated legislative sources (covenantal law) but may nevertheless be regarded as a procedural mechanism to be pursued in the name of respect, of responsiveness, of transparency. The method in itself has a beneficial systemic potential of rationalising practices of lobbying, even though its actual suitability as an instrument of an increased legal pluralism is quite weak.

At least symbolically, therefore, the adoption of such method of dialogue between the European Union and both churches and religious associations or communities, on the one hand, and, on the other, philosophical and non-confessional organisations is representative of the *Zeitgeist*[14].

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outside of the Western legal tradition that is traditionally limited to rules of private international law applicable to distinct jurisdictions of states ("Legal diversity may be based on religion or ethnicity as well as on territory. Such a situation has existed historically in many Islamic countries. In India the laws concerning matters of the family, including succession upon death, are different for Hindus, Muslims, Parsis, Buddhists, and other religious groups, and in Lebanon and Israel they are different for Muslims, Jews, and the various groups of Christians. American Indian reservations present similar problems when the occurrence of events on a reservation or the affiliation of a person with a reservation results in the application of tribal law rather than the law of the state in which the reservation is located. Membership in an American Indian tribe, for example, may determine the applicable law"), available at *https://www.britannica.com/topic/conflict-of-laws/Jurisdiction*.

[14] See art. 17 of the Treaty on the Functioning of the European Union "1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. 2. The Union equally respects the status under national law of philosophical and non-confessional organisations. 3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations".

2. Accommodation of religious diversities in Europe: an area of weak legal pluralism

In European legal history, the legislative function has been the exclusive competence of governmental institutions for a long time.

In the United Kingdom – and, *mutatis mutandis*, in other common law jurisdictions – its exercise may have been the shared field of power by the King in Parliament, with the judiciary playing a crucial role either in the strict implementation of positive legislative acts or by finding the appropriate rules in the law of the land. On the continent, it may have become the attribution of politically elected assemblies that – since and through the French revolution – replaced the previous rule-making setting of the *ancien régime*. Even more so, with special regard to the political and ideological Marxist-Leninist framework of normative decision-making in the third European model, when the reference is to the socialist system of sources of law. Whatever the context and in spite of the distinctiveness of the legal traditions concerned, the modern European state has achieved the monopoly in law-making, overcoming all further competing sources that would be inclined to qualifying (individual and collective) social behaviours as lawful or lawless and expecting people's compliance with that qualification.

Law is considered here – without any further theoretical elaboration – as the body of rules for whose implementation the state employs its own law enforcement power and institutional machinery (courts, police, and prisons). Such law is normally identified with positive rules produced in conformity with competences and procedures established by fundamental legal sources.

The definition provided above may be seen as showing some objective leaning toward legal positivism, but in fact it is compatible with both the recognition of the prevailing role of interpretation – judicial but not only – over the political will of the law-maker and a growing impact of international and supranational law as well as of rules enacted by subnational law-making authorities.

Therefore, the definition given above appears to be sufficient to include state and state-like law – such as subnational, international, or

supranational law – in a specific contemporary setting shaped as 'normative pluralism'.

Not yet legal pluralism, though: in fact, it is necessary to make reference to the traditional classification of legal families or legal traditions, that reflect the plurality of systems of sources of law experienced in time and space on the planet. The coexistence of more than one legal tradition within the same jurisdiction – with or without one shared higher source of legitimacy for all – is *the* structural factor leading to a correct understanding of the concept of legal pluralism, respectively of a weak or of a strong form. There is no unanimous agreement among scholars on the definition of such systems or on the criteria to be used for establishing such classifications[15].

The focus then is on religion and religious law, on the one hand, and on the state's authority, on the other, thus making up an authentic dilemma: the state is committed to recognising and protecting individual and collective religious freedom, but not to the extent of allowing individuals and religious communities to comply with religious precepts when these latter collide with state law, thus inevitably affecting – and reducing – the scope of religious freedom. Accommodation and rationalisation of the dilemma through negotiated agreements then make their way in.

Religion is a multi-faceted phenomenon that combines a foundation of transcendence with a corresponding concern for the day-to-day activities of believers (the latter, according to the respective beliefs, are in fact considered to be strictly connected to the former). On the one side, religion offers a worldview based on faith in and veneration for metaphysical entity/ties, on spiritual values generating expectations, hopes

[15] The full identification of state law and religious law is a typical feature of theocratic states and, in part, of hybrid systems in which the state abstains from regulating some substantive areas of social relations such as personal matters and, more specifically, family law. On legal systems (or families, or traditions) see H.P. GLENN, *Legal Traditions of the World*, 5th ed., 2014, Oxford; G. CUNIBERTI, *Grands systèmes de droit contemporaines*, II éd., Paris, 2011; R. LEGEAIS, *Grands systèmes de droit contemporaines. Approche comparative*, II éd., Paris, 2005; R. DAVID, C. JAUFFRET-SPINOSI, *Les grands systèmes de droit contemporaines*, XI éd., Paris, 2002; M.C. LOSANO, *I grandi sistemi giuridici. Introduzione ai diritti europei ed extraeuropei*, Bari, 2000.

and commitments for achieving some sort of after-death eternal prize or punishment, or some immortality status beyond the self, or some destination to metempsychosis; on confidence in communication from and with the sacred being(s) through prayers and liturgies; and on acknowledging the authority of learned clergy and of spiritual saviours. But, on the other side, on such foundations, religion aims as well at regulating the behaviour of believers not only when related to strictly spiritual practices of cult but also on matters of social organisation: family (marriage and divorce), sex, procreation and raising of children, alimentation, dress-codes, ethics, economic and financial activities, attitudes toward religious and secular authorities. This last component of religious teaching may imply respect and compliance with non-religious rules but, on the contrary, it may also request from their faithful members a complete rejection of any rule other than religious precepts.

In other words, religion is also a legal system, and as such it may go as far as competing with secular institutions and rules in regulating the behaviour of citizens who are also believers in one specific faith. Furthermore, religion has its own legitimacy, independent from any state's intervention, and its own circuit of recognition by citizens/believers, although there are cases of established churches and official state religions that provide a combination of state and religion – or state and church – that other jurisdictions keep (or try to keep) strictly separated.

Religion, furthermore, lives on a double dimension: the inner space of individuals' own sovereign conscience marks the private sphere whereas the collective or communitarian religious life not only presides over liturgical and ceremonial functions but also allows institutional and social control over the believers' compliance with religious regulations (rather than with state's rules, when substantively different or even alternative). The public sphere of religion thus adopts the role of a source of inspiration of both inner beliefs and social behaviour: it is a source of inspiration that, ultimately, aims at achieving a political subjectivity of its own and at interacting with varying shades of power to states' legislative function.

In other words, the presence of religion in the public sphere may – and often did and still often does – represent the 'spiritual power' that affects the exercise of the state's legislative, executive and judicial

powers. Thus, for example, lobbying in opposition to divorce on religious ground provides the motivation to denying the possibility of divorce even for those who do not share that same faith. The distinction – crucial in *régimes* of separation – between a religious 'sin' and a violation of a state's rule becomes blurred and a non-believer may eventually be subject to state's religiously-motivated rules. When the spiritual power controls constitution-making and its entrenchment as well as its implementation and judicial interpretation, then the margins of survival of any form of secularism become more and more narrow.

Models of regulation of state and religion(s) or state and church(es) relationship are very different in time and space[16].

The early models of non-regulation in Europe were the historical experiences of brutal repression and persecution of minorities on the ground of religious faith – before and after the Reform – and, later, new models of arrangements were practiced, under the inspiration of the principle *cujus regio, ejus et religio* (Peace of Augsburg, 1555) that meant to achieve religiously homogenous Christian (either Catholic or Protestant) polities within the Holy Roman Empire and paved the way for established state churches and official state religions as a typical feature of nation-states.

Beyond and against such models, new ways for coping with the state-church dilemma have been devised in the Western experience of modernisation: it has been correctly stated that «the ideals of the Enlightenment presuppose a secular constitutional frame» and that «from a constitutional standpoint secularism emerged as a corollary of the ideal of the Enlightenment: the separation of faith from reason and equal liberty for all»[17]. Therefore,

[16] For a research limited to member states of the European Union see M.L. IGLESIAS VILA, A. SAIZ ARNAIZ, R. TONIATTI, A. TORRES PÉRES (eds.), *Religious Practice and Observance in the EU Member States, A Study for the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament*, European Parliament, Bruxelles, 2013, available at *http://www.europarl.europa.eu/committees/en/libe/studies.html#menuzone*.

[17] Furthermore, "the expulsion of religion from the public sphere, where members of different faith-based communities must interact on an equal footing, is thus necessary to institutionally guarantee the dual aims of the Enlightenment. Separation of faith from reason is fostered by entrusting the public sphere to the latter and by allowing full

> all Western models of managing religion […] irrespective of their differences […] adhere to two fundamental principles: the separation of church and state in the public sphere and the protection of freedom of and freedom from religion in the private sphere[18].

The Enlightenment in the American colonies proved to be crucial in establishing communities and states – and later a federal Union – under the rule of such innovative ideological setting (by the inspiration of Thomas Jefferson and other prominent political philosophers who were also active statesmen)[19]: the Virginia Statute for Religious Freedom (drafted in 1777 and enacted in 1786)[20] and the First Amendment to the

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expression of the former within the private sphere. Constitutional secularism may be construed variously as requiring outright expulsion of religion from the public sphere, as customarily understood in the context of French *laïcité*, or as merely called upon to insure that the state remain equidistant as between all religions in the polity. In either case, what remains imperative for constitutional secularism is that religion is depoliticized. The Enlightenment project thus confined religion to the private sphere". See S. MANCINI, *Introduction: constitutionalism and religion in an age of consolidation and turmoil*, in ID. (ed.), *Constitutions and Religion*, Cheltenham, 2020, p. 2.

[18] See S. MANCINI, *Introduction: constitutionalism and religion in an age of consolidation and turmoil*, cit., p. 3.

[19] See R. TONIATTI, *Le origini del costituzionalismo repubblicano statunitense nel pensiero di Thomas Jefferson*, in *Rivista di diritti comparati*, 2021, p. 123, available at: *https://www.dirittticomparati.it/wp-content/uploads/2021/03/*.

[20] "An act for establishing religious Freedom […] Be it enacted by General Assembly that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities". It is noteworthy that the statute attempted to enhance its normative status by using a sort of substantive entrenchment by the following provision that stated that "and though we well know that this Assembly elected by the people for the ordinary purposes of Legislation only, have no power to restrain the acts of succeeding Assemblies constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare that the rights hereby asserted, are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right".

federal Constitution of the United States (1791)[21].

In Europe, on the contrary, the *Déclaration des Droits de l'Homme et du Citoyen* (1789) did not emphasise as much religious freedom in the field of fundamental rights, supposedly as its ambition was to de-Christianise altogether France as well as the rest of Europe, as an ideological postulate but also, politically, as a reaction to Catholic identification with the *ancien régime* (and consequent attachment to the enjoyment of privileges) and its opposition across the board to the Revolution, the Enlightenment and modernisation[22].

The post-Napoleonic conservative and non-secularist political order designed by the Congress of Vienna (1815) could not prevent, however, the basic principles of the Enlightenment to gradually gain space and be further developed in the course of time in the constitutional settings of nation-states in Europe. Nevertheless, on each side of the Atlantic the very constitutional architecture of separation between state and church(es) and its implementation will ever since remain quite visible.

In the contemporary scenario, therefore, it can safely be said that all European states' Constitutions guarantee individual freedom of religion in the private sphere, including – either by specific provisions, or implicitly, or else as established by case-law – the freedom to change one's religion or to have no religion at all. Limitations must be provided for by law and the implementation of constitutional protection must respect the principles of equality and non-discrimination. The same pat-

[21] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof […]".

[22] See art. 10: "Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi", the reference to "opinions, even religious ones" working as a symptom of something marginal, unusual, extreme. Of course, any diversity, including religion, was absorbed by the supreme value of equality (see art. 6: "La loi est l'expression de la volonté générale. Tous les citoyens ont droit de concourir personnellement, ou par leurs représentants, à sa formation. Elle doit être la même pour tous, soit qu'elle protège, soit qu'elle punisse. Tous les citoyens étant égaux à ses yeux sont également admissibles à toutes dignités, places et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leurs talents"). See S. DESAN, *The French Revolution and religion*, 1795-1815, in S. BROWN, T. TACK-ETT (eds.), *The Cambridge History of Christianity*, Cambridge, 2006, p. 556.

tern has been transferred to the European Convention of Human Rights[23] and to the Charter of Fundamental Rights in the European Union[24].

Freedom of religion is also equally guaranteed to all churches and religious bodies whose organisation of self-government cannot be inconsistent with constitutional values[25]. Religious pluralism is quite uniformly safeguarded also from an institutional or communitarian point of view, at least with regard to those religious entities that have been traditionally present in Europe and have an organised structure.

A plurality of models concerning state-church(es) – rather than state-religion(s) – is thus characterising Europe.

In spite of their differences and although formal arrangements are quite independent from the degree of secularisation of society, which is fairly uniform and high[26], a generally shared feature of all models is a framework of mutual cooperative attitudes.

Cooperative relations are physiological in the context of those national orders where a religious legacy from the past has determined the formal presence of an established state official church, as is the case in

[23] See art. 9 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others").

[24] See art. 10 ("Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance").

[25] For a detailed survey of specific constitutional provisions, see M.L. IGLESIAS VILA, A. SAIZ ARNAIZ, R. TONIATTI, A. TORRES PÉRES (eds.), *Religious Practice and Observance in the EU Member States*, Bruxelles, 2013, p. 20.

[26] For a critical approach to the constitutional entrenchment of the principle of secularism in constitutions, see Y. ROZNAI, *Negotiating the Eternal: the Paradox of Entrenching Secularism in Constitutions*, in *Michigan State Law Review*, 2017, p. 253.

the denominational model[27]. But they tend to be consistent – and in fact they are sometime explicitly mentioned in the constitutional source[28] – also with models where the priority is achieving a balance between a sociological dominant position occupied by a traditional religious denomination and a *régime* of separation and secularism openly stated in the text of the Constitution[29] or drawn from it as a systemic assumption in constitutional case-law[30].

[27] See, e.g., the Constitution of Denmark (art. 4 of the Constitution: "The Evangelical-Lutheran Church of Denmark is the established Church of Denmark and, as such, is supported by the State"); of Finland (art. 76 refers to the Evangelic Lutheran Church and to a Church Act); of Sweden (art. 2(1) of Chapter 8 of the Instrument of Government establishes the Church of Sweden). See also Malta, whose Constitution (art. 2.1) proclaims the Roman Catholic Apostolic Religion as the official religion of the country.

[28] Explicit reference to the principle of cooperation is to be found in the Spanish Constitution (art. 16.3) where it states that "there shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and shall consequently maintain appropriate cooperation with the Catholic Church and the other confessions"; and in the Constitution of Poland (art. 25.3: "the relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good").

[29] As in Greece (art. 3(1) of the Constitution defines the Eastern Orthodox Church of Christ as the "prevailing religion in Greece"); in Bulgaria the Constitution (art. 13.1) proclaims Eastern Orthodox Christianity to be "the traditional religion in the Republic of Bulgaria", while it also states (art. 13.2) that "religious institutions shall be separate from the State", that (art. 13.4) "religious institutions and communities, and religious beliefs shall not be used to political ends", and that (art. 11.4) "there shall be no political parties on ethnic, racial or religious lines, nor parties which seek the violent seizure of state power". In Ireland, the Constitution states that all powers of government 'derive, under God, from people' (art. 6(1)), while art. 44(1) "acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion".

[30] This is the case of Italy: in its judgement no. 203 of 1989 (at 3 and 4 of the Conclusions in points of law), the Constitutional Court declared "the overriding principle of the secularity of the State, which is one of the aspects of the form of State outlined in the Constitution of the Republic". Nevertheless, the Court also states that "the principle of secularity, as it emerges from Articles 2, 3, 7, 8, 19 and 20 of the Constitution, does not imply the indifference of the State to religions but rather a guarantee of State protection of the freedom of religion, in a regime of confessional and cultural pluralism" (see the full text of the decision in its English translation provided by the Court itself on

One way for regulating the mutual recognition and the permanent cooperative relations between state and church(es) is by reference to negotiation and conclusion of bilateral agreements that indicate the constitutional formalisation of some degree of compromise affecting the presence of religion(s) in the public sphere.

The form of such agreements depends on the legal nature of the religious entity concerned: the Roman Catholic Church enjoying as Holy See sovereign status in the international community, the proper form of the agreement is an international treaty – traditionally named 'concordat' –, while other religious denominations are parties to agreements qualified within a framework of domestic law[31].

The constitutional requirement concerning the voluntary subordination of state legislation to the bilateral method of law-making and to a formal consensual agreement as the main source for regulating the framework of cooperation between state and individual church(es) is an indicator of the basic mutual recognition between the institutions involved, each one approaching the other with its own identity.

Both stages – negotiation and the following conclusion of the agreement – are important as they mark an ideal area of mutual compatibility between the two institutional identities: not from the point of

its website in *https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_203_1989_Casavola_en-fin.pdf*).

[31] See the text of the Italian Constitution, whose special consideration of Catholicism (the former state religion) only appears as due to the legal subjectivity of the Roman Catholic Church (art. 7: "the State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments"); and art. 8 ("all religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives").The same distinction applies to the Constitution of Poland: according to art. 25, "the relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute" (art. 25.4); and "the relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers" (art. 25.5).

view of religion – as the state does not compete with church(es) on theological ground – but a mutual compatibility on those features of a religion that make of it also a legal system, having the aim of regulating individual and collective behaviour that is also the proper field of intervention by the distinct state rule-making function.

The final agreement thus indicates the framework of cooperation – the area of non-competition or of acceptable competition – as well as, indirectly, the features of non-cooperation, whereby the identities are mutually incompatible.

The fact that, in case of minority religions, the agreement is then transformed into state's legislation – as in the Italian, Polish and Spanish jurisdictions – is an indicator clearly assertive of the state's exclusive sovereignty; whereas, in the case of the Roman Catholic Church, its equal sovereign *status* explains the reason for the application of the general rule concerning the legislative execution of an international law source. Most likely, the pattern adopted for the Roman Catholic Church has worked as a source of inspiration for framing and adapting the procedure to the systemic legal conditions of minorities' denominations.

In the following paragraphs, the implementation of the constitutional cooperative framework with minorities in Italy and Spain will be analysed before some final remarks may be developed assessing how the potential for an area of consensual legal pluralism has been so far developed.

3. Origins and evolution of the constitutional setting of state-church(es) relations in Italy

The 1948 Republican Constitution introduced in post-WW2 Italy a thoroughly innovative normative framework and a set of values in the field of state and church(es) relations consistent with the fundamental principle of equal freedom in a secular plural religious context.

The Statuto Albertino (the previous constitutional source of the Kingdom of Italy)[32] had declared in its art. 1 that «The Catholic, Apostolic, and Roman religion is the sole religion of the state. All other forms of worship now existing are tolerated in conformity with the law»[33]. The provision was not reformed in spite of the conflict between the state – and its commitment to achieve national unification (1861) through wars of independence including against the Pope's state – and the Roman Catholic Church, which culminated in the military conquest of Rome in 1870 and its proclamation as the capital of Italy[34].

The *status* of official state religion regained its substantive role when the Lateran Pacts were signed in 1929, including a Concordat that established a fairly long list of privileges that gave full meaning to the exclusive presence of the Roman Catholic religion in the public space[35]. The solution of the conflict with the Church was an important achievement for the image of the fascist *régime* in Italy as well as abroad.

Just a few months later, new *ad hoc* legislation was enacted that gave other religious denominations (*legge sui culti ammessi*, act on the

[32] In fact the *Statuto Albertino* had been granted by Carlo Alberto the King of Sardinia in 1848 and after achieving national unification it became the Constitution of the Kingdom of Italy. It remained almost entirely unchanged throughout the twenty years of fascist autocracy and was eventually replaced by the 1948 constitutional text that was the outcome of the Constituent Assembly elected in 1946.

[33] Furthermore, according to its art. 28, "the press shall be free, but the law may suppress abuses of this freedom. However, Bibles, catechisms, liturgical and prayer books shall not be printed without the prior permission of the [local] bishop".

[34] *Ad hoc* legislation was enacted one year later (*Legge sulle Guarentigie*, Guarantees Act, 1871). The Kingdom regulated – unilaterally although with generosity – its relations with the Catholic Church: the free exercise of spiritual power was safeguarded, the person of the Pope was proclaimed inviolable and the buildings of his residence enjoyed immunity, a civil list was ensured as well as the right to keep and establish diplomatic relations. The Holy See rejected the law and the *Questione Romana* was thus raised. It officially lasted until 1929, for almost 60 years. Catholics were prohibited from participation to public life in Italy, a prohibition that lasted in a rigid form until 1913.

[35] The state of Vatican City was recognised as an independent sovereign state. Financial compensation was provided for the loss of the income from the former Papal state.

admitted cults, 1929)[36] a shared minority *status* for all of them: the new law required consistency with public order and morals and the appointment of respective ministers subject to approval by state's authorities. Nevertheless, under the conditions laid down by the law, the act allowed civilian effects of religious weddings and declared that religious differences could not be the ground for derogation from the enjoyment of civil and political rights as well as from admission to civilian and military public tasks[37]. Furthermore – somehow naively – the act also stated that debate on religious matters is «fully free» («La discussione in materia religiosa è pienamente libera»). Of course, such liberal provisions did not affect cases of persecution against some Protestant denominations and eventually the enactment and implementation of the 1938 racial legislation against the Jewish community.

In synthesis, the Kingdom's legacy to the new Republican constitutional order in the field of regulation of state and church(es) relations resulted in a substantial difference in method and merits[38]: a conventional method with the Catholic Church, unilateral legislative enactments for the minorities; a wide public space for the former, compared to none for the latter. An Italian administrative court went as far as writing, more recently, that «the crucifix should also be considered a symbol of a value system underpinning the Italian Constitution»[39]. And the ECtHR acknowledged that

> it is true that by prescribing the presence of crucifixes in State-school classrooms – a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity – the regula-

[36] The Act is referred to as number 1159 of 1929. Semantically, cults that are "admitted" implies a subtle semantic improvement from the 1848 Statuto Albertino provision that declares religious minorities as "tolerated" cults.

[37] The rule was in conformity with the general principle of equality of all citizens established in art. 24 of the *Statuto Albertino*.

[38] For a critical view on the conformity of the 1929 Concordat with the 1948 Constitution, see G. CALOGERO, *Church and State in Italy: The Constitutional Issues*, in *International Affairs*, 1959, p. 33. Literature on the issue is indeed very large.

[39] Quotation from the judgement of the ECtHR (GC) in the case of *Lautsi and Others* v. *Italy*, 2011, at 15.

> tions confer on the country's majority religion preponderant visibility in the school environment

although it reached the conclusion that the presence of the crucifix «is not in itself sufficient, however, to denote a process of indoctrination on the respondent State's part» (at 71) and that «a crucifix on a wall is an essentially passive symbol (at 72)»[40].

Constitutional adjudication had to cope with the most visible legislative indicators of such privileges, although somehow reluctantly and after realising that Parliament was even more reluctant to act[41]. Never-

[40] The Strasbourg Court further writes that "this point is of importance in the Court's view, particularly having regard to the principle of neutrality", so that "it cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities", again in the case of *Lautsi and Others* v. *Italy*, 2011 (at 71 and 72).

[41] For instance, with regard to the exclusion of minority religions from the protection against the crime of blasphemy, the Court concluded that the pre-eminence of the equality principle demanded a declaration of unconstitutionality for those parts of the provision that effectively violated the principle. The Court then divided the blasphemy provision into two parts: the first outlawing invectives and offensive language against a generic Divinity, not ascribed to any particular religion, the contents of which could be filled in by the religion of any believer, and the second outlawing invectives and offensive language against the Symbols and Persons venerated in the religion of the State. The Court struck down only the latter part of the provision, limiting its declaration to the words "Symbols, or Persons venerated in the religion of the State" (decision n. 440, 1995). Another emblematic example is provided by a decision declaring that, as the teaching of the Catholic religion in public schools is optional and voluntary, students not taking such classes cannot be made subject to other mandatory courses ("the Court clarifies the outlines of the discipline regulating religious instruction and the principle of secularity by establishing: 1) the optional nature of the lessons on the Catholic religion, 2) the compatibility of the rules of the Rome Agreement with the principle of secularity, 3) the individual right to participate in religion classes or not, 4) the duty of the secular State to protect the self-determination of citizens and to respect the freedom of conscience and the educational responsibility of parents, guaranteed under Articles 19 and 39 of the Constitution, and 5) the evident discrimination against students who do not avail themselves of religion classes if attendance of lessons on another subject is compulsory for them. Instruction in Catholicism is optional, only becoming compulsory once a student has chosen to follow the lessons. Consequently, in the case of non-attenders, the alternative constitutes solely a situation of non-obligation") (decision

theless, the Constitutional Court did recognise the fundamental constitutional principle of secularism (*laicità*) and expressly stated that

> the Constitutional Court is the custodian of the principle of secularism in the Italian system, as the Constitution does not explicitly proclaim the secular nature of the Republic. However, there is no doubt that Italy is a secular State, and the Court upholds a reading in this sense of the constitutional provisions of Articles 7, 8, 19 and 20[42].

The Court also said that

> the principle of *laicità* does not entail the state's indifference to religions but rather the state's guaranty for safeguarding religious freedom, in a context of denominational and cultural pluralism[43].

3.1. Agreements and negotiated legislation: an innovative context for religious minorities

For the purposes of this research, while art. 7 of the Constitution confirms the previous method of bilateral negotiation between the state and the Catholic Church[44], art. 8 substantially introduces an innovative rule insofar as it extends the same conventional method to minority religious denominations and subordinates the ultimate legislative definition of the contents of the relations between the state and each non-Catholic religious denomination to a previous bilateral agreement[45].

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n. 203, 1989; the English translation of both the abstract is available at *https://www.cortecostituzionale.it/actionJudgment.do*).

[42] And it added that with judgment n. 203 of 1989, the Court for the first time explicitly outlined the principle of secularity, defining it as an "overriding principle of the State" (the English translation of the abstract is available at *https://www.cortecostituzionale.it/actionJudgment.do*).

[43] The quotation is from judgement n. 203, 1989 (the translation is mine).

[44] See the text of art. 7: "The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are governed by the Lateran Pacts. Changes to the Pacts that are accepted by both parties shall not require a constitutional amendment". In fact, there has been a negotiated reform of the agreement in 1984.

[45] See the text of art. 8: "All religious confessions enjoy equal freedom before the law. Religious confessions other than Catholicism have the right to organise themselves

The extension of the bilateral method, *mutatis mutandis*, to all religious denominations is to be positively appreciated, not only as a means that allows – at least virtually – even smaller and more marginal religious groups (without any parliamentary representation) to approach national governmental institutions and to bring to their attention specific needs and requirements that can be accommodated through the bilateral method and reach appropriate legislative solutions; and it is also to be positively appreciated as such extension does, indeed, represent as well a necessary step toward enjoying equal religious freedom.

Nevertheless, such step is limited for at least three reasons: in the first place, because – while not inhibiting its enactment or qualifying it as unconstitutional – it overshadows the opportunity of having a general law on religious freedom for all – citizens and religious denominations of all sorts – which would represent the authentic achievement of equality[46]. There have been political[47] as well as scholarly[48] attempts in this direction but, thus far, Parliament has never shown sufficient sensitivity to the issue. Legislation implementing the Constitution would have the legal effect as well as the political impact of replacing the 1929 Act on admitted cults that is at present the only general legislative source on religious freedom that is applicable to minority religions in a constitutional context inspired by the principles of secular pluralism

in accordance with their own statutes, to the extent that these are not in conflict with the Italian legal system. Their relations with the State shall be regulated by law on the basis of agreements with their respective representatives".

[46] See S. BORDONALI, *La legge sui Culti ammessi, le intese e l'esigenza di una legge-base sul fatto religioso*, in *Stato, Chiese e pluralismo confessionale*, n. 4, 2020, available at *https://www.statoechiese.it*, p. 12.

[47] A draft framework legislation was introduced in Parliament in 1990 for the first time but it never reached a final reading. For a detailed analysis of all the draft bills introduced in Parliament since 1990 see L. DE GREGORIO, *La legge generale sulla libertà religiosa. Disegni e dibattiti parlamentari*, in *Quaderni del Dipartimento di Scienze giuridiche*, *Università Cattolica del Sacro Cuore*, Piacenza, 2012 available at *https://dipartimenti.unicatt.it/scienzegiuridiche-Quaderno_04_De_Gregorio_Chiuso.pdf*.

[48] Reference is to the proposal elaborated by the think tank Astrid and published in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *La legge che non c'è. Proposta per una legge sulla libertà religiosa in Italia*, Bologna, 2020.

and equality that are by themselves quite inconsistent with the restrictive notion of 'admitted cults' of the fascist era.

The second important limit is due to the interpretation of art. 7 (and, indirectly, of art. 8) adopted by the Constitutional Court, according to which, while not giving the sources of the Lateran Pacts with the Holy See the *status* of constitutional law (as advocated by some), the provision still entails a special position in the hierarchical system of sources of law inasmuch as art. 7 «acknowledges to the State and the Catholic Church a mutual position of independence and sovereignty and cannot have the effect of denying the fundamental principles of the constitutional order of the State»[49]. Which means that only the latter (the fundamental principles) and not each one and all of the entrenched constitutional provisions have the legal force of prevailing over the rules of the Concordat. No analogous argument supports the status of the *intese* with minority religions, whose only elements of support is that Parliament cannot unilaterally change rules that have not been the object of a previous agreement between the Executive and the minority religious institutions themselves.

A third serious limit is the consequence of the interpretation given, once again, by the Constitutional Court to the agreement clause of art. 8, second paragraph of the Constitution[50]: according to such interpretation, the provision is not the source of a justiciable right to negotiate and try to reach an agreement as a precondition for Parliament enacting *ad hoc* legislation for a minority denomination; starting or not a

[49] See judgement n. 30 of 1971 (at 3 of the Court's legal arguments): [art. 7] "esso riconosce allo Stato e alla Chiesa cattolica una posizione reciproca di indipendenza e di sovranità, non può avere forza di negare i principi supremi dell'ordinamento costituzionale dello Stato" (our translation).

[50] The judgement – that overrides previous decisions in the matter by both the Council of State and the Court of Cassation – is n. 52 in 2016. The judgement has been critically commented by many scholars: see, among many others, S. LARICCIA, *Un passo indietro sul fronte dei diritti di libertà e di eguaglianza in materia religiosa [?]*, in *Stato, Chiese e pluralismo confessionale*, n. 20/2016 available at *https://www.statoechiese.it/images/uploads/articoli_pdf/lariccia_un_passo.pdf?pdf=un-passo-indietro-sul-frontedei-diritti-di-liberta-e-di-eguaglianza-in-mat*; A. POGGI, *Una sentenza "preventiva" sulle prossime richieste di Intese da parte di confessioni religiose? (in margine alla sentenza n. 52 della Corte costituzionale)*, in *Federalismi.it*, 2016 (March 26th).

negotiation is a fully discretionary political choice by the Executive that may be held accountable in Parliament for its refusal to negotiate but cannot be constitutionally considered forced to do so and subject to judicial review. The Constitutional Court expressly denies that having or not having an agreement – and consequent *ad hoc* legislation – affects the enjoyment by religious minorities of the equal status guaranteed by the Constitution[51].

This judgement contributes to highlighting the importance of enacting appropriate framework legislation that would provide the general regulation in the field of state and church(es) relations – in view of avoiding keeping religious minorities without an agreement under the only source of the 1929 Act on admitted cults –, while leaving the agreements to take care of requests for exceptions and derogations from it. Quite to the contrary, looking at the fairly repetitive substantive contents of each one of the agreements so far stipulated as well as of their respective transformation into legislative acts, one draws the conclusion that what such sources do is, in fact, establishing the general rule but only for a selected group of religious minorities. A closer look at the texts will provide appropriate evidence to the previous assessment.

3.2. Agreements and negotiated legislation: the Intesa with twelve minority religious denominations

The 1948 Republican Constitution has been the victim of slow and delayed implementation in crucial areas (constitutional adjudication, self-administration of the judiciary, regional decentralisation, direct democracy, just to mention some of the most relevant examples) that represented the most innovative reforms from the former system. The same happened with regard to the process of setting aside the very concept of 'official state religion' formalised in *Statuto Albertino* and adapting to the new constitutional order inspired by the combination of the principles of formal and substantive equality and of religious pluralism. And, once again, regulating the relations with the Catholic Church came first (1984), and putting in motion and inaugurating the new sea-

[51] As stated, among others, in its judgement n. 195 in 1993.

son of agreements with minority denominations arrived later (starting in the same year 1984).

The number of the agreements that have been negotiated so far is not so high (12) and yet it is by itself quite representative of a relevant plural religious presence in Italy against any image of a Catholic monolithic society[52].

The consequence of the constitutional and legislative framework that has been described so far is that organised institutions qualified by and related to the religious phenomenon in Italy may be classified into three main categories: (a) the Catholic Church, under the strong protection of art. 7 of the Constitution, (b) twelve religious minority groups, especially supported by the weaker framework of art. 8, third paragraph of the Constitution, and (c) 'other' religious minority groups, generally safeguarded by the principles of equality (art. 8, first and second paragraph) and non-discrimination (art. 3 of the Constitution), although in fact still regulated by the 1929 act on admitted cults[53].

[52] The agreements that have been signed and transformed into legislation (and at different times later reformed, through the same procedure) involve the Union of Methodist and Waldensian Churches (1984), the Evangelical Christian Churches Assemblies of God in Italy (1986), the Italian Union of Seventh-day Adventist Christian Churches (1986), the Union of Jewish Communities in Italy (1987), the Baptist Evangelical Christian Union of Italy (1993), the Lutheran Evangelical Church in Italy (1993), the Holy Orthodox Archdiocese of Italy and Exarchate of Southern Europe (2007); the Church of Jesus Christ of Latter-day Saints in Italy (2007), the Apostolic Church in Italy (2007); the Italian Buddhist Union (2007), the Italian Hindu Union (2007), the Soka Gakkai Italian Buddhist Institute (2015). Another agreement has been signed with the Christian Congregation of Jehovah's Witnesses in Italy (2007) but it still has to be converted into law.

[53] See the text of art. 3: "All citizens have equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinions, or personal or social condition. It is the duty of the Republic to remove those obstacles of an economic and social nature that, by in fact limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country". Art. 20 of the Constitution also deserves to be mentioned in the field of equal freedom of all religious denomination: "the ecclesiastical nature and the purpose of religion or worship of an association or institution may not be a cause for special limitations in law,

The Roman Catholic Church has a recognised wide presence in the public sphere and an individual as well as a collective protection under a semi-constitutional status, the second group has a limited collective public relevance and an individual protection under a legislative *status* – though subject to the political discretion of the Executive –, and the third is entitled mainly to individual judicial protection from discrimination on religious ground[54] while the collective dimension (for instance, with regard to religious buildings) is mainly safeguarded by judicial review of legislation and administrative decisions[55].

Within this general distinctive framework, it is the main focus of this paragraph to deal with the contents of the legislation enacted under the agreement clause of art. 8 and to assess whether such sources are instrumental to establish a pattern of weak legal pluralism, that allows – under the endorsement of the state – the enforcement of religious law as a set of non-state rules.

The body of legislation enacted by Parliament in conformity with the individual agreements negotiated by the Government with the representatives of each denomination has a wide substantive area of coincidence that may be considered as a sort of average model regulation.

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nor for special fiscal impositions in its establishment, legal capacity or any of its activities".

[54] To such effect a relevant role is paid by the principle of freedom of conscience (and freedom from religion) enshrined in art. 19 of the Constitution ("All are entitled to freely profess their religious convictions in any form, individually or in associations, to propagate them, and to celebrate them in public or in private, save in the case of rites contrary to morality").

[55] With regard to the distinction of legal status, see: "The equality principle of art. 8 section 1 of the Constitution does not prevent the State from treating the various denominations differently (since the section refers simply to "equal freeedom" and not to equality of treatment). The subsequent differentiation in the legal status of the religious denominations is strongly related to the issue of covenantal cooperation since some denominations, due to having stipulated an intesa, enjoy a special status while the others are acknowledged and regulated according to the above-mentioned general law of 1929 on the "admitted cults". This means that the substantive legal condition of a religious denomination is closely related to the formal way its status is regulated: access to bilateral sources is synonymous with better treatment", in M. VENTURA, *Religion and Law in Dialogue: Covenantal and non-Covenantal Cooperation of State and Religions in Italy*, in R. PUZA, N. DOE (eds.), *op. cit.*, p. 122.

(i) In the first place, it is to be mentioned the provision establishing that the law on admitted cults no. 1159 of 1929 as well as «any norm that conflicts with the present law» cease to be effective with regard to the religious denomination that has reached a negotiated agreement and is the specific addressee of the legislative act[56]. This rule clearly draws a line of distinction from those denominations that continue to be under the previous sources of law.

(ii) Another constant rule to be always found in these pieces of legislation is the recognition of the autonomy of the denomination concerned to be «freely organised according to their own regulations and governed by their statutes», as far as compatible – it should be recalled – with art. 8, second paragraph of the Constitution. Consequently, a statement follows according to which

> the Republic, referring to the rights of freedom guaranteed by the Constitution, recognises that the appointments of ministers of worship, the organization of the community and the disciplinary and spiritual acts take place without any interference by the state.

A component of such freedom of self-organisation is the explicit insurance of the free interaction with sister (and/or mother) bodies worldwide[57].

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[56] It is quite emblematic that the preamble to the first *Intesa* reads that "The Italian Republic, in referring to article 8 of the Constitution, and the Waldensian Table, in considering legislation on admitted cults of 1929-1930 not respecting equal freedom recognized by the Constitution for all religious confessions and therefore not suitable for regulating the relations between the churches it represents and the state agree that the law of approval, pursuant to article 8 of the Constitution, of this Agreement replaces any effect of the aforementioned legislation, with respect to the churches represented by the Table Waldensian".

[57] See the specific wording of some of the relevant provisions ("the Republic also guarantees free communication and collaboration of the Church in Italy with the headquarters of the Church of Jesus Christ of Latter-day Saints and with any other national and international body" (art. 3.3) and with the World Council of Churches, with federations and national and international bodies (art. 2.3); the Union of Buddhists is guaranteed "free communication with the Buddhist organizations that are part of it" (art. 2.3); and the Buddhist Institute Soka Gakkai is guaranteed free communication with the international Soka Gakkai, based in Japan-Tokyo, art. 2.3).

Furthermore, a distinction is introduced and adapted to peculiar needs of some of the denominations concerned: for the purposes of civil laws activities directed to the exercise of worship and pastoral care, to the formation of ministers of worship, for missionary and evangelization purposes, and to Christian education are regarded as religious or cult activities; wherever activities other than religion or worship, such as those of assistance, charity, instruction, education and culture are considered to be commercial or for profit activities.

According to the Intesa with the Church of Jesus Christ of Latter-day Saints, it is acknowledged that, for the Church, «the care of needs of souls also includes genealogical research necessary for the salvation of the souls of the ancestors. This activity however, is carried out in compliance with the laws in force».

In the agreement with the Soka Gakkai Institute,

> activities of religion or worship [are] those directed to the rite of the Gongyo and the worship of the Gohonzon, to religious ceremonies, to the study of Buddhist texts and in particular those of Nichiren Daishonin, to spiritual assistance, to the training of ministers of worship, to the diffusion of the Buddhist principles of nonviolence and of respect and compassion for all existing forms of life (art. 12).

(iii) A third area of regulation concerns the freedom of appointment of confessional ministers «without state interference» and the scope of ministerial activities that are ensured. Thus, magistrates or other authorities may not request ministers of worship to testify or to give information about people or subjects they have become aware of because of their own ministry. In case military service be mandatory, ministers of worship have the right to obtain, at their request, to be exempted from military service or assigned to civilian service and they are exempted from the call to arms if they are ministers of worship with care of souls.

Again, in the military field, for the purposes of spiritual assistance and in respect of needs of military service, ministers' right of access to the barracks is established as well as the right to organise special meetings, on premises prepared in accordance with the competent military authority. Furthermore, ministers of worship who are either military personnel on duty or performing alternative civilian service are placed

in condition of being able to perform, together with the service obligations, also their ministry of spiritual assistance to the military who request so.

With regard to spiritual assistance to members of the denomination concerned, a legislative provision establishes that military personnel belonging to the denomination concerned, who do request so, have the right to participate, in compliance with the needs of service, on the days and times fixed, to religious activities which take place in the localities where they perform their military service; in case there are no places of worship they can in any case obtain, in compliance with the service requirements, prior permission to attend ceremonies at the nearest location as certified by the competent denominational bodies.

In the event of the death in service, the competent military command adopts, in agreement with the relatives of the deceased, the necessary measures and ensure that the funerals are celebrated in accordance with the religious prescriptions.

(iv) Spiritual assistance by the ministers of worship is guaranteed in health, socio-health and social structures to members of the denomination and also to other patients who explicitly request it. The access of the ministers is free and without time limit. The management of the said structures are required to communicate the requests of spiritual assistance to the ministers of worship of the denomination.

The same normative model is addressed to spiritual assistance in prisons: a list of ministers of worship responsible for spiritual assistance in prisons is transmitted to the competent authority and such ministers are included among those who can visit the prisons without a special authorisation. Spiritual assistance in prisons is carried out at the request of prisoners or of their families and also for initiative by ministers of worship, and takes place in suitable premises made available by director of the penitentiary (who shall inform of each request from the detainees to the responsible minister of worship competent in the territory).

All the financial charges for carrying out spiritual assistance are the sole responsibility of the denomination concerned.

(v) A most important field of regulation concerns the teaching of religion(s) in public schools.

The general rule is that all students in Italian public schools have a right of option between choosing to take or not to take any religious instruction. In particular, it is to be stressed that no mandatory religious teaching is required in accordance with their respective religious affiliation: such condition, in fact, in line with constitutional secular principles, is simply non-existing in the public space (whether for members of the Roman Catholic Church or of minority religious communities).

The implementation of the general rule is, nevertheless, quite differentiated.

The main difference lies in the circumstance according to which, because of the Concordat and subsequent agreements, the Italian public education system is under the obligation to ensure the teaching of the Roman Catholic religion by teachers (who must receive an endorsement by the local bishop), even though, in line with the general *régime* – it is convenient to be repeated – choosing to receive such instruction is optional and voluntary for all students, whether Catholic or members of minority religious communities. No further obligation of denominational religious teaching in public schools is established with regard to religious minorities, unless under request by them.

In other words, the constitutional framework of the rules concerning religious instruction in public schools is structured in conformity to the need of guaranteeing the freedom of conscience of all pupils at any stage: in the first place, therefore, as stated above, all students are recognised the right not to avail themselves of any religious teachings[58].

Furthermore, if and what alternative religious teaching – apart from the Catholic one under the Concordat – is to be offered to students who are members of minority religious communities depends on the negotiations (and subsequent legislation) that originated a fairly wide range of different options.

[58] It is further established that, in order to give real effectiveness to the implementation of the right of a free choice, the school system is to ensure that religious teaching does not take place according to schedules that may still have for the pupils discriminating effects and that no forms of widespread religious teaching is carried out in the programs of other disciplines. In any case, pupils cannot be requested to perform any religious practices or to participate to acts of worship.

In the first place, in conformity with the constitutional principles of educational freedom, religious denominations have the right to establish their own schools of all types and levels. The exercise of such right of free establishment must be in compliance with current legislation on school equality and with educational rights.

On the opposite side, one is to find that, according to some of the *intese*, the option of a few denominations is to have no religious instruction in public schools for their students. Religious instruction thus results to be regarded as a thoroughly private activity to be kept accurately separated from interference by public institutions. An explicit provision to such extent is to be found in some of the agreements.

For instance, the text of the agreement with the Waldensians indicates a fairly radical attitude:

> the Italian Republic acknowledges that the Waldensian Table, in conviction that the education and religious formation of children and youth are the specific competence of families and churches, does not require in state-run schools or other educational public institutions any teaching of catechesis or of religious doctrine or any worship practices for anybody being a component of the churches that it represents (art. 9).

Likewise, in the preamble of the agreement with the Evangelical Church, one reads that the Assemblies of God, in the belief that education and religious instruction of children and youth are specific competence of families and churches, do not require to perform, in schools run by the state or other public bodies, the teaching of catechesis or religious doctrines or worship practices.

Also the *Intesa* with the Union of Jewish Communities is clear on the issue («any interference with religious education and training of Jewish pupils is excluded», art. 11.1) although in this case it is also stipulated that «the Italian Republic, in guaranteeing the pluralist character of the school, assures the officers designated by the Union or by the Community the right to respond to any requests coming from by pupils, their families or school bodies with regard to the study of Judaism» (art. 11.4).

According to the agreement (art. 6), the Buddhist Institute Soka Gakkai «benefits from the possibilities offered by current legislation to

respond to requests from pupils and their families regarding the knowledge and study of the religious doctrine of the Soka Gakkai».

The principle of non-interference is expressly mentioned in the agreement with the Italian Hindu Union Sanatana Dharma Samgha («any interference with the religious education of pupils belonging to the Hindu confession represented by the IHU is excluded», art. 6.1.) although officers designated by the IHU are acknowledged «the right to respond to any requests from pupils, their families or school bodies, in order to study the religious fact and its implications» (art. 6.4).

In most cases, although indirectly, the request by one denomination to introduce religious instruction in public schools according to the principles of their faith and by their own personnel has a binding effect on school authorities. In fact, there may be a request from students, from their families or from school bodies, to introduce forms of study *of the religious phenomenon and its implications* («lo studio del fatto religioso e delle sue implicazioni»). The wording of the provision is apparently chosen in order to make reference to a neutral and non-denominational teaching and, in particular, to safeguard the value of pluralism in public schools.

Nevertheless, taking into account that the provision is written in some of the *intese*, it is not surprising that such teaching may be entrusted to personnel appointed by some denominations[59]. It is further established that such activities are part of the optional activities aimed at expanding the offer of instruction determined by the educational institutions in the exercise of their autonomy, according to modalities agreed between schools and the individual religious denomination; and that any financial charges deriving from the implementation of said activities are borne by denomination concerned.

A specific regulation is further provided for the purpose of recognising the qualifications of higher theological education[60].

[59] For instance, the right to respond to any such requests is recognised to the Italian Union of Seventh-day Adventist Christian Churches, the Holy Orthodox Archdiocese of Italy and Exarchate of Southern Europe, the Apostolic Church, the Church of Jesus Christ of Latter-day Saints, the Italian Hindu Union.

[60] Reference is to the degrees and diplomas in theology and biblical culture, issued to students having the qualification of upper secondary school, by the Waldensian Fac-

(vi) Marriages celebrated within and by each denomination having an *intesa* with the state are recognised as producing civil effects upon transcription on public registers[61]. A standard procedure to such result is quite analytically regulated[62].

It is interesting to give evidence to a provision in the text of the agreement with the Union of Jewish Communities according to which «the right to celebrate and dissolve religious marriages according to Jewish law and tradition remains unaffected, without any civil effect or relevance»: in fact, this is a situation of public recognition of legal pluralism in religious family law which stands parallel to and unaffected by state law.

(vii) As the Italian calendar is greatly conditioned by Christian and Catholic holidays, it is only consequential that other denominations are acknowledged their own days of religious festivities.

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ulty of Theology, by the Rabbinical College in Rome, the Rabbinical School Margulies Disegni in Turin and other Rabbinical Schools recognised by the Union of Jewish Communities, by the School and Faculty of the Theological Studies Center of the Apostolic Church in Italy, by the Bible Institute of the Church of God's Assemblies in Italy, by the Adventist Institute of Biblical Culture. It is also provided that, were compulsory military service in force, respective students are admitted to enjoy the same postponements granted to university students of courses having similar duration.

[61] There are no rules on the celebration of marriages in the agreement with the Buddhist Union and the Buddhist Soka Gakkai Institute.

[62] The law requires that the spouses – having Italian citizenship – who intend to celebrate their marriage according to their own religion must communicate this intention to the competent public official (registry of civil status). The registrar, after proceeding to the publications requested by the parties, and after having ascertained that nothing opposes the celebration of marriage according to current regulations, certifies that they have been informed about rights and duties of the spouses by reading the provisions of the civil code. The minister of worship before whom the celebration takes place attaches the authorization issued by the public official immediately after the celebration. Furthermore, the minister of worship is under the obligation to transmit an original text of the marriage certificate for the required transcription in the public registrar (no later than five days after the celebration).

Jewish religious holidays are analytically listed in the *Intesa* and provisions relating to sabbatical rest are applicable to all of them, as established by the *Intesa* itself[63].

The right of Jews to observe the sabbatical rest (which runs from half an hour before sunset of the sun on Friday to one hour after sunset on Saturday) is guaranteed[64]. The same right of observing the biblical sabbatical day of rest (specified as running from sunset on Friday to sunset on Saturday) is granted to members of the Adventist Church and the rules on the exercise of such right are the same as those indicated above.

Specific rules are addressed to members of Orthodox Christians within the Holy Orthodox Archdiocese of Italy and Exarchate of Southern Europe: the list of religious holidays is punctually indicated as well as the rights and duties of their members as far as work and school duties are concerned[65].

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[63] The list includes: a) Rosh Hashana, first and second day; b) Yom Kippur; c) Succoth, first, second, seventh and eighth day; d) Simhat Tora; e) Pesach, eve, first and second day, seventh and eighth day; f) Shavuoth, first and second day; g) Fasting on the 9th of Av. It is also established that by June 30 of each year, the calendar of these holidays falling in the following calendar year is communicated by the Union to the Ministry of the Interior, which orders its publication in the Official Gazette.

[64] The right to enjoy the sabbatical rest as weekly rest may be exercised at their request by Jews "employed by the State, by public bodies or by private individuals or who carry out autonomous or commercial activities, who are in the armed forces and who are assigned to the replacement civil service. This right is exercised within the framework of the flexibility of work organization. In any other case the working hours not worked on Saturdays are made up on Sunday or on other working days without the right to any extraordinary compensation. However, the essential needs of the essential services are provided for by the legal system". The regulation includes provisions that ensure that "in setting the days of competition tests the competent authorities will take into account the need to respect the sabbatical rest". Also, "school authorities will adopt appropriate arrangements to allow Jewish candidates who request it to sit exam tests on a day other than Saturday". Finally, "the absences of Jewish pupils from school on Saturdays do not require a justification when requested by their parents or by the pupils themselves if of age".

[65] This is the text of art. 10: "1. To the Orthodox faithful, belonging to the Archdiocese, dependent on public or private entities or that carry out autonomous activities and assured the right to refrain from working in the following major religious holidays: Circumcision of the Lord, Holy Theophany, Holy Saturday, Holy Easter Sunday, Sun-

The right to celebrate Hindu religious holidays is also granted, with reference to "Dipavali", a feast which represents, among the festivals dedicated to the different divinities and followed by related traditions, the Victory of Light over Darkness[66].

Members of organizations represented by the Buddhist Union in Italy, at their request, are recognised the right «to observe the Vesak festival, which celebrates birth, enlightenment and death of the Buddha and which conventionally occurs on the last Saturday and Sunday of the month of May of each year»[67].

Members of Soka Gakkai Buddhist Institute have the right to observe, upon their request, the holidays of February 16, which celebrates the birth of Buddha Nichiren Daishonin, and October 12, which celebrates the inscription of the Dai Gohonzon, true cult object for SGBI members, by Nichiren Daishonin himself[68].

(viii) According to a general regulation, Italian taxpayers are allowed to devolve a part of their annual income tax – the so called 8x1000 – to the religious community of their free and voluntary choice

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day of Pentecost, Dormition of the Mother of God, Birth of the Lord and Syntax of the Mother of God, with the obligation to recover the relative working hours and without the right to any extraordinary remuneration. 2. On Good Friday and on the festivities referred to at paragraph 1 the absence from school of pupils belonging to the Orthodox Archdiocese is considered justified, at the request of the parents or guardians, or of themselves if of age. 3. The unavoidable needs of the services remain in any case essentials provided for by the legal system. 4. Within January 15th of each year, the dates of the holidays mentioned in paragraph 1 are communicated by the Archdiocese to the Ministry of the interior, which orders its publication in the Official Gazette".

[66] The text specifies that the day of the new moon is celebrated – amavasja – between the second half of October and the first half of November. With regard to work obligations, it is stated that "this right is exercised within the framework of flexibility of work organization". Furthermore, "by January 15th of each year the date of the holiday mentioned in paragraph 1 is communicated by the Hindu Union to the Ministry of the Interior, which orders its publication in the Official Gazette" (art. 25).

[67] The usual proviso is mentioned, that "this right is exercised in the framework of the flexibility of work organization". Individuals, nevertheless, "remain subject to the unavoidable needs of essential services as provided for by the legal system" (art. 23).

[68] And, once again, "this right is exercised within the framework of the flexibility of the organization of work. However, the essential requirements of the essential services provided for by the Italian legal system remain unaffected" (art. 22).

or to the state (which is bound to spend it for social purposes). All religious entities having either a Concordat – the Roman Catholic Church – or an agreement – the twelve communities dealt with so far – share this system of public financing.

In the preamble to the Intesa, the Church of Jesus Christ of Latter-day Saints declares that they do not intend participating to their share in the distribution of the 8x1000 of citizens' donation from the income tax.

Most denominations choose to state the specific purposes in whose support the funds thus raised are used.

The Waldensian Table states its strong commitment «to provide for the maintenance of the cult and for the support of ministers solely by means of volunteer offerings». Consequently, «the Waldensian Table will use the sums devolved by taxpayers exclusively for social, welfare, humanitarian and cultural interventions in Italy and abroad directly, through the entities having part in the Waldensian system or through associative and ecumenical organisations at the national and international level» (from the text added to the agreement).

For the Apostolic Church the sums so collected are addressed «to social, cultural and humanitarian interventions, also in favour of other foreign countries» (art. 24). For the Assemblies of God, the sums are to be allocated «to social and humanitarian interventions also in favour of third world countries» (art. 26). For the Orthodox Church, funds are employed «for the purposes of worship, education, assistance and charity».

In some other cases, the quota of funds from the 8x1000 is «intended for the support of ministers of worship and to specific needs of worship and evangelization» by the Evangelical Lutheran Church (art. 26) or to activities «having the purpose of religion or worship, as well as for reimbursement of expenses of ministers of worship and missionaries» by the Seventh Day Adventist Church (art. 26).

The Buddhist Union chooses to commit itself to employing the sums it receives from the 8x1000 fund for the sustenance of ministers of worship and for religious or cult activities, for activities

> directed to meditation practices, initiations, religious ordinations, to religious ceremonies, to reading and commenting on the texts of Dharma, spiritual assistance, spiritual retreats, the monastic and lay formation of ministers of worship *(art. 10 and art. 19)*.

The Buddhists of the Soka Gakkai Institute allocates the funds for the realization of the institutional purposes of the Institute and to social and humanitarian interventions in Italy and abroad, as well as initiatives for the promotion of peace, respect and defense of life in all existing forms, as well as for the defense of the environment (art. 18).

For the Hindu Union,

> the purposes of use of those funds is the sustenance of ministers of worship, the needs of worship and activities such as religious or cult activities, such as those directed to meditation practices, initiations, religious ordinations, to religious ceremonies, to reading and commenting on sacred texts – Veda, Purana, Agama, Itihasa, Sastra –, to spiritual assistance, to spiritual retreats, to the monastic and lay formation of the ministers of cult *(art. 20)*.

(ix) The regulation of burials and cemeteries is strictly linked to religious beliefs and combines a first set of rules that are substantively common to all religious denominations and another one which reflects fundamental diversities.

With regard to most Christian religious minorities, the text of the respective *Intesa* either does not present specific provisions on cemeteries and burials of members – taking for granted the performance of practices considered suitable to their specific creed – or formalises the need (shared by non-Christian religious minorities) of a reserved own area on the premises of a cemetery.

The latter is the case of the Church of Jesus Christ of Latter-day Saints as well as of the Holy Orthodox Archdiocese of Italy and Exarchate of Southern Europe: the *Intesa* of the latter establishes the principle according to which «where possible, [members] can be provided in the cemeteries reserved areas in accordance with current legislation» (art. 11.5).

As to the former, two general principles are stated: that «burial in the wards of the Church takes place according to a regulation issued by

the same, in accordance with the Italian legislation on the subject»; and that «in the cemeteries of the Church the observance of the rites of Church ceremonies is ensured». Furthermore, the planning of cemeteries «must provide, upon request of the Church, special wards for the burial of its deceased faithful, constituted by granting an adequate area of the cemetery in accordance with the laws in force»; and «burial in Church cemeteries and special wards of the municipal cemeteries are perpetual in accordance with the rites and the tradition of the Church itself» (art. 11).

In the second group, a fairly similar set of provisions is present in the *Intesa* with the Union of Jewish Communities: the general rules are that «observance of Jewish ritual prescriptions is ensured in Jewish cemeteries» and that «burials in community cemeteries and Jewish wards of municipal cemeteries are perpetual in accordance with the law and the Jewish tradition». Consequently, the aspiration of having at least special reserved areas for the burial of members of the Jewish Community is supported by provisions which establish that, under request by the latter, municipal authorities must include such reserved areas in their planning of cemeteries, mayors are to give «in concession an adequate area in the cemetery», and burial in such wards «takes place according to regulation issued by the competent Community» (art. 16).

For the Buddhist Union, the *Intesa* establishes that their «members are guaranteed compliance with the rules of [their] own tradition regarding the treatment of corpses», in compliance with the applicable regulations, and that «where possible, they can be provided in the cemeteries reserved areas in accordance with current legislation» (art. 9). Similar rules have been agreed upon in favour of members of the Hindu community (art. 10).

Also for members of the Buddhist Soka Gakkai Institute, «the respect of the rules of their own tradition as regards the treatment of bodies, in compliance with the regulations in force on the matter, is guaranteed»; and «reserved areas may be provided in the cemeteries in accordance with current legislation». Furthermore,

> an individual declaration issued to the Soka Gakkai Institute by its members that they wish to be cremated is equivalent to the declarations deemed valid, by the laws in force, for the purposes of authorizations for cremation *(art. 9)*.

(x) Dietary requirements are regularly present in the form of references to rules of religious law, whose compliance is therefore mandatory for members of some denominations also in the state's public space.

In the present Italian context, however, only the Union of Jewish Communities has negotiated the introduction of specific provisions in their agreement with the State. The general legal framework is that recruitment in the armed forces, police or other assimilated services, stays in hospitals, nursing homes or public nursing homes, and permanence in institutes of prevention and punishment may not give rise to any impediment in the exercise of religious freedom and in the fulfillment of worship practices. Within this general rule, Jews who find themselves in the conditions mentioned above are recognised the right to observe the Jewish prescriptions in food matters, at their request, with the assistance of the competent Community, and without burdens for the institutions in which they are (art. 7). Instrumental to respecting *kosher* food requirements is the provision allowing *shekita*, the ritual slaughtering of animals for human consumption: «The slaughtering performed according to the Jewish rite continues to be regulated […] in accordance with to Jewish law and tradition» (art. 5)[69].

Apart from food regulation, another Jewish religious practice expressly mentioned in the relative *Intesa*, reads that «Jews who request it are allowed to lend the oath required by the laws of the state with head covered», thus introducing into the Italian legal system another rule of religious law which therefore results compatible.

[69] Reference is to the ministerial decree of 11 June 1980, published in the Official Gazette no. 168 of 20 June 1980. On the regulation of the ritual practice in Europe, see P. LERNER, A.M. RABELLO, *The prohibition of ritual slaughtering (kosher shechita and halal) and freedom of religion of minorities*, in *Journal of law and religion*, vol. 22, 2006/2007, pp. 1-62, translated into Italian by C. PICIOCCHI, *Sul bilanciamento costituzionale fra libertà religiosa e protezione degli animali*, with a presentation by R. TONIATTI, *Il divieto di macellazione rituale (shekità kosher e halal) e la libertà religiosa delle minoranze*, Quaderni del Dipartimento di scienze giuridiche, Trento, 2010.

(xi) Some religious minorities in Italy share a particular concern with regard to the substantive area of bearing arms and participation to national military service.

This is the well-known case of members of the Christian Adventist Church: in the first place, therefore, the *Intesa* establishes that

> the Italian Republic, having acknowledged that the Christian Adventist Church is for reasons of faith against the use of weapons, ensures that Adventists subject to the service obligation are assigned, at their request and in compliance with the provisions on conscientious objection, to the substitute civil service.

Nevertheless, «in the event of a call to arms, Adventists who have been recruited in the military service are assigned, at their request, to the civilian substitute service, or to unarmed military service or to sanitary military services, in relation to the needs» (art. 6)[70].

The same wide preliminary acknowledgement to the Buddhist Union is in the text of their agreement («the Republic, having acknowledged that UBI is for spiritual reasons contrary to the use of weapons») is followed from provisions that regulate the same exemptions as above, although no special exemptions are reserved to ministers (art. 4).

On the contrary, in the agreement with the Soka Gokkai Institute, «in the event of restoration of compulsory military service» and if subjects to the obligation of military service, only ministers of worship are granted to be «assigned to civil service, at their request and in compliance with the provisions on conscientious objection». Whereas,

> in the event of recall to service for reasons of general mobilisation, ministers of worship, who have served in the military, are assigned, at their request, to the civil service or health services, in relation to the needs of the service *(art. 4)*.

[70] Further exemptions are guaranteed for ministers of worship of the Christian Adventist Church: in fact, they are recognised the right, at their request, to be exempted from military service or to be assigned to the civilian replacement service. This faculty is recognized to ministers of worship with care of souls even in case of general mobilization. In that case, ministers of worship without care of souls are assigned to the civilian replacement service or to health services (art. 6).

(xii) Important provisions concern the protection accorded to the buildings of the different denominations having an agreement: the rules are that such buildings cannot be employed, requisitioned, expropriated or demolished, except for serious reasons and after agreement with the respective religious authorities and that – again, except in cases of urgent need – the public force cannot enter, for the exercise of its functions, in such buildings without having made arrangements with the same authorities of individual churches.

(xiii) Further provisions provide for special regulations for individual religious minorities, whether in the form of an exception from a general rule or of general statements on some of their respective policies.

In such residual context, with reference to the specific approach of the current Criminal Code (1930, with many amendments), in the respective agreement it is established that

> the Italian Republic acknowledges that the Waldensian Table, in the belief that faith does not require direct criminal protection, reaffirms the principle that criminal protection in religious matters must be implemented only through the protection of the exercise of rights of liberty recognized and guaranteed by the Constitution, and not through the specific protection of religious sentiment *(art. 4)*.

The same attitude is found in both the Preambles to the agreement with the Union of Buddhists, where one can read that «the Italian Union of Buddhists states that faith does not require direct criminal protection»; and with the Evangelical Church, according to whose opinion

> the Assemblies of God, convinced that faith does not require direct criminal protection, reaffirm the principle that criminal protection in this matter must only be implemented through protection of the exercise of the rights of freedom recognized and guaranteed by the Constitution, and not through the specific protection of religious sentiment.

The text of some of the agreements (with the Orthodox Archdiocese, with the Adventists and with the Hindu Union) refers also to radio and television broadcasting: on the assumption that the radio and television system is run in conformity with the principles of freedom of expression, of thought and pluralism as dictated by the Constitution, it is stat-

ed that, as part of the planning, requests will be taken into account for broadcasting services managed by religious entities operating in local areas, considering factors such as the share of users suitable for ensuring their economic management and an adequate plurality of broadcasters in compliance with regulations in the field.

In the preamble to the *Intesa* with the Union of Adventist Christian Churches it is stated – as a general policy orientation – that such Churches confirm «the validity of the values of separatism to which this agreement is inspired».

Also to be mentioned the statement, in the preamble, according to which the Orthodox Archdiocese «declares that its own faithful are called to live the religious experience in a community dimension and participate in spreading the message of the Gospel».

4. A new constitutional context for religious minorities in Spain

The use of formal agreements between the State and representative institutions of religious minorities in Spain is a thoroughly innovative practice under the law since the 1978 Constitution.

The liberal and democratic post-Franco constitutional scenario adopted a new cooperative attitude toward the religious sphere – until then, in fact, dominated by the Roman Catholic Church – taking into account the strong cultural drive toward religious pluralism and a secularised society[71].

[71] It has been noticed that "la experiencia constitucional iniciada en 1978 es la primera en la que la libertad religiosa ha dejado de ser un problema para la convivencia ciudadana. La primera en la cual el carácter aconfesional del Estado se está afirmando sin estridencia y sin agresividad y en la que el reconocimiento de la presencia de la Iglesia Católica en la sociedad española, expresamente mencionada en el apartado 3 del art. 16, no se traduce en discriminación para las demás confesiones religiosas", in J. PÉREZ ROYO, *Curso de Derecho Constitucional*, XIII ed., Barcelona, 2012, p. 259. The new inclination of the Spanish liberal and democratic constitutional order is furthermore expressly acknowledged in the preamble of each one of the three Agreements of cooperation signed with religious minorities. The following standard text is from the Agreement of cooperation with Protestant Churches: "La Constitución Española de 1978, al configurar un Estado democrático y pluralista, ha supuesto un profundo cambio en la tradicional actitud del Estado ante el hecho religioso, consagrado como

The perspective of cooperation between a non-confessional state and Church(es) is to be interpreted as a more balanced political and normative framework with regard to both the strict secularist regulation of the religious phenomenon introduced by the Constitution of the Second Republic (1931)[72] and the monolithic Catholic clericalism established after the end of the civil war until the collapse of authoritarian rule[73].

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fundamentales los derechos de igualdad y libertad religiosa, cuyo ejercicio garantiza con la mayor amplitud permitida por las exigencias derivadas del mantenimiento del orden público protegido por la Ley y por el respeto debido a los derechos fundamentales de los demás".

[72] Secularism and separation were the inspiring principles also of the Constitution of the second Republic. It declared that "the Spanish State does not have an official religion" (art. 3) and so far there is a substantive continuity with the new 1978 Constitution. The main difference is that the Republic had established a system of strict control on churches, religious associations and institutions, on national security and public order ground: the radically innovative context of the 1931 new constitutional *régime* could explain these options, as a consequence of the role of political opposition plaid by the Roman Catholic Church. Art. 26 of the 1931 Constitution stated that "all faiths shall be considered as Associations subject to a special law. The state, regions, provinces and municipalities, shall not maintain, promote, or aid financially churches, religious associations and institutions. A special law shall regulate the total extinction within a maximum of two years of the budget for the Clergy. Those orders that statutorily impose, in addition to the three canonical votes, another special obedience to any legitimate authority other than the State, shall stay dissolved. Their assets will be nationalized and affected to charitable and educational ends. Other religious orders will be subject to a special law passed by these constituents Cortes and fixed to the following rules: 1. Dissolution of those which, by their activities, constitute a danger to state security. 2. Inscription of those that remain in a special registry dependant on the ministry of justice. 3. Inability to acquire and conserve, either by themselves or through an intermediary, more assets than those, with justification, they intend for living costs or those that go to direct completion of their private purposes. 4. A ban on exercising industry, commerce, or education. 5. Submission to all the tax laws of the country. 6. Obligation to render annually accounts to the State of the investment of its assets in connection with the aims of the Association. The property of the Religious Orders may be nationalized".

[73] Under the previous authoritarian *régime*, the state entertained formal relations only with the Roman Catholic Church through a Concordat (1953). On Spanish historical perspectives, see J. MARTINEZ-TORRON, *Religious Freedom and Democratic Change in Spain*, in *Brigham Young University Law Review*, 2006, p. 777.

The current constitutional context implicitly assumes the pluralist paradigm and it combines recognition of freedom of ideology, religion and worship within the same provision (art. 16)[74]. It is inspired by the liberal principles of secularism and mutual separation (art. 16.3 «There shall be no State religion») and of protection of religious freedom, this latter being guaranteed to both "individuals and communities", thus acknowledging the collective social dimension beyond the strictly individual sphere[75].

The private sphere is reinforced by the provision that «no one may be compelled to make statements regarding his religion, beliefs or ideologies» – thus expressing the negative side of the protection of religious freedom –, whereas one more indicator of the recognition of the collective dimension is drawn from the 'consensual principle'[76].

In fact, contrary to art. 8 of the Italian Constitution, art. 16 of the Spanish Constitution does not expressly mentions such agreements as specific instruments, but, however, it does indirectly incorporates the consensual principle when it sets the mandatory obligation to «take into account the religious beliefs of Spanish society» and, mostly, the pur-

[74] Also art. 9 of the ECHR and art. 10 of the Charter of Fundamental Rights of the European Union choose to combine more contents related to intellectual and spiritual life of individuals ("freedom of thought, conscience and religion") within the same provision and under the same limits. Such normative format strongly suggests that freedom of religion does not enjoy a distinct status – supposedly hierarchically higher – from other fundamental rights and is properly subject to balancing tests in position of equality.

[75] The standard text of the preamble of the Agreements of cooperation acknowledges that "los derechos de igualdad y libertad religiosa […] concebidos originariamente como derechos individuales de los ciudadanos, alcanzan también, por derivación, a las Confesiones o Comunidades en que aquéllos se integran para el cumplimiento comunitario de sus fines religiosos".

[76] A survey of relevant constitutional rules must include also art. 14 ("Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance") and art. 9.2 ("It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective").

pose of consequently maintaining «appropriate cooperation relations with the Catholic Church and other confessions»[77].

The relations between Spain and the Roman Catholic Church are regulated by four negotiated agreements (*acuerdos*) producing the effect of replacing the 1953 Concordat and, consequently – in spite of the name –, enjoying the status of sources of international law, enacted through the parliamentary procedure required for international treaties[78].

A more detailed regulation is provided by a sub-constitutional source, the *Ley Orgánica de Libertad Religiosa* (LOLR, 1980): art. 7 repeats in part the text of art. 16 of the Constitution and then expressly makes reference to the establishment of "cooperation agreements or conventions" without any further general or specific purpose other than what can be drawn from the notion of 'cooperation'.

The same provision, nevertheless, introduces new precepts: Churches, Faiths or Religious Communities are eligible to become partners of the agreements under the condition, in the first place, of being "enrolled in the Registry", and secondly, of having achieved the enjoyment of 'well-known roots' (*notorio arraigo*) in Spanish society due to the territory covered and the number of the faithful. Furthermore, «such agreements shall, in any case, be subject to approval by an Act of Parliament»[79].

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[77] The explicit mention of the Catholic Church only is not necessarily discriminating the other confessions as it still represents a sociological majority among religions and because, due its character of subject of international law, it is the only partner of an international treaty. The adjective "appropriate" in the text of the provision (in Spanish: "las *consiguientes* relaciones de cooperación") may therefore be interpreted as indicating a formal feature of the "cooperation relations".

[78] The agreements with the Roman Catholic Church are: the Agreement of July 28, 1976, which abolishes the privilege of ecclesiastical jurisdiction and the right of presentation of bishops and other ecclesiastical prerogatives; and the four Agreements of January 3, 1979 relative respectively to legal affairs; to teaching and cultural affairs; to religious assistance in the armed forces and military service of clergy and ministers of cult; and to economic affairs.

[79] This is the Spanish text of the provision: "El Estado, teniendo en cuenta las creencias religiosas existentes en la sociedad española, establecerá, en su caso, Acuerdos o Convenios de cooperación con las Iglesias, Confesiones y Comunidades

The regulation leaves some textual key issues without a clear understanding. Reference to other parts of the LOLR is required for a wider definition of the whole normative framework. In fact, eligibility for concluding agreements is the result of inscription of Churches, Faiths and Religious Communities in the Registry (art. 5 LOLR) and inscription in the Registry depends on their conformity to a set of requirements (art. 6 LOLR).

In fact, «Registered Churches, Faiths, and Religious Communities shall be fully independent and may lay down their own organisational rules, internal and staff by-laws». Such rules include those «governing the institutions they create to accomplish their purposes» as well as «clauses on the safeguard of their religious identity and own personality, as well as the due respect for their beliefs». However, their independence and autonomy must be «without prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination». In other words, the basic constitutional values are there to control the independence and autonomy of registered churches, faiths, and religious communities (art. 6 LOLR).

Furthermore, the granting of legal personality to Churches, Faiths and Religious Communities and their Federations that submit an application depends on registration which requires a communication concerning the

> foundation or establishment of the organisation in Spain, declaration of religious purpose, denomination and other particulars of identity, rules of procedure and representative bodies, including such body's powers and requisites for valid designation thereof *(art. 5 LOLR)*.

The implementation of the 'other confessions' agreement clause' of art. 16 of the Constitution is therefore part of a substantive and procedural framework that still leaves some doubts of interpretation. What does appear quite settled is that the rationale of the textual provision

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religiosas inscritas en el Registro que por su ámbito y número de creyentes hayan alcanzado notorio arraigo en España. En todo caso, estos Acuerdos se aprobarán por Ley de las Cortes Generales".

indicates that there is no obligation on the State to start a negotiation and finalise the agreement[80].

Whether the translation of the expression *notorio arraigo* as 'well-known roots' be correct or not[81], the precise meaning of it is indeed very vague and under the possibility of arbitrary interpretations and applications. The same can be said with regard to the 'territory and number clause'. Still, after the negotiation is over and agreement on a given text is achieved between the parties, is the text amendable by Parliament or is Parliament bound to either vote in favour or to reject it?

The required parliamentary approval of the agreements is exercised through an act (*ley de las Cortes Generales*) that remains distinct from the text of the agreement itself, which is simply attached to it. This practice leaves the legislative function of the parliamentary chambers formally unaffected, on the one hand, and, on the other, enhances the role of social groups in dealing with the normative function that is meant to regulate their interests and claims of protection[82]. In other words, such agreements deserve the qualification of instruments of participatory democracy as part of a formal legislative decision-making

[80] The opinion is to be shared that "sin embargo, al afirmar la LOLR "establecerá, en su caso", la concurrencia de estos dos requisitos, y en particular el de notorio arraigo, no implica necesariamente que el Estado esté obligado a la firma de un Acuerdo", in *Acuerdos de cooperación*, in *Observatorio del pluralismo religioso en España*, available at *https://www.observatorioreligion.es/diccionario-confesiones-religiosas/glosario/acuerdos_de_cooperacion.html*.

[81] A different translation ("notorious radication" or "deep radication") is suggested in G.M. MORAN, *The Spanish System of Church and State*, in *Brigham Young University Law Review*, 1995, p. 544.

[82] See J. MANTECÓN, *España: Los acuerdos del Estado con la Santa Sede Y las confesiones minoritarias*, in *Revista Latinoamericana de Derecho y Religión*, 2016, p. 1 ss., where it is noticed that "el acuerdo resulta ser un mero presupuesto de la ley mediante la que es aprobado, y que no compromete en absoluto la soberanía del Parlamento" and that "se trata de un acto unilateral estatal". However, the practice of conclusion of agreements is "una manifestación más del fenómeno, cada vez más recurrente en el Estado moderno de que éste, antes de legislar sobre algún aspecto concreto, procura ponerse de acuerdo con los interlocutores sociales afectados (sindicatos, empresarios, categorías profesionales, etc.)".

function, and as such they are to be judicially interpreted and enforced[83].

Consequently, the opinion is to be shared that the Chambers do not have a role in the determination of the contents of the agreements[84].

The notion of *notorio arraigo* ('well-known roots') and the 'territory and number clause' can be explained and interpreted with reference to no other argument than the practice followed in the implementation of the relevant sources of law. In particular, the three vague requirements just mentioned were applied to religions (Protestantism, Judaism and Islam), rather than to confessions as established religious institutions, and to their federal organisations that would reduce domestic differences within each one of them. Such federations «funcionan como estructuras representativas del conjunto de Iglesias o comunidades que las componen, facilitando su interlocución con el Estado»[85].

The agreements, therefore, are 'open' and 'closed' instruments, in the sense that other registered religious entities may join the federation and become a party to the respective *Acuerdo* and that when a registered religious entity leaves the federation it steps out of the *Acuerdo* as well.

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[83] See: "estos acuerdos, en cuanto tales, suelen ser calificados por la mayor parte de los autores como pactos de Derecho público interno, subrayando, por un lado su carácter de acuerdo con un ente de Derecho público, pero proclamando por otro su naturaleza formal normativa de Derecho estatal interno. En esta línea, el Consejo de Estado los ha definido como «convenios de Derecho público, próximos, aunque diferenciados, de los acuerdos con la Santa Sede»", J. MANTECÓN, *España: Los acuerdos del Estado*, cit., p. 4.

[84] The opinion has been expressed that "los acuerdos, en cuanto pactos –y por tanto como una realidad jurídica–, son algo; son un acto norma que obligaría verdaderamente a las partes. El acuerdo, por definición, aparece como un texto con vocación normativa y vinculante para ambas en virtud del principio «pacta sunt servanda»; aunque no revista una precisa categoría formal en el ámbito de nuestro ordenamiento jurídico. Pero si la LOLR habla de acuerdos o convenios con las Confesiones, por más que los supedite a la ulterior aprobación formal del legislativo, habrá que entender que 6 lo que pretende establecer con las Confesiones son verdaderos acuerdos o pactos, de los que resulte un empeño mutuo", J. MANTECÓN, *España: Los acuerdos del Estado*, cit., p. 5.

[85] See *Acuerdos de cooperación*, in *Observatorio del pluralismo religioso en España*.

Agreements of cooperation have been signed between the Spanish state and the Federation of Evangelical Communities of Spain (FEREDE), the Federation of Israelite Communities of Spain (FCI) and the Islamic Commission of Spain (CIE). All three *Acuerdos de cooperación* have been signed and have received approval by *las Cortes Generales* through three distinct parliamentary acts – respectively, Ley n. 24, 25, 26 – on the same day (November 10, 1992).

The fact that the parties signing the Agreements are the Federations means that their content can only be applied to those religious entities that are part of the respective Federations. In Spain as well, therefore, one has to distinguish between a difference in status as far as the source of regulation among religious denominations: on the one hand the Roman Catholic Church, on the other the three federated entities being part of an *Acuerdo*, and – lastly – other denominations as well as individuals who are not members of any of the former entities, in both cases – denominations and individuals – being under the protection of the Constitution and the 1980 *Ley Orgánica de Libertad Religiosa* (just as in Italy both of them enjoy the guarantees of the Constitution and the 1929 act on admitted cults, the inertia of Italian Parliament emerging as a negative distinguishing feature).

4.1. Agreements and negotiated legislation: the Acuerdo with three religious minorities

The format of each Agreement is very similar.

The preamble (*exposición de motivos*) recalls the innovative distinctive liberal character of the state and its constitutional mandate to respond to religious beliefs of Spanish society by entertaining cooperative relations with religious confessions. It also recalls that the *Ley Orgánica de Libertad Religiosa* introduces specific instruments of cooperation with those religious confessions whose roots in Spanish society – by virtue of the number of their believers and their territorial presence – have achieved self-evident visibility. The preamble eventually summarises the contents of the Agreement after recognising that the specific religious community it deals with does possess those required features (and something more, to the extent that Judaism is recognised

because of its historical presence – without further remarks – while Islam is acknowledged as contributing to the definition of Spanish identity)[86].

Also the substantive provisions are quite similar, as they accommodate shared needs of religious minorities, introducing an adaptation of general rules to the specific context.

(i) A common pattern of regulation is adopted by the relevant Spanish statutes with regard to the identification and definition of the *status* of ministers of cult.

Certification of the entitlement to the religious role is a function of the unitary entities that are party to the agreement. Differences in definition reflect the specific role that religious ministers are to play in their respective community: functions of worship and religious assistance are tasks shared by all of them, whereas possession of the formal title of Rabbi is a requirement for Jewish communities, while Islamic Imams have also the task of being in charge of the management of their community[87].

[86] See Act no. 24/1992: "en este caso se encuentra el protestantismo español, en su conjunto, integrado por las distintas Iglesias de confesión evangélica, la práctica totalidad de las cuales […] han constituido la Federación de Entidades Religiosas Evangélicas de España (FEREDE), como órgano representativo de las mismas ante el Estado […]"; Act no. 25/1992: "En este caso se encuentra la religión judia, de tradición milenaria en nuestro país, integrada por distintas Comunidades de dicha confesión […] que han constituido la Federación de Comunidades Israelitas de España, como organo representativo de las mismas ante el Estado"; Act no. 26/1992: "en este caso se encuentra la religión islámica de tradición secular en nuestro país, con relevante importancia en la formación de la identidad española, representada por distintas Comunidades de dicha confesión, inscritas en el Registro de Entidades Religiosas e integradas en alguna de las dos Federaciones igualmente inscritas, denominadas Federación Española de Entidades Religiosas Islámicas y Unión de Comunidades Islámicas de España, que, a su vez, han constituido una entidad religiosa inscrita con la denominación de «Comisión Islámica de España», como órgano representativo del Islam en España ante el Estado […]. Dando respuesta a los deseos formulados por ambas Federaciones, expresión de la voluntad de los musulmanes españoles, y tras las oportunas negociaciones se llegó a la conclusión del presente Acuerdo de Cooperación".

[87] See the text: "For all legal purposes, ministers of worship of the Churches belonging to the FEREDE are the natural persons who are dedicated, on a stable basis, to

All ministers of cult are subject to the general provisions of the Military Service[88], although they may request to be assigned to missions that are compatible with their ministry. The only partial exception concerns Rabbis who may request to provide religious assistance in the Armed Forces or be assigned to another mission that is compatible with their Ministry.

An important component of the *status* of all ministers of cult is that they «will be not obliged to testify about facts that have been revealed to them in the exercise of their functions of worship or religious assistance in the terms legally established for professional secrecy».

(ii) The functions of ministers of cult are defined with reference to the respective religious creed: for Evangelical ministers, worship or religious assistance functions are those related to the exercise of worship, administration of sacraments, care of souls, preaching the Gospel and religious teaching. As to the religious functions of Rabbis, the definition refers to those that are exercised according to Jewish Law and tradition, in particular those that derive from the rabbinical function, of the exercise of worship, of rendering of ritual services, of the training of rabbis, of the teaching of the Jewish religion and of religious assistance. Likewise, according to the *Acuerdo*, the Islamic functions of worship, instruction and religious assistance are those that are in ac-

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the functions of worship or religious assistance and certify compliance with these requirements, through certification issued by the respective Church […]" (art. 1). And, "ministers of worship of the Communities belonging to the Federation of Israelite Communities of Spain are individuals being in possession of the title of Rabbi, who carry out their religious functions on a stable and permanent basis and certify compliance with these requirements by means of a certificate issued by the Community to which they belong […]" (art. 3). Similarly, "Islamic religious ministers and Imams of the Islamic Communities are individuals who are dedicated with stable character to governing functions of the Communities, to directing prayer, to Islamic religious instruction and assistance and certify compliance with these requirements by means of a certificate issued by the Community to which they belong, with the confirmation of the Islamic Commission of Spain" (art. 3).

[88] It is also established that the studies carried out in the respective seminaries or schools or centers will give right to extension of incorporation to second class ranks, in the established terms in the current legislation of the Military Service.

cordance with Islamic law and tradition, emanated from the Koran or Sunna and protected by the Organic Law on Religious Freedom.

The definitions referred to Judaism and Islam appear to be quite tautological, as they are textually drawn from the respective religious sources of law and traditions. In this sense, such definitions – whether taken out of the proper constitutional context – might be considered virtually suitable to introduce into the legal system rules not necessarily compatible with constitutional values, for example with regard – just as in the case of the Concordat with the Roman Catholic Church – to the principle of equal gender *status*. Further comments on this issue will be developed in the last paragraph.

(iii) The right to spiritual assistance of individuals is regulated both in the armed forces as well as in penitentiaries, hospitals, healthcare or other similar public centers or establishments, through distinct provisions, supposedly in order to avoid any assimilation of the former to the latter because of the element of coercion involved.

The right of all the military – whether or not professionals, and irrespective of how many people of that religious creed serve in the armed forces – to participate in the religious activities and rites in the days and hours of obligation is guaranteed although under condition, with prior authorization from their Heads, who will ensure that the exercise of those rights is compatible with the needs of the service, facilitating the places and means suitable for their development. More generally, «religious assistance will be dispensed by ministers of worship appointed by the respective Head-institution and authorized by the army commands that will provide the necessary collaboration so that they can carry out their functions».

It is specified that such rights and functions are to be exercised under the same conditions as the ministers of worship of other Churches, Confessions or Communities that have entered into Cooperation Agreements with the state, thus highlighting a self-evident discrimination against those minority religious entities that have not (yet) achieved the same status.

It is also stated that the Jewish military who cannot fulfill the religious obligations for not having a synagogue in the place of service

may be authorized to comply with those obligations in the synagogue of the nearest town.

The *Acuerdo* specifies that

> Muslim military personnel who cannot fulfill their Islamic religious obligations, especially the collective common prayer on Fridays because there is no mosque or, where appropriate, no place of worship at the place of destination may be authorized for the fulfillment of those obligations in the mosque or place of worship of the nearest town, when service needs allow it.

State authorities are under the obligation of informing the family of the death of Muslim military personnel while on duty. The same provision is found also in the agreement with the Jewish Community which specifies that the purpose of the communication is that they can receive the proper ceremony and that they may be buried according to the Jewish rite.

The access of ministers of worship in other structures (penitentiary, hospital, healthcare or other similar public centers or establishments) for the purpose of providing spiritual assistance is free and without schedule limitation and

> in any case, religious assistance will be provided with due respect for the principle of religious freedom and with observance of the rules of organisation and internal regime of the centers, especially the provisions of penitentiary legislation.

Another general rule is that «the expenses that the development of the aforementioned spiritual assistance of inmates originates will be paid by the respective Head-Institution».

(iv) The *Acuerdos* give a definition of what are to be regarded as places of worship.

Such are «the buildings or premises that are permanently and exclusively assigned to the functions of worship or religious assistance, when so certified by the respective Church with the declaration of conformity by the Permanent Commission of the FEREDE»; and «the buildings or premises that are destined permanently and exclusively to the functions of cult, instruction or religious assistance, when certified by the respec-

tive Jewish Community»; likewise, «mosques or spaces of cult of the Islamic Communities belonging to the Islamic Commission of Spain, the buildings or premises exclusively destined to the habitual practice of the prayer, of Islamic religious instruction or assistance, when so certified by the respective community» and by the Islamic Commission of Spain.

All places of worship of the three religious minorities enjoy the status of inviolability in the terms established in the laws. In the event of forced expropriation, the respective national authorities must be previously heard, except for reasons of urgency, national security and defense or serious public order or security. Similarly, such places of worship may not be demolished without being previously deprived of their religious character, except in the cases provided for in the laws, for reasons of urgency or danger[89].

(v) The regulation of burials and cemeteries of religious minorities is a very relevant topic in a country, like Spain, whose transition to the formal recognition of religious pluralism and, most notably, of minorities belonging to a non-Christian background is so relatively recent.

Jewish and Islamic cemeteries are granted the right to «enjoy the legal benefits [established] for places of worship» and to have their own denominational reserved burial area.

Therefore, Israelite Communities, belonging to the FCI as well as Islamic Communities belonging to the Islamic Commission of Spain have the right to the concession of plots reserved, respectively, for Jewish and Islamic burials in the municipal cemeteries, as well as «the right to own private cemeteries, in accordance with the provisions of the regime of local and health legislation». The principle of reserved burial ground includes

> the right to transfer the bodies of the deceased currently buried in municipal cemeteries and of those whose death occurs in a locality where

[89] To be mentioned that "the State respects and protects the inviolability of the archives and other documents belonging to the Islamic Commission of Spain as well as of its member Communities". No such provision is present in the text of the other two agreements.

there is no Jewish or Islamic cemetery to cemeteries belonging, respectively, to the Jewish of Islamic Community.

Furthermore, appropriate measures are taken to observe the traditional Jewish or Islamic rules regarding burials, inhumation ceremonies and rituals, which will be carried out with the intervention of the local Jewish or Islamic Community.

(vi) Marriage ceremonies of all the religious minorities are recognised to have civil effects, under the condition of being celebrated before the respective ministers of worship and of being registered in the Civil Registry[90].

Only for members of Islamic Communities, the provision expressly refers to civil effects attributed to the marriage celebrated «according to the religious form established in Islamic law from the moment of its

[90] The normative texts provide quite a detailed procedure: couples who wish to marry according to the religious law of their own minority community are requested to start the procedure before the Court Clerk (*Secretario judicial*), a Public Notary, an Official in Charge of the Civil Registry or diplomatic or consular official in charge of the Corresponding Civil Registry in accordance with the Civil Registry Law. The next step involves the person in charge of the Civil Registry who will issue, in duplicate, a certification accrediting the marital capacity of the contracting parties that they must deliver to the minister of worship in charge of the marriage. For the civil validity of the marriage, consent must be given before the minister of worship officiating the ceremony and, at least, two witnesses of legal age, not later than six months since the issuance of the matrimonial capacity certification. Once the marriage is celebrated, the officiating minister of worship will issue a certification of the celebration of the same, with the necessary requirements for its registration, such as the identity of the witnesses and the circumstances of the previous record or file (which will necessarily include the name and surname of the Court Clerk, Notary Public, an Official in Charge of the Civil Registry or diplomatic or consular official who had issued it, the date and protocol number if applicable). This certification will then be sent by means electronic, in the form determined by regulation, together with the certification accrediting the condition of minister of worship, within a period of five days to the Official in Charge of the competent Civil Registry for registration. It will also extend in the two copies of the act of the celebration of the marriage by delivering to the contracting parties and will keep the other as a record of the celebration in the file of the officiant or from the religious entity that he represents as a minister of worship. Without prejudice to the responsibilities that may arise and the rights acquired in good faith by third parties, the registration may be promoted at any time.

celebration if the contracting parties meet the capacity requirements required by the civil code».

Furthermore, in Spain, according to the three *acuerdos*, the jurisdiction as to the causes of nullity and dissolution of marriage is exclusively vested in the state's civil jurisdiction and no recognition is granted to Jewish and Islamic confessional jurisdictions.

On the contrary, in Italy art. 14.9 of the *Intesa* with the Jewish Community establishes that the right to celebrate and dissolve religious marriages according to Jewish law and tradition remains unaffected, although «without any civil effect or relevance».

(vii) The field of religious instruction is regulated by the *Acuerdos* in the form of adapted implementation of general legislation[91].

In the first place, all agreements allow the minority religious entities to establish and direct their own educational centres at the levels of early childhood education, primary education and secondary education, as well as university centres and seminaries having religious character, subject to the general legislation in force in the field of education.

Furthermore, the right to request and receive the respective religious education is guaranteed to students, to their parents and to school bodies in public educational centres, as well as in private ones (having an agreement to the purpose) «whenever, as for the latter, the exercise of that right does not contradict the own character of the centre concerned, at the levels of early childhood education, primary education and secondary education».

Religious instruction will be given by teachers indicated by the respective denominational authorities, whose agreement is required also as to the contents and textbooks related to the religious teaching. Public and private educational centres (the latter having an agreement to the purpose) shall facilitate the spaces adequate for the exercise of that right in harmony with the carrying on the execution of general teaching activities.

Higher levels of education as well are open to religious instruction: the religious minority communities may, in agreement with the aca-

[91] Explicit reference is to the provisions of article 27.3 of the Constitution as well as in the Organic Law 8/1985 of July 3, Regulatory Law or Education, and in Organic Law 1/1990 of October 3, on the General Ordering of the Educational System.

demic authorities, organise religious teaching courses in public university centres being able to use the premises and means of the same.

(viii) Each religious denomination proudly has its own special symbolic moments of celebration of their creed and the *Acuerdos* provide for an adequate protection of such different spiritual calendars.

This is also the case concerning work and professional duties of individuals of the Union of Adventist Churches of the Seventh Day and other evangelical Churches, belonging to the Federation of Evangelical Religious Entities of Spain, whose day of obligation is Saturday. Subject to an agreement between the parties, the weekly day of break on Friday afternoon and on the full day of Saturday may replace the one established by the general rule.

The rule of exception applies as well to students at public and private schools – these latter being parties to an agreement with the State – who will be exempted from class attendance and exams since sunset on Friday until sunset on Saturday, at the request of the person or those who exercise parental authority or guardianship. Similarly, exams or all kinds of selective tests called for recruitment into Public Administrations shall be set on an alternative date for the members of religious minorities, unless there is a reasonable cause that prevents it.

The rationale provides the ground for regulating the same exceptions from the general rules in favour of members of Jewish and Islamic Communities.

For members of Jewish Communities, the weekly day of work break starts on Friday afternoon and includes the full day of Saturday, in replacement of what is the general rule, subject to the agreement between the parties.

The provision related to members of the Islamic Communities belonging to the Islamic Commission is more complex in conformity of their respective religious practices: they may request to suspend their working activities on Fridays of each week, the day of mandatory and solemn collective prayer of Muslims, from 13:30 to 16:30 and to terminate their working day one hour before sunset during the month of fasting (Ramadan). In both cases, prior agreement between the parties will be necessary and working hours that are missing must be made up without compensation.

The respective religious holidays of the Jewish Community[92] as well as of the Islamic Community[93] are also respected and similarly regulated.

(ix) Conformity of food to religious regulations is taken in account by the agreements concerning the Jewish and the Islamic Communities.

In fact, the *Acuerdo* with the former establishes that

> according to the spiritual dimension and the particularities specific to the Jewish tradition, the denominations of "Casher" and its variants, "Kasher", "Kosher", "Kashrut" and these associated with the terms "U", "K" or "Parve", are those that serve to distinguish food and cosmetic products made according to Jewish Law.

It is up to the Federation of Jewish Communities, with the purpose of protecting the correct use of these names, to request and obtain the corresponding trademark registrations from the Industrial Property Registry, in accordance with current legal regulations, so that – once the above requirements have been fulfilled and for the purposes of marketing, importing and exporting – these products, when they carry the corresponding FCI mark on their packaging, will have the guarantee of having been made in accordance with Jewish Law and tradition.

In conformity to the protection of the religious conformity of food, it is also taken for granted that «the sacrifice of animals […] carried out in accordance with Jewish laws, must respect current sanitary regulations».

The rationale of protection of food products made in accordance with the spiritual dimension and the particularities of Islamic law is

[92] For the Jewish Community they are: Rosh Hashaná (1st and 2nd day); Yom Kippur; Succoth, 1st, 2nd, 7th and 8th day; Pesaj 1st, 2nd, 7th and 8th day; Shavuot (1st and 2nd day).

[93] For Islam they are: AL HIYRA (corresponding to 1st day of Muharram, first day of the Islamic New Year); ACHURA (10th day of Muharram); IDU AL-MAULID (corresponds to 12th of Rabiu al Awwal birth of the Prophet); AL ISRA WA AL-MI'RAY (corresponds to the 27th of Rajab, date of the Night Tour and the Ascension of the Prophet); IDU AL-FITR (corresponds to the 1st, 2nd & 3rd days of Shawwal and celebrates the culmination of the Fast of Ramadan); IDU AL-ADRA (corresponds to the 10th, 11th and 12th days of Du Al Hyyah and celebrates the sacrifice performed by Prophet Abraham).

established also for the designation of "Halal". The same regulation in the respective *Acuerdo* concerns the achievement of the proper packaging marks. The concept of sacrifice rather than the one of slaughtering in used in both texts.

The agreement with the Islamic Community concerns the commitment to making an attempt to adapt to the Islamic religious precepts the food served to inmates in centres or public establishments and military units, as well as to Muslim students of the public and private educational centers that request it.

(x) The agreements set a common pattern of regulation in the field of economic and fiscal *régime* of religious minorities.

In the first place, it is established that each Community enjoys its own system of raising funds and receiving offerings and donations from its members, such initiatives being considered operations not subject to taxation.

Furthermore, a number of similar activities that are considered as tax free is included in each *Acuerdo*. The agreement with the Evangelical Churches describes activities that are tax free, such as the delivery of publications, instructions and internal pastoral bulletins, made directly for their members – provided that it is free – and the activity of teaching theology in seminaries of the Churches belonging to the FEREDE, intended for the training of ministers of worship and that exclusively impart teachings of ecclesiastical nature.

According to the agreement with the Jewish Community, some activities are expressly mentioned as not being subject to any tax: the delivery of publications of a religious nature, carried out directly to its members by the Communities belonging to the Federation of Israelite Communities, provided that it is free; and the activity of religious teaching in training centres of the Communities belonging to the Federation of Israelite Communities aimed at training ministers of worship and exclusively teaching their own rabbinical training.

Similarly, the agreement with the Islamic Community indicates to the same purpose of exemption from taxation activities like free internal delivery of publications, lectures and newsletters of an Islamic religious character, carried out directly to its members by the Communities belonging to the Islamic Commission, as well as activities of Islamic

religious teaching in the centres of the Islamic Commission and of its Communities intended for the instruction of Imams and religious officials.

Furthermore, the Communities as well as the associations and entities created and managed by them and engaged in religious, charitable-teaching, medical or hospital or social assistance activities will be entitled to the benefits and to legal and tax regulations provided at all times for non-profit entities. The texts refer to wider areas of exemptions from taxation and of tax deductions. No public funding is provided.

5. Concluding remarks

Bilateral agreements as means of regulation of the relations between the state and religious minorities have been indicated, in the introductory notes above, as an instrument virtually suitable for introducing a reasonable accommodation between the systemic legal monism of western states and claims for recognition of the specific legal system embedded in the several epiphanies of the religious phenomenon.

Such virtual suitability appears to be even more clearly apparent when the religious phenomenon to be dealt with is represented by several religious minorities, in particular when their organised presence in the polity is to be regarded as a social and cultural innovative reality and when some of their more visible distinguishing features (dress-code, dietary requirements, days of rest and festivities) depart from the general practice (often under the centuries-long influence of the religious majority, although not always declared).

The hypothesis of the reasoning developed in the foregoing paragraphs was of facing a form of consensual legal pluralism that, through the bilateral negotiation, could provide an opportunity of rationalisation of a condition of weak legal pluralism, so that the consent by the state's institutions would offer the actual source of legitimacy for the enforcement of rules belonging to a different legal tradition – namely, religious law –, while the consent by the religious community concerned would ensure a legitimate compliance with their own spiritual sources and, at the same time, an implicit acceptance of the polity's legal framework.

It is time, at this final stage, to (try to) draw some concluding remarks from the analysis of the substantive relevant rules enacted by the state, through bilateral negotiations, in Italy and Spain. These final remarks will focus both the method and the merits of the two historical models of consensual legal pluralism as practiced through Italian *intese* and Spanish *acuerdos* with some of their religious minorities.

The two countries have been selected for several reasons: both of them have experienced a transition from a constitutional *régime* with strong authoritarian features that included, in particular, having an official state religion – enjoying a culturally and socially dominant and legally privileged position – to a liberal and democratic setting, qualified by constitutional principles such as protection of equal religious pluralism and secularism.

Another structural character shared by the two countries is a traditional significant presence of the Roman Catholic Church and the consequent historical practice of regulating their mutual relations through a bilateral negotiated instrument of international law – a concordat – that only revolutionary events have had the political force of denouncing[94]. Agreements with religious minorities may be regarded, *mutatis mutandis*, as an application of the bilateral method to a new and wider set of subjects within the domestic legal order. The adoption of the conventional method has, quite obviously, relevant and meaningful consequences of high liberal and democratic nature as the method is a clear indicator of the achieved constitutional transition and of the effectiveness of the principles of equal pluralism and secularism.

And yet, in both countries, the Roman Catholic Church still has its own and more visible constitutional *status*, formally distinct from the one of (constitutionally anonymous) religious minorities.

The Italian Constitution reserves to it a provision by itself (art. 7), and its widely supported interpretation is that amending the principle underlying the conventional method requires the entrenched procedure for the revision of the Constitution, while changing the content of the

[94] The earliest concordats go back in history to at least the year 1122 CE (the Concordat of Worms). The 1801 French concordat between Napoleon and the Pope was denounced in 1905 when, through the law of separation between church and state, France opted for a model of unilateral regulation of those relations.

substantive regulations, as long as the Church agrees, may be achieved through ordinary parliamentary legislation following the bilateral agreement[95].

In Spain, one constitutional provision covers all religions but the text of art. 16.3 expressly mentions the Catholic Church only, and introduces a sort of implicit incremental reference to «the religious beliefs of Spanish society» that shall be taken into account in order to «*consequently* maintain appropriate cooperation with the Catholic Church and the other confessions[96]».

In both cases, applying the conventional method also to religious minorities indirectly implies the acknowledgement of the need to achieve some level of compensation for the minorities, at least as far as the method is concerned.

One the main differences between the two constitutional setting is that, while in Italy the *intesa* is expressly mentioned by the constitutional text (art. 8 Const.), in Spain what is the object of the fundamental law is the vague notion of 'appropriate cooperation', the instruments of «co-operation agreements or conventions» being mentioned only by the subconstitutional source (art. 7 LOLR). Furthermore, while in Italy the *intesa* is to be transformed into formal state legislation, in Spain the LOLR (art. 7) establishes that «such agreements shall, in any case, be subject to approval by an act of Parliament».

In both countries, the Executive enjoys wide discretionary margins of appreciation on whether or not starting a negotiation, on selecting the minority(ies) to that purpose, on expressing the normative will on the contents to introduce in the text, on taking the parliamentary initiative for enacting the corresponding legislation. In other words, the implementation of the constitutional provisions is a thoroughly political non-justiciable option, which may entail – although not necessarily – a discriminatory attitude[97].

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[95] See, more recently, R. BIFULCO, *Diritto costituzionale*, Torino, 2020, p. 82.

[96] The italics are added.

[97] The reasons for not having an agreement between the Italian Republic and one or more minority denominations, however, may also be the consequence of the specific attitudes of the latter: with regard to Islam in Italy and the absence of a bilateral *intesa*, this is the explanation given in C. CARDIA, *Le ragioni di una ricerca. Le originalità del-*

Furthermore, both in Italy and Spain the practice does not allow any parliamentary amendment of the negotiated text, on the twofold assumption of the Executive's political liability in front of Parliament (that undoubtedly has the ultimate power of denying the approval) and of the priority of respect for the outcome of the previous negotiation.

Many reasons, therefore, at least theoretically, suggest an appreciative assessment for the constitutional model based on the conventional method in regulating state-church relations, in particular when applied also to religious minorities in polities having or having had an established historical practice of a concordat with the Roman Catholic Church. This is not to say that unilateral state's constitutional and legislative regulation is intrinsically unsuitable for an adequate protection of religious freedom and equal pluralism. However, what is to be said on the issue is that the conventional method may be closer to the need of introducing some areas of legal pluralism with regard to the applicability of minorities' religious law through a form of association of the minorities themselves to the political process preparing the formal decision-making stage.

The focus, at this stage, necessarily turns on the merits of the method, with specific regard to the Italian *intese* and the Spanish *acuerdos* that, in fact, share some critical features.

The analytical survey of the content of those sources has shown that a fairly large majority of the provisions does not go much farther than repeating the same contents from one text to the other[98].

From this perspective, the comment needs being differentiated between the two national sets of rules. In fact, the repetitiveness largely corresponds to confirming the normative substance of the general legislative implementation of Spanish constitutional rules – that is, the LOLR –, while, in Italy, the large number of common rules in the

l'Islam, le difficoltà dell'integrazione, in C. CARDIA, G. DELLA TORRE (eds.), *Comunità islamiche in Italia. Identità e forme giuridiche*, Torino, 2015, p. 24. In particular, its extreme fragmentation leads to describing Islam in Italy as a sort of 'mosaic', in E. CAMASSA, *Caratteristiche e modelli organizzativi dell'Islam italiano a livello locale*, *ibidem*, p. 125.

[98] In Italy, the phrase 'photocopy agreements' (*intese fotocopia*) has become of wide use.

agreements substantively works as a replacement precisely of that missing general legislation: in each *intesa* – whether in the preamble or in the text of a provision –, it is clearly stated that the effects of the 1929 act on admitted cults is no longer applicable to the denomination concerned, so that the *intesa* itself becomes the source giving implementation to the Constitution.

In other words, the constitutional principle of equal pluralism in Spain may be considered fairly implemented and guaranteed even without the agreements with the three religious minorities, whereas in Italy the agreements with the twelve creed-based communities are a necessary development of the Constitution, although limited to those communities only.

A different course of reasoning concerns, more specifically, the introduction of margins of legal pluralism, that is, indeed, hardly to be acknowledged as a distinguishing feature of the agreements in both countries: in terms of content, in fact, what both *intese* and *acuerdos* do is either physiologically applying and adapting to minorities rules that are constitutionally (or, in Spain, by the LOLR) mandated – in conformity to the principle of having reasonably differentiated rules for differentiated factual circumstances – or introducing specific rules whose impact as exceptions to the state's legal system is rather marginal in a context inspired by the principles of religious freedom and equal pluralism.

All the agreements provide for (i) the definition of the status of religious ministers, also with regard to the social security service as well as to their military obligations; (ii) the introduction of the rule according to which members of the armed forces may receive religious assistance, including participation in rites and religious activities, and attend places of worship outside armed service facilities in order to fulfil religious duties, when these activities are compatible with the needs of the armed service; (iii) the ensurance that religious assistance is guaranteed to inmates of prisons, hospitals and similar institutions and that religious ministers have free and unscheduled access to these institutions, but that the cost of this religious assistance will be charged to the religious community; (iv) the protection of the respective spiritual festivities, weekly day of rest and time for collective prayers, in agreement with

private employers; (v) the safeguard that religious education for members of minorities will take place in public schools and in private schools where it does not contradict the religious ideological frame of the private school, and that these communities may establish and run schools of primary and secondary education; (vi) the obligation for the state to effectively collaborate with the religious communities to foster and promote trusteeships and endowments to preserve their historical, cultural and artistic heritage; (vii) the possibility for the religious minorities to organise public fundraising and to receive offerings without taxation as well as to distribute gratuitous religious literature and to provide religious education to ministers or religious officials in their communities tax free; (viii) the legal protection of places of worship; (ix) and, finally, the tax benefits applicable to certain assets and activities.

In other words, whether religious assistance is granted by a member of the respective clergy named Pastor, Rabbi or Imam and that those who carry such title and exercise the function are identified by each religious community according to their own rules is, indeed, a form of (extremely) weak legal pluralism. The fact that in the course of negotiations such non-state religious rules have been incorporated (also) as state rules and that such incorporation has been endorsed and accepted by the representative institutions of religious communities does have, indeed, its contingent importance but it does not result in a systemic impact on the main setting of the state's legal monism. The required consistency of the margins of applicability of minorities' religious law with the state's public policy (or *ordre public*) is well preserved.

In another perspective, specific comments deserve to be elaborated with regard to the textual use of concepts such as "Jewish law and tradition", both in Italy and Spain, and such as «Islamic law and tradition» in Spain with reference to the religious component of a marriage as well as of burials ceremonies and ground.

Let us take, for example, the *Intesa* with Italian Judaism, that presents a number of exclusive specific provisions, addressed to both the single territorial Communities as well as to their Union and to the respective functions.

In the first place, the text takes into account the long historical Jewish organised presence in what at present is territory of the Italian state: Jewish Communities are defined as «traditional institutions of Judaism in Italy» and as «originary social communities» (*formazioni sociali originarie*) that «provide, pursuant to the main normative body [*Statuto*] of Italian Judaism, to the fulfillment of the religious needs of Jews according to the law and the Jewish tradition».

The formula «originary social communities» implies their being primary social institutions, pre-existing since well before the origins of any Italian polity (whether monarchical or republican and, indeed, even well before Christianity): their recognition in such terms by the state in a legislative provision of its own might be said to imply that the very existence of such Communities does not appear as receiving any legitimacy from an outer source (namely, the Italian state) other than from themselves. The Jewish Communities, in other words, would be framed as pre-existing the state not only historically – and this is undeniable – but legally as well, and this statement, on the contrary, although likely to be consistent with Jewish law, is thoroughly questionable from the Italian state's legal point of view (considering, among others, the argument derived from art. 8 Const. that binds all religious minorities to be organised in compliance with the Constitution as the fundamental source of law).

Secondly, mention is to be made also to the circumstance of such wording being literally drawn from the main basic normative source of the Community – *the Statuto dell'Ebraismo italiano* –, which is the result of the exercise of its freedom of organisation as expressly provided for by the *Intesa*[99].

Furthermore, the acknowledgement of the mission of the Communities appears to be very wide indeed: although textually limited to "religious needs of Jews" and to "religious assistance, reference is also ex-

[99] See the text of art. 1 of the 2017 *Statuto* (in Italian) which is exactly the same of art. 18 of the *Intesa*: "Le Comunità Ebraiche, istituzioni tradizionali dell'ebraismo in Italia, sono formazioni sociali originarie, organizzate secondo la legge e la tradizione ebraiche, ciascuna nell'ambito della propria circoscrizione. Provvedono al soddisfacimento delle esigenze religiose e delle diverse esigenze associative, sociali e culturali degli ebrei".

pressly made to "Jewish law and tradition". The "religious needs of Jews" are defined by the Italian state or by "Jewish law and tradition"? The answer to the question does not necessarily lead to the same solution: one interpretation would give the exclusive priority to religious sources of law and would therefore reserve to the latter the whole regulation of Jewish lives and activities in Italy, therefore establishing – by the normative will of the state (legal monism) – a *régime* of legal pluralism without any limit and, in particular, any obligation of consistency with the constitutional setting, in particular with regard to basic values.

A different answer would obviously entail a limited reference to the provisions that are part of the *Intesa* and subsequent legislation, as will be indicated later. In all cases, it is the *Intesa* itself that supports this second solution. In fact, according to its art. 26, «the Italian Republic acknowledges that according to Jewish tradition, religious needs include those of worship, welfare and culture» and

> for the purposes of civil laws, the following are also considered: a) religious or cult activities, those directed to the fulfillment of the rabbinic magisterium, to the exercise of worship, to the provision of ritual services, to the training of rabbis, to the study of Judaism and to Jewish education[100].

The Jewish Communities' functions are recognised as to

> take care of the exercise of worship, education and religious education, […] promote Jewish culture, […] provide for the protection of collective interests of Jews locally, contribute according to Jewish law and tradition to the assistance of members of the Communities themselves

as indicated above[101].

[100] The text follows by stating that "activities other than those of religion or worship, are those of assistance and charity, instruction, education and culture, and in all cases commercial or for profit activities".

[101] The same provision (art. 18.3) recognises the older Communities: "The Israeli communities of Ancona, Bologna, Casale Monferrato, Ferrara, Florence, Genoa, Livorno, Mantua, Merano, Milan, Modena, Naples, Padua, Parma, Pisa, Rome, Turin, Trieste, Venice, Vercelli and Verona retain their legal personality and territorial structure

As to the Union of Jewish Communities, the *Intesa* gives the definition of it as «the representative body of the Jewish confession in relations with the State and for matters of general interest of Judaism». More in detail,

> the Union cares for and protects the religious interests of Jews in Italy; it promotes the conservation of traditions and Jewish cultural heritage; it coordinates and integrates the activities of the Communities; maintains contact with the Jewish collectivity and Jewish entities in other countries *(art. 19)*.

Lastly, in this context, the wording of art. 14.9 of the agreement with the Union of Jewish Communities should also be mentioned: «the right to celebrate and dissolve religious marriages remains unaffected, without any civil effect or relevance, according to Jewish law and tradition». In this field, the parallel and independent Jewish religious legal order is therefore explicitly acknowledged as a self-referential legal setting validly in force for those individuals whose option is not to choose the state's legal system for regulating their family life.

Although within fairly strict formal and substantive limits and deeply constrained by the systemic legally monist culture and constitutional architecture of the Western state, consensual legal pluralism is an interesting framework for regulating the relations between states such a Italy and Spain and religious minorities: the interest is more theoretical, perhaps, than historical, although both *intese* and *acuerdos* have a potential that deserves to be further developed. So is the whole area of covenantal law.

Intese and *acuerdos* are likely to represent the tip of the iceberg of application of religious laws, whose practice may continue mainly un-

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which they are currently equipped with and assume the denomination of Jewish Communities". Furthermore (art. 18.4) "the constitution of new Communities, as well as the modification of the respective territorial borders, unification and the extinction of existing ones are recognized by decree of the President of the Republic, having heard the opinion of the Council of State, at the joint request of the Community and the Union".

noticed and even in the guise of legal pluralism in a strong sense[102], to the extent of risking to fall into the area of criminal law. The existence of forms of strong legal pluralism implies a lack of attempt at favouring a dialogue and at rationalising the coexistence of diversities. Further research in the field is therefore welcome, through the contribution of a wider range of social sciences.

[102] See A.Y.O. ALQAWASMI, *Marriage and divorce practices in Islamic centers in Italy*, in *Oñati Socio-Legal Series*, 2021, available at: *https://opo.iisj.net/index.php/osls/article/view/1201*.

PART II

GERMANY'S COOPERATION WITH RELIGIOUS AND BELIEF GROUPS: BILATERAL AGREEMENTS AND EXEMPTION RIGHTS

Rossella Bottoni

1. Introduction

This chapter aims to explore the cooperation system between the State and religious and belief groups in Germany, in order to assess the space afforded to religion- and belief-based rules by the German legal system and their impact upon it[1].

At the constitutional level, Germany is characterized by a peculiar arrangement, where the relationships between the State and religions/beliefs play an important role. The Weimar Constitution of 1919 (*Weimarer Weimarer Reichsverfassung* – WRV) was founded on a compromise between the supporters of France's separation model and those of the unionist systems of northern Europe[2]. The provision that

[1] The definitional issue of 'religious rules' goes beyond the purposes of this chapter. On the attempts at and difficulties in defining what 'religious rules' are, see S. FERRARI, *Religious Rules and Legal Pluralism: An Introduction*, in R. BOTTONI, R. CRISTOFORI, S. FERRARI (eds.), *Religious Rules, State Law, and Normative Pluralism - A Comparative Overview*, Berlin, 2016, pp. 3-7.

[2] P. UNRUH, *Is German Religionsverfassungsrecht under threat from the European Union?*, in *Oxford Journal of Law and Religion*, 9(1), 2020, pp. 2-3. For a summary of Germany's legal and historical developments, see G. ROBBERS, *Germany*, in M. HILL

«There shall be no state church» (Art. 137 § 1 WRV) established a «*hinkende Trennung* (''limping separation'') between Church and State – a term even used by the German Constitutional Court»[3]. This regulation was confirmed by the Basic Law of 1949 (*Grundgesetz* – GG) which, by virtue of Art. 140 GG, incorporated Arts. 136-139 and 141 WRV. "Limping separation" has been strengthened by a complex constitutional framework which mentions God[4] and, at the same time, founds a "neutral" – but not "secular" (in the French meaning of *laïc*) – State[5]. In fact, the German notion of neutrality does not exclude coop-

QC (ed.), *Religion and Discrimination Law in the European Union*, Trier, 2012, pp. 155-159.

[3] R. HENKEL, *State-church relationships in Germany: past and present*, in *Geo-Journal*, 67(4), 2006, p. 310.

[4] «This *invocatio dei* makes reference to the idea of God; it is not an *advocatio dei*, which would directly place the constitution under the will of God as is the case in many other countries' constitutions such as the Irish constitution or the one of Greece.

The preamble does not restrict its reference to the Christian idea of God. It would be a thought unthinkable that in 1949, after the murder of the Jewish by the Germans, and in the attempt to reconnect Germany with its pre-Nazi and anti-Nazi good traditions, the new German constitution would exclude the Jewish idea of God. It is generally understood that the preamble of the Basic Law does not refer to any specific idea of teaching of God such as the Christian, the Jewish or the Muslim or any other specific concept of God.

Instead, the reference to God is a reference to religion as such. The preamble of the German constitution by making reference to God acknowledges the existence of transcendence, of the idea that there is more than the visible world, that there is something beyond. By this reference to the responsibility before God the preamble of the Basic Law accepts that there is something more and other than the state and its constitution, something that goes beyond what is made by human kind. It is thus acknowledging that the state the constitution creates and structures is not all-encompassing, that is, the state is not total. The reference to God in the German constitution is anti-total and is thus anti-totalitarian» (G. ROBBERS, *Religion and Law in Germany*, Alphen aan den Rijin, 2010, p. 75). See also S. TESTA BAPPENHEIM, *'Veluti si Deus daretur': Dio nell'ordinamento costituzionale tedesco*, in J.I. ARRIETA (ed.), *Ius divinum. Atti del XIII Congresso internazionale di diritto canonico, Venezia, 17-21 settembre 2008*, Venezia, 2010, pp. 253-271; ID., *Cenni sulla costituzionalizzazione delle radici cristiane in Germania*, in *Ius Ecclesiae*, 3, 2006, pp. 755-771.

[5] S. TESTA BAPPENHEIM, *Il delicato bilanciamento costituzionale fra libertà di parola e tutela del sentimento religioso: profili comparati*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 18, 2019, p. 3. See also p. 18.

eration[6]; it rather encourages it. Further, cooperation in the Federal Republic of Germany is promoted not only at federal level, but also by the *Länder*, which are responsible for most competences in ecclesiastical matters[7]. This also applies to the *Länder* of the former German Democratic Republic: after the reunification in 1990, Western Germany's system of religion-friendly separatism and cooperation was extended to Eastern Germany[8].

As a last introductory remark, it should be noted that Germany's constitutional regulation dates back to a time characterized by quite a different religious demography. Today's German population belongs to a far greater variety of religions and beliefs, while the number of the members of the two traditional Churches has decreased: approximately 28 per cent is Catholic and 26 percent belongs to a confederation of Evangelical-Lutheran, Reformed and United Protestant Churches. 39 percent of the population is unaffiliated or belongs to groups not count-

[6] I. AUGSBERG, S. KORIOTH, *The interplay between state law and religious law in Germany*, in R. BOTTONI, R. CRISTOFORI, S. FERRARI (eds.), *Religious Rules, State Law, and Normative Pluralism - A Comparative Overview*, Berlin, 2016, p. 179; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, in G. ROBBERS (ed.), *État et Églises dans l'Union européenne*, Baden-Baden, 2008, p. 83; P. UNRUH, *op. cit.*, p. 4; K.G. VANCE, *German Religious Liberty Jurisprudence: A Proposed Solution for the U.S. Supreme Court's Double-Barreled Dilemma*, in *Journal of Church and State*, 2020, p. 18; A. HOLLERBACH, *National identity, the constitutional tradition and the structures of law of religions in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Religions in European Union Law*, Milan, 1998, p. 91. For a more detailed treatment, see C. HAUPT, *Religion-State Relations in the United States and Germany: The Quest for Neutrality*, New York, 2012; G. ROBBERS, *Religious freedom in Germany*, in *Brigham Young University Law Review*, 2, 2001, pp. 649-655.

[7] V. PACILLO, *Churches and Federal State in Europe: the paradigm of Germany and Switzerland*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 2011, pp. 3-14; G. ROBBERS, *Religious freedom in Germany*, cit., pp. 645-646; S. TESTA BAPPENHEIM, *Il delicato bilanciamento costituzionale fra libertà di parola e tutela del sentimento religioso: profili comparati*, cit., p. 27.

[8] R. HENKEL, *op. cit.*, pp. 311-312; B. THÉRIAULT, *A Land of Opportunity? Ecclesiastical Strategies and Social Regulation in the New German Länder*, in *Journal of Church and State*, 40(3), 1998, pp. 603-604; S.P. RAMET, *Religion and Politics in Germany since 1945: The Evangelical and Catholic Churches*, in *Journal of Church and State*, 42(1), 2000, p. 133.

ed in official statistics, 5.3 percent is Muslim (most are Sunni) and 1.9 percent is Christian Orthodox. Other religious and belief groups, which together constitute about 1 percent, include Buddhists (270,000), Jews (100,000-200,000), Jehovah's Witnesses (169,000), Hindus (100,000); Mormons (40,000), Sikhs (10,000-15,000) and members of the Church of Scientology (3,400)[9].

2. Germany's constitutional regulation of religion/belief

This section aims at introducing the analysis on the role of religion- and belief-based rules within the general framework of Germany's constitutional regulation of religion. A useful interpretative framework is the European model of State-religion relationships, elaborated by Silvio Ferrari and characterized by three principles shared – albeit in different forms and degrees – by European countries: *a)* the right to freedom of religion or belief, *b)* religious and belief groups' right to doctrinal and organizational autonomy, and *c)* the selective character of State cooperation with religious and belief groups[10].

2.1. The right to freedom of religion or belief

Under Art. 4 §§ 1-2 GG «Freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviola-

[9] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, pp. 2-3, in *https://www.state.gov/reports/2019-report-on-international-religious-freedom/germany*.

[10] S. FERRARI, *Islam and the European system of State-religions relations throughout Europe*, in M.-C. FOBLETS, J.-F. GAUDREAULT-DESBIENS, A. DUNDES RENTELN (eds.), *Cultural Diversity and the Law. State Responses from Around the World*, Brussels, 2010, pp. 479-484; ID., *Models of State-Religion Relations in Western Europe*, in A.D. HERTZKE (ed.), *The Future of Religious Freedom: Global Challenges*, Oxford, 2012, pp. 203-205; ID., *Religion and Religious Communities in the EU Legal System*, in *Insight Turkey*, 17(1), 2015, pp. 68-73.

ble. The undisturbed practice of religion shall be guaranteed»[11]. As specified by the Federal Constitutional Court,

> Art. 4(1) and (2) GG contains a coherent fundamental right that must be understood to be comprehensive […]. It extends not only to the inner freedom to believe or not to believe – i.e. to have a faith, conceal such a faith, renounce one's faith and turn to a new one – but also to the outer freedom to express, spread and promote one's faith, and to turn others away from their faith […]. Thus, it encompasses not only acts of worship and the practise and observance of religious customs, but also religious education and other expressions of religious and ideological life […]. This includes the right of the individual to align their entire behaviour with the teachings of their faith and act in accordance with this belief, i.e. live a life guided by their faith; this applies to more than just imperative religious doctrines[12].

Unlike other constitutional rights which find their limits in the provisions of general law, Art. 4 GG does not state that freedom of religion or belief may be restricted by or pursuant to a law. This does not mean that manifestations of religion or belief may not be limited. They may be limited indeed, but only in order to protect other equally important constitutional rights. Limitations on the right to freedom of religion or belief are thus interpreted narrowly[13], and they are also more restricted

[11] English translation in *https://www.btg-bestellservice.de/pdf/80201000.pdf*. Robbers has noted that «Religious freedom has a prominent place in Germany's constitution. Freedom of religion is protected before many other freedoms. Only human dignity, freedom and life, and equal protection are human rights placed before religious freedom in Germany's constitution» (G. ROBBERS, *Religious freedom in Germany*, cit., pp. 643-644).

[12] Federal Constitutional Court (Bundesverfassungsgericht – BVerfG), Judgment of the Second Senate of 14 January 2020 – 2 BvR 1333/17 –, para. 78, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/01/rs20200114_2bvr133317en.html*.

[13] G. ROBBERS, *Religious freedom in Germany*, cit., p. 647; I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 178.

than those prescribed by Art. 9 of the European Convention on Human Rights[14].

In principle this leaves considerable room for the respect of religion- and belief-based rules interfering with State law. In practice the application of such precepts in everyday life should not be taken for granted. The above-mentioned judgment issued in January 2020 by the Federal Constitutional Court did recognize the existence of the individuals' right to align their behaviour to the precepts of their religion or belief and, more broadly, to their convictions (which include not only imperative religious doctrines, but also convictions on which behaviour is correct or wrong in a situation of life). Nevertheless, in the examined case, the court concluded that the ban on wearing a headscarf by legal trainees, albeit interfering with the freedom of faith of the individual guaranteed in Arts. 4 §§ 1-2 GG, is constitutional.

Art. 4 § 3 GG stipulates that «No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law». Although conscientious objection could be based «on religious conviction, ethical or humanitarian views, or ideological-pacifist reasons»[15], objectors to military service had to undergo an administrative procedure, whereby their application had to be approved. Exemption was granted only from all services entailing the use of weapons, and objectors were still required to perform alternative service, which was

> by no means a freely eligible alternative to military service […]. It [was] rather a privilege in the actual sense of the word granted to an individual by the state out of consideration for his plight of conscience[16].

[14] A. VON CAMPENHAUSEN, *The application of the freedom of religion principles of the European Convention on Human Rights in Germany*, in A. EMILIANIDES (ed.), *Religious Freedom in the European Union*, Leuven, 2011, p. 180.

[15] J. KUHLMANN, E. LIPPERT, *The Federal Republic of Germany: Conscientious Objection as Social Welfare*, in C.C. MOSKOS, J. WHITECLAY CHAMBERS II (eds.), *The New Conscientious Objection: From Sacred to Secular Resistance*, Oxford, 1993, p. 99.

[16] W. LOSCHELDER, *The non-fulfilment of legally imposed obligations because of conflicting decision of conscience. The legal situation in the Federal Republic of Ger-*

Germany abolished conscription in July 2011, but interestingly this reform has not relegated the problem of conscientious objection to military service to the realm of history. In 2018, 127 requests from professional soldiers for discharge on ground of conscience were accepted, with a refusal rate of 30-40%[17].

Under Art. 138 WRV «Sunday and holidays recognised by the state shall remain protected by law as days of rest from work and of spiritual improvement». In 2006, the so-called Federalism Reform transferred the legislative competence to regulate shop opening hours to the *Länder*. The *Länder*'s laws, while confirming the general rule that shops may not open on Sundays and holidays, provided for exceptions. The *Land* Berlin's 2006 *Shop Opening Hours Act* prescribed the opening of shops on all four Sundays in the period of Advent. The Evangelical Church Berlin-Brandenburg-Silesian Oberlausitz and the Berlin Archdiocese lodged a constitutional complaint challenging Berlin's legal provision, whereby the possibilities of opening shops on Sundays and holidays were more extensive as compared to the former legal regulation and to the provisions enacted by other *Länder*. In 2009 the Federal Constitutional Court decided that the impugned provision was incompatible with Art. 4 §§ 1-2 GG in conjunction with Art. 140 GG and Art. 139 WRV. The press release issued by the court's press office specified that

> the Berlin Shop Opening Act is neither a targeted encroachment on the complainants' freedom of religion, nor do the different provisions and options regarding the opening of shops on Sundays and holidays constitute the "functional equivalent" of an encroachment because the provisions which are challenged here are directed towards retail shop owners and not towards the religious communities. Freedom of religion is, however, not limited to the function of a right of defence, but rather it also requires in a positive sense to safeguard the space for active exercise of religious conviction and the realisation of autonomous person-

many (FRG), in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *L'obiezione di coscienza nei paesi dell'Unione europea*, Milan, 1992, pp. 33-34.

[17] EUROPEAN BUREAU FOR CONSCIENTIOUS OBJECTION, *Annual Report on conscientious objection to military service in Europe*, 2019, p. 15, in *https://ebco-beoc.org/sites/ebco-beoc.org/files/attachments/2020-02-14-EBCO%20_Annual_Report_2019.pdf*.

> ality in the area of ideology and religion. The state has this duty to protect also towards the religious communities […].
> The duty of the state to observe ideological and religious neutrality does not run counter to lending the scope of protection of Article 4.1 and 4.2 GG concrete shape by Article 139 WRV. For the constitution itself places the Sunday and the holidays, to the extent that they are recognised by the state, under a special mandate of protection by the state and thus performs an evaluation which is also rooted in the Christian, Western tradition and which uses its calendar.
> As regards work on Sundays and holidays, Article 139 WRV establishes inter alia a relationship of rule and exception. In principle, typical "working-day activity" has to cease on Sundays and holidays, with the protection provided by Article 140 GG in conjunction with Article 139 WRV not being limited to a religious or ideological meaning of Sundays and holidays. In the secularised social and state order, however, the provision is also aimed at pursuing secular objectives such as personal rest, contemplation, relaxation and diversion. Here, the possibility of spiritual edification which is also covered by Article 139 WRV is intended to be granted to all people irrespective of a religious commitment.
> On this basis, it emerges that statutory concepts of protection for guaranteeing rest on Sundays and holidays must, as a rule, make those days, in a recognisable manner, days of rest from work. As regards the shop opening hours at issue here, this means that the exception requires a factual reason which does justice to the protection of Sundays. A mere economic interest of retail shop owners in generating turnover and an everyday interest in purchasing ("interest in shopping") of potential buyers are in principle not sufficient for justifying exceptions from the protection of rest from work and of the possibility of spiritual edification on Sundays and holidays which is directly anchored in the constitution. Apart from that, exceptions must remain recognisable as such for the public and may not amount to life on Sundays and holidays being virtually the same as on working days with their activity[18].

[18] BVerfG, Judgment of the First Senate of 1 December 2009 – 2 BvR 2857/07 –, in *https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2009/bvg09-134.html*. See also I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 180; K.G. VANCE, *op. cit.*, p. 11.

2.2. Religious and belief groups' right to doctrinal and organizational autonomy

The right to freedom of religion or belief may be exercised either alone or in community with others. It includes the right to form religious or belief associations[19] and, in this respect, it is closely linked to the right to freedom of association. The associational dimension, in turn, is strictly related to the institutional one[20]. Under Art. 137 § 3 WRV

> Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.

This principle «basically means absence of state intervention in the doctrine and internal organisation of religious communities»[21]. German scholars have interpreted it as a declination of the principle of neutrality[22] and have defined it the third pillar of the German system of State-religion relationships, along with the right to religious freedom and the principle of separation[23]. While Art. 4 GG protects «corporate expressions of faith»[24], which traditionally only includes freedom of wor-

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[19] P. UNRUH, *op. cit.*, p. 3; A. VON CAMPENHAUSEN, *The application of the freedom of religion principles of the European Convention on Human Rights in Germany*, cit., p. 184.

[20] «R]eligious freedom, though highly personal and individual, cannot do without institutions. Religion as a matter of social fact is a matter of community, exercised in community with others. Institutions are the framework, the basis, and the structure in which individual belief prospers. No legal order disregarding the institutional aspect of religious freedom can fully guarantee this human right» (G. ROBBERS, *Religious freedom in Germany*, cit., p. 658).

[21] S. FERRARI, *Islam and the European system of State-religions relations throughout Europe*, cit., pp. 480-481.

[22] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 83.

[23] A. VON CAMPENHAUSEN, *Le regime constitutionnel des cultes en Allemagne*, in AA.VV., *The constitutional status of Churches in the European Union countries*, Milan, 1995, p. 47.

[24] K.G. VANCE, *op. cit.*, p. 17.

ship[25], Art. 137 § 3 WRV recognizes religious and belief groups' right to doctrinal and organizational autonomy. The notion of autonomy encompasses a broader range of matters which are recognized to be within religious and belief groups' competence, like the definition of the contents of one's doctrine, the choice between a hierarchical or democratic structure of self-organization, the choice of one's religious leaders and about their education and training, the possibility to carry out charity and social activities, the implementation of the decisions adopted by one's internal organs and based on one's procedural law, the rules on membership and the definition of members' rights and duties, and so on[26]. Specific declinations of the right to autonomy are the right to obtain legal personality[27] and the right to own property[28]. For the purposes of this chapter, the relevant content of the notion of autonomy is «self-determination of religious groups by means of religious rules»[29]. A court decision may be mentioned to highlight the implications for the application of religious or belief rules.

The Baha'i religious community is part of a hierarchically structured religion and its application for registration as an association under Art. 41 of the Civil Code was rejected on the ground that its governing body, the Spiritual Assembly, did not demonstrate to have the necessary legal independence. On 5 February 1991 the Federal Constitutional Court reversed the lower court's decision by referring inter alia to the applicant's religious law. In doing so, it obliged «public authorities to make possible exemptions from the general rule in order to allow reli-

[25] A. VON CAMPENHAUSEN, *Le regime constitutionnel des cultes en Allemagne*, cit., p. 48.

[26] P. UNRUH, *op. cit.*, p. 5; I. AUGSBERG, S. KORIOTH, *op. cit.*, pp. 180-181; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 86.

[27] «Religious communities acquire legal capacity according to general provisions of civil law» (Art. 137 § 4 WRV).

[28] «Property rights and other rights of religious societies or associations in their institutions, foundations and other assets intended for purposes of worship, education or charity shall be guaranteed» (Art. 138 § 2 WRV).

[29] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 179.

gious communities being registered in accordance with their religious norms»[30].

> [To the extent that] courts generally regard the influence of the National Spiritual Assembly on existence, membership and activity of the local Spiritual Assembly provided in the Statutes as impermissible third-party determination of the association from outside, they have misjudged the specific nature of religious associations which organize themselves as a sub-organization of a religious society with a hierarchy defined by their beliefs, and hence the significance of the fundamental right of religious freedom of association for the interpretation and application of the principle of autonomy of association. They have regarded the National Spiritual Assembly as an alien organization determined by other goals and interests which exercises a dominating influence, without accommodating the unity and commonality given by the connection under religious law. The same ultimately applies to the selection of the members of the local Spiritual Assembly by the faithful of the local Baha'i community. By virtue of the connection under religious law, these are also not to be regarded as third parties subjecting the association to determination from outside, and hence removing its self-determination; rather, this type of establishment of memberships complies with the purpose of the association, as a hierarchical management

[30] G. ROBBERS, *Minority Churches in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *The legal status of religious minorities in the countries of the European Union*, Milan, 1994, p. 165. This decision is consistent with the case law that the European Court of Human Rights (ECtHR) developed later, in particular *Metropolitan Church of Bessarabia and Others v. Moldova*, 45701/99, 13 December 2001; *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, 40825/98, 31 July 2008. «In order to render religious communities autonomous, a State must first recognize the legal personality of those that wish to have this status. Without such recognition, they simply cannot *exist* before the State and within the State's legal system. But the State should also provide for a legal status that allows them to exist *autonomously*, that is, to structure themselves internally as prescribed by their doctrinal principles. For example, a hierarchical Church should be allowed to have a legal status that does not force it to adopt democratic rules, where a majoritarian principle is applied to decision-making or the clergy is elected by the believers instead of the competent religious authorities» (R. BOTTONI, *The Legal Treatment of Religious Minorities: Non-Muslims in Turkey and Muslims in Germany*, in H. GÜLALP, G. SEUFERT (eds.), *Religion, Identity and Politics: Germany and Turkey in Interaction*, London, 2013, p. 122).

> body to administrate the affairs of the local Baha'i community (Art. 2.1 of the Statutes and the Preamble), and in fact serves to realize it[31].

The notion of autonomy thus allows room for the application of religion- and belief-based rules, which in turn leads to the recognition of exemptions from laws of general application, for example in the field of tax law, data protection law or – as we will see later on – labor law[32]. At the same time, it should be stressed that autonomy is not absolute, and limitations apply («within the limits of the law that applies to all»)[33]. This is the case of religious adjudication. Germany does not recognize it explicitly, but this may take place in the form of either mediation or arbitration. Criminal law and most matters of family law (like marriage, divorce and the status of children) remain nevertheless – as stated by the Federal Court of Justice itself – «absolute state monopoly»[34].

> In Germany, there is no system of personal laws based on religious affiliation. The state legal system is wholly secular. Religious activities are protected, but there is no part of the law which adopts religious rules as a source of law[35].

Religious marriages may be celebrated, but they may not be recognized civil effects. Only civil marriage has legal effects. Further, until 2008 the celebration of a religious wedding before contracting civil

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[31] English translation in W.C. DURHAM JR., B.G. SCHARFFS, *Law and Religion: National, International, and Comparative Perspectives*, New York, 2019, p. 493. See also U. SCHAEFER, *An introduction to Bahā'ī law: doctrinal foundations, principles and structures*, in *Journal of Law and Religion*, 18(2), 2002-2003, p. 350.

[32] G. ROBBERS, *Religious freedom in Germany*, cit., p. 654; I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 181.

[33] On the courts' approaches to elaborate the limitation clause, see G. ROBBERS, *Religious freedom in Germany*, cit., pp. 654-655.

[34] Quoted by I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 183. State-endorsed methods of alternative dispute resolution should not be confused with informal solutions linked to the phenomenon of the so-called sharia councils. See M. JARABA, *Khul' in action: How do local Muslim communities in Germany dissolve an Islamic religious-only marriage?*, in *Journal of Muslim Minority Affairs*, 40(1), 2020, pp. 26-47.

[35] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 180.

marriage was a criminal offence (but no penalty was formally prescribed)[36]. There are two main exceptions to the general rule of compulsory civil marriage. The first one concerns two non-Germans entering – in Germany – into a religious marriage, which can obtain civil effects in the home country of one of the spouses. The second one concerns German citizens marrying abroad. For example, a couple may celebrate a religious wedding in Italy. This can be recognized civil effects in Italy and, thus, would be valid also under German civil law[37].

The Civil Code stipulates that an existing marriage or civil partnership is an impediment to marriage (Section 1306)[38], and that a marriage entered into contrary to this provision may be annulled (Section 1314). Bigamy is also a criminal offence. Under Section 172 of the Criminal Code, «Whosoever contracts a marriage although he is already married, or whosoever contracts a marriage with a married person, shall be liable to imprisonment not exceeding three years or a fine»[39]. As regards bigamous or polygamous marriages celebrated abroad, case law had evolved. On 30 April 1985 the Federal Administrative Court ruled that the right of a second wife in a polygamous marriage to stay in Germany

[36] S. KORIOTH, I. AUGSBERG, *Religion and the Secular State in Germany*, 2010, p. 327, in *https://classic.iclrs.org/content/blurb/files/Germany.pdf*; R. PUZA, *Religion in criminal law: Germany*, in M. KOTIRANTA, N. DOE (eds.), *Religion and criminal law*, Leuven, 2013, pp. 108-111; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 96. The rule that civil wedding must always precede religious one may be found in the legal systems of other European countries. Some of them have even enshrined it in the constitution. This is the case of Belgium (Art. 21: «[…]. A civil wedding should always precede the blessing of the marriage, apart from the exceptions to be established by the law if needed»); Luxembourg (Art. 21: «Civil marriage must always precede the nuptial benediction») and Romania (Art. 48 § 2: «[…]. A religious marriage ceremony can be celebrated only after the civil ceremony»). See EUROPEAN PARLIAMENT'S COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, *Religious practice and observance in the EU Member States*, 2013, p. 24, in *https://www.europarl.europa.eu*.

[37] G. ROBBERS, *Civil effects of religious marriage in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Marriage and religion in Europe*, Milan, 1993, pp. 213-214.

[38] «A marriage may not be entered into if a marriage or a civil partnership exists between one of the persons who intend to be married to each other and a third party». English translation in *https://www.gesetze-im-internet.de/englisch_bgb*.

[39] English translation in *https://www.gesetze-im-internet.de/englisch_stgb*.

had to be regarded as covered by Art. 6 § 1 GG («Marriage and the family shall enjoy the special protection of the state»)[40]. In a subsequent case, the Higher Administrative Court of North Rhine-Westphalia held that the second wife was not entitled to family reunification with her husband and his first wife[41]. In 2004, the Residence Act was approved, which stipulates that «If a foreigner is married to several spouses at the same time and lives together with one spouse in the federal territory, no other spouse will be granted a temporary residence permit» (Section 30(4))[42], consistently with Art. 4 § 4 of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[43].

2.3. The selective character of State cooperation with religious and belief groups

The cooperation between the State and religious (and, in some case, also belief) groups is the rule in Europe, not the exception.

> There are two reasons that explain this propensity towards cooperation. On the one hand, a tendency to cooperate with all social organizations, both religious and non-religious, is deeply embedded in the genetic code of the European modern state, which is founded on the consensus of its citizens. Cooperation with social groups is the normal way of governing the state. […]. On the other hand, in the eyes of many states, religions preserve an important significance in terms of social resource, both from a cultural, ethical or political point of view. This explains why, in many legal systems, religion is considered, together with

[40] G. ROBBERS, *Civil effects of religious marriage in Germany*, cit., p. 216.

[41] P. FOURNIER, *Muslim marriage in Western courts. Lost in transplantation*, 2010, p. 60.

[42] English translation in *https://www.gesetze-im-internet.de/englisch_aufenthg*. See also H.M. HEINIG, *Immigration and religion in Germany*, in A. MOTILLA (ed.), *Immigration, National and Regional Laws and Freedom of Religion*, Leuven, 2012, pp. 103-104.

[43] «In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.

By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor». Official *Journal L 251 of 3 October 2003*.

art and science, a 'civilizational factor' of general interest which must be safeguarded and encouraged by public powers[44].

The remarks above apply admirably to Germany. Religions and beliefs are recognized to play a positive role. «They have not only private but public standing, without being part of the state. German legal culture recognizes a public sphere, which is distinct from governmental or private spheres»[45]. Not only religious and belief groups have the right to carry out a number of social activities as part of their mission (being their right to organizational autonomy recognized)[46], but such activities also enjoy the protection and assistance of the State because they are regarded as having a positive impact on society at large[47]. Two of the most typical forms of State support (in Germany and elsewhere) are public funding and favorable fiscal treatment[48], whereas the recognition of religious and belief groups' public standing is especially evident in the place assigned to religious teaching in public schools. Germany's

[44] S. FERRARI, *Religion and Religious Communities in the EU Legal System*, in *Insight Turkey*, cit., pp. 71-72.

[45] G. ROBBERS, *Religious freedom in Germany*, cit., p. 659.

[46] See G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 87.

[47] «The church-related welfare associations, together with the state, also play an important role in providing social services. The Free Welfare Associations, among which *Caritas* and *Diakonie* are giants, delivered, until unification, 70 percent of all family service, 60 percent of all service for the elderly, 40 percent of all hospital beds, and 90 percent of all employment for the handicapped in West Germany» (B. THÉRIAULT, *op. cit.*, p. 606). For a general treatment of this topic, see A. VON CAMPENHAUSEN, *State and Church in the social field in Germany*, in I. DÜBECK, F.L. OVERGAARD (eds.), *Social welfare, religious organizations and the State*, Milan, 2003, pp. 33-46.

[48] G. ROBBERS, *Financing religion in Germany*, in B. BASDEVANT-GAUDEMET, S. BERLINGÒ (eds.), *The financing of religious communities in the European Union*, Leuven, 2009, pp. 169-176; A. HOLLERBACH, *Finances and assets of the churches. Survey on the legal situation in the Federal Republic of Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Stati e confessioni religiose in Europa. Modelli di finanziamento pubblico. Scuola e fattore religioso*, Milano, 1992, pp. 57-76; R. ASTORRI, *Il finanziamento tributario delle confessioni religiose. Profili comparatistici*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2006, pp. 3-25. For recent figures, see US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit.

legal regulation in this realm «can be read as something of a reaction to the Nazi regime's moves to control education from the national level, to ignore the rights of parents, and to restrict religious education and pluralism in education policy»[49]. Under Art. 7 § 3 GG

> Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.

Whereas instruction in a specific religion is offered in public schools whenever a minimum number of students require it (usually six to eight)[50], other forms of cooperation are reserved to specific religious and belief groups, that is, they are not available to all of those existing and operating in the German territory. As noted by Silvio Ferrari,

> everywhere in Europe this cooperation is selective. States do not collaborate in the same way with all religious communities: some receive more and others less, and yet others nothing at all. The readiness of states to collaborate with religious groups is greater when there is harmony between the values that regulate religious society and those that lie at the basis of civil society; it is less where this harmony does not exist. That is the reason why almost everywhere in Europe it is more complicated and expensive to build a mosque than to build a church […]. In other words, state support is mainly directed toward those religious communities that, by virtue of the number of their members, the time they have been in a country, or the political wight they

[49] K.G. VANCE, *op. cit.*, p. 11. See also G. ROBBERS, *Religious freedom in Germany*, cit., pp. 652-653; A. VON CAMPENHAUSEN, *State, school and church in the Federal Republic of Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Stati e confessioni religiose in Europa. Modelli di finanziamento pubblico. Scuola e fattore religioso*, Milano, 1992, pp. 175-178; A. BARB, *The New Politics of Religious Education in the United States and Germany*, in *German Law Journal*, 20(7), 2019, pp. 1041-1045; S. KORIOTH, I. AUGSBERG, *op. cit.*, p. 328.

[50] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 89.

> carry are better integrated into the cultural and social traditions of a people and are in harmony with the rules and values that inspire it[51].

The selective character of cooperation in Germany results not only in a given policy of signing bilateral agreements (as we will see later on), but also in the provision of specific forms of legal personality. All religious groups may acquire legal personality according to the general provisions of civil law (Art. 137 § 4 WRV), but those whose statute and number of members offer a guarantee of their permanency may obtain recognition as corporations under public law (Art. 137 § 5 WRV)[52]. The latter do not become organs of the state apparatus[53], but obtain a recognition of their public standing and of the importance of their existence and activities in the public sphere. This implies a number of benefits, which «are usually referred to as a 'bundle of privileges' since there are advantages in tax law, employment law, social law, building law and media law»[54].

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[51] S. FERRARI, *Models of State-Religion Relations in Western Europe*, in A.D. HERTZKE (ed.), *The Future of Religious Freedom: Global Challenges*, Oxford, 2012, p. 204.

[52] «Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency. If two or more religious societies established under public law unite into a single organisation, it too shall be a corporation under public law».

[53] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 85.

[54] S. MÜCKL, *Religious persons as legal entities – Germany*, in L. FRIEDNER (ed.), *Churches and Other Legal Organisations as Legal Persons*, Leuven, 2007, p. 113. See also US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 4; A. HOLLERBACH, A. DE FRENNE, *New rights and new social developments in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *"New liberties" and Church and State Relationships in Europe*, Milan, 1998, pp. 131-133; M. GAS-AIXENDRI, *Protection of Personal Data and Apostasy: Comparative Law Considerations*, in *Journal of Church and State*, 57(1), 2015, p. 82; A. VON CAMPENHAUSEN, *The Churches and employment regulations in the Federal Republic of Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Churches and labour law in the EC countries*, Milan, 1993, pp. 105-113; M. GERMANN, *The portrayal of religion in Germany: the media and the arts*, in N. DOE (ed.), *The portrayal of religion in Germany: the media and the arts*, Leuven, 2004, pp. 77-107.

The most known one is the right to levy the church tax on one's members. Under Art. 137 § 6 WRV «Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with *Land* law». The status of corporation under public law is granted by each *Land*. The two major Churches (Catholic and Protestant) have this status in all *Länder* and levy the church tax, which provides them with about 80 per cent of their entire budget. Although this is a right, and not a duty, a number of religious minorities having the status of corporation under public law – including the Jewish communities – have used this opportunity, too[55].

> The rate of the church tax is between eight and nine percent of the individual's wage and income tax liability. Other tax standards may also be used. Although this concept is not a requirement, in most cases the church tax is collected by the state tax authorities for the larger religious communities, as a result of an arrangement with the state. For this service the religious communities usually pay four percent of the tax yield to the state by way of compensation[56].

The ECtHR has regarded this funding system as consistent with the European standards of human rights protection.

> The applicants are entirely free to practise or not to practise their religion as they please. If they are obliged to pay contributions to the Roman Catholic Church, this is a consequence of their continued membership of this church, in the same way as e.g. the duty to pay contributions to a private association would result from their membership of such association. The obligation can be avoided if they choose to leave the church, a possibility for which the State legislation has expressly provided. By making available this possibility, the State has introduced sufficient safeguards to ensure the individual's freedom of religion. The individual cannot reasonably claim, having regard to the terms of Art. 9 of the Convention, to remain a member of a particular church and nevertheless be free from the legal obligations, including financial obligations, resulting from this membership according to the autonomous regulations of the church in question. The same considerations would also apply if the matter were to be considered under Art. 11 of the Convention (freedom of association).

[55] G. ROBBERS, *Financing religion in Germany*, cit., p. 170.

[56] G. ROBBERS, *Financing religion in Germany*, cit., p. 170.

> The Commission therefore concludes that there is no appearance of any interference with the applicants' rights under Art. 9 (and/or 11) of the Convention, and their complaint in this respect must accordingly be rejected as being manifestly ill-founded[57].

In recent years, in Germany – like in other European countries characterized by a church-tax based funding system – an increasing number of members of religious groups having the status of corporation under public law have apostatized to avoid paying the church tax. This can be done by means of a declaration before state authorities. An issue has raised concerning those faithful unwilling to pay the church tax but still expecting to have access to church services. On 26 September 2012, the Federal Administrative Court endorsed the Catholic Church's position, rejecting the possibility of a partial membership: admission to the sacraments and religious services requires the payment of the church tax[58]. The judges held that

> state authorities may not accept a declaration of withdrawal from 'the church as a corporation under public law'. Such a declaration could be understood as a theological qualification or condition, the validity of which the secular state is not competent to judge[59].

On 24 September, two days before the court decision, a decree of the German Bishops' Conference had entered into force, stating that those who – for whatever reason – declared apostasy before the competent civil authorities violated their duty to remain in communion with the Catholic Church and to contribute financially to the carrying out of its mission. They would not be automatically excommunicated, but they would not be admitted to confession and Eucharist nor could be a godparent or hold office in the Church[60].

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[57] *E. and G. R. v Austria* [dec.], application no. 9781/82, 14 May 1984. See also *Klein and Others v. Germany*, 10138/11, 6 April 2017.

[58] PEW FORUM, *In Western European Countries With Church Taxes, Support for the Tradition Remains Strong*, 30 April 2019, in *https://www.pewforum.org*.

[59] G. ROBBERS, *Recent Legal Developments in Germany: Infant Circumcision and Church Tax*, in *Ecclesiastical Law Journal*, 15, 2013, pp. 70-71.

[60] G. ROBBERS, *Recent Legal Developments in Germany: Infant Circumcision and Church Tax*, cit., p. 70. See also P.V.A. BRAIDA, *Breve commento al decreto generale*

Today there are reportedly 180 religious groups having the status of corporation under public law[61], but a significant number still remains excluded from this form of cooperation. German scholars have stressed that this difference does not breach the principles of parity and equal treatment.

> The difference in status draws its legitimacy from the social impact and relevance that the various religions and denominations have; it also meets differences in approach and self-understanding of those religions and denominations. Rights that are attached to each status match duties that follow from the status. Either status can be obtained when the individual religious community meets minimum requirements[62].

Consistently with the ECtHR case law on this matter, differences can be made, provided that they are based on 'objective and reasonable justification' and that all religious groups complying with the prescribed requirements may have access to the most privileged status[63]. As regards Germany, it has been noted that, on the one side, the church-tax based funding system was introduced after State Churches were disestablished, in order to make them dependent on their own income[64]. On the other side, religious minorities – especially new ones – did not suffer from past expropriations and, thus, they do not need to be compensated; further, they do not carry out social activities to the same great extent as traditional Churches[65].

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della conferenza episcopale tedesca entrato in vigore il 28.9.2012 circa l'uscita dalla Chiesa (Kirchenaustritt), in *Quaderni di diritto e politica ecclesiastica*, 2, 2013, pp. 479-495; S. TESTA BAPPENHEIM, *Brevi cenni introduttivi alla fattispecie del Kirchenaustritt in Germania*, in *Diritto e Religioni*, 11, 2011, pp. 327-338.

[61] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 5. A non-exhaustive list is provided at *https://www.uni-trier.de/index.php?id=26713*.

[62] G. ROBBERS, *Germany*, cit., pp. 161-162; see also I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 184.

[63] ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*, 40825/98, 31 July 2008, paras 87-104; *Savez crkava "Riječ života" and Others v. Croatia*, 7798/08, 9 December 2010, paras 85-92.

[64] G. ROBBERS, *Religious freedom in Germany*, cit., p. 651.

[65] G. ROBBERS, *Financing religion in Germany*, cit., p. 175.

Examining in greater detail who are the subjects included in and those excluded from Germany's system of selective cooperation, the first important category to mention is belief groups. Under Art. 137 § 7 WRV, «Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies». All Member States of the Council of Europe offer legal protection to the individual dimension of what nowadays tends to be called as 'non-religion' – an expression encompassing the worldviews of «atheists, agnostics, sceptics and the unconcerned»[66]. Germany belongs to the tiny minority of countries treating belief groups (that is, 'belief' as a collective or institutional reality, and not as an individual conviction) in the same way as religious groups[67]. Belief groups in Germany may organize a teaching of non-denominational ethics and morals in public schools, when this is requested by students non attending denominational religious courses. In fact, the organization *Humanistischer Verband Deutschlands* has made use of this possibility[68]. They may obtain the legal status as corporations under public law at the same conditions prescribed for religious groups. When they obtain this recognition, they may levy the church tax on their members[69]. The Criminal Code prohibits and punishes offences against religious and belief groups alike[70].

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[66] ECtHR, *Kokkinakis v. Greece*, 14307/88, 25 May 1993, para. 31

[67] The Belgian constitution stipulates that «The salaries and pensions of representatives of organizations recognized by the law as providing moral assistance according to *a non-denominational philosophical* concept are paid for by the State» (Art. 181 § 2), and that «Schools run by public authorities offer, until the end of compulsory education, the choice between the teaching of one of the recognized religions and *non-denominational ethics* teaching» (Art. 24 § 1). The Norwegian constitution stipulates that «Our values will remain our Christian and *humanist* heritage» (Art. 2), and that «The Church of Norway, an Evangelical-Lutheran church, will remain the National Church of Norway and will as such be supported by the State. […]. All religious and *belief* communities should be supported on equal terms» (Art. 16). The italics is mine.

[68] See S. COGLIEVINA, *Il trattamento giuridico dell'ateismo nell'Unione*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2011, p. 82.

[69] PEW FORUM, *op. cit.*

[70] S. TESTA BAPPENHEIM, *Il delicato bilanciamento costituzionale fra libertà di parola e tutela del sentimento religioso: profili comparati*, cit., pp. 24-25; R. PUZA, *Religion in criminal law: Germany*, cit., p. 98. Under Section 166 (Revilement of religious faiths and religious and ideological communities) of the Criminal Code, «(1) Whoever

The recognition of the status as corporation under public law did not cause conflicts until the Congregation of Jehovah's Witnesses in the *Land* of Berlin applied for it in the early 1990s[71]. On 26 June 1997 the Federal Administrative Court denied it on the ground of the group's lack of loyalty to the State. German scholars have maintained that the *Grundgesetz* «contains an unwritten requirement of legal loyalty: a religious community applying for public law status may not revolt against the legal order or interfere with existing law»[72]. This requirement was allegedly not met by the Jehovah's Witnesses because they are instructed not to exercise active and passive electoral rights in state elections, although voting is not a legal duty in Germany[73]. The Federal Constitutional Court vacated the decision.

> The principle of strict parity would be undermined if content-related and confession-related aspects were to be used as delimitation criteria with the aid of an additional, unwritten precondition for the award. […]. Insofar as the decision not to participate in state elections was religiously motivated, there was specific protection of not only the propagation of this faith conviction, but also of its practice, namely by Article 4 of the Basic Law in conjunction with the Church's right of self-determination (Article 137.3 of the Weimar Constitution). […]. As the writings of the Jehovah's Witnesses are alleged to document, their understand-

publicly or by disseminating material (section 11 (3)) reviles the religion or ideology of others in a manner which is suitable for causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding three years or a fine. (2) Whoever publicly or by disseminating material (section 11 (3)) reviles a church or other religious or ideological community in Germany or its institutions or customs in a manner which is suitable for causing a disturbance of the public peace incurs the same penalty».

[71] S. MÜCKL, *Relationship between State and Church – Public Church Law versus Religious Constitutional Law*, in H. PÜNDER, C. WALDHOFF (eds.), *Debates in German Public Law*, Oxford, 2014, p. 166; C. HOFHANSEL, *Recognition Regimes for Religious Minorities in Europe: Institutional Change and Reproduction*, in *Journal of Church and State*, 57(1), 2013, pp. 111-112. For a description of the background situation, see G. BESIER, R.-M. BESIER, *Jehovah's Witnesses' Request for Recognition as a Corporation under Public Law in Germany: Background, Current Status, and Empirical Aspects*, in *Journal of Church and State*, 43(1), 2001, pp. 35-48.

[72] S. MÜCKL, *Religious persons as legal entities – Germany*, cit., 112.

[73] G. ROBBERS, *Religious freedom in Germany*, cit., p. 650. See also S. KORIOTH, I. AUGSBERG, *op. cit.*, p. 325.

> ing of religious neutrality – with the consequence of non-participation in elections – did not mean that they rejected elections as forming the basis of the democratic state. The Jehovah's Witnesses, rather, accepted the results of democratic elections as forming the basis of state authorities which were also legitimate in the light of their religion. […].
> A religious community which wishes to become a corporate body under public law must be true to the law. It must offer an assurance that it will comply with the valid law, in particular that it will exercise the sovereign powers assigned to it only in compliance with the constitutional and other statutory ties. […]
> A religious community which wishes to acquire the status of a corporate body under public law must offer in particular an assurance that its future conduct will not endanger the fundamental constitutional principles set forth in Article 79.3 of the Basic Law, the fundamental rights of third parties which are entrusted to the protection of the State, or the fundamental principles of the liberal law on religious organisations and state law on churches that are enshrined in the Basic Law. […].
> Requiring loyalty to the State on the part of the religious bodies that are corporate bodies over and above the requirements that have been named is not necessary to protect the fundamental constitutional values, and moreover is incompatible with them. […].
> Over and above this, the demand that a religious body that is a corporate body must be loyal to the State is a legal point of difficulty. "Loyalty" is a vague term amenable to an extraordinary number of possible interpretations, ranging through to the expectation that the religious community must adopt specific state goals or regard itself as the guardian of the State. The term namely relates to an inner disposition, to a notion, and not merely to external conduct. Hence, it not only endangers legal certainty, but it also leads to a drawing together of religious community and State which is neither required nor permitted by the state's law on churches that is enshrined in the Basic Law[74].

Thus, loyalty is due to the law, not to the State. This clarification points to the core of the notion of cooperation. According to the Federal Constitutional Court

> it cannot be an aim in accordance with the Basic Law to award corporate body status in order to use privileges to persuade a religious community to cooperate with the State. The Basic Law explicitly prescribes

[74] BVerfG, Judgment of the Second Senate – 2 BvR 1500/97 –, paras. 38, 42, 77, 83, 92 and 94, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rs20001219_2bvr150097en.html*.

> cooperation of the State with the religious communities in some instances – for instance in the levying of church tax (Article 140 of the Basic Law in conjunction with Article 137.6 of the Weimar Constitution) or in religious instruction (Article 7.3 of the Basic Law) – and permits it in other areas. However, it does not impose this on the religious communities as a prerequisite. Whether they accept such offers or seek to keep their distance from the State is left to their religious self-perception[75].

In subsequent years, the Congregation of the Jehovah's Witnesses was awarded the status of corporation under public law in other *Länder* and, although in some cases the issue was brought to court, by 2017 it had obtained this legal status in all 16 *Länder*[76].

Far more controversial is the Church of Scientology, which has been involved in a great number of court decisions. A study of 2003 has found 85 reported cases[77]. In Germany, the Church of Scientology is regarded as a business organization and, as such, it is not covered by either the term 'religious' or 'ideological' association within the meaning of the *Grundgesetz*[78]. It is maintained that, although traditional Churches are also involved in commercial activities, these are part of their charity and social mission, and business is not the true motivation of their activities[79]. What is more, public authorities at the federal and *Land* level monitor the activities of the Church of Scientology, and so called 'sect filters' are used by public and private employers. Major parties like the Christian Democratic Union, the Christian Social Union,

[75] BVerfG, Judgment of the Second Senate – 2 BvR 1500/97 –, cit., para 96.

[76] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2017, p. 8, in *https://www.state.gov/reports/2017-report-on-international-religious-freedom/germany*.

[77] G. TAYLOR, *Scientology in the German courts*, in *Journal of Law and Religion*, 19(1), 2003-2004, p. 156.

[78] S. MUCKEL, *The Church of Scientology under German Law on Church and State*, in *German Yearbook of International Law*, 41, 1998, p. 316. See also G. ROBBERS, *Religious freedom in Germany*, cit., pp. 661-663. See also S. KORIOTH, I. AUGSBERG, *op. cit.*, p. 323.

[79] S. MUCKEL, *The Church of Scientology under German Law on Church and State*, cit., p. 307.

the Social Democratic Party and the Free Democratic Party exclude members of the Church of Scientology from the party[80].

Different concerns are raised by Islam. Its religious nature is undisputed and, on the one side, the increase of the Muslim population, mainly as an effect of immigration from Turkey[81], poses the same challenges as the spread of other non-traditional religious and belief groups.

> This appearance of non-Christian religious groups causes specific problems for the legal system, which was framed when these new religious phenomena were by and large irrelevant. Against the background of a changed social context the question arises as to whether the old constitutional background is still adequate to meet the current challenges[82].

On the other side, the 'Islam Question' is harshened by the securitization of religious freedom policies in many countries of the world[83], which has had an adverse impact on the approach towards religious practices such as religious slaughter, the wearing of an Islamic head-

[80] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 9.

[81] «Turkish and Italian immigrants constitute the most important sections of the alien population in Germany. The reason for this is, that in the days of recruitment of guest workers, it was mostly Turkish and Italian citizens who carne to Germany on account of special agreements Germany had with these countries. As the groups became settled in Germany, a phase of family reunification followed. Nowadays the search for work and family reunification are still the most common reasons for immigration to Germany» (H.M. HEINIG, *Immigration and religion in Germany*, cit., p. 94).

[82] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 177. See also G. ROBBERS, *Minority Churches in Germany*, cit., p. 170; A. VON CAMPENHAUSEN, *New and small religious communities in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *New religious movements and the law in the European Union*, Milan, 1999, pp. 177-190; M. KOENIG, *Incorporating Muslim Migrants in Western Nation States – A Comparison of the United Kingdom, France, and Germany*, in M. BURCHARDT, I. MICHALOWSKI (eds.), *After Integration. Islam, Conviviality and Contentious Politics in Europe*, Berlin, 2015, pp. 43-58.

[83] H.-C. JASCH, *State-Dialogue with Muslim Communities in Italy and Germany. The Political Context and the Legal Frameworks for Dialogue with Islamic Faith Communities in Both Countries*, in *German Law Journal*, 8(4), 2007, pp. 346-47. See also S. FERRARI, *Individual Religious Freedom and National Security in Europe After September 11*, in *Brigham Young University Law Review*, 2, 2004, pp. 357-384.

scarf and ritual circumcision. Manifestations of religion, which used to be balanced against the protection of other equally important fundamental freedoms, now tend to be evaluated in terms of their adherence to a certain notion of national identity. The expression of different cultural values tends to be regarded in itself as a threat to the democratic order[84].

It is against this political and ideological framework that the issue of the *Islamic Charta* by the Central Council of Muslims in Germany on 20 February 2002 should be placed. This document states inter alia that

> 11. Whether German citizens or not, the Muslims represented by the Central Council (ZMD) accept the basic legal order of the Federal Republic of Germany as guaranteed by its Constitution, [providing] for the rule of law, division of power, and democracy, including a multi-party system, universal suffrage and eligibility, and freedom of religion. Therefore they accept as well everybody's right to change his religion, to have another religion, or none at all. The [Quran] forbids any compulsion or coercion in matters of faith.
> 12. We do not aim at establishing a clerical theocracy. Rather we welcome the system existing in the Federal Republic of Germany where State and religion harmoniously relate to each other.
> 13. There is no contradiction between the divine rights of the individual, anchored in the [Quran], and the core right as embodied in Western human rights declarations. We, too, support the intended protection of individuals against an abuse of State power. Islamic law demands equal treatment of what is identical and permits unequal treatment of what is not identical. The command of Islamic law to observe the local legal order includes the acceptance of the German statutes governing marriage and inheritance, and civil as well as criminal procedure.
> 19. The Central Council (ZMD) promotes an integration into society of the Muslim population which will not be detrimental to their Islamic

[84] See for example S. MUCKEL, *Islam in Germany*, in R. POTZ, W. WIESHAIDER (eds.), *Islam and the European Union*, Leuven, 2004, p. 42; M. PULTE, *Securitisation of religious freedom: religion and the limits of state control. The German situation*, in M. KIVIORG (ed.), *Securitisation of religious freedom: religion and limits of state control*, Granada, 2020, p. 237. A theoretical framework is provided by J. HÜTTERMANN, *Figurational Change and Primordialism in a Multicultural Society: A Model Explained on the Basis of the German Case*, in M. BURCHARDT, I. MICHALOWSKI (eds.), *After Integration. Islam, Conviviality and Contentious Politics in Europe*, Berlin, 2015, pp. 17-42.

identity. Therefore it supports all efforts for a better minority command of the German language and for better access to German citizenship[85].

The latter is an especially sensitive issue, because of public authorities' perceived need to reduce Turkish influence on German Muslims[86]. Like other European countries, Germany has been concerned with the construction of a national Islam. These efforts – where the drive for cooperation needs to be carefully balanced with the respect for Muslim organizations' autonomy – led in 2006 to the launch of the German Islam Conference, a forum for the dialogue between public authorities and Muslims in Germany[87], and in 2018 to the establishment of an institute of Islamic theology in order to train imams and teachers of Muslim religion[88]. The provision of an Islamic religious teaching in public schools has been an especially debated issue for the last few decades[89]. Only in two cases has the status of corporation under public law been awarded to Muslim groups: the Ahmadiyya Muslim Jamaat obtained this recognition in the *Länder* Hesse in 2013 and Hamburg in 2014. It is reported that it does not levy the church tax – just like the Congregation of the Jehovah's Witnesses[90]. An application for the award of the status of corporation under public law to the Ahmadiyya

[85] English translation in *http://www.zentralrat.de/3037.php*. See also M. ROHE, *The Application of Shari'a Law in Europe: Reasons, Scope and Limits*, in P. KRUINIGER (ed.), *Recht van de Islam 23. Vereniging tot bestudering van het Recht van de Islam en het Midden-Oosten*, Den Haag, 2009, p. 54.

[86] See for example US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 13.

[87] H.-C. JASCH, *op. cit.*, pp. 372-378.

[88] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 13. See also M. PULTE, *Public authorities and the training of religious personnel in Europe – the German perspective*, in M. MESSNER (ed.), *Public Authorities and the Training of Religious Personnel in Europe*, Granada, 2015, p. 123.

[89] See J. LUTHER, *Il modello tedesco della politica ecclesiastica e religiosa*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2014, pp. 217-218; S. MUCKEL, *Islam in Germany*, cit., pp. 71-75; M. PULTE, *Public authorities and the training of religious personnel in Europe – the German perspective*, cit., pp. 121-122; G. ROBBERS, *Religious freedom in Germany*, cit., pp. 657-658; US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., pp. 6 and 12.

[90] PEW FORUM, *op. cit.*

Muslim Jamaat has been pending in the *Land* North Rhine-Westphalia since 2018. The party Alternative for Germany introduced a motion to parliament to deny recognition alleging that the religious group aimed at establishing a theocratic order. The motion was rejected by other parties on the ground that only the State Chancellery is competent in this matter[91].

The most recent developments have concerned the institution of Muslim and Jewish military chaplaincies. The government discussed it with the German Islam Conference in 2019, and actuals measures were taken with regard to the Jewish communities. In July a bill was approved in order to appoint Jewish military chaplains for about 300 Jews serving in the army. The Conference of Orthodox Rabbi praised this measure as «an important signal, especially in times […] when there is again fertile ground for anti-Semitism, hate from the far right, and conspiracy theorists»[92]. In June 2021, Rabbi Zsolt Balla, based in the synagogue of Leipzig in Saxony, became the first Jewish military chaplain to be appointed since the expulsion of all Jews from the army in 1933[93]. Earlier in December 2019, Baden-Württemberg appointed for the first time two rabbis as police chaplains – one for Baden and the other one for Württemberg[94].

[91] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 9.

[92] Cit. in US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2020, p. 14, in *https://www.state.gov/reports/2020-report-on-international-religious-freedom/germany*.

[93] See *https://www.haaretz.com/world-news/europe/.premium-the-first-jewish-chaplain-to-the-german-military-in-100-years-takes-office-1.9925258*. See also P.C. APPELBAUM, *Loyalty Betrayed: Jewish Chaplains in the German Army During the First World War*, Portland, 2014.

[94] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2020, cit., p. 14.

3. Bilateral agreements[95]

Unlike other European constitutions, the German one does not mention bilateral agreements[96]. The authorization for the State to conclude them is grounded on Art. 138 § 1 WRV[97] read together with Art. 123 § 2 GG[98], which includes the *Reichskonkordat* signed in 1933 between

[95] 'Agreement' is the English word which will be used throughout this chapter, following Greg Taylor's note: «The German name for it is *Vertrag*; *Staatsvertrag* is also sometimes used for this or other agreements with Jewish and other religious groups. Vertrag is the German word for "treaty" as well as "contract", so that the word *Staatsvertrag* could be translated as "state treaty" and the word *Vertrag* as "treaty" or "contract". However, "treaty" would be quite misleading in English, as it would suggest that the agreement has a status in international law which it clearly does not have. "Contract", too, would sound odd». Hence the preference for «the all-purpose English word "agreement"» (G. TAYLOR, *German Courts Decide Who Is Jewish: On the Agreements between the German State and Jewish Groups, and the Resulting Litigation*, in *Journal of Law and Religion*, 20(2), 2004-2005, p. 397, fn. 1).

[96] See for example Albania (Art. 10 § 6: «Relations between the state and religious communities are regulated on the basis of agreements entered into between their representatives and the Council of Ministers. These agreements are ratified by the Assembly»); Italy (Art. 7 § 2: «[The relationships between the State and the Catholic Church] shall be regulated by the Lateran pacts. Amendments to such pacts which are accepted by both parties shall not require the procedure of constitutional amendments»; Art. 8 § 3: «[The relationships of denominations other than Catholicism] with the State shall be regulated by law, based on agreements with their respective representatives»); Poland (Art. 25 §§ 4-5: «The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute. The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers»).

[97] «Rights of religious societies to public subsidies on the basis of a law, contract or special grant shall be redeemed by legislation of the Länder. The principles governing such redemption shall be established by the Reich».

[98] «Subject to all rights and objections of interested parties, treaties concluded by the German Reich concerning matters within the legislative competence of the Länder under this Basic Law shall remain in force, provided they are and continue to be valid under general principles of law, until new treaties are concluded by the authorities competent under this Basic Law or until they are in some other way terminated pursuant to their provisions».

the Holy See and Germany amongst the international treaties. Bilateral agreements are indeed mentioned in the *Länder*'s constitutions[99]. They are regarded as special acts not of administrative law, but of internal public law (and, in the case of concordats with the Holy See, also of international law). They do not confer the status of corporation under public law, nor is this status a prerequisite to conclude an agreement[100]. Nevertheless, religious and belief groups signing one are usually corporations under public law strengthening the cooperation relationship through the bilateral instrument[101].

German scholars have identified three generations of bilateral agreements. The *Reichskonkordat* and the agreements signed in the 1920s and 1930s by Bavaria, Prussia and Baden respectively with the Catholic and the Evangelical-Lutheran Churches were characterized by the conferral of privileges counterweighted by strong jurisdictionalism[102]. The agreements of the 1950s and 1960s reflected Germany's new democratic orientation through the recognition of religious groups' autonomy and the guarantee of religious freedom. Those decades were further characterized by the signing of the first agreements with religious and belief groups other than the two traditional Churches. Finally, after Germany's reunification the bilateral instrument has experienced a great expansion[103]. An increasing number of agreements has been

[99] W. WIESHAIDER, *L'intesa tra il Governo Federale Tedesco e il Consiglio Centrale degli Ebrei in Germania*, in *Quaderni di diritto e politica ecclesiastica*, 2, 2003, pp. 425-426. See also J. LUTHER, *op. cit.*, pp. 212-213, fn. 9.

[100] J. LUTHER, *op. cit.*, p. 212.

[101] R. ASTORRI, *Lo sfondamento dell'orizzonte tradizionale: dalla prospettiva nazionale a quella globale. Stati e confessioni religiose alla prova. Religione e confessioni nell'Unione europea tra speranze disilluse e problemi emergenti*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 10, 2014, p. 10.

[102] Francesco Margiotta Broglio has referred to them as 'totalitarism concordats'. See F. MARGIOTTA BROGLIO, *L'istituto concordatario negli Stati totalitari e negli Stati democratici*, in *Ulisse*, 15, 1980, pp. 24-50.

[103] J. LUTHER, *op. cit.*, p. 214; G. ROBBERS, *Treaties between religious communities and the State in Germany*, in R. PUZA, N. DOE (eds.), *Religion and law in dialogue: Covenantal and non-covenantal cooperation between State and religion in Europe*, Leuven, 2006, pp. 60-62. See also A. HOLLERBACH, *Concordati e accordi concordatari in Germania sotto il pontificato di Giovanni Paolo II*, in *Quaderni di diritto e politica ecclesiastica*, 1, 1999, pp. 73-79; R. PUZA, *Convenzioni concordatarie e diritto statale*

signed not only by Eastern *Länder* exiting the system of State-religion relationships of the communist age[104], but also by Western *Länder*. There have been notable cases like Hamburg, which signed no bilateral agreement before Germany's reunification and concluded five between 2005 and 2012 – respectively with the Holy See, the Evangelical-Lutheran Church, the Jewish community, the Alevite community and jointly with three Muslim organizations. Nowadays, all *Länder* have agreements with the Evangelical-Lutheran Church (in some of them the one concluded with Prussia is legally binding) as well as with the Jewish community. Agreements with the Catholic Church are in force in all *Länder* except Berlin (also in this case some consider the one signed with Prussia as legally binding)[105]. The website of the Gregorian Pontifical University, which contains the most updated database of existing concordats, reports as many as 49 agreements signed at the *Länder* level. Some are general, whereas others focus on specific topics, like the legal regulation of theological faculties[106]. A smaller number of *Länder* have signed agreements with Muslim organizations (Bremen and, as

in materia religiosa. L'esperienza della Germania, in *Quaderni di diritto e politica ecclesiastica*, 2, 1997, pp. 317-322; A. VON CAMPENHAUSEN, *Conventional cooperation between State and religion: Austria and Germany*, in R. PUZA, N. DOE (eds.), *Religion and law in dialogue: Covenantal and non-covenantal cooperation between State and religion in Europe*, Leuven, 2006, pp. 7-9.

[104] R. ASTORRI, *Gli accordi concordatari durante il pontificato di Giovanni Paolo II. Verso un nuovo modello?*, in *Quaderni di diritto e politica ecclesiastica*, 1, 1999, pp. 33-34; R. ASTORRI, *Le convenzioni generali con i nuovi Länder della Germania*, in *Quaderni di diritto e politica ecclesiastica*, 2, 2009, pp. 307-315.

[105] R. ASTORRI, *Lo sfondamento dell'orizzonte tradizionale: dalla prospettiva nazionale a quella globale*, cit., pp. 10-11.

[106] See *https://www.iuscangreg.it/accordi_santa_sede.php#SGermany*.

mentioned, Hamburg[107]) or the Alevite community (Bremen[108], Hamburg[109], Lower Saxony[110] and Rheinland-Palatinate[111]).

Bilateral agreements often repeat fundamental provisions of constitutional law or specify rights recognized in non-bilateral laws[112]. The matters they regulate typically include theological faculties, religious teaching in public schools, private education, spiritual assistance in the army and hospitals, the media, tax exemptions and funding[113]. As regards theological faculties in State universities, the Catholic Church enjoys a wider sphere of autonomy than the Evangelical-Lutheran Church. Professors in these institutes are public employees, but those working in Catholic ones must obtain a canonical mandate (*missio canonica*). When this is revoked, the concerned professor may no longer teach at the theological faculty but, being still a public employee, he

[107] G. ROBBERS, *The mutual roles of religion and State in Germany*, in B. SCHANDA (ed.), *The mutual roles of religion and State in Europe*, Trier, 2014, p. 85; S. TESTA BAPPENHEIM, *Accordo fra Libera Città Anseatica di Amburgo e comunità islamiche locali. Un prototipo per la Germania, una prospettiva per altri Paesi?*, in C. CARDIA, G. DALLA TORRE (ed.), *Comunità islamiche in Italia*, Torino, 2015, pp. 533-555.

[108] The text in original language is available at *https://www.rathaus.bremen.de/sixcms/media.php/13/Alevitischen_Gemeinde_in_Deutschland.pdf*.

[109] The text in original language is available at *https://www.hamburg.de/contentblob/3551366/4e1faf8a197766a1d54a25acf7e5ee3a/data/download-alevitische-gemeinde.pdf*.

[110] The text in original language is available at *https://www.mk.niedersachsen.de/download/102951/Vertragsentwurf_Aleviten.pdf*.

[111] The text in original language is available at *https://mwwk.rlp.de/fileadmin/mbwwk/Service_Sonstiges/Vertrag_Land_RLP__Alevitische_Gemeinde_Deutschland_eV.pdf*.

[112] G. ROBBERS, *Treaties between religious communities and the State in Germany*, cit., p. 62.

[113] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 82; R. PUZA, *Citoyens et fidèles dans les pays de l'Union européenne: l'Allemagne*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Citizens and believers in the countries of the European Union*, Milan, 1999, pp. 401-402. See also R. ASTORRI, *La qualificazione professionale degli insegnanti di religione cattolica tra riforma della scuola e riforma dell'Università*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2001, pp. 132-134; R. PUZA, *Giovanni Paolo II e i concordati. Il finanziamento della Chiesa*, in *Quaderni di diritto e politica ecclesiastica*, 1, 1999, pp. 123-124.

or she must obtain another university post[114]. We will return later on the issue of the ministerial exception.

Although religious rules – as noted – are not a source of law in Germany, both state laws and bilateral agreements may refer to them[115]. Nevertheless, the reference to religion- and belief-related rules does not tend to be related to exemption rights. For example, the 2003 Agreement between the Federal Republic of Germany and the Central Council of Jews in Germany does not regulate any religion-specific needs (religious dietary rules, holidays, and so on). The preamble acknowledges «the special historical responsibility of the German people for Jewish life in Germany having regard to the immeasurable suffering that the Jewish population endured in the years from 1933 to 1945»[116]. As it has been noted

> Reviewing the agreement, one notes that it does not contain very much else beyond expressions of goodwill. Doubtless its chief importance (besides the allocation of funds for which it provides) lies in the fact that it exists at all. It represents a recognition by the whole German nation of the importance of good relations with Jewish people and of their valued place in society. There is no such comparable nationwide agreement with any other religious or ethnic group in German society, not even the Christian churches, unless one would include the Concordat of 1933[117].

Jewish communities' religion-specific needs are typically regulated by agreements signed with each *Land*, although they are not necessarily treated as exemption rights. For example, Art. 4 of the agreement with Saxony-Anhalt ensures the rights of indemnity contained in the Act on

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[114] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 89. See also I. RIEDEL-SPANGERBERGER, *La Facoltà di teologia in Germania*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2001, pp. 187-190.

[115] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 181.

[116] An English translation of the agreement is available in G. TAYLOR, *German Courts Decide Who Is Jewish*, cit., pp. 419-421.

[117] G. TAYLOR, *German Courts Decide Who Is Jewish*, cit., p. 411. On payments to Holocaust survivors and subsidies to Jewish groups, see also US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., pp. 6 and 13-14.

Sundays and Holidays on Jewish holidays, but it does not include any specific clauses on Jewish public employees or students in public schools[118]. Art. 5 § 3 of the agreement with Hamburg commits the Land to offer as far as possible, within the existing possibilities, a diet complying with religious dietary rules in public institutions. Art. 6 of this agreement, like Art. 3 of the one signed with Bremen[119], guarantees the Jewish community's right to maintain cemeteries, to establish new ones and to modify existing ones[120]. No mention is made of specific burial-related rules, though. By contrast, the agreements signed jointly with three Muslim organizations by Hamburg (Art. 10) and Bremen (Art. 6) recognize their right to have on-purpose burial sites in cemeteries, with no obligation to use coffins and with the exemption from exhumation[121]. It should be noted that exemption rights in this matter may also be granted by non-bilateral legislation. For example, Art. 1 § 4 of the Burial Decree of the *Land* Hamburg grants exemptions from the compulsory requirement to use coffins when this request is grounded on religion or belief[122]. The guarantee to have access to food compliant with Islamic dietary rules in healthcare, justice and police structures and the right to observe three Islamic holidays are recognized respectively by Arts. 7 and 3 of the Hamburg agreement and by Arts. 7 and 10 of the Bremen one.

Another exemption right that may be found in a bilateral agreement is the protection of the seal of confession. Under Art. 9 of the *Reichskonkordat*

> The clerics may not be required by judicial and other authorities to give information concerning matters which have been entrusted to them

[118] See GERMAN FOUNDATION FOR INTERNATIONAL LEGAL COOPERATION, *German Legal Provisions Relating to Religion in the Federal Republic of Germany*, p. 156, in *https://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Deutschland/Religionsnormen/German_Legal_Provisions/German_Legal_Provisions_Relating_to_Religion_March_2002.pdf*.

[119] The text in original language is available at *https://www.transparenz.bremen.de*.

[120] The text in original language is available at *http://www.landesrecht-hamburg.de*.

[121] S. MUCKEL, *Islam in Germany*, cit., p. 58.

[122] J. LUTHER, *op. cit.*, p. 216.

> while exercising the cure of souls, and which therefore come within the obligation of pastoral secrecy[123].

The recognition of this exemption right is especially relevant today, because the scandal of child sexual abuses had led lawmakers in different states around the world to discuss mandatory reporting to authorities by the clergy of related crimes learned during confession, or even to introduce bills in parliament[124]. In Germany this exemption right is not reserved to the Catholic Church. For example, Art. 21 of the Agreement of the Free State of Thuringia with the Protestant Churches in Thuringia stipulates that

> The statutory provisions in accordance with which clerics, their assistants and persons, while being trained for their profession participate in this professional activity, are entitled to refuse to give evidence on what is entrusted to them or becomes known to them in their capacity as spiritual advisers shall remain unaffected. The Free State of Thuringia shall stand for the preservation of this protection of the seal of confession and the secrecy regarding cure of souls[125].

Non-bilateral legislation extends this exemption right to all ministers of worship (Section 139 § 2 of the Criminal Code; Section 383 of the Code of Civil Procedure)[126]. Under Section 53 of the Code of Criminal Procedure, a clergyman/woman may not be heard as a witness concerning facts learned during confession or spiritual advice. This prohibition may not be derogated even if the concerned member of the clergy is willing to reveal information. Any evidence given in such circumstances is null and void[127].

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[123] English translation in GERMAN FOUNDATION FOR INTERNATIONAL LEGAL COOPERATION, *op. cit.*, p. 138.

[124] See M. CARNÌ, *Segreto confessionale e derive giurisdizionaliste nel rapporto della* Royal Commission *Australiana*, in *Diritto e Religioni*, 12(1), 2019, pp. 46-63; R. PALOMINO LOZANO, *Seal of confession and child abuse*, in *Ius Canonicum*, 59(118), 2019, pp. 767-812.

[125] GERMAN FOUNDATION FOR INTERNATIONAL LEGAL COOPERATION, *op. cit.*, p. 167.

[126] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 97.

[127] R. PUZA, *Religion in criminal law: Germany*, cit., p. 106.

4. Exemption rights

This section will examine derogations from general legal rules on the grounds of religion or belief in non-bilateral legislation and in case law.

As mentioned, exemption rights are not recognized in the field of criminal or family law. Cases of deviation from this principle are rather unusual. In 2007 a wife applied for a fast-track procedure of divorce (before the one-year period of separation from her husband) on the grounds of his repeated abuses and death threats. The judge did not grant the request because the parties, of Moroccan origin, were from a cultural environment where it was not unusual for the husband to use physical punishment against the wife – as if this was something which the wife could not therefore reasonably complain about. The judge was also reported to have cited a Koranic verse supporting her decision. The judgment sparked immediate, wide outrage and the judge was removed[128].

Parents do not have the right to refuse a life-saving medical treatment (like a blood transfusion can be in some instances) for their minor children[129]. Responsibilities are different when adults are involved. In 1971 the Federal Constitutional Court decided a case concerning a husband who had been charged with and convicted of involuntary manslaughter for failing to persuade his dying wife to receive a blood transfusion. The couple belonged to the Evangelical Brotherhood Association and believed in the healing power of prayer. The judges justified the man's behavior on the grounds of Art. 4 GG[130].

[128] I. AUGSBERG, S. KORIOTH, *op. cit.*, pp. 185-186. See also *https://www.au.org/church-state/may-2007-church-state/au-bulletin/german-judge-s-use-of-quran-sparks-debate*.

[129] W. LOSCHELDER, *op. cit.*, p. 40; H.-L. SCHREIBER, *New liberties and the physical integrity of the individual life and death in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *"New liberties" and Church and State Relationships in Europe*, Milan, 1998, p. 112.

[130] K.G. VANCE, *op. cit.*, pp. 7-8; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 84.

A study based on the qualitative reading of 72 decisions of German courts from the 1970s to 2016 on religion-based exemptions requested from school activities (coeducational swimming classes, school trips and sex education classes) has revealed that requests were made by Muslims and by Christians alike. As regards Muslims, the author has noted a shift in the case law from toleration and acceptance of exemption requests (the first ones date back to the mid-1980s) to a firm rejection thereof since the 2000s. This change is linked with increasing concerns about the multicultural character of the German society and the visibility of Islam in the public square[131]. Against the common assumption by the public at large that such legal challenges are a sign of failed integration, this study suggests that just the opposite may be held as true:

> Legal challenges by Muslim parents could only be made because parents acquired German linguistic skills, knowledge of the German legal system, and a sense that they can and should take part in shaping the country's socio-political landscape. Conclusions from the analysis in this article suggest that the more Muslims have become integrated and rooted in Germany, the less their religious concerns have been tolerated in the political and social spheres[132].

4.1. The ministerial exception

One of the most typical exemption rights recognized by Germany – as well as by other Member States of the European Union and of the Council of Europe – is the ministerial exception[133], consisting in a derogation from employment antidiscrimination law which allows religious or belief groups to hire personnel whose views are consistent with their own, and to dismiss them when such views (and related behavior) are regarded as no longer consistent. This is a well-established

[131] F. SPENGLER, *Shar'ī norms and German Schools: Court Challenges to Participation in Swimming Lessons, School Trips and Sex Education*, in *Islam and Muslim-Christian Relations*, 30(3), 2019, pp. 363-382.

[132] F. SPENGLER, *op. cit.*, p. 378.

[133] See P. SLOTTE, H. ÅRSHEIM, *The Ministerial Exception. Comparative Perspectives*, in *Oxford Journal of Law and Religion*, 4(2), 2015, pp. 171-198.

principle, whose application is nevertheless increasingly contested, mostly because of the difficulty to draw a line between public behavior which the employer has the right to scrutinize, and private one where the individual has a right to self-determination. A matter of controversy is also the definition of the different degrees of loyalty attached to each professional position: it is reasonable to expect for example that the teaching personnel in a religion- or belief-based private school is bound to different contract obligations than the cleaning staff.

Section 9 of Germany's General Act on Equal Treatment regulates permissible difference of treatment on the grounds of religion or belief.

> (1) Notwithstanding Section 8, a difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity.
> (2) The prohibition of different treatment on the grounds of religion or belief shall be without prejudice to the right of the religious community referred to under Section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation[134].

Controversies originated by the application of the ministerial exception are decided by German courts taking into account not only State law but also the concerned religious or belief group's legal rules defining the relationships between employers and employees[135]. Two cases are worthy of special attention, because they have been brought to the Federal Constitutional Court. The first judgment dates back to 4 June 1985. Maximilian Rommelfanger was a physician working in a hospital of a Catholic foundation, which provided medical care to patients regardless of their religion or belief and whose personnel also included

[134] English translation in *https://www.gesetze-im-internet.de/englisch_agg*.

[135] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 187; G. ROBBERS, *Germany*, p. 164.

non-Catholics (about 20%). The employment relationships were governed by guidelines stipulating that the employer could terminate the contract for important reasons including inter alia breaches of loyalty or serious offences against the Catholic Church's moral principles. In 1976 Germany decriminalized abortion at certain conditions. In 1979 the physician signed a letter with about fifty persons, which was published by the magazine *Stern*, to express disapproval of the criticism made by some circles against the abortion law. In 1980 his employment contract was terminated, because his views were just the opposite of those of the Catholic Church and he had further widely circulated them by means of the published letter. Dr. Rommelfanger challenged the dismissal. The three instances of labor courts (Essen, regional and federal) rejected the views of the employer, which then lodged a constitutional complaint. The Federal Constitutional Court noted that voluntary abortion was a serious crime under the Canon Law of the Catholic Church – a crime prescribed since the very first centuries of Christianity and sanctioned by excommunication. It thus found that the applicant had breached his duty of loyalty and that his dismissal was valid. Dr. Rommelfanger remained unemployed for one month and then found a new job in a non-Catholic hospital. He also applied to the European Commission of Human Rights alleging a violation of Art. 10 of the European Convention on Human Rights, but his application was rejected as manifestly ill-founded[136].

The second case originated from the dismissal of a senior doctor working in a Catholic hospital, on the ground that he remarried without a prior annulment of his first marriage. On 22 October 2014, the Federal Constitutional Court annulled the Federal Labor court's decision whereby the dismissal had been declared void. Interestingly the constitutional judges referred to the ECtHR case law which, in their view, did not justify a change in the interpretation of constitutional law in this matter[137]. Nevertheless, a subsequent case, originated from similar cir-

[136] *Maximilian Rommelfanger against the Federal Republic of Germany*, 2242/86, 6 September 1989 [dec.]. See also G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 91; I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 181, fn. 4.

[137] F. CRANMER, *German Constitutional Court upholds dismissal of divorced & remarried Roman Catholic doctor*, in *Law & Religion UK*, 27 November 2014, *https://*

cumstances, led to a different outcome. In that case, the Federal Labor Court requested a preliminary ruling to the Court of Justice of the European Union and, on 20 February 2019, it decided in favor of the plaintiff, a Catholic chief of medicine in a Catholic hospital, who had been dismissed for marrying a second time[138].

It should be noted that a number of the most relevant decisions by the European Court of Human Rights[139] and the Court of Justice of the European Union[140] have involved Germany. This may be partly explained by the circumstance that about 1.5 million people are employed by Germany's largest Churches together[141].

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lawandreligionuk.com/2014/11/27/german-constitutional-court-upholds-dismissal-of-divorced-remarried-roman-catholic-doctor.

[138] E. TÖPFER, *Franet National contribution to the Fundamental Rights Report 2020*, p. 40, in *https://fra.europa.eu/sites/default/files/fra_uploads/germany-frr2020_en.pdf*.

[139] See the cases *Obst*, 425/03, 23 September 2010; *Schüth*, 1620/03, 23 September 2010; *Siebenhaar*, 18136/02, 3 February 2011; *Müller*, 12986/04, 6 December 2011 [dec.]; *Baudler*, 38254, 6 December 2011 [dec.]; *Reuter*, 39775, 6 December 2011 [dec.]. The texts of the judgments are available at *https://hudoc.echr.coe.int*. See also G. ROBBERS, *Church autonomy in the European Court of Human Rights. Recent developments in Germany*, in *Journal of Law and Religion*, 26(1), 2010-2011, pp. 281-320; F. CRANMER, *Employment Rights and Church Discipline: Obst and Schüth*, in *Ecclesiastical Law Journal*, 13(2), 2011, pp. 208-215; N. HERVIEU, *Salarié d'une Église, Tu pourras commettre l'adultère … Enfin pas systématiquement (CEDH 23 septembre 2010, Obst et Schüth c. Allemagne). Licenciement pour cause d'adultère et obligations spécifiques des salariés d'organisations religieuses*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 2010, pp. 1-5; C. WALTER, *German national report*, in M. RODRÍGUEZ BLANCO (ed.), *Law and Religion in the Workplace. Proceedings of the XXVIIth Annual Conference, Alcalá de Henares, 12-15 November 2015*, Granada, 2016, pp. 196-198.

[140] *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, 17 April 2018; *IR v JQ*, 11 September 2018. The texts of the judgments are available at *http://curia.europa.eu*. For a broader discussion of the ministerial exception in the European Union, see E. SVENSSON, *Religious Ethos, Bond of Loyalty, and Proportionality. Translating the 'Ministerial Exception' into 'European'*, in *Oxford Journal of Law and Religion*, 4(2), 2015, pp. 224-243.

[141] C. EVANS, A. HOOD, *Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights*, in *Oxford Journal of Law and Religion*, 1(1), 2012, pp. 82-83; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 90.

4.2. Religious slaughter

The derogation from the compulsory previous stunning of animals to slaughter according to a religious rite is one of the most controversial exemption rights in Germany as well as in other European countries[142]. Few religious practices are as misunderstood as religious slaughter.

Religious slaughter is the slaughter of an animal carried out according to a religious rite, in order to eat the meat thereof. The slaughter of an animal in order to offer it as a sacrifice to a deity, without consuming its meat, is not covered by the legal protection afforded to religious slaughter. Although in practice the only relevant religious rites in the European territory are the Jewish and Islamic ones, any religious community having internal rules that regulate the slaughter of an animal for the production of food for human consumption would be covered by the same legal provisions.

There exists a widespread idea that religious slaughter (and only religious slaughter) is characterized by the throat cut. In fact, a large part of the public opinion and media associate religious slaughter to the image of blood. However, it should be stressed that the cut of the throat of large animals also takes place in conventional slaughter. This is a compulsory requirement prescribed by the State (or any other secular competent authority): for hygienic reasons, blood must be drained from any large animals whose meat is meant to be used for human consumption.

The definition of religious slaughter as slaughter without previous stunning is equally misleading. It is true that, in the State's perspective, the main difference between conventional and religious slaughter is that the former is carried out *after* stunning, whereas there are religious rites prescribing slaughter *without* previous stunning. However, in the religious community's perspective, religious slaughter is characterized by a number of rules, rites and procedures far more complex than the mere slaughter without previous stunning. Further, a number of Muslim communities allow previous stunning, provided that the animal is only

[142] R. BOTTONI, *I recenti decreti delle Regioni vallona e fiamminga sulla macellazione rituale nel contesto dei dibattiti belga ed europeo in materia*, in *Quaderni di diritto e politica ecclesiastica*, 2, 2017, pp. 545-580.

rendered unconscious, and that death is actually caused by the act of slaughter (and not of stunning).

Religious slaughter was practiced by ancient Jews long before the Christian age as a humane method to kill animals. Jews in Europe practiced it for centuries without raising any problems, among other reasons because Christian communities had no rules on animal welfare. From the Jewish point of view, *shechita* was much less painful than clubbing or stabbing animals, hanging them upside down and cutting their throats (practices that were widespread amongst Christian communities). Methods alternative to *shechita* could leave the animal stunned, but not unconscious, and butchering could start while the animal was alive and even alert. It is worth noting that one of the seven Noahide laws – which in Judaism are regarded as applying to all human beings as descendants of Noah – prohibits the eating of a limb torn from a live animal[143]. This rule may seem odd in the 21st century, but it should be placed in the historical context where it developed – a context characterized by little or no consideration for animals as living being. There exists a common misunderstanding according to which animal welfare is a 'secular' interest (pursued by conventional slaughter, which allegedly does not harm animals). This would be opposed to a 'religious' interest (the protection of the right to religious freedom, which allegedly includes the right to harm non-human sentient beings). However, animal welfare is not an alien concept in Judaism and Islam. Jews and Muslims dealt with this issue before the enactment of the first secular legal measures to protect animals. Even stunning – which secular legal regulations regard as the technique allowing the slaughter of an animal in the least painful way, according to the current state of scientific knowledge and technological progress – was introduced in conventional slaughter in the context of industrialization, out of a need to kill as many animals as possible in as little time as possible[144].

[143] S. LAST STONE, *Jewish law. Dynamics of belonging and status*, in R. BOTTONI, S. FERRARI (eds.), *Routledge Handbook of Religious Laws*, London, 2019, p. 161.

[144] At this regard, Italy's National Bioethics Committee has developed some interesting considerations (*Opinion concerning religious slaughter and animal pain*, 19 September 2003). In Judaism and Islam, religious rules concerning slaughter address the problem of the legitimacy of killing animals to produce food for human consump-

Between World War I and World War II, religious slaughter was prohibited in most of Europe, including – it goes without saying – Germany (*Animal Slaughter Act* and *Ordinance on the Slaughter of Warm-Blooded Animals* of 21 April 1933, *Animal Welfare Act* of 24 November 1933 and *Ordinance on the Slaughter of Cold-Blooded Animals* of 14 January 1936)[145]. After the end of World War II, most European countries have allowed again this practice – that is, religious slaughter without previous stunning. As mentioned, the killing of an animal according to a religious rite envisaging prior stunning does not conflict with State law on slaughter. Limitations or prohibitions always and only apply to religious slaughter *without* previous stunning.

Under both the *Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing*, and the *Council Regulation 1099/2009 of 24 September 2009 on the protection of animals at the time of killing*, which repealed and replaced the Directive, previous stunning is compulsory. However, Member States may derogate from this compulsory requirement in the case of religious

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tion. Religious slaughter stresses that other living beings are not freely available to human beings. By sacralizing the procedure to kill an animal, religious slaughter emphasizes the gravity of this act. Killing an animal is not something ordinary, which may be carried out without reflecting on the fact that it causes the death of a living being. Modern, industrial methods of slaughter have affected this original meaning, by making it misunderstood. Contemporary societies have lost the direct relationship between human beings and farm animals, which characterized the past and somehow 'humanized' the moment when an animal was killed. Slaughter aiming at the production of food has been depersonalized and organized according to economy- and industry-related needs. Nevertheless, the ethical value of religious slaughter should not be neglected. Detailed rules for example on the sharpness of the blade and the way the cut must be performed aim at reducing animal pain. It goes without saying that these provisions should be evaluated in the light of the knowledge and the techniques that were available when religious slaughter was codified. It is legitimate to ask the question of whether the progress of such knowledge and techniques allows room for reconsidering some of those rules. At the same time, it is necessary to stress that religious slaughter lacks any intention to be cruel against animals, and that it was rather envisaged to prevent any avoidable suffering. The text in original language is available at *http://bioetica.governo.it.*

[145] S. FERRARI, R. BOTTONI, *Legislation Regarding Religious Slaughter in the EU Member, Candidate and Associated Countries*, 2010, p. 88, in *https://issuu.com/florencebergeaud-blackler/docs/report-legislation.*

slaughter, provided that some requirements are complied with: religious slaughter may only be carried out 1) in slaughterhouses, 2) under the responsibility of the official veterinarian, and 3) provided that bovine animals are mechanically restrained before slaughter. Most EU countries have allowed a derogation, including Germany[146].

Germany provides for both a 'standard' and 'exceptional' derogation from the compulsory requirement of previous stunning. The former, which is easier to obtain, allows a religious community to modify stunning parameters in order to perform reversible stunning before religious slaughter. It is typically granted to Muslim communities. Under Art. 14 § 2 of the *Ordinance on the protection of animals at the time of slaughter or killing* of 3 March 1997

> By way of derogation from Article 13 § 6 in conjunction with Annex 3, the competent authority may authorise temporarily:
> […];
> 3. short-time electric stunning by way of derogation from Annex 3, part II, no. 3.2 with a minimum time for the current flow of two seconds, and by way of derogation from Annex 3, part II, no. 3.3 for cattle older than six months, without current flowing through the heart as a method for stunning, in so far as is necessary to meet the requirements of the members of certain religious communities, to whom mandatory rules of their religious community forbid the use of other methods for stunning[147].

The exceptional derogation allows to be exempted from any form of previous stunning and can only be applied for by religious communities, whose rules require slaughter without stunning or prohibit consumption of meat of animals slaughtered in a different way. Under Art. 4a of the *Animal Welfare Act*, enacted on 24 July 1972 and amended a number of times:

> (1) Warm-blooded animals may be slaughtered only if stunned before exsanguination.

[146] See R. BOTTONI, *Legal Aspects of Halal Slaughter and Certification in the European Union and its Member States*, in Y.R. AL-TEINAZ, S. SPEAR, I.H.A. ABD EL-RAHIM (eds.), *The Halal Food Handbook*, Hoboken, 2020, pp. 256-260.

[147] English translation in S. FERRARI, R. BOTTONI, *op. cit.*, p. 86.

> (2) Notwithstanding paragraph 1, stunning is not required in case
> 1. it is impossible under the circumstances of an emergency slaughter,
> 2. the competent authority have granted an exceptional permission for slaughter without stunning (religious slaughter); this exceptional permission may be granted only where necessary to meet the needs of members of certain religious communities in the territory covered by this Act whose mandatory rules require slaughter without stunning or prohibit consumption of meat of animals not slaughtered in this way or
> 3. this is provided through statutory ordinance according to Article 4b §3[148].

Thus, the exceptional permission requires the existence of a religious commandment, which all believers must respect. As a consequence, only the Jewish communities have always been granted the 'exceptional' derogation. By contrast, Muslim communities' requests to perform religious slaughter without previous stunning have often been rejected[149]. This difference of treatment may historically be grounded also on political considerations, as highlighted by the Gelsenkirchen Administrative Tribunal in a judgment of 1982.

> The permission for Jews to slaughter represents an act of political, cultural and humanitarian compensation to the Jews who are still alive (*den noch lebenden Juden*). The Jewish religion has in Germany a greater historical tradition than the Muslims. Jews have integrated more or less into the German people (*Volk*) as Germans with essentially the same rights and duties. There exists no violation against the principle of equal treatment with respect to the Muslims[150].

On 15 June 1995 the Federal Administrative Court justified the denial of the exceptional permission to a Muslim organization on the ground that «the faith of Sunnites, just as the faith of Muslims in general, does not contain any mandatory provisions that ban the consumption of the meat of animals that were stunned before they were slaughtered». This restriction does not violate the right to religious freedom

[148] English translation in S. FERRARI, R. BOTTONI, *op. cit.*, p. 84.

[149] See for example S. MUCKEL, *Islam in Germany*, cit., pp. 50-52.

[150] Quoted by S. LAVI, *Unequal rites – Jews, Muslims and the History of Ritual Slaughter in Germany*, in *Tel Aviver Jahrbuch für deutsche Geschichte*, 37, 2009, p. 174.

«if the religious conviction of the person concerned only prohibits him or her from the consumption of the meat of animals that were not ritually slaughtered»[151]. The court added that

> the adherents of such a religion […] are neither legally nor factually forced to eat the meat of animals that were not ritually slaughtered. The ban on ritual slaughter does not ban the consumption of the meat of animals that were ritually slaughtered. The adherents of such a religion can change over to food of vegetable origin or to fish, and they can resort to meat that is imported from other countries. Certainly, meat is a usual food today. Doing without meat, however, does, according to the Court, not constitute an unreasonable restriction of the freedom to develop one's personality. The court concluded that the difficulty that this restriction adds to planning one's diet, which is to be measured against the standard of Article 2.1 of the Basic Law is reasonable in the interest of the protection of animals[152].

A Turkish citizen and pious Sunni Muslim, who had been living in Germany for 20 years and operated a butcher's shop, had been granted the exceptional permission to cater for his customers until 1995, when the above-mentioned judgment was issued. He lodged a constitutional complaint arguing that

> with a view to the precept of the state's strict neutrality as regards religious and philosophical creeds, state courts cannot decide in a binding manner whether mandatory provisions in the mentioned sense exist for the individual member of the respective religious group. It is therefore sufficient if it can be inferred, with sufficient clarity, from the circumstances that a serious religious conviction exists[153].

Interestingly, the complainant also claimed a violation of his right to occupational freedom[154]. The Federal Constitutional Court regarded the

[151] Quoted by BVerfG, Judgment of the First Senate of 15 January 2002 – 1 BvR 1783/99 –, para 12, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2002/01/rs20020115_1bvr178399en.html*.

[152] BVerfG, Judgment of the First Senate of 15 January 2002, cit., para 11.

[153] BVerfG, Judgment of the First Senate of 15 January 2002, cit., para 20.

[154] BVerfG, Judgment of the First Senate of 15 January 2002, cit., paras 21-23. In India, where cow slaughter is a major socially and politically divisive issue, members

constitutional complaint as well-founded and, in the judgment of 15 January 2002, it recognized the claimant's right to be granted an exceptional permission to perform religious slaughter without previous stunning. This decision, adopted unanimously, rested on the interpretation of the legal elements 'religious group' and 'mandatory provisions'.

> [T]he concept of a "religious group" under § 4a.2.2 of the Animal Protection Act does not require that such a group: (1) fulfils the prerequisites for the recognition as a religious body under public law pursuant to Article 137.5 of the *Weimarer Reichsverfassung* [WRV, Constitution of the German *Reich* of August 11, 1919]; or (2) is entitled to engage in imparting religious instruction pursuant to Article 7.3 of the Basic Law. The Court found that for granting an exemption pursuant to § 4a.2, number 2 of the Animal Protection Act, it is sufficient that the applicant belongs to a group of persons who are united by a common religious conviction […]. This means that groups within Islam whose persuasion differs from that of other Islamic groups may also be considered as religious groups under the terms of § 4a.2, number 2 of the Animal Protection Act […]. This interpretation of the concept of a "religious group" is in accord with the Constitution and, in particular, takes Articles 4.1 and 4.2 of the Basic Law into consideration. […].
>
> Indirectly, this interpretation has consequences also when it comes to dealing with the concept of "mandatory provisions" that prohibit the members of the religious group in question from the consumption of the meat of animals that were not ritually slaughtered. The competent authorities, and in the case of disputes, the courts, are to examine and to decide whether the religious group in question complies with this prerequisite, because this is the legal element that is required for the grant of the exceptional permission that is sought. In the case of a religion that, as Islam does, takes different views as regards mandatory ritual slaughter, the point of reference of such an examination is not necessarily Islam as a whole or the Sunnitic or Shiitic persuasions of this religion. The question whether mandatory provisions exist is to be answered with a view to the specific religious group in question, which may also exist within such a persuasion […].

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of the Muslim Quraishi Community who were mainly engaged in the butchers trade lodged a petition with the Supreme Court, complaining that the laws of the States of Bihar, Uttar Pradesh, and Madhya Pradesh infringed their rights to freedom of religion and freedom of occupation, too, insofar as they restricted cattle slaughter. See D. BARAK-EREZ, *Symbolic Constitutionalism: On Sacred Cows and Abominable Pigs*, in *Law, Culture and the Humanities*, 6(3), 2010, p. 427.

> In this context, it is sufficient that the person who needs the exceptional permission pursuant to § 4a.2, number 2, part 2 of the Animal Protection Act in order to supply the members of a religious group, states, in a substantiated and understandable manner, that the common religious conviction of the religious group mandatorily requires the consumption of the meat of animals that were not stunned before they were slaughtered […]. If such a statement has been made, the state, which may not fail to consider such a concept that the religious group has of itself […] is to refrain from making a value judgement concerning this belief […]. In the light of Article 4 of the Basic Law, the state cannot negate the "mandatory" nature of a religious norm for the sole reason that the respective religion has also rules that take its adherents' pressure of conscience into consideration by admitting exemptions, *e.g.*, with a view to present environment of its adherents and the dietary habits that prevail there […][155].

In the same year (2002), the Parliament approved an amendment to constitution including animal welfare as a national objective, in order to give it constitutional protection and greater weight when balanced against religious freedom[156].

> Art. 20A GG. Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

Subsequent case law remained divergent, with some courts that granted the 'exceptional' derogation, and others that did not[157]. In the political and public debate, the issue of religious slaughter remains a hotly debated one.

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[155] BVerfG, Judgment of the First Senate of 15 January 2002, cit., paras 55-57. See also M. ROHE, *Islamic norms in Germany and Europe*, in A. AL-HAMARNEH, J. THIELMANN, *Islam and Muslims in Germany*, 2008, pp. 55-57; *The Constitutional Court's "Traditional Slaughter" Decision: The Muslims' Freedom of Faith and Germany's Freedom of Conscience*, in *German Law Journal*, 3(2), 2002, E7.

[156] C.E. HAUPT, *Free exercise of religion and animal protection: a comparative perspective on ritual slaughter*, in *George Washington International Law Review*, 39, 2007, pp. 868-872.

[157] S. FERRARI, R. BOTTONI, *op. cit.*, p. 89.

> Besides organizations for the protection of animals, some extremist nationalists used this conflict for defaming the judiciary to 'support the claims of immigrants (including Jews living in Germany since more than 1000 years?) against the ethic standards of Germans in their own country'[158].

In any case, the exceptional permission to slaughter without previous stunning may only be requested for the production of meat intended for internal consumption. Export of meat from animals subject to a method of religious slaughter without prior stunning is strictly forbidden[159]. This practice is only allowed to guarantee the right to religious freedom of those who live in Germany, and not to gain economic profit. This is a remarkable difference with other European countries, where religious slaughter without previous stunning is regarded as a powerful instrument to promote export to Muslim markets[160].

4.3. Religious symbols

Two different issues have emerged in Germany concerning religious symbols[161]: one is the controversy over the display of the crucifix in classrooms of Bavarian public school – which will not be addressed here as it is not related to an exemption right[162]–: the other one revolves

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[158] M. ROHE, *Islamic norms in Germany and Europe*, cit., p. 57.

[159] S. FERRARI, R. BOTTONI, *op. cit.*, p. 88.

[160] This is the case of Lithuania, Poland and Italy. See R. BOTTONI, *I recenti decreti delle Regioni vallona e fiamminga sulla macellazione rituale nel contesto dei dibattiti belga ed europeo in materia*, cit., pp. 546-550; R. BOTTONI, *The Italian Experience with Halal Certification: The Case of Halal Italia*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 6, 2020, pp. 1-18.

[161] The most updated and comprehensive study on religious symbols is S. TESTA BAPPENHEIM, *I simboli religiosi nello spazio pubblico: profili giuridici comparati*, Napoli, 2019.

[162] On this issue see R. PUZA, *Citoyens et fidèles dans les pays de l'Union européenne: l'Allemagne*, cit., pp. 387-392; H.M. HEINIG, *Religion in public education – Germany*, in G. ROBBERS (ed.), *Religion in public education*, Trier, 2011, pp. 177-179; S.P. RAMET, *op. cit.*, pp. 140-141; K.G. VANCE, *op. cit.*, pp. 14-15; S. KORIOTH, I. AUGSBERG, *op. cit.*, p. 329; P. CAVANA, *I simboli religiosi nello spazio pubblico nella recente esperienza europea*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoe*

around the right to wear a religious symbol. What is significant about the German experience is that a number of *Länder* have indeed granted a derogation from the general prohibition on some categories of people to wear a religious symbol, but they have granted it to Christian and/or Western symbols, and not to Islamic ones[163].

On 24 September 2003, the Federal Constitutional Court ruled in a case concerning Ms. Ludin, a Muslim woman who had not been appointed to the teaching profession

> on the grounds of lack of personal aptitude. By way of a reason, it was stated [by the Stuttgart Higher School Authority] that the complainant was not prepared to give up wearing a headscarf during lessons. The headscarf, it was stated, was an expression of cultural separation and thus not only a religious symbol, but also a political symbol. The objective effect of cultural disintegration associated with the headscarf, it was said, was not compatible with the requirement of state neutrality[164].

The Stuttgart Administrative Court, the Higher Administrative Court of Baden-Württemberg and the Federal Administrative Court concurred that a teacher wearing a headscarf in the classroom was liable to impose a influence on young pupils, which they could not avoid[165]. In the opinion submitted to the Federal Constitutional Court, the Federal Government attached great importance

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chiese.it), 28, 2012, pp. 33-35. See also ECtHR, *Lautsi and Others v. Italy*, 30814/06, 18 March 2011 [GC], para 28.

[163] The focus will be on the *hijab*. On *burkas* and *niqabs*, see J. THIELMANN, K. VORHOLZER, *Il burqa in Germania: un problema minore*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2012, pp. 211-218; OPEN SOCIETY JUSTICE INITIATIVE, *Restrictions on Muslim Women's Dress in the 28 EU Member States: Current Law, Recent Legal Developments, and the State of Play*, 2018, pp. 44-49, in *https://www.justiceinitiative.org/uploads/dffdb416-5d63-4001-911b-d3f46e159acc/restrictions-on-muslim-womens-dress-in-28-eu-member-states-20180709.pdf*.

[164] BVerfG, Judgment of the Second Senate of 24 September 2003 – 2 BvR 1436/02 – para 3, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html*.

[165] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., paras 7, 10 and 14-15.

> to the employer's prediction of future danger in that the teacher's conspicuous outer appearance might have a long-term detrimental influence on the peace at the school, in particular because throughout all the lessons the pupils were confronted with the sight of the headscarf and thus the expression of a *foreign* [*sic*!] religious belief, without a possibility of avoiding it[166].

The Federal Constitutional Court examined the meanings attached to the Islamic headscarf, which «is not in itself a religious symbol»[167]. These included the meanings of a «symbol for upholding traditions of the society of the wearer's origin» and of «a political symbol of Islamic fundamentalism that expresses the separation from values of western society, such as individual self-determination and in particular the emancipation of women»[168]. By a majority of 5 vote to 3[169], the court did conclude that the complainant had «in a constitutionally unacceptable manner been denied access to a public office», but that this happened because the exclusion lacked the necessary, sufficiently definite statutory basis[170]. In doing so, the court invited the *Länder* to adopt legislation prescribing such prohibitions or limitations. In fact, it held that «the *Land* legislature responsible is at liberty to create the statutory basis that until now has been lacking»[171]. This position has been criticized in that it failed to provide some indications on permissible legislation, and it extended the margin of discretion to the point that all imaginable

[166] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 22. The italics is mine.

[167] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 50.

[168] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 51.

[169] M. MAHLMANN, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, in *German Law Review*, 4(11), 2003, p. 1107.

[170] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., paras 30, 38, 49, 57-58, 61, 72.

[171] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 62. For a general discussion of the judgement, see S. TESTA BAPPENHEIM, *Il Kopftuch e la libertà religiosa nelle scuole tedesche: una, nessuna, centomila*, in *Coscienza e libertà*, 38, 2004, pp. 104-121.

solutions might be regarded as equally legitimate from the constitutional point of view[172].

The minority judges attached a dissenting opinion holding that the majority seemed to ignore that the constitution itself provided the legal basis for the refusal to appoint a headscarved woman[173]. «The uncompromising wearing of the headscarf in class that the complainant seeks is incompatible with the requirement for a civil servant to be *moderate* and neutral»[174].

After the court decision, half of Germany's *Länder* adopted laws on neutrality regulating the wearing of religious symbols and clothing by teachers in public schools and, in some cases, of other categories of public officials (Baden Württemberg, Bayern, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia and Saarland)[175]. Interestingly, no *Land* of the former Democratic Republic has done so. As Joppke has noted, lawmakers basically faced two options. The first one was a prolongation of

> the German tradition of pro-religious neutrality, which would mean to generally accept veiled Muslim teachers in public school, much as veiled catholic nuns were already accepted in the same capacity. […]. The second option was to move toward stricter, French style neutrality,

[172] H.M. HEINIG, *Religion in public education – Germany*, cit., p. 183.

[173] The minority position has been endorsed by A. VON CAMPENHAUSEN, *The German headscarf debate*, in *Brigham Young University Law Review*, 2, 2004, pp. 69-694.

[174] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 102. The italics is mine. It should be noted that German case law reached different conclusions in cases concerning private, and not public employees. In 1996 the Hamburg Labor Court found that the dismissal of a Sikh chef growing a beard and wearing a turban at the workplace was illegitimate. On 30 July 2003, the same year as the Ludin case, the Federal Constitutional Court also found that an employer had acted illegitimately by dismissing a veiled saleswoman out of fear of a decrease in sales. See S. TESTA BAPPENHEIM, *«Auri sacra fames?». Sì, ma non troppo. Nota a «BVerfG», 30 luglio 2003*, in *Quaderni di diritto e politica ecclesiastica*, 3, 2005, pp. 811-816; D. SCHIEK, *Just a Piece of Cloth? German Courts and Employees with Headscarves*, in *Industrial Law Journal*, 33(1), 2004, pp. 68-69.

[175] E. HOWARD, *Religious clothing and symbols in employment. A legal analysis of the situation in the EU Member States*, Brussels, 2017, p. 85, in *https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48810*.

in which the state prohibits the veil, but then would have to prohibit all religious symbolisms, the Christian ones included[176].

Instead, a third path was followed by the greatest majority of the concerned *Länder*: they did not choose one of those two competing notions of neutrality, but a national version based on the promotion of Christian-Western values[177]. None of them prohibited expressly the Islamic headscarf, but this was «the focus of the laws' prior parliamentary debates and explanatory documents, which have emphasized the need to recognize the Western cultural tradition shaped by Christianity (and Judaism)»[178]. Five *Länder* – Baden-Württemberg, Bavaria, Hesse, North Rhine-Westphalia and Saarland – prohibited the wearing of religious symbols and clothing exempting those representing Christian-Western educational values[179]. Berlin's law, applicable to all civil servants in the justice and law enforcement sectors, made an exception for small crosses or crucifixes worn as jewels[180].

Most of these laws have been challenged before court[181]. A case reached the Federal Constitutional Court which, on 27 January 2015,

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[176] C. JOPPKE, *State neutrality and Islamic headscarf laws in France and Germany*, in *Theory and Society*, 36, 2007, p. 328.

[177] C. JOPPKE, *op. cit.*, p. 328.

[178] HUMAN RIGHTS WATCH, *Discrimination in the name of neutrality. Headscarf Bans for Teachers and Civil Servants in Germany*, 2009, pp. 1-2, in *https://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf*. On cultural Christianity and its alleged neutrality, and the desacralization of the symbols of the majority, see S. MANCINI, M. ROSENFELD, *Sotto il velo della tolleranza. Un confronto tra il trattamento dei simboli religiosi di maggioranza e di minoranza nella sfera pubblica*, in *Ragion pratica*, 2, 2012, pp. 421-452.

[179] HUMAN RIGHTS WATCH, *op. cit.*, pp. 25-27. The Baden-Württemberg case has been closely examined by C. JOPPKE, *op. cit.*, pp. 331-336.

[180] HUMAN RIGHTS WATCH, *op. cit.*, p. 37. For a general discussion of Berlin's neutrality law, reputed to reinforce the types of discrimination that EU law seeks to eliminate, see J.M. MUSHABEN, *Women Between a Rock and a Hard Place: State Neutrality vs. EU Anti-Discrimination Mandates in the German Headscarf Debate*, in *German Law Review*, 14(9), 2013, pp. 1757-1785.

[181] HUMAN RIGHTS WATCH, *op. cit.*, pp. 31-35 and 37-38; OPEN SOCIETY JUSTICE INITIATIVE, *op. cit.*, pp. 46-47; E. HOWARD, *op. cit.*, pp. 85 and 94; J.M. MUSHABEN, *op. cit.*, p. 1768.

issued a judgment concerning two employees in state schools in North Rhine-Westphalia, dismissed because they refused to remove the Islamic headscarf while on duty. By a majority of 6 votes to 2, the court held that

> A statutory prohibition on expressing religious beliefs at the *Land* level (in this case, pursuant to § 57 sec. 4 of the North Rhine-Westphalia Education Act) by outer appearance in an interdenominational comprehensive state school based on the mere abstract potential to endanger the peace at school or the neutrality of the state is disproportionate if this conduct can be plausibly attributed to a religious duty perceived as imperative. An adequate balance between the constitutional interests at issue – the educational staff's freedom of religion, the pupils' and parents' negative freedom of religion, the fundamental right of parents and the educational mandate of the state – can only be struck via a restrictive interpretation of the prohibitive provision, i.e. that there must be at least a sufficiently specific danger to the protected interests[182].

As regards the preference attributed to Christian and Western educational and cultural values or traditions in the carrying out of the educational mandate, the majority concluded that this resulted in a disadvantage for followers of religions other than Christianity and Judaism, which may not be justified under constitutional law[183]. This is not to say that Christian references should not be allowed, but other religious and ideological values should find space, too[184].

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[182] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, headnote 2, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/01/rs20150127_1bvr047110en.html*. This position has been welcomed as bringing German case law in line with international standards, defined not so much by the ECtHR which, in this matter, recognizes a wide margin of appreciation to contracting States, as by the UN Human Rights Committee, which has a more restrictive approach. See J.R. LEISS, *One Court, Two Voices: Case Note on the First Senate's Order on the Ban on Headscarves for Teachers from 27 January 2015: Case No. 1 BvR 471/10, 1 BvR 1181/10*, in *German Law Journal*, 16(4), 2015, p. 914.

[183] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, cit., para 124.

[184] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, cit., paras 111 and 115. On subsequent case law, see E. HOWARD, *op. cit.*, p. 94.

The two dissenting judges rejected the argument that «only a sufficiently specific danger to the peace at school and to state neutrality can justify a ban»[185] on the Islamic headscarf, and they refuted the majority's view that the impugned provision constituted an exemption for Christian and Jewish religions, thus privileging them[186].

Two more court decisions are worth a brief mention. Since 1 January 2019 the municipality of Koblenz prohibited the wearing of the burkini for health-related reasons, but in June the High Administrative Court of Rhineland-Palatinate overturned the ban[187]. On 4 July of the same year, the Federal Administrative Court denied the religion-based exemption requested by a turban-wearing Sikh from the obligation to wear a helmet while riding a motorcycle[188].

4.4. Ritual circumcision

Circumcision is a practice typically associated to Judaism and Islam, but it should be noted that it is rooted also in other contexts, for example in some African cultures as a rite of passage[189]. In Judaism, it is

[185] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, cit., para 2 of the separate opinion. This view is shared by G. TAYLOR, *Teachers' Religious Headscarves in German Constitutional Law*, in *Oxford Journal of Law and Religion*, 6(1), 2017, pp. 93-111. On the dissenting judges' position, see also M. MAHLMANN, *Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Head Scarf Decision*, in *German Law Review*, 16(4), 2015, pp. 895-896 and 898.

[186] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, cit., para 3 of the separate opinion.

[187] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 11.

[188] An English translation of part of the judgment may be found on the court's website at *https://www.bverwg.de/en/040719U3C24.17.0*. See also F. CRANMER, *Sikh motorcyclists in Germany obliged to wear helmets*, in *Law & Religion UK*, 10 July 2019, *https://lawandreligionuk.com/2019/07/10/sikh-motorcyclists-in-germany-obliged-to-wear-helmets*.

[189] This has led some scholars to make a distinction (whose usefulness is negated by others) between traditional circumcision and ritual circumcision. See A. LICASTRO, *La questione della liceità della circoncisione "rituale" tra tutela dell'identità religiosa del*

quite uniform. It is the visible sign of the covenant between God and the Jewish people[190], and it is performed on 8-day old male children. As regards Islam, circumcision is not expressly referred to by the Koran (which more generally requires to follow the faith of Abraham)[191], but it is mentioned in a *hadith*. There is considerable variation in this practice amongst Muslims, including the age it should be performed (any time before puberty). As known, it is not traditional in Christianity, which soon abandoned it in the effort to focus on Hellenists and heathens[192].

Just like religious slaughter, ritual circumcision was practiced for centuries in Germany. In the history of the Federal Republic, case law occasionally dealt with it before the controversial judgement of 2012. Four decisions (three of civil law and one of criminal law) seemed to establish the principle that ritual circumcision was legal provided that it was performed *lege artis* and that consent was manifested by both parents and (if he had sufficient maturity) by the child himself. In two other cases, the court granted welfare aid to a Muslim family to finance in one case the circumcision and in the other case its celebration. In short, before 2012, German case law never challenged the principle that parents have the right to have their son circumcised[193].

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gruppo e salvaguardia del diritto individuale alla integrità fisica, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 22, 2019, pp. 36-40.

[190] Genesis 17: 1-14; Leviticus 12: 1-3.

[191] Koran 16: 123.

[192] J. LUTHER, *op. cit.*, p. 219; D. ABRAHAM, *Circumcision: Immigration, Religion, History, and Constitutional Identity in Germany and the U.S.*, in *German Law Journal*, 18(7), 2017, p. 1752, fn. 15; S. GATZHAMMER, *Commento alla sentenza del Landgericht Köln del 7 maggio 2012 in tema di circoncisione e commento alla nuova normativa § 1631d del codice civile tedesco (BGB)*, in *Il diritto ecclesiastico*, 1-2, 2013, pp. 358-359.

[193] A. GÜNZEL, *Nationalization of Religious Parental Education? The German Circumcision Case*, in *Oxford Journal of Law and Religion*, 2(1), 2013, p. 207; M. GERMANN, C. WACKERNAGEL, *The Circumcision Debate from a German Constitutional Perspective*, in *Oxford Journal of Law and Religion*, 4(3), 2015, pp. 442-443. For a general treatment of this issue in a comparative perspective, see A. ANGELUCCI, *Dietro la circoncisione. La sfida della cittadinanza e lo spazio di libertà in Europa*, Torino, 2018; V. FORTIER (ed.), *La circoncision rituelle. Enjeux de droit, enjeux de vérité*, Strasbourg, 2016.

An investigation started in November 2010 concerning a child brought to hospital after circumcision led to two indictments: the first one of parents for child abuse, and the second one of the physician who had circumcised the boy «for aggravated battery, "use of a dangerous instrument to physically abuse another and damage their well-being", through a violation of the infant's physical integrity»[194]. The first-instance court acquitted all parties asserting

> that it was important to start from the fact that circumcision served as a rite of passage to document cultural and religious membership in the Muslim community. Uncircumcised, the boy would face the threat of stigmatization in that community. As a final point, the court also noted that its own appointed expert, as well as American practice, saw in circumcision a positive medical benefit improving hygiene and perhaps helping to prevent certain diseases[195].

However, the prosecutor insisted on pursuing the case against the physician and appealed. On 7 May 2012, the District Court of Cologne – disregarding both previous case law and legal literature in favor of ritual circumcision[196], and rather relying on «long-time anti-circumcision activists»[197] – held that circumcision, as a permanent and irreparable change to the child's body not motivated by medical reasons, was a violation of his rights to physical integrity[198] and self-determination, and it was not justified by parents' right to decide on their son's religious upbringing[199]. The physician was finally acquitted because he

[194] D. ABRAHAM, *op. cit.*, p. 1747.

[195] D. ABRAHAM, *op. cit.*, p. 1748.

[196] A. GÜNZEL, *op. cit.*, p. 207.

[197] D. ABRAHAM, *op. cit.*, p. 1748.

[198] Art. 2 § 2 GG: «Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law».

[199] This is covered by the right to religious freedom (Art. 4 §§ 1-2 GG) and the right to the care and upbringing of their children. Under Art. 6 § 2 GG, «The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty».

was found to lack guilt[200] under Section 17 (mistake of law) of the Criminal Code[201].

This decision attracted criticism not only for the outcome of the balancing test of the interests at stake, but also for the construction of such interests. Munzer has noted that Germany's cultural norms disfavor permanent modifications of children's bodies[202].

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[200] G. ROBBERS, *Recent Legal Developments in Germany: Infant Circumcision and Church Tax*, cit., p. 69; V. PUSATERI, *Uno sguardo oltralpe: la Corte d'Appello di Colonia ritiene che la pratica di circoncisione maschile cd. rituale integri reato*, 2012, in *https://archiviodpc.dirittopenaleuomo.org/d/1728-uno-sguardo-oltralpe-la-corte-d-appello-di-colonia-ritiene-che-la-pratica-di-circoncisione-maschile.*

[201] «If, at the time of the commission of the offence, the offender lacks the awareness of acting unlawfully, then the offender is deemed to have acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the penalty may be mitigated pursuant to section 49 (1)».

[202] S.R. MUNZER, *Secularization, anti-minority sentiment, and cultural norms in the German circumcision controversy*, in *University of Pennsylvania Journal of International Law*, 37(2), 2015, p. 577. It is interesting to note that – unlike other Western countries – Germany prohibits ear piercing and tattooing to persons below the age of 16 even when they have parents' permission. In the USA – just to cite a country which is typically referred to when dealing with male circumcision – «rarely if ever do state laws impede parents who wish to pierce even a baby's ears» (D. ABRAHAM, *op. cit.*, p. 1753). As just mentioned, the number of circumcised people in the USA for non-religious reasons as well as the World Health Organization's recommendation are typically taken as examples to show that what is regarded as undisputed medical evidence (that is, 'circumcision is not medically indicated') in countries like Germany is – to say the least – subjective (D. ABRAHAM, *op. cit.*, p. 1753; M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 456). The staunch support for circumcision that is attributed in particular to American health professional and paediatricians should be nonetheless evaluated in a broader context, where medical reasons historically went hand in hand with moral, social and cultural motives (S. MANCINI, *La Corte distrettuale di Colonia vieta la circoncisione*, in *Quaderni costituzionali*, 3, 2012, pp. 635-636). In the USA, the percentage of circumcised babies was 85 percent percent in 1985, but it has decreased to 32,5 percent today (S. MANCINI, *op. cit.*, pp. 635-636). In Canada, too, the circumcision rate has dropped from 70 percent in the 1970s to 30-40 percent (M. ADRIAN, *Reply to Stephen R. Munzer's "Secularization, Anti-Minority Sentiment, and Cultural Norms in the German Circumcision Controversy"*, 2017, in *https://pennjil.com/melanie-adrian-reply-to-stephen-r-munzers-secularization-anti-minority-sentiment-and-cultural-norms-in-the-german-circumcision-controversy*). Today it is generally accepted that, even in America, circumcision may no longer be justified merely on medical grounds, and that

> The ritual status of circumcision is, however, more complicated than ascribing everything to secularization and German secularism. That status involves a blindness to the fact that what counts as "secular" is often modelled on Christian norms. What gives "ritual" circumcision a pejorative cast and makes it a practice seemingly eligible for prohibition turns on the facts that some secular views consider nonmedical circumcisions "strange" and that Christian social norms in Germany have never included circumcision as a Christian practice. […].
> Many non-Christian social norms are hardly uniquely German[203].

In Paz's opinion, too, the court's understanding of the physical body coincides with the one prevailing in Christianity[204], where visible signs of belonging are irrelevant.

Children's right to self-determination has been debated, too. Minors are legally incompetent and may not make use of their rights. The enjoyment of such rights requires a proxy, who does not exercise them but makes decisions in the child's place. According to Art. 6 § 2 GG, parents are better placed to determine the child's best interests than the State[205]. However, the determination of the best interests is not self-determination. If the State

> overrides the parents' definition of the child's best interests, it does not bring the child's autonomy to bear but instead a different kind of heteronomous determination. In any case, however, the child's self-determination cannot be claimed by either side[206].

Proper self-determination may be exercised only from a certain age, and at that point circumcision would not prevent him from making different religious choices, if he wishes so – although the court held oth-

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prophylaxis may only strengthen choices that are made on non-medical grounds (that is, religious, ethical, personal…) (A. LICASTRO, *op. cit.*, pp. 35-36).

[203] S.R. MUNZER, *op. cit.*, p. 576.

[204] R.Y. PAZ, *The Cologne Circumcision Judgment: A Blow Against Liberal Legal Pluralism*, 2012, in *https://verfassungsblog.de/cologne-circumcision-judgment-blow-liberal-legalpluralism*.

[205] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 447.

[206] M. GERMANN, C. WACKERNAGEL, *op. cit.*, pp. 452-453.

erwise[207]. It is hard to see how the State may promote the child's alleged self-determination by prohibiting his religious socialization and by imposing an irreligious worldview and identity on him[208].

> As to the point of stressing the autonomy of the person, [this] argument seems to express a certain one-sided image of the adult as an autonomous person. It is exclusively based on the ideal of individual independence without, however, assuming to what extent social, cultural, and religious belonging can be constitutive for the development and the shape of a personal identity. In my view this is too narrow an understanding of autonomy. It neglects the fundamental role of human relationships and the social involvement each individual life is based on, including those relationships established later in life[209].

The court stressed the irreversible and permanent character of circumcision. This is obviously true, but most parental decisions are irreversible[210] – and so is baptism[211], although its irreversibility bears less stigmatization since it does not carry a physical mark. Last but not least, the deferral of the child's religious initiation is also irreversible. «It is not before the child can exercise his religious freedom autonomously that he can reverse the decision of the state in the same way as he could reverse the decision of the parents»[212].

Moving on to parents' right to decide on their son's religious upbringing, the court held that they should have waited until their son reached the legal age to decide for himself. However, this meant denying parents' right altogether[213].

> Freedom of religion is relevant in this case not only for the parents but also for the child. As indicated, a child's upbringing includes religious, cultural and ethical education. Just as the child learns his parents'

[207] M. HEIMBACH-STEINS, *Religious Freedom and the German Circumcision Debate. EUI Working Paper RSCAS 2013/18*, 2013, p. 8, in *https://cadmus.eui.eu/handle/1814/26335*.

[208] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 453.

[209] M. HEIMBACH-STEINS, *op. cit.*, p. 8.

[210] A. GÜNZEL, *op. cit.*, p. 209.

[211] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 454; D. ABRAHAM, *op. cit.*, p. 1759.

[212] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 454.

[213] A. GÜNZEL, *op. cit.*, p. 208.

> mother tongue and becomes integrated into the social circles to which they belong, the child is also introduced to his parents' religion. Since religion is not something one can really learn and understand in depth without being a part of it, it is only natural that the child has to be treated as a full member of the religion with all his rights and duties. Consequently, religious education means to perform all the relevant rituals, in this case circumcision, at the prescribed time and this way to integrate the child into the religious community of his parents. Only this way can a religious identity be formed[214].

The court decision became publicly known on 26 June 2012, starting an emotionally heated debate where virtually anybody seemed to take part.

> Lawyers, medical doctors, philosophers, theologians, activists for children's rights, religious representatives from the Muslim and the Jewish communities, but also from the Christian churches, politicians, artists and other citizens articulated themselves publicly, and expressed differing interests and perspectives with contradictory ways of understanding the problem at stake. […].
> Far from a balanced argumentation, a discussion "storm" came over the German public. Strong weapons were used: It seemed as if children had to be protected against religiously motivated violence and as if the values of enlightenment had to be restored against the destructive, archaic and unconstitutional powers performed by the religious traditions[215].

Not only did the court decision equate ritual circumcision to beating, psychological violence and other degrading treatments[216], but opponents in the public and political arena even equated – implicitly or explicitly – ritual circumcision with practices that under no circumstance may be justified, for example burning widows[217]. This comparison is highly problematic. Even opponents of male circumcision on religious grounds may not deny that this practice is admissible for medi-

[214] A. GÜNZEL, *op. cit.*, p. 208.

[215] M. HEIMBACH-STEINS, *op. cit.*, pp. 1 and 5-6. See also A. LICASTRO, *op. cit.*, p. 47.

[216] S. GATZHAMMER, *op. cit.*, p. 357.

[217] D. ABRAHAM, *op. cit.*, pp. 1751-1752.

cal reasons. By contrast, burning widows certainly has no therapeutic purpose and may not be permitted on any grounds.

> Many critics of circumcision are ingenious in inventing veritable *parades of horribles* that the relationship between the state and religion has yet in store, if circumcision remains legal. […]. 'What if religion requires a father to press a crown of thorns on his son's head?'[218].

The circumcision issue, as it developed, submerged the central ethical question, that is: what does the 'child's well-being' exactly mean and require?[219] Instead, an unprecedented, polarized discussion went on «for many months, not only in newspapers but also in a seemingly endless number of television talk shows, on the Internet, and in private conversations all over Germany»[220], and it did so – as noted by Angelika Günzel – because it touched upon four taboos of German society: 1) the relationship with Muslims, 2) the place of religion in secular Germany, 3) sexuality, and 4) the relationship with Jews[221].

The 'Islam Question' is not merely a recent outcome of contemporary jihadism, but it has since long been exacerbated by immigration waves. Although not all Muslims are migrants and certainly not all migrants are Muslims, the public at large often regards 'Muslim' and 'migrant' as synonyms. The tensions revolving around migration call issues of citizenship and identity into question. Migrants are associated to archaic and barbaric practices, which leads to the idea popular in some German (and European) circles that «whoever doesn't belong to our times, does not belong in our land»[222].

Despite the important role that the German legal system assigns to religions – as repeatedly stressed in this chapter, there seems to be a

[218] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 448.

[219] M. HEIMBACH-STEINS, *op. cit.*, p. 13.

[220] A. GÜNZEL, *op. cit.*, p. 206.

[221] A. GÜNZEL, *op. cit.*, p. 206. According to Munzer, factors like «increased secularization leading to an ever-increasing emphasis on human rights, and a strong history of anti-Semitism and a recent history of anti-Muslim sentiment go a long way in explaining why the circumcision controversy erupted in Germany» (S.R. MUNZER, *op. cit.*, p. 577).

[222] Quoted by D. ABRAHAM, *op. cit.*, p. 1754. See also pp. 1746-1747 and 1749-1750.

growing opinion that religion does not play a positive role in people's lives. Children should be recognized the right to be let free from parents' decisions concerning their religious belonging – which is nevertheless inconsistent with European and international standards on human rights protection recognizing parents' right to educate their children according to their religious or philosophical convictions[223].

> Those who vehemently claim the values of the enlightenment for themselves and their position in the debate – these are namely the most rigorous critics of religious practices (far beyond the single case discussed here) – often seem to stick to a very narrow understanding of what they claim. Some commentators criticise this attitude as 'vulgarised rationalism' […] or – as it was the case in a previous debate on Islam in Europe – 'enlightenment-fundamentalism'[224].

To my knowledge, only another author – Susanna Mancini – has dealt with the issue of sexuality in a comment on the 2012 court decision. She has noted that this judgment confirms a tendency of Western democracies to regulate traditional practices involving exclusively women and/or minor children of cultural minorities. *Others*' practices are regulated in the name of human rights, which nevertheless may hide far less noble motives. Recent years have been characterized by a rise in the number of mammaplasties and labiaplasties which, like ritual circumcision, have no therapeutical purpose. But whereas the first two types of intervention reflect glorification of sexuality, the third one is inserted in an ideological discourse where civilization is opposed to barbary. Women as well as children, with their bodies, become the symbolic places of a battle between competing values and identities. Human rights and the prohibition of discrimination risk legitimizing a dangerous attitude towards the hierarchization of cultures, criminalization of diversities, and forced homogenization[225].

Last but not least, Germany's relationship with Jews – quite different from that with Muslims – is unescapably a constant reminder of the

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[223] M. HEIMBACH-STEINS, *op. cit.*, pp. 7, 9 and 11.

[224] M. HEIMBACH-STEINS, *op. cit.*, p. 12. See also M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 445.

[225] S. MANCINI, *op. cit.*, pp. 635-638.

country's responsibility in the Holocaust. The will to make Germany a hospitable place for surviving Jews has been central in the construction of the Federal Republic's national identity and in its public discourse. The prohibition of the practice which

> is arguably *the* core collective marker of Jewish ethnic identity, constitutive beyond any religious commitments, would be […] to cross a pronounced red line. A ban on circumcision would represent a disinvitation to Jews, a hostile act akin to Holocaust denial would significantly reverse endless efforts at reconciliation[226].

Not surprisingly is Angela Merkel reported «to have said that she does not 'want Germany to be the only country in the world where Jews cannot practice their rituals. Otherwise we will become a laughing stock'»[227]. On 19 July, less than one month after the court decision became public, the German parliament approved a resolution to guarantee the viability of Jewish and Muslim religious life in Germany. On-purpose legislation was passed on 12 December with 434 'yes', 100 'no' and 46 abstentions[228]. An amendment was made not to the Criminal Code, but to the Civil Code[229]. Under the new Section 1361d,

> (1) The care for the person of the child includes the right to give consent to the medically unnecessary circumcision of a male child who is not capable of reasoning and forming a judgment, if this is to be carried out in accordance with the rules of medical practice. This does not apply if the circumcision, even considering its purpose, jeopardises the best interests of the child.
> (2) In the first six months after the child is born, circumcision may also be performed pursuant to subsection (1) by persons designated by a religious group to perform this procedure if these persons are specially trained to do so and, without being a physician, are comparably qualified to perform circumcisions[230].

[226] D. ABRAHAM, *op. cit.*, pp. 1750-1751.

[227] R.Y. PAZ, *op. cit.* See also S. GATZHAMMER, *op. cit.*, p. 358.

[228] M. HEIMBACH-STEINS, *op. cit.*, p. 1; D. ABRAHAM, *op. cit.*, pp. 1754-1755.

[229] M. HEIMBACH-STEINS, *op. cit.*, p. 4; S. GATZHAMMER, *op. cit.*, p. 359.

[230] English translation in M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 465.

It has been noted that the latter rule favors Jewish rather than Islamic practice. Jewish children are circumcised at the eight day of life by a special figure called *mohel*. Muslim children in Germany are circumcised at an older age, when they may be regarded by public authorities as being already able to give (or not) their consent[231]. It has further been noted that the new legal regulation was inserted in the title concerning parental custody, and not in the section concerning religious education, thus allowing in principle not only ritual but also traditional circumcision[232].

It goes without saying that the new legislation did not stop the polarized debate on circumcision. Despite being on opposite fronts, both opponents and proponents seemed to share one argument: the existence of a religion-based exemption right. The former complained that the Holocaust had made it impossible to prohibit this practice and allowed an otherwise unjustifiable privilege, whereas the latter argued that the respect due to Jews (and Muslims) required an exception[233]. This argument has been rejected by Michael Germann and Clemens Wackernagel. Their views are worth noting as appropriate conclusive remark of this section devoted to exemption rights and of this chapter alike.

> It is [a] misunderstanding that the right to religious freedom creates a privilege for individuals or groups of individuals that relieves them of the obligation to obey generally applicable laws. […].
> In any case, whosoever views such deference to basic rights concerns as being equal to a 'dispensation' from the obligation to obey the law puts into question the meaning of liberal basic rights in general. Whosoever rejects a 'religious justification in the sense of a particular permission' to certain behaviour deprives the right to religious freedom of its meaning. Whosoever purports to deduce from the principle of state neutrality

[231] J. LUTHER, *op. cit.*, p. 220. On 30 August 2013, in a case concerning the circumcision of a child born of a Kenyan mother and a German father, who were divorced, the court found that the mother's consent was invalid. What was further required was not the father's agreement to circumcision, but the involvement of the six-year-old boy in the decision. See M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 466.

[232] S. GATZHAMMER, *op. cit.*, p. 360.

[233] M. GERMANN, C. WACKERNAGEL, *op. cit.*, pp. 444-446 and 465-466. See also M. HEIMBACH-STEINS, *op. cit.*, p. 5.

> in religious matters that the religious convictions of the parents must be 'neutral' for their determination of the child's well-being, does not only misunderstand the principle of state neutrality but also the right to religious freedom. In essence, all arguments in this direction dismiss the fundamental function of the Basic Law's basic rights as defensive rights. […].
> Whosoever denounces 'religious privileges' must ask himself what kind of 'privileges' he deems legitimate and what role he attributes to fundamental rights if not as a safeguard against governmentally imposed homogeneity[234].

Ritual circumcision is not a socially shared practice and, only as such, it is not perceived of as objectively reasonable. Nevertheless, the fundamental freedoms guaranteed by the constitution are meant to accommodate different religions and beliefs, regardless of their perceived rationality. The recognition of the right to religious freedom implies taking into account religion- (or belief-)based reasons, and not inquiring into the consistency of a religious or belief system. This is not to say that there should be no limitations, but these should not be based on the religious or non-traditional character of a practice. If rights were extended only to individuals or groups having 'rational' beliefs, that is, behaving in a familiar way or according to a majoritarian consensus[235],

> society would become a homogenous group as an imagined extension of the 'self'. Founding state, politics, and law on such a concept of homogeneity has an infamous record. The Basic Law poses the challenge of embracing heterogeneity and difference[236].

[234] M. GERMANN, C. WACKERNAGEL, *op. cit.*, pp. 462-464. Likewise, Angelika Günzel has argued that an alarming element is the indication that «respecting the special religious needs of someone means to grant an unconstitutional privilege. This clearly undermines the concept of religious freedom as a fundamental right». See A. GÜNZEL, *op. cit.*, p. 208.

[235] M. GERMANN, C. WACKERNAGEL, *op. cit.*, pp. 446, 448, 464 and 467.

[236] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 468.

THE STATE AND RELIGIOUS GROUPS. THE CASE OF THE LOW COUNTRIES. NO AGREEMENTS NEEDED? THE ROLE OF AGREEMENTS IN BELGIUM AND THE NETHERLANDS

Adriaan Overbeeke

1. Introduction

Formally, neither Belgium nor the Netherlands ever experienced an 'established church' regime. In this regard, both countries are distinguishable from Italy, where the Roman Catholic Church is still *primus inter pares* with its own Article 7 in the Italian Constitution[1]. Both countries' constitutions do not identify instruments like *concordats*, *agreements*, *conventions* or *accords* to regulate the relationship be-

[1] See art. 7 of the Italian Constitution: «The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments» (translation under the responsibility the Senato della Repubblica, available at the website *https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf*).

tween religious groups and the State, as Article 8 of the Italian Constitution does explicitly[2]. So far the similarities on the constitutional arrangements concerning these type of state-religion agreements.

Belgian and Dutch regimes are quite different, especially where the *financial relations* between state and church become the focus of our analysis[3]. Belgium supports religion directly, the Netherlands does not[4]. When comparing the constitutional basis of these issues, the differences are striking.

Nevertheless there are important similarities between Belgium and the Netherlands too, and this for obvious reasons. Particularly history is a relevant factor[5], since both countries' emergence as independent political entities, ultimately resulting in statehood, had to do with a deep divide in the policy views on *what the correct position of the ruler vis-à-vis the religious choices of his subjects* should be.

Since the end of the 16th Century, the Netherlands, then a confederation of provinces, slowly developed into an independent state. It was

[2] *Ibid.*, art. 8: «All religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives».

[3] See L. FRANKEN, *State Support for Religion in Belgium: A Critical Evaluation*, in *Journal of Church and State*, Vol. 59:1, 2017, pp. 59-80; J.F. HUSSON, J. MAHIELS, *Le financement des cultes reconnus et des organisations laïques en Belgique*, in B. BASDEVANT-GAUDEMET, S. BERLINGÒ (eds.), *The Financing of Religious Communities in the European Union*, Leuven, 2009, pp. 97-109; S. VAN BIJSTERVELD, *The Financing of Religious Communities in the Netherlands*, *ibid.*, pp. 269-275. A general introduction on church and state regimes in both countries: R. TORFS, J. VRIELINK, *Belgium*, in G. ROBBERS, W. COLE DURHAM, *Encyclopedia of Law and Religion*, Leiden-Boston, 2016, pp. 29-53; S.C. VAN BIJSTERVELD, *Netherlands*, *ibid.*, pp. 276-287.

[4] S. VAN BIJSTERVELD, *The financing of religious communities in the Netherlands*, in B. BASDEVANT-GAUDEMET, S. BERLINGÒ (eds.), *op. cit.*, pp. 269-275.

[5] See, as an introduction on Dutch religion history, J. KENNEDY, J. ZWEMER, *Religion in the Modern Netherlands and the Problems of Pluralism*, *BMGN - Low Countries Historical Review*, Vol. 125:2-3, 2010, pp. 237-268; W. FRIJHOFF, *How North and South in the Low Countries Switched Religions - Catholic and Protestant*, in *The Low Countries*, 19, 2011, pp. 46-53; J. SPAANS, *Religious policies in the seventeenth-century Dutch Republic*, in R. PO-CHIA HSIA, H. VAN NIEROP (eds.), *Calvinism and Toleration in the Dutch Golden Age*, Cambridge, 2002, pp. 72-86.

the outcome of an Uprising against the Spanish rulers in the context of the Protestant Reformation. The Dutch Republic, firmly Protestant in nature, was one of the early examples of *toleration* of religious diversity in the strict sense, namely grudgingly accepting religious diversity in the private sphere as the best solution for the time being. This attitude was already expressed in the first treaty to unite the provinces in the Low Countries, the 1579 *Union of Utrecht*. Article XIII stated:

> Concerning the matter of religion: Holland and Zeeland shall act at their own discretion, (…), provided that in accordance with the Pacification of Ghent each individual enjoys freedom of religion and no one is persecuted or questioned about his religion (…)[6].

Belgian Independence in 1830 was also a product of a revolt against a ruler – *in casu* the Dutch King William I – who did not respect the prerogatives of religious groups. This concerned in particular the rights of the Roman Catholic Church. The King developed interventionist church policies not very different from those introduced in the preceding Napoleonic era[7].

It is no coincidence that the issue of concordats and agreements is basically determined by national *historical developments*. First, one cannot understand the current Belgian and Dutch regimes without taking into account their institutional history, which is partially *a common institutional history*. In 1830 Belgium became an independent state separated from the Netherlands, the Netherlands has formally been a Kingdom since 1815, including – until 1830 – the Belgian provinces[8]. Furthermore there are the *long term societal developments* which put the pre-existing church and state arrangements and the related legislation under strain, especially the emerging and growing *pluralisation* of

[6] See Document 37 in E.H. KOSSMANN, A.F. MELLINK, *Texts concerning the Revolt of the Netherlands*, Cambridge, 1974, pp. 165-173.

[7] See (PhD thesis) E. BOS, *Souvereiniteit en Religie. Godsdienstvrijheid onder de eerste Oranjevorsten*, Hilversum, 2009, pp. 167-169.

[8] L. WILS, *Het Verenigd Koninkrijk van koning Willem I (1815-1830) en de natievorming*, in *Bijdragen en mededelingen betreffende de geschiedenis der Nederlanden*, 112:4, 1997, pp. 502-516.

the religious landscape (immigration), which give rise to new religious claims, and the ongoing *secularisation*[9].

Two other countries discussed in this issue by Mélanie Lopez, *France* and *Spain*[10], were however also meaningful for Belgium and the Netherlands. Especially 16th Century Spain (Philips II) and 19th Century France (Napoleon Bonaparte) are the two empires that influenced the development of the church-state relations in the Low Countries. A third country, *Austria*, is relevant (and this apart from the similarities in the Austrian and Belgian 'recognition' regimes). Since 2015 Austria has been drawing special attention of both the Belgian and Dutch authorities because of Austria's restrictive policies towards Islam[11].

Belgium and the Netherlands will be discussed separately (*infra* par. 2 and 3), followed by a brief analysis of how and to what extent Belgian and Dutch authorities coordinated its Covid policy with religious representatives (par. 4). An attempt will be made then to draw some conclusions (par. 5); this is done with some restraint, given the fact that *agreements with religious communities* are not regulated in both national systems and, if present, scarce in numbers. The presence of agreements is related to the need of every national regime to regulate areas where church and state meet. The idea of negotiated solutions in the sphere of church and state relationships, and this in a broad range of activities, is already discussed and even promoted, be it under strict conditions, by KULeuven canon lawyer Rik Torfs who introduced the concept of *contractual religious freedom*[12]. Torfs suggests that the use

[9] R. TORFS, J. VRIELINK, *supra* at note 3, p. 29.

[10] See in this issue M. LOPEZ, *Le Droit Conventionnel Des Cultes Sous Le Regard Des Politiques: Expériences Française Et Espagnole*.

[11] See for Belgium the expert report of R. TORFS and G. DU PLESSIS, *Onderzoek naar de adequaatheid van de erkenningscriteria voor lokale kerk- en geloofsgemeenschappen in het Vlaams Gewest én naar de handhaving van deze criteria en andere administratieve verplichtingen door de lokale kerk- en geloofsgemeenschappen*, Brussels, 2019, pp. 254-261 (*https://docs.vlaamsparlement.be/pfile?id=1483945*); the Netherlands: *(On)zichtbare nvloed* (parliamentary report) 2020, pp. 86 and 182-183 (*https://zoek.officielebekendmakingen.nl/kst-35228-4.html*).

[12] R. TORFS, *Contractual Religious Freedom*, in A. VAN DE BEEK, E.A.J.G. VAN DER BORGH, B.P. VERMEULEN (eds.), *Freedom of Religion*, Leiden-Boston, 2010, pp. 141-154.

of contractual techniques will be fruitful on the condition that core elements of religious freedom, what he calls *the first level of religious freedom* – are not compromised: "the hard core of religious freedom (…) cannot be the subject of religious freedom"[13]. In other issues – financial issues being the least problematic – agreements are conceivable, creating room for the introduction (on a contractual basis) of monitoring mechanisms in exchange for subsidies, but "[o]nly if the religious group concerned wants to make use of the offer made by the state to actively support its activities, a limitation concerning the exercise of religious freedom is possible"[14]. In this logic state support systems (applicable in Belgium) are in a better position in comparison with systems where religious communities' existence depends on self-financing (applicable in the Netherlands).

2. Belgium

Belgium is the more interesting of the two systems. This is because the country's government structures are in permanent change, and so is the shape of its territory and its language composition. A century ago, in 1919, the bilingual country transformed into a trilingual country, due to the annexation of the former German territories of Eupen-Malmédy. Increasingly, the *language* question became an important divisive factor in Belgian politics, and step by step, from 1970 on, the unitary state developed into a federal state, leaving important powers to its subdivisions. One of the issues that became partially divided concerns religion law. State funding of religious communities has, since 2001, been a competence of both the federal state and regional state authorities. This development caused a need for cooperation agreements ('accords de coopération') between different levels of government in the federation. At the same time, religions become interlocutors for the governments of all the new state entities in the Belgian federal state.

[13] *Ibid.*, p. 148.
[14] *Ibid.*, p. 149.

First, the constitutional basis for the relation between the state and religious groups is briefly discussed (2.1) after which some characteristics of the regime will be summarised (2.2). Finally the question about the role of agreements will be treated; two examples of negotiated arrangements in the sphere of religion and "special rights" for religious groups will be discussed.

2.1. Belgian Constitution (1831, 1993). State relations with religious groups

The past fifty years, the Belgian Constitution underwent many modifications in the process of Belgium becoming a federal state, but its provisions on religious freedom and on the church and state relationship remained remarkably unchanged since the Constitution was drafted in 1831.

Important are articles 19, 20 and 21. Article 19 and 20 guarantee religious freedom, even the negative aspects of this freedom:

> Article 19 of the Constitution:
> Freedom of worship, its public practice and freedom to demonstrate one's opinions on all matters are guaranteed, but offences committed when this freedom is used may be punished.
> Article 20 of the Constitution:
> No one can be obliged to contribute in any way whatsoever to the acts and ceremonies of a religion or to observe its days of rest.

Relevant for the legal status of religious organisations is the first paragraph of Article 21 (unchanged since 1831)[15], which provides a constitutional basis for the institutional relationship between religious groups and state authorities. The text is, as is illustrated by the examples used, reflects the resistance against some over-intrusive policies of the former Dutch government, especially where the Roman Catholic majority was concerned:

[15] The current 2019-2024 legislature is given the competence to redraft art. 21 Constitution. See *Déclaration de révision de la Constitution*, in *Moniteur belge*, 23 May 2019.

> Article 21 § 1 of the Constitution:
> The State does not have the right to intervene either in the appointment or in the installation of ministers of any religion whatsoever or to forbid these ministers from corresponding with their superiors, from publishing the acts of these superiors, but, in this latter case, normal responsibilities as regards the press and publishing apply.

This paragraph mentions the right to appoint and to install religious ministers (e.g. the nomination of bishops), free "correspondence" between religious ministers and their superiors (including the Holy See, a religious authority abroad) and the right to make viewpoints of a religious leadership public, without prior consent of government. Precisely these three elements were lacking in the government's church policies towards the Roman Catholic Church under Dutch rule (1815-1830). The text has a 'separationist' flavour and is indeed considered to be the traditional basis for the principle of separation (or "mutual independence") of church and state in Belgian constitutional law[16]. Recently the Belgian Constitutional Court, in a case on religious education in state schools, confirmed this interpretation, but at the same pointed out that this principle "is not absolute and does not exclude any interference of the state in the autonomy of religious communities (…)" and that the scope of the principle of the separation of church and state "is in itself open for modification and evolution"[17].

Other sections in the Constitution are relevant too, article 24 on educational freedoms[18] and article 10 on equal treatment and non-discrim-

[16] R. TORFS, J. VRIELINK, *supra* at note 3, pp. 31-32. See TH. J. SHELLEY, *Mutual Independence: Church and State in Belgium: 1825-1846*, in *Journal of Church and State*, Vol. 32, No. 1, 1990, pp. 49-63.

[17] "B.7.1. The principle of the separation of church and state, amongst others derived from article 21, first branch, of the Constitution, is not absolute and does not exclude any interference of the state in the autonomy of religious communities (…) B.7.2. The scope of the principle of the separation of church and state is intrinsically open for modification and evolution" (Constitutional Court 45/2017, 27 April 2017, in *Moniteur belge*, 7 July 2017). See F. AMEZ, *Désignation et révocation des enseignants de religion dans l'enseignement officiel de la Communauté française: quel rôle pour quelle autorité religieuse?*, in *Recht, Religie en Samenleving*, 2017/2, pp. 67-85.

[18] R. TORFS, J. VRIELINK, *supra* at note 3, pp. 37-41.

ination[19]. Articles 19 to 21 form however the foundation for a freedom oriented framework for the relationship between state and religious groups, a basic tier of freedoms made available for *all* religious groups, traditional and non-traditional, older and newer religions. The Belgian Constitution never granted special status to the country's dominant religion, Roman Catholicism.

The Constitution not only guarantees freedom and separation, but it also includes in its chapter on State Finances an article on state involvement in the financial sphere:

> Article 181 of the Constitution:
> § 1. The salaries and pensions of ministers of religion are paid for by the State; the amounts required are charged annually to the budget.
> § 2. The salaries and pensions of representatives of organisations recognised by the law as providing moral assistance according to a non-denominational philosophical concept are paid for by the State; the amounts required are charged annually to the budget.

The right to receive salaries and pensions was already present in the earlier Dutch and French period and linked to *recognized* religions[20]. The Belgian Constitution does not mention this special category, but traditionally only the ministers of *recognised* religions are eligible for these salaries. The second paragraph was introduced in 1993 and made it possible to finance the nonreligious humanist movement.

2.2. Characteristics of the Belgian system

What is peculiar in the Belgian model is the combination of an outspoken separation-oriented system of religious freedom with a system of state support. State support is not only guaranteed in the Constitution itself. Other components of direct support – without exception reserved for 'recognised religions', are present in lower legislation, partially inherited from the preceding French legislation. The origins of the Belgian state's formation – a reaction against state involvement in religion – are still recognisable in Belgian religion law.

[19] R. TORFS, J. VRIELINK, *supra* at note 3, pp. 36-37.

[20] Catholicism, Protestant churches (since 1802), Jewish communities (since 1808).

Until now, there has been no legal obligation, neither on the federal level nor on regional level, to make the adoption of new regulations concerning religion dependant on the result of negotiations with religious groups. Formally, it is a regime that *does not depend upon agreements, negotiations or accords with religious groups*. However, a regime creating special rights for special religious groups cannot completely ignore the question of negotiation and even – when conflicts arise within or with religious groups arise – the search for some form of negotiation and agreement.

It is quite conceivable that the frequent conflicts (and pacifications) between liberal governments and the Roman Catholic Church in the 19th century did involve forms of negotiation or even formal consultation, especially with the Roman Catholic Church, an important stakeholder.

One can prove *such a course of events* in one case, namely the adoption of the 1870 legislation on "temporal affairs" of recognised religion[21], which was a law relevant for financial support for local religious communities (for more than 99% Roman Catholic parishes). The 1870 Law was a first important transaction, leading to pacification and relaxing the then tense relationship between a liberal state and the church, that is to say: the Catholic Church[22].

In the second half of the 20th Century the country changed demographically as a result of labour immigration and so did the religious landscape. As a consequence additional religions were recognised: Islam in 1974[23], Orthodoxy in 1985[24]. The 'ecclesiastical' organisation structures of these religions differed profoundly from the Roman Catholic hierarchy, the traditional church leadership the state authorities

[21] Law 4 March 1870 ('sur le temporel des cultes'), in *Moniteur Belge*, 9 March 1870.

[22] See A. OVERBEEKE, *Les 150 ans de la Loi belge sur le temporel des cultes du 4 mars 1870* (*http://belgianlawreligion.unblog.fr/2020/03/30/les-150-ans-de-la-loi-belge-sur-le-temporel-des-cultes-du-4-mars-1870/*).

[23] Law 19 July 1974 ('portant reconnaissance des administrations chargées de la gestion du temporel du culte islamique'), in *Moniteur belge*, 23 August 1974.

[24] Law 17 April 1985 ('portant reconnaissance des administrations chargées de la gestion du temporel du culte orthodoxe'), in *Moniteur belge*, 11 May 1985.

was used to deal with. These institutional differences are relevant for our topic. It has been shown to be difficult to regulate "special rights" (e.g. state salaries, prison chaplaincies) for religious groups if they are itself plural, non-institutionalised worlds.

The Belgian government has to remain neutral (separation) but, at the same time, has to guarantee these special rights. In order to fulfil its constitutional obligations the government did need more information on religious structures and internal differences. In these circumstances state authorities need at least a *consultation strategy* or other strategies to guarantee some stability when making "special rights" available to new religious groups. So probably, negotiations and agreements may be useful, even in a system where state authorities were constitutionally designed to be a reluctant, non-intervening party.

Finally, the system of 'recognised religions' is still lacking a proper legislation on recognition[25]. This means that, if a religious community wants to apply for recognition and for the important special rights that accompany this status, it is impossible to fulfil a series of clear legal formalities in order to qualify. Recognition seems to have always been a question of lobbying and *negotiation*. In some cases this process was transparent, in other cases it was just the opposite. Recognition of the Buddhist community in Belgium is an unclear process that has been lasting for about twenty years[26]. It cannot be excluded that recognising religious groups on the basis of *ad hoc* "agreements" and "negotiations" amounts to unequal treatment. The 2002 recognition of the humanist movement was realised after numerous failed legislative attempts to pass legislation and lengthy negotiations, a process starting

[25] See PhD thesis S. WATTIER, *Le financement public des cultes et des organisations philosophiques non confessionnelles: Analyse de constitutionnalité et de conventionnalité*, Brussels, 2016, p. 990. See also PhD thesis A. OVERBEEKE, *De overheid en de grondrechtspositie van godsdienstige en levensbeschouwelijke gemeenschappen: de bescherming van corporatieve vrijheid van godsdienst in de Belgische grondwet, getoetst aan de internationale verdragen*, Universiteit Antwerpen, 2005, p. 801.

[26] See however the Bill recently introduced in Parliament (*relative à l'Union Bouddhique Belge, aux délégués et aux établissements chargés de la gestion des intérêts matériels et financiers des communautés bouddhiques reconnues*); House of representatives, Session 2019, Doc. n° 312/001.

already in 1972[27]. When comparing the older legislation regulating special rights for the traditional recognised religions (based upon art. 181 § 1 Const.) and the non-confessional humanist organisation (art. 181 § 2 Const.), one cannot escape the conclusion that these religions are worse off, at least in financial terms. It would be interesting to research the source of differential treatment of recognised groups and to include in this research the possible impact of the (lacking) negotiating power of representatives of the religions concerned (Islam, Orthodoxy).

2.3. Agreements? Two (or three) examples

For Belgium (and seemingly even for its colonial territory in Africa, be it extremely controversial)[28] *forms of agreement or negotiation* between state and religious groups could not be excluded where problems have to be solved, caused by the system of state support[29]. State support presupposes the presence of interlocutors of the support recipients, with whom negotiations can be conducted. Belgian authorities discovered the opportunities of a negotiated solution in this domain in an early stage.

Formally, the 1831 Constitution stipulated: «The State does not have the right to intervene either in the appointment or in the installation of ministers of any religion whatsoever». But, how should a Belgian government minister responsible for the payment of the salaries of priests

[27] See proposal for a parliamentary bill dd 13 April 1972, *Parl. Doc.* Senate, Session 1971-72, n° 293.

[28] See proposal for a parliamentary bill dd 20 January 1954 'portant approbation de la convention entre la Belgique et le Saint-Siège apostolique au sujet du Congo belge signée à Bruxelles, le 8 décembre 1953', *Parl. Doc.* House of Representatives Session 1953-54, n° 180. The proposal didn't pass the Senate: M.D. MARKOWITZ, *The Missions and Political Development in the Congo*, in *Africa: Journal of the International African Institute*, Vol. 40:3, 1970, p. 242; P.M. BOYLE, *School Wars: Church, State, and the Death of the Congo*, in *The Journal of Modern African Studies*, Vol. 33:3, 1995, pp. 457-458.

[29] On recent developments, see A. OVERBEEKE, *Nouveauté à réglementer. L'usage de "chartes", "pactes" ou des "déclarations communes" dans le droit des cultes belge*, 13 December 2019 (*http://belgianlawreligion.unblog.fr/2019/12/13/chartes-et-pactes-avec-les-religions-et-la-laicite-organisee/*).

act, if *two* different ministers of religion both claim one and the same salary for one small recognised religious community? This turned out to be the case for the Anglican parish in Ostend in 1838, where two foreign priests claimed the salary the Belgian government had to decide to whom the salary was due. In order to resolve the issue the Belgian government immediately made use of a number of modern techniques: (a) consulting church bodies, (b) consulting British diplomats and the Foreign Office and even (c) organising a small investigation, sending a questionnaire to all known Protestant churches in the country, in order to get credible information on Protestant church structures[30].

Two other situations will be discussed where some form of agreement is looked for by State authorities, in order to solve important and sensitive issues in de the context of church and state relations.

2.3.1. Example: Post WW I annexation of German territories (The Eupen-Malmédy Case)

The first example, the *Eupen-Malmédy Case*, dates back one hundred years[31]. Due to article 34 of the 1919 Versailles Treaty a small part of the German Imperial Reich (1051 km²) was to be annexed by Belgium[32]. Religious communities in this territory were, as a consequence,

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[30] A. OVERBEEKE, *Inrichtingsvrijheid op het terrein van eredienst en school: de zoektocht naar godsdienst-gesprekspartners bij oude en nieuwe minderheidsgodsdiensten*, in J. VELAERS (ed.), *Recht en verdraagzaamheid in de multiculturele samenleving*, Antwerp, 1993, p. 115.

[31] Literature: W. JOUSTEN, *Errichtung und Auflösung des Bistums Eupen-Malmedy (1921-1925): Eine Studie mit besonderer Berücksichtigung kirchenrechtlicher Aspekte*, série *Quellen und Forschungen zur Geschichte der Deutschsprachigen Belgier*, volume 8, publication n°5562, Archives générales du Royaume, Bruxelles, 2016, p. 409; V. O'CONNELL, *The Annexation of Eupen-Malmédy. Becoming Belgian, 1919-1929*, New York, 2018, pp. 203-211.

[32] Art. 34 Versailles Treaty: "Germany renounces in favour of Belgium all rights and title over the territory comprising the whole of the Kreise of Eupen and of Malmedy. During the six months after the coming into force of this Treaty, registers will be opened by the Belgian authority at Eupen and Malmedy in which the inhabitants of the above territory will be entitled to record in writing a desire to see the whole or part of it remain under German sovereignty. The results of this public expression of

entitled to the rights, discussed before: freedom rights and even state support, if the communities were part of a recognised religion, then Catholicism, Protestantism and the Jewish faith.

The annexation created a situation where the government's search for an agreement with religious authorities (on the organisation of religious life in new state territory) did not supplement the constitutional freedom principles, but circumvented, even violated them.

In their 'integration policies' Belgian authorities were confronted with a sensitive issue. Catholic parishes (the religious majority) and Protestant local churches (a small minority) in Eupen-Malmédy belonged to church bodies, based in Germany. This meant that ecclesiastical territorial circumscriptions did not match the new political structures. The Roman Catholic parishes were part of the Archdiocese of Cologne, whose archbishop resisted the detachment of his Belgian parishes and their transfer to the Belgian diocese of Liège, a solution preferred by the Belgian government. The position of the Cologne archdiocese was fully acceptable in the light of the Belgian constitution (cfr. art. 21 Constitution), but it was inacceptable in the political context of 1918-1919. Anti-German feelings were widespread.

In fact, Belgian authorities did not give the impression to have the intention to deliberately neglect the essence of article 21 of the Constitution, church autonomy. The government must have been aware of its limited room for manoeuvre. Decisions of the competent church authorities were needed, decisions of the Holy See, in order to realise the disconnection of the new Belgian local communities from their respective German church denominations. This ambition resulted in an intense negotiation process, a joint effort of the Ministry of Justice and the Ministry of Foreign affairs, pressing the Holy See *to agree* to overrule as it were the archbishop of Cologne and to achieve ultimately (in 1925)[33] the attachment of the Eupen-Malmédy parishes to a Belgian diocese.

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opinion will be communicated by the Belgian Government to the League of Nations, and Belgium undertakes to accept the decision of the League".

[33] After a five year period, where the parishes in Eupen-Malmédy were united in one special Diocese Eupen-Malmédy. See: W. JOUSTEN, *supra* at note 31, pp. 218-236.

As far as the two local Protestant churches in the Eupen-Malmédy territory were concerned, a small minority, their attachment to a Belgian Protestant church body was simply *ordered* by the state, by statute law[34], without – as far as we know – any negotiation with the two church bodies concerned. Constitutional principles were bluntly ignored, not only at the cost of the German protestant *Evangelische Kirche der altpreußischen Union* losing these (now foreign) communities, but also at the cost of the autonomy of the small Belgian protestant church, the *Union des Églises Protestantes Évangéliques*, that had just to accept these former German communities in her midst[35].

The initiation by the government of a negotiating process with Catholic church authorities was motivated by the ambition to find a specific solution (an intervention in the church structure itself) in a context of post WWI nation building, focused on the integration of the former German population into Belgian society. In Eupen-Malmédy the state authorities needed an autonomous religious community to act within its own realm but entirely in accordance with Belgian, not German, policies.

The 'agreement' the government looked for, was from the start quite simple. The ultimate objective was to guarantee that *foreign*, in this case German, *influence in church life had to be excluded*. Church autonomy was a serious obstacle, to be circumvented by negotiating an agreement under some diplomatic pressure. After all, it was the Holy See who decided and reorganised the dioceses concerned, in 1921 and 1925[36].

Strictly speaking, this is not an agreement (between civil and religious authorities) but a unilateral act of the competent religious authority in the Roman Catholic Church, the Holy See.

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[34] Art. 2.II Law 27 June 1922 (on the 1922 budget of the Ministry of Justice), in *Moniteur belge*, 1 July 1922.

[35] One year later, the protestant Synod (of the Union des Eglises) formally accepted the protestant parish of Eupen Church 13 July 1923 (source: H.R. BOUDIN, *Eglise Protestante Unie de Belgique, Mémorial Synodal 1839-1992*, Brussels 1992, p. 69).

[36] Papal Bull *Ecclesiae universae*, 30 July 1921 (full text in W. JOUSTEN, *supra* at note 31, pp. 176-179), Papal Bull *Apostolicis Litteris*, 15 April 1925 (*ibid.*, pp. 219-221).

2.3.2. Example: a search for financial transparency (agreement June 2018, Charter 29 march 2019)

A second example is very recent, but is comparable to the problem the attachment of new German territories brought about in 1919: a legitimate fear for foreign influence, resulting in resulting in similar policy questions: (a) how to avoid (or to manage and control) foreign influence in Belgian religious communities of Muslim immigrants and (b) how to integrate these communities into Belgian society? The context is however, different. Now *Islamic radicalism* is the core of the issue, and the possible influence of foreign funding. Another concern are the so called *anti-integrative tendencies*, in Muslim communities oriented to Muslim countries.

Under the Belgian Constitution and the international human rights obligations it is difficult or even impossible to ban foreign funding completely, so government policies leading to some transparency are gaining popularity[37]. Last year the Belgian federal government took the initiative to contact religious leaders of all recognised religion or belief organisations. They were invited to sign an *agreement*, a 'Joint Statement', on financial management of religious communities[38]. They agreed to develop a common framework – a *Charter* – regulating all financial aspects of the religious organisations in order to reach a higher level of financial transparency and to avoid foreign funding that endangers the independence of the religious communities. Purely formal this Charter[39] is a set of rules that can be defined as 'self-regulation' created in a process initiated by government. *In itself* it is not per se incompatible with the constitutional principles of religious autonomy; formally it

[37] Concept for a proposal of a bill regulating the recognition and supervision of local faith communities, Flemish Government, 13 November 2020 (*https://beslissingenvlaamseregering.vlaanderen.be/document-view/5FAA439C20B6670008000094*).

[38] *Déclaration commune* 13 June 2018 (*https://orthodoxia.be/wp-content/uploads/2019/07/Déclaration-13.06.18-signée.pdf*).

[39] *Charte pour les organes représentatifs des cultes reconnus et d'une organisation philosophique non confessionnelle reconnue*, 26 March 2019 (signed by the Prime Minister, the Minister of Justice and leaders of the catholic, protestant, Anglican, orthodox, Muslim and Jewish belief communities and the recognised humanist freethinkers' movement) (*https://orthodoxia.be/wp-content/uploads/2019/07/190326-Charte-signée.pdf*).

is a new form of *negotiated self-regulation*, where the texts are written by government officials; the religious leaders concerned are just asked to agree – without an opportunity, as far as we know, to amend the texts[40].

For Belgian state authorities achieving results in this matter has always to be made dependent on the voluntary cooperation of religious communities, whose representatives formally have to accept a regulation – supplementing the legal framework – in the form of an agreement. This is a consequence of the guaranteed religious autonomy (art. 21 Const.). The question of the regulations' conformity with internal religious rules (canon law, for instance) has to be answered by the religious denominations themselves.

At first sight, this is a friendlier approach than what we saw in the case of Eupen-Malmédy, where the choices of the Catholic Church were *formally* based on church principles within the boundaries of canon law. In reality however, Belgian government pressure was the only overriding factor in achieving the desired results.

The 2019 Charter and the 2018 Joint Statement do even emphasise explicitly the constitutional freedom principles to be respected by Belgian authorities. Apparently, in the eyes of both the authors (government officials) and the undersigning religious leaders, the obligations in the Charter (and in a more detailed 'Pact'[41] accompanying the Charter) are in full accordance with the principles laid down in article 21 and article 181 of the Constitution.

3. The Netherlands

The *constitutional basis* for the relation between state and religious groups will be briefly dealt with (see infra par. 3.1) followed by a *char-*

[40] See A. OVERBEEKE, *Nouveauté à réglementer. L'usage de "chartes", "pactes" ou des "déclarations communes" dans le droit des cultes belge*, cit.

[41] *Pacte d'engagements pour les gestionnaires des associations, ainsi que pour tous ceux qui assument une responsabilité de gestion matérielle et/ou financière, en lien avec les communautés des cultes reconnus ou d'une organisation philosophique non confessionnelle reconnue*, 2019 (not yet published).

acterisation of this regime (see infra par. 3.2). Finally we will turn to *the role of agreements*, presenting two examples of negotiated arrangements in the sphere of religion and special rights for religious groups (see infra par. 3.3).

3.1. The Dutch Constitution (1815, changes 1848, 1983): relations with religious groups

Unlike the Belgian Constitution the Dutch Constitution changed dramatically since 1815 as far as church and state relations are concerned[42]. In 1848 the principle of religious autonomy was introduced in the Chapter of religion. This amendment opened the way for the establishment of Catholic dioceses[43]. In 1983 this Religion chapter – that originally contained paragraphs on financial support – was replaced by one, very concise, article 6, an article which treats religious and non-religious life stances equally (by using the terms 'religion or belief').

> Article 6
> 1. Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law.
> 2. Rules concerning the exercise of this right other than in buildings and enclosed places[44] may be laid down by Act of Parliament for the protection of health, in the interest of traffic and to combat or prevent disorders.

The enactment of art. 6 of the 1983 Constitution was the final stage of a long history of increasing religious freedom and church autonomy. Simultaneously state authorities became less and less involved in religious affairs. This evolution followed a 1972 constitutional amendment that ended the financial obligations of the state towards churches[45].

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[42] S.C. VAN BIJSTERVELD, *supra* at note 3, pp. 277-278; H. KNIPPENBERG, *The Changing Relationship between State and Church/religion in the Netherlands*, in *Geo-Journal* 67, no. 4 (2006): pp. 317-330 (*http://www.jstor.org/stable/41148128*).

[43] S.C. VAN BIJSTERVELD, *supra* at note 3, p. 278.

[44] In the same period old legislation on registration of religious bodies, dating back from 1853, was rescinded.

[45] S.C. VAN BIJSTERVELD, *supra* at note 3, p. 277.

The status of religious groups is not developed in the Constitution itself. The Dutch Civil Code (CC) however contains a specific paragraph on the position of religious entities, illustrating the broad degree of organisational autonomy given to religious groups[46]. In its formulation elements of article 8 of the Italian Constitution are recognisable.

> Article 2:2 CC Churches and other religious communities
> 1. Religious communities and their independent subdivisions and bodies in which they are united, have legal personality.
> 2. They are governed by their own charter insofar the rules thereof are not in conflict with law.

An obligation to be registered by public authorities as a religious denomination, introduced in 1853, existed until 1988. Legally this registration had limited meaning: registration of an organisation was not of decisive importance in answering whether the registered group really qualified as a religious denomination[47]. Registration was reintroduced in 2008[48].

When it concerns their internal affairs religious denominations are free to represent themselves in their contacts with the government.

3.2. Characteristics of the Dutch system

What started originally in 1815 as an interventionist regime, with a *de facto* preference for mainstream Protestantism, developed into a system of separation doing away with all remnants of older religion law. Deleting the chapter on religion in the 1983 Constitution has become

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[46] *Ibid.*, pp. 282-283; T.J. VAN DER PLOEG, *Government, legal personality and internal structure of religious communities in The Netherlands and a number of other European countries*, in A. VAN DER BRAAK, D. WEI, C. ZHU (eds.), *Religion and social cohesion; Western, Chinese and intercultural perspectives*, Amsterdam, 2015, pp. 41-54.

[47] T. VAN KOOTEN, *Het kerkgenootschap in de neutrale staat*, The Hague, 2017, p. 36, referring to: Hoge Raad (Supreme Court) 6 December 1939, in *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1941, n. 3708; Hoge Raad 31 oktober 1986, in *Nederlandse Jurisprudentie*, 1987, n. 173.

[48] *Ibid.*, pp. 231-260.

the symbolic final piece in this development – the 'disentangling' form church and state, in a sense[49].

The choice not to finance religion – specific religions – was made willingly and without political conflict. It was a product of broad consensus. Having abolished special rights in the financial sphere, the need for contact, consultation or even negotiation became very limited, at first.

The Dutch system of financial self-support has a separationist flavour but is not a sign of an anti-clerical position. This becomes visible in the sphere of indirect support. In the Netherlands, as is the case in France, a system of tax deduction for donations is put in place[50], and important chaplaincies in the army and in detention centres are organised and paid for by the state[51]. Access to state funded religious education in public authorities' elementary schools is also made possible[52], a phenomenon that also can be categorised as indirect support.

State neutrality is a central principle in the role of state authorities. For a neutral state, it is important to be able to work with representative bodies taking responsibility for the selection of the religious staff working in state institutions (chaplaincies, for instance). This means that here a system of consultation and sometimes negotiation is inevitable. Here the Dutch and Belgian positions are identical. The Constitutions do not mention the possibility or impossibility of contracts and agreements with religious groups. The Dutch model for church and state leaves room for negotiation and for the conclusion of various types of agreements.

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[49] See on this changing relationship: P. VAN SASSE VAN YSSELT, *Public Funding of Religious organisations in the Netherlands*, in F. MESSNER (ed.), *Public Funding of Religions in Europe*, Farnham, 2015, pp. 26-28.

[50] See *ibid.*, pp. 41-43.

[51] R. VAN EIJK, *The search for a workable balance: spiritual care in the Netherlands*, in R. BALODIS, M. RODRÍGUEZ BLANCO (eds.), *Religious assistance in public institutions. Proceedings of the XXVIIIth Annual Conference, Jurmala, 13-16 October 2016*, Granada, European Consortium for Church and State Research, 2018, pp. 263-274.

[52] S.C. VAN BIJSTERVELD, *supra* at note 3, p. 284.

3.3. Agreements? Two examples

The need for negotiations and for some form of agreements is probably increasing, as Dutch society is becoming increasingly religiously diverse and secularised at the same time. A first example illustrates the demands resulting from this growing diversity. This agreement accompanies a legal exemption, laid down in general legislation regarding animal slaughter. A second example concerns tax legislation. Tax law includes a special regime for charitable organisations, a category which include churches. Agreements with denominational umbrella organisations allow this legislation to operate smoothly.

3.3.1. Example: an agreement on religious (ritual) slaughter[53] *– religious exemptions (2012)*

In 2012 an agreement – *Convenant onverdoofde slacht*[54] – was concluded which contained the conditions under which ritual slaughter could be carried out. The agreement was reached between the government (the Ministry of Agriculture), religious groups (a Muslim umbrella organisation, two Jewish denominations) and representatives of the meat industry. It aimed at increasing the welfare of animals when slaughtered without stunning them firs, while securing the religious rituals[55]. This agreement covers the religious rights of a growing more recent minority – Islamic communities – and a very small older minority – the Jewish community.

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[53] See on this topic G. VAN DER SCHYFF, *Ritual slaughter and religious freedom in a multilevel Europe: The wider importance of the Dutch case*, in *Oxford Journal of Law and Religion*, 3(1), 2014, pp. 76-103.

[54] *Convenant onbedwelmd slachten volgens religieuze riten*, 5 juni 2012, Staatscourant 2012, nr. 13162. English translation: *https://www.eerstekamer.nl/overig/20140325/vertaling_in_het_engels/document*. See G. VAN DER SCHYFF, *supra* at note 53, p. 82-83.

[55] "The aim of the covenant is to improve animal welfare by requiring among other things that a ritually slaughtered animal must be unconscious within 40 seconds of being cut as ascertained on the basis of prescribed criteria; otherwise the animal must still be stunned. It was further agreed that animals must have their throats cut in one movement with a sharp knife of specific measurements": G. VAN DER SCHYFF, *l.c.*, p. 83.

It is uncertain whether the 2012 agreement, that had to be amended later on[56], is in itself a success.

But as *an instrument*, it illustrates the advantages of a negotiated solution in order to maintain a contested exemption for religious groups. Reaching a compromise on a minimum level of animal welfare protection increases support for the continuation of legal exceptions to the main rule that slaughter has to be carried out after stunning. In this particular case the agreement chronologically immediately preceded the Senate decision in a failed legislative initiative in Dutch parliament to ban ritual slaughter (without stunning) altogether. The proposal was supported by an overwhelming majority in the Lower chamber of parliament but ultimately rejected in the Senate on, amongst others, religious freedom grounds[57].

3.3.2. Example: an agreement on tax exemptions, tax deductibility (2017)

A 2017 'Samenwerkingsconvenant Interkerkelijk Contact in Overheidszaken en Belastingdienst' (Covenant Interdenominational Contact in Government Affairs and Tax Administration)[58] touches the legal position of nearly all Christian and Jewish denominations. It concerns an agreement between the *Interkerkelijk Contact in Overheidszaken* (CIO),

[56] *Addendum bij het Convenant onbedwelmd slachten volgens religieuze riten1, nr. DGAN/17109825, als overeengekomen op 5 juli 2017*, *Staatscourant* 2017, nr. 41228.

[57] «The aim of the covenant is to improve animal welfare by requiring among other things that a ritually slaughtered animal must be unconscious within 40 seconds of being cut as ascertained on the basis of prescribed criteria; otherwise the animal must still be stunned. It was further agreed that animals must have their throats cut in one movement with a sharp knife of specific measurements»: G. VAN DER SCHYFF, *supra* at note 53, pp. 82-83.

[58] *Samenwerkingsconvenant Interkerkelijk Contact in Overheidszaken en Belastingdienst 15 December 2017* (*https://download.belastingdienst.nl/belastingdienst/docs/convenant_belastingdienst_cio_al12021z1ed.pdf*).

an umbrella organisation of 28 Christian and 2 Jewish denominations[59], and the Ministry of Finances on the tax status of churches. In Dutch law there is general legislation allowing tax deductibility of donations, which includes those to churches[60]. The CIO was founded in 1940 by various Protestant denominations with the aim of jointly determining a position in relation to the German occupation authorities[61]. It became a platform for contact with the government. Its main task today is to represent the interests of the participating denominations.

The 2017 agreement sets a series of conditions that make is easier for churches – if the criteria are met – to respect the law and to keep the special status allowing them to get donations from their members, resulting in tax exemptions for these members. The agreement is respected *de facto* by tax authorities and is not legally enforceable[62].

It is clear that the value of this type of agreements depends on the tax legislation itself: if tax deductibility for churches is discontinued in new tax legislation, then the need to conclude an agreement no longer applies.

4. Meanwhile: Covid-19, the need for consultation, negotiations and agreements

If one has to choose one single event requiring some form of agreement between churches and public authorities in 2020, then *Covid-19* would be a favourite. Managing the pandemic asks for drastic government measures, which also will affect the collective forms of religious manifestation.

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[59] See on CIO: L. VAN 'T HUL, *Politieke onderhandelingen tussen de Nederlandse overheid en religieuze organisaties, 1946-1996* (PhD Thesis), Universiteit van Amsterdam, 2020, p. 227.

[60] This is an example of legal provisions creating facilities which are not exclusively aimed at religious denominations, but include these organisations. See P. VAN SASSE VAN YSSELT, *supra* at note 49, pp. 41-43.

[61] L. VAN 'T HUL, *supra* at note 59, p. 26.

[62] Samenwerkingsconvenant Interkerkelijk Contact in Overheidszaken en Belastingdienst 15 December 2017, § 22.

It would be interesting to investigate in future how the authorities in Belgium and the Netherlands, when developing restrictive measures, met this need for some form of agreement with religious leaders. The first impression is that both countries developed very different approaches in the light of their own constitutional safeguards for religious communities: the decisions taken were different in kind and moreover, the role assigned to the representatives of the religious communities was fundamentally different. The role the government expected from religious representatives ranged from the obedient implementers of unilaterally imposed measures (Belgium) to a true negotiating partner necessary to achieve a *modus vivendi* in order to realize the restrictive government policies within the sphere of the religious communities (The Netherlands).

In Belgium the federal government is responsible for the lion's share of the measures restricting the activities of religious communities. From March 2020, given the impact of the coronavirus outbreak in the country, the Interior minister made a series of far-reaching ministerial orders including clauses that implied an almost complete shutdown of the activities of religious communities. When determining these provisions the advice of the Council of State was not requested. In order to do so, the minister consistently invoked to the urgent circumstances provoked by Covid-19[63]. In a number of these ministerial orders, the representative bodies of the religious communities were instructed to regulate the remaining room for religious activity in internal guidelines[64]. In other words: the necessary restrictions laid down in legislation were not consulted with the religious representatives, who were only expected to implement them. If consultation with religious leaders took place, this

[63] See, for instance, the consideration "Given the urgency, which does not allow waiting for the opinion of the (…) Council of State within a period reduced to five days, in particular because of the need to consider measures based on the epidemiological results which evolve day by day" in Ministerial Order 28 November 2020 amending the ministerial order of 28 October 2020 containing urgent measures to limit the spread of the coronavirus COVID-19, in *Moniteur belge*, 29 November 2020.

[64] See, for instance: art. 6 Ministerial Order 5 June 2020 amending the Ministerial Order of 23 March 2020 containing urgent measures to limit the spread of the coronavirus COVID-19, in *Moniteur belge*, 6 June 2020.

consultation was focused on the implementation, and didn't include negotiations on the legal measures. If negotiations were deemed necessary by public authorities, they apparently only involved representatives of the 'recognised' religions[65].

Belgian scholar Louis-Léon Christians described the attitude of the representatives of the recognized religions as follows:

> that health measures restricting religious freedom are supported by the religious leaders who make efforts to theologically re-legitimize the temporary prohibition of collective celebrations. They insist on the role of individual prayer and support to neighbors and to the poor and suffering people, as an essential means of pleasing God[66].

It is not risky to suppose that they were doing the government a favour at the same time. Individual believers did not succeed in their efforts to soften the government's efforts[67].

In a summary judgment of 8 December 2020[68], handed down just before Jewish *Hanukkah*, the Council of State decided, at the request of Orthodox Jewish communities, to overturn parts of the ministerial order banning religious activities and ordered these to be replaced[69]. The court decision itself sparked a public discussion on the question if the state was favouring religion over other activities. We will leave the content of the judgment aside here, but what is important is the judge's instruction to not only take into account the fundamental rights interests of these communities when developing the alternative measures, but to establish the new regulations *involving the religious denominations'*

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[65] L.L. CHRISTIANS, *Covid-19, Law and religion in Belgium*, paper for the *International Conference on Covid-19 Pandemic & Religious Freedom Reports from North America and Europe*, University of Portsmouth, 2 December 2020, p. 5 (unpublished).

[66] *Ibid.*, p. 2.

[67] See Council of State, judgment n° 247.674, 28 May 2020, *Wouter Suenens, Joseph Junker, Dorothea Dufaux and Valentine Van Cranenbroeck* c. *Belgian State*.

[68] Council of State, judgment n° 249.177, 8 December 2020, *Congregation Yetev Lev Dsatmar Antwerp ltd., VZW Thora Vejirah, Joel Fogel, Moshe Grunhut, Baruch Dresdner and Yitti Elyovics* c. *Belgian State*.

[69] See: *Covid-19: Council of State overturns restriction on religion* (*https://www.brusselstimes.com/news/art-culture/144515/covid-19-council-of-state-overturns-restriction-on-religion/*).

leadership: «It is imperative that the replacement takes place in consultation with representatives of the faiths and philosophical communities». This is the first time that a Belgian judge, albeit in summary proceedings, issues an order for the adoption of regulations, taking into account mandatory consultation with the religious denominations involved[70]. Following this judgment, the Minister of Justice brought together, on December 9, 2020, representatives of recognized religions as well as a humanist organisation to address the new measures to be taken. It appears from the minutes of the meeting that the majority of these representatives *agreed* to limit the collective exercise of worship to 15 people maximum given the difficult health situation[71].

The way in which the Dutch Covid 19 policy measures were implemented in the sphere of the collective practice of religion differed considerably from the Belgian approach. The government lacked the authority to restrict the practice of religion if that limitation was not expressly provided for in a statute. This limits the room for manoeuvre, if state authorities have to act swiftly. If the Dutch state lacks the power to impose prohibitions unilaterally, then it is obvious for the government to try to achieve its policy aims through consultation with church denominations. They are urged by the Dutch government to impose restrictions on their collective practice of religion via self-regulation[72].

On 15 December 2020, when stricter 'lockdown' measures came into force as a consequence of the rising contamination figures, the CIO advised the participating denominations to reduce religious collective activities considerably[73], thereby taking full account of the urgent ad-

[70] This resulted in a Ministerial Order 11 December 2020 amending the Ministerial Order of 28 November 2020 containing urgent measures to limit the spread of the coronavirus COVID-19, in *Moniteur belge*, 11 December 2020.

[71] Following the description of the facts in Council of State, judgment n° 249.313, 22 December 2020, *l'a.s.b.l. Saint-Joseph, Louis Bochkoltz and Nicolas Windels* c. *Belgian State*.

[72] See: *Churches told to limit congregations after outcry over Staphorst* (*https://www.thehagueonline.com/news/2020/10/07/churches-told-to-limit-congregations-after-outcry-over-staphorst*).

[73] «In the event that physical meetings are nevertheless held (especially during the coming public holidays), then with a maximum of thirty people in accordance with the

vice received from the government that same day. The letter contained a paragraph on *the competence to decide* in these matters under current legislation:

> The CIO regularly consults with the Minister of Justice and Security, who is also responsible for relations with church communities and other religious organisations (…). The current state of affairs is discussed with him, *on the basis of which the CIO determines a position* based on its own responsibility *and provides advice* to the affiliated denominations[74].

At first sight the Dutch approach is more respectful in the light of the constitutional position of religious denominations compared with the rigid Belgian policy of direct limitations whose proportionality was debatable[75]. In The Netherlands the religious groups themselves determined the position to be taken when it comes to the conditions set for religious gatherings. Members of CIO, the denominations, were free to put aside the advice given by CIO. However, if one takes into account the political pressure on governing bodies of the different denomination to make the choices asked for by the government, it could be argued there was hardly any difference between Belgium and The Netherlands. In both countries government authorities somehow succeeded in having it their way. But still, the attitude towards religious groups and the readiness to involve religious groups by consulting them and seeking an agreement remains a small but important point of difference. The Belgian government operates in a way showing relatively little respect for the firmly anchored principle of organisational freedom. An adjustment only took place in December 2020, under pressure of the court, leading

already known guidelines of the RIVM» (RIVM = National Institute for Public Health and the Environment).

[74] CIO-president J. SMIT, message 15 December 2020. See: *https://www.cioweb.nl/wp-content/uploads/2020/12/201215-Voorzitter-CIO-Corona-december-2020.pdf*.

[75] Cfr. A. OVERBEEKE, L.-L. CHRISTIANS, *L'interdiction belge des activités religieuses dans le cadre de la crise sanitaire du Covid-19*, 9 April 2009 (*http://belgianlawreligion.unblog.fr/2020/04/09/linterdiction-belge-des-activites-religieuses-dans-le-cadre-de-la-crise-sanitaire-du-covid-19/*).

to a solution based on a form of consultation (see *supra*, this paragraph).

5. By way of conclusion: comments, questions

This contribution is not based on an in-depth systematic investigation into agreements between governments and religious authorities. The choice of examples could then be called almost arbitrary. It is therefore risky to draw conclusions from it. This contribution therefore ends with a few cautious comments. The phenomenon of agreements (between the state and religious groups) is not foreseen in the Belgian and Dutch Constitutions, *but also not forbidden*. Both regimes offer meaningful examples of negotiated solutions for very different and sometimes difficult problems in the relations between the state and one or more religious groups. It seems that the more involved a state is in the organisation of religious life, the more the need arises for contact, consultation and negotiation, and consequently: a need for agreements. Further research of the Belgian and Dutch cases could offer clarity on this point.

In Europe, national systems without any kind of agreement with religious groups are inconceivable. For example, state authorities are expected under the ECHR to guarantee basic individual and even collective religious rights of special categories of persons, for instance prisoners[76]. To this end usually agreements are made with religious organizations. This means that it will be difficult to find one country where negotiations on the realization of these religious rights are never undertaken. It can be assumed that the more religiously pluralized a country is, the higher the risk of discrimination (of smaller minorities in the first place).

It can be advanced that it is possible to use the technique of negotiations and agreements in harmony with principles of constitutional law but also in order to circumvent these principles, as appears to have been

[76] See, for instance: ECtHR 9 June 2020, *Erlich and Kastro v. Romania*, nos. 23735/16 and 2370/16.

the case in the Belgian Eupen-Malmédy case in 1919 where constitutionally based principles of church autonomy and state neutrality were partially ignored by Belgian authorities.

It would be worthwhile to test existing contracting techniques against Torfs' *concept of contractual religious freedom* (supra, -5-) in order to ascertain whether freedom of religion is not compromised when entering into contract relations resulting in an agreement. Another important question also concerns the concept agreement itself. The definition in the online Cambridge English Dictionary is open and suggests a certain equivalence between partners: «a decision or arrangement, often formal and written, between two or more groups or people»[77]. But in a definition (taken from the Longman Dictionary of Contemporary English on line) *agreement* means also «when someone says yes to an idea, plan, suggestion etc.; agreement to do something»[78]. Looking at the negotiation of the Belgian 2019 Charter on financial transparency, I think this process is characterized by the Longman definition: the texts are written by government officials and religious groups responded thereafter with a "yes, we accept".

A number of questions remain open and could be the subject of further (comparative) research.

At present, there are no 'rules' or 'good practices' for these negotiations techniques. Do we need (at least in a Belgian or Dutch context, where the idea of agreements is not part of national religion law) to develop a set of principles, governing these negotiation processes, given the fact that both countries have to respect state neutrality in their religion policies and other fundamental rights as well?

If such guidelines are needed, the following elements should be taken into consideration:

(a) the *selection of participants*. Are all religious groups equal?; which religious group is eligible to participate in a consultation with the government?; which selection mechanisms can a government use

[77] *Cambridge English Dictionary* (on line) (*https://dictionary.cambridge.org/us/dictionary/english/agreement*).

[78] *Longman Dictionary of Contemporary English* (on line) (*https://www.ldoceonline.com/dictionary/agreement*).

without jeopardizing its position as 'the neutral and impartial organiser of the practising of the various religions'[79]?

(b) the *selection of topics deemed negotiable*; this becomes difficult when the topics to be discussed have a theological character: how can this go hand in hand with the neutral position of the government?

(c) the *timing of the negotiation process* (an agreement must at least be, a form of *informed consent*, especially when human rights are involved, so plural communities must have the opportunity to consult their stakeholders)

(d) the *nature of the negotiation process*: is an agreement to be negotiated freely (so suggestions and amendments are welcomed) or does the situation call for an agreement designed and written by the government?

(e) the *legal status of the results* achieved in these negotiations. To what extent are government and religious communities bound by what they have agreed upon?

[79] See already: ECtHR [GC], 27 June 2000, Cha'are Shalom Ve Tsedek v. France, no. 27417/95, § 84. On the obligation of neutrality: J. RINGELHEIM, *State Religious Neutrality as a common European Standard? Re-appraising the European Court of Human Rights approach*, CRIDHO Working Paper 2017/8, Louvain-la-Neuve, UCL, p. 23.

LE DROIT CONVENTIONNEL DES CULTES SOUS LE REGARD DES POLITIQUES: EXPÉRIENCES FRANÇAISE ET ESPAGNOLE

Mélanie Trédez-Lopez

SUMMARY: *1. Propos introductifs. 2. Des droits conventionnels inscrits dans des paysages religieux uniformes et des cadres juridiques variables en France et en Espagne. 3. Des droits conventionnels anciens remis en cause à l'époque contemporaine. 3.1. Le droit conventionnel des cultes français: un héritage impérial ou colonial maintenu en marge du principe constitutionnel de laïcité. 3.2. Du concordat de l'Espagne confessionnelle franquiste aux accords de la Transition démocratique: un droit conventionnel révélant une hiérarchisation des croyances. 4. Le droit conventionnel des cultes au coeur des campagnes politiques. 4.1. Abroger tous les accords au nom de la laïcité: la voie de l'extrême gauche en France et en Espagne. 4.2. Abroger le concordat avec le Saint-Siège pour mettre fin aux privilèges accordés à l'Église catholique au nom de l'a-confessionnalité: la proposition des socialistes espagnols. 4.3. La voie du statut quo préconisé du centre à l'extrême droite. 4.4. La conclusion de nouveaux accords de coopération au nom du principe constitutionnel d'égalité: la voie minoritaire du socialisme français. 5. Conclusion: quel avenir pour le droit conventionnel des cultes en France et en Espagne?*

1. Propos introductifs

Le droit conventionnel des cultes, né et alimenté des accords liant l'État et les confessions religieuses, constitue la manifestation la plus aboutie de la coopération pouvant être instituée entre pouvoirs publics et religions. Le droit conventionnel peut en ce sens être qualifié de droit formalisé par opposition au droit informel découlant du dialogue entre autorités publiques et religions. Ce droit vise notamment à garantir la liberté religieuse et de culte à titre individuel et collectif sur le territoire de l'État et dans le respect de ses normes. Le droit conventionnel peut également être qualifié de droit spécial, s'appliquant spécifiquement et exclusivement aux confessions religieuses (ou plus exactement à cer-

taines d'entre elles), par opposition au droit commun régulant le fonctionnement des groupements associatifs à vocation culturelle, philosophique ou syndicale et régissant les droits des membres desdits groupements.

En France comme en Espagne, on observe une tendance à utiliser de manière réductrice, en lieu et place du concept de droit conventionnel des cultes, le concept de «droit concordataire», alors même que cette terminologie ne peut faire justement référence qu'aux Concordats, conventions bilatérales de droit international conclues par les États avec l'Église catholique par le biais du Saint-Siège. Ce concept ne peut par conséquent pas justement englober les accords de droit public conclus entre les États, personnes morales de Droit public et les fédérations représentant les confessions, personnes morales de droit privé.

La présente étude propose d'envisager le droit conventionnel des cultes, à travers des regards croisés sur deux expériences nationales, en envisageant les accords de coopération conclus avec les cultes en France et en Espagne, depuis leurs origines (2) jusqu'à leur remise en cause contemporaine par les personnalités politiques qui exploitent les défis lancés par les faits religieux comme des instruments de campagnes électorales (3). Des précisions contextuelles, relatives d'une part au paysage religieux de chacun des États objet d'étude et, d'autre part, à leur configuration juridico-politique, s'imposent en amont de toute problématisation (1).

2. Des droits conventionnels inscrits dans des paysages religieux uniformes et des cadres juridiques variables en France et en Espagne

Le paysage religieux contemporain est sensiblement le même en France et en Espagne: basé sur l'implantation traditionnelle du christianisme, dans sa branche catholique et protestante et du judaïsme, puis alimenté par des mouvements migratoires observés à des époques différentes de part et d'autre des Pyrénées et ayant conduit, au fil du XX^{ème} siècle, à l'implantation de l'islam, du bouddhisme, de l'orthodoxie ou encore du christianisme évangélique. La France a en effet été une terre d'asile ou d'installation pour de nombreux réfugiés ou immigrés en

provenance du Maghreb, d'Afrique sub-saharienne, d'Asie ou d'Amérique latine, emportant avec eux leur culture et religions dès les années 1960 tandis que l'immigration vers l'Espagne est demeurée un phénomène impossible pendant le franquisme et la Transition, si bien que les premières communautés étrangères à s'implanter durablement sur le territoire ne le font qu'à compter de la fin des années 1980-1990.

Partant de populations totales de l'ordre de 66,9 millions d'habitants pour la France et de 46,6 millions d'habitants pour l'Espagne, il est possible d'envisager de manière approximative le nombre de croyants des principales confessions implantées sur l'un et l'autre des territoires. Il est important de souligner l'absence de statistiques officielles portant sur les croyances religieuses en France, ce qui doit nous conduire à nous en remettre aux chiffres avancés par les Fédérations religieuses, par les instituts de sondage ou, le cas échéant, aux chiffres balayés par les médias. L'examen du paysage religieux espagnol est facilité par l'ouvrage du *Centro de investigaciones sociológicas* (Centre de recherche sociologique), instance publique rattachée au ministère de la Présidence, des Relations avec les Assemblées et de la Mémoire démocratique, qui interroge chaque mois un échantillon d'habitants sur leurs croyances et pratiques religieuses. Par ailleurs, à travers sa *Comisión Asesora de Libertad religiosa* (Commission de soutien à la liberté religieuse), le Ministère de la Justice espagnol assure une forme de recensement des croyants en s'appuyant sur le registre des entités religieuses ou sur les données des fédérations représentatives des confessions[1]. Ainsi, à partir de ces diverses sources et des chiffres concernant les années 2016 à 2018, il est possible d'avancer que les français comme les espagnols demeurent majoritairement catholiques: tandis que les sondages du *Centro de investigaciones sociológicas* pour le mois de septembre 2019 faisaient état de 68% de catholiques en Espagne (contre 76,6% en 2008 et 88,13% en 1991), la Conférence épiscopale espagnole avançait le chiffre précis de 32 556 922 catholiques résidant en Espagne. Le pourcentage de catholiques en France est sensiblement identique, de l'ordre de 65% de la population (contre 87% en 1972)

[1] Les chiffres concernant l'Espagne avancés ci-après proviennent du rapport annuel sur la liberté religieuse pour l'année 2017 réalisé par le Ministère de la Justice: *Informe anual sobre la situación de la libertad religiosa en España 2017*, Madrid, 2018.

représentant environ 40 millions d'individu[2]. L'islam représente la seconde religion en nombre de croyants au sein des deux États, réunissant plus de 5 millions de fidèles en France (soit 7 à 8% de la population) et près de deux millions en Espagne (soit environ 4,5% de la population). Le protestantisme constituerait la troisième confession dans chacun des deux États. Implanté traditionnellement en France et dans une moindre mesure en Espagne, il a connu un essor dans sa branche évangélique avec l'immigration en provenance d'Afrique ou d'Amérique latine, cette dernière ayant été massive en Espagne dans les années 2000. On évalue approximativement à 1,5 million le nombre de protestants résidant en France, de même qu'en Espagne, représentant respectivement 2,2% et 3,2% de la population française et espagnole. Les orthodoxes seraient au nombre de 1,5 millions en Espagne (soit 2,2% de la population, pourcentage nourri des flux migratoires des années 2000 en provenance des pays d'Europe de l'est) et environ 200 000 en France, représentant 0,3% de la population. La France est le premier pays bouddhiste d'Europe avec près de 600 000 pratiquants (pour 4 millions en Europe) avoisinant 1% de la population. À compter de 1975, les bouleversements connus par les pays du sud-est asiatique ont entraîné un afflux massif de réfugiés cambodgiens et chinois qui ont trouvé asile en France et contribué à l'implantation du bouddhisme sur le territoire. Il y aurait 85 000 bouddhistes en Espagne représentant 1,8% de la population. Enfin, il existe en France comme en Espagne une communauté juive traditionnelle qui avoisine 45 000 personnes en Espagne où le nombre de juifs a connu une légère progression comme conséquence d'une vague d'immigration en provenance d'Argentine au XXI^{ème} siècle. La proportion de juifs n'atteint pour autant que 0,08% de la population espagnole tandis qu'il y aurait 600 000 juifs en en France, représentant environ 1% de la population.

Il ressort de ces chiffres une forme d'identité des paysages religieux des deux États mais c'est sans compter le fait que l'Espagne reconnait largement tout mouvement religieux justifiant d'une doctrine (et respectueux de l'ordre public) comme entité religieuse tandis que la France garde une grande réserve à cet endroit. Prenons l'exemple de

[2] *L'Église catholique de France en chiffres*, in *Le nouvel obs*, 26 juin 2016.

l'Église de Scientologie, dont la qualification juridique a toujours été controversée en France, *a fortiori* depuis la condamnation définitive de ses deux principales associations pour escroquerie en bande organisée, recel aggravé, extorsion et exercice illégal de la médecine (Cass. crim., 16 oct. 2013, reqs 11-89002 et 13-85232) tandis que l'*Audiencia Nacional*, haute juridiction espagnole, lui a reconnu le statut d'«entité religieuse» et le droit d'être inscrite au registre des entités religieuses dans un arrêt du 11 octobre 2007 (SAN, n°352/2005, Sala 3ª). Dans le même sens, si le statut cultuel des Témoins de Jéhovah a longtemps été remis en cause en France et si ces derniers se heurtent encore dans certains cas à des tracasseries administratives, malgré une évolution de la jurisprudence administrative leur étant favorable, au contraire, depuis la reconnaissance de la liberté religieuse en Espagne en 1980, les Témoins de Jéhovah n'ont jamais rencontré de sérieux obstacles à l'exercice de leur culte et sont reconnus comme religion d'enracinement notoire sur le territoire espagnol depuis 2006.

Afin de conduire une comparaison de manière cohérente, ce sont donc les 6 religions évoquées *supra* qui vont attirer notre attention, pour leur représentativité de part et d'autre des Pyrénées mais également parce que l'État laïc français et l'État a-confessionnel espagnol ont tous deux reconnu l'importance de ces religions enracinées sur leur territoire en instituant un dialogue officiel avec leurs instances représentatives. C'est ainsi qu'en France, les pouvoirs publics dialoguent régulièrement avec la Conférence des évêques de France (CEF), la Fédération protestante de France (FPF), l'Assemblée des évêques orthodoxes de France (AEOF), le Conseil représentatif des institutions juives de France (CRIF), l'Union bouddhiste de France (UBF), le Conseil français du culte musulman (CFCM) et le Conseil représentatif des Institutions juives de France (CRIF). Pour sa part, l'État espagnol entretient des relations avec la *Conferencia episcopal Española* (CEE), la *Federación de entidades religiosas evangelicas de España* (FEREDE), la *Comision islámica de España* (CIE), la *Federación de comunidades judías de España* (FCJE), la *Federación de Entidades Budistas de España* (UBE-FEBE) et la *Asamblea Episcopal Ortodoxa de España y Portugal*. Notons que la France comme l'Espagne dialoguent sur le

plan diplomatique avec le Saint-Siège en tant qu'instance représentant l'Église catholique à titre universel.

De ces dialogues officiels au niveau des fédérations et/ou au niveau diplomatique sont nés les accords qui constituent le droit conventionnel des cultes mais précisons d'ores et déjà qu'ils ne concernent pas toutes les confessions envisagées *supra*. En France, ces accords ont été conclus dès le début du XIX^{ème} siècle avec les cultes catholique, protestant et juif, ces accords ne demeurant en vigueur aujourd'hui que dans une zone limitée du territoire Français: les départements d'Alsace et de Moselle. Le droit conventionnel des cultes est par conséquent un droit non seulement spécial mais aussi d'application territoriale restreinte. En Espagne, les accords de coopération avec les cultes ont été négociés et conclus à compter de la transition démocratique avec l'Église catholique (1976-1979), puis avec les cultes juif, protestant et musulman en 1992. Le droit conventionnel des cultes exclue donc les cultes bouddhiste et orthodoxe en France comme en Espagne et le culte musulman en France, alors même qu'un dialogue institutionnalisé est établi avec les fédérations représentatives de ces cultes.

Les accords conclus entre l'État et les confessions en France et en Espagne évoluent dans deux contextes juridico-politique bien distincts alors que la France et l'Espagne cultivent une même culture juridique. En effet, si l'Espagne et la France partagent à la fois une configuration socio-religieuse semblable et un socle normatif commun au regard de leurs droits civils ou de leurs droits constitutionnels par exemple, leurs droits conventionnels des cultes s'articulent de façon très différente: autour du principe constitutionnel de laïcité et du principe légal de séparation des Églises et de l'État en France (respectivement envisagés par l'article premier de la Constitution du 4 octobre 1958 et par la loi de séparation des Églises et de l'État du 9 décembre 1905); autour des principes constitutionnels d'a-confessionnalité de l'État et de coopération des pouvoirs publics avec les cultes d'enracinement notoire en Espagne (articles 16 et 9.2 de la Constitution du 6 décembre 1978). Si le droit conventionnel des cultes français a vu le jour avant la mise en place du cadre constitutionnel et légal précité, son maintien en certains points du territoire est de ce fait remis en cause comme constituant une violation des principes de laïcité et de séparation. Le droit convention-

nel des cultes espagnol, concomitant ou postérieur à la Constitution démocratique espagnole de 1978, n'en n'est pas moins décrié pour autant, puisqu'il serait constitutif d'une hiérarchisation des cultes et donc des croyances, mettant à mal le principe d'égalité entre les individus proclamé à l'article 14 de la Constitution.

3. Des droits conventionnels anciens remis en cause à l'époque contemporaine

Les deux systèmes de droit conventionnel sont nés à des époques et sous des régimes politiques de différente nature. Si le droit conventionnel français a vu le jour sous le IInd empire au XIX^{ème} siècle, dans le cadre d'un régime de type personnel, c'est sous la transition démocratique post-franquiste (1975-1992) que le droit conventionnel espagnol s'est formé. Ces deux ensembles d'accords se distinguent par ailleurs d'un État à l'autre par leur portée: uniforme à l'ensemble du territoire en Espagne mais au contraire limitée en certaines zones du territoire français. Ancrés dans des contextes spatio-temporels distincts et d'application territoriale variable, ils partagent néanmoins leur remise en cause à l'époque contemporaine, notamment au nom de la laïcité et/ou de l'égalité.

3.1. Le droit conventionnel des cultes français: un héritage impérial ou colonial maintenu en marge du principe constitutionnel de laïcité

Le droit conventionnel des cultes français s'est construit aux prémisses du XIX^{ème} siècle sous l'influence de l'empereur Napoléon III pour s'appliquer à l'ensemble du territoire national et y régir l'organisation de quatre cultes: le culte catholique, à travers un concordat conclu le 15 juillet 1801 entre l'Empereur des français et le Pape Pie VII, devant régir les rapports entre l'État français et le Saint-Siège, mais aussi clarifier les droits de l'Église catholique en France (complété par des articles organiques imposés unilatéralement par la France à travers une loi du 8 avril 1802); les deux cultes protestants de l'Église réformée et de la confession d'Augsbourg à travers des articles organiques éga-

lement adoptés par la voie législative le 8 avril 1802 et le culte juif régi par un décret impérial du 17 mars 1808 portant exécution d'un règlement adopté le 10 décembre 1806 par l'assemblée générale des juifs convoquée à Paris par l'Empereur[3]. On soulignera que si l'on parle communément de droit conventionnel des cultes, ou de droit concordataire, ces «conventions» ont été imposées unilatéralement par l'Empereur afin d'organiser le fonctionnement interne des cultes en créant des circonscriptions ecclésiastiques (églises, paroisses ou consistoires…) et en vue d'organiser la nomination et la discipline des ministres des cultes (droit de regard sur l'habit ecclésiastique, la langue et le contenu des prêches notamment). Il s'agissait ainsi davantage d'asseoir un droit de regard de l'État sur leur fonctionnement que de reconnaître les droits de leurs membres.

Lorsque la loi de séparation des Églises et de l'État a été adoptée un siècle plus tard sous la III[ème] République, le 9 décembre 1905[4]. Cette loi a provoqué l'abrogation de ce système concordataire pour l'ensemble du territoire à l'exception de l'Alsace et de la Moselle, alors sous occupation allemande depuis le traité de Francfort du 10 mai 1871. Sous l'Empire allemand, bien que devenus des *länders*, ces territoires ont reçu application de certaines normes françaises, dont le Concordat et les articles organiques. Ceci a contribué à la conformation d'un système juridique hybride: le droit local alsacien-mosellan dont le droit conventionnel des cultes n'est qu'une branche. Lorsque la France a récupéré l'Alsace et la Moselle à l'issue de la première guerre mondiale, les politiques ont fait le choix de maintenir le droit local des cultes, ce que le Conseil d'État a validé *a posteriori*, déclarant dans avis du 24 janvier 1925 (n°88.150): «le régime concordataire tel qu'il résulte de la loi du 18 germinal an X, est toujours en vigueur dans les départements du Rhin et de la Moselle».

Outre le système des cultes en vigueur en Alsace-Moselle, il existe également un droit local des cultes en Outre-mer, puisque la loi de sé-

[3] B. BASDEVANT-GAUDEMET, *Le jeu concordataire dans la France du XIX siècle*, Paris, 1988; J. SCHLICK, *Églises et État en Alsace et en Moselle*, Strasbourg, 1979; F. MESSNER, *Le droit des cultes dans les départements du Rhin et de la Moselle*, in *Revue Européenne des relations Églises-États*, vol. 1, 1994, pp. 37-51.

[4] J.-M. MAYEUR, *La séparation des Églises et de l'État*, Paris, 2005.

paration des Églises et de l'État de 1905 n'a pas étendu son champ d'application à l'intégralité des territoires français ultramarins: Saint-Pierre et Miquelon, la Nouvelle-Calédonie, Mayotte, la Guyane et la Polynésie reçoivent en effet application d'un décret-loi du 16 janvier 1939 *relatif à l'institution dans les colonies de conseils d'administration des missions religieuses*, plus connu sous le nom de «Décret Mandel», instituant des conseils d'administration des missions religieuses et organisant le régime fiscal des biens de ces missions. Ici encore, l'objectif est davantage de contrôler que de reconnaitre de droits de nature religieuse individuels et collectifs. Ce droit local des cultes en Alsace Moselle et en Outre-mer a résisté à la proclamation de la laïcité par la Constitution de 1946, réaffirmé par la Constitution de 1958.

Les points de tension pesant sur ce droit conventionnel des cultes français, à la fois spécial et exceptionnel, sont nombreux. Évoquons en premier lieu la rémunération des ministres des quatre cultes liés à l'État par des accords en Alsace-Moselle, qui constituerait une entorse à l'interdiction de financement des cultes reconnue par la loi de séparation (article 2). Si les critiques en ce sens sont nombreuses, le Conseil Constitutionnel saisi d'une question prioritaire de constitutionnalité relative à la rémunération des pasteurs protestants par l'État en Alsace-Moselle, a affirmé en 2013 que cette rémunération, envisagée par les articles organiques relatifs au culte protestant, devait être regardée comme conforme au principe constitutionnel de laïcité (CC, QPC n°2012-297, du 21 février 2013). Les sages ont réitéré cette ligne d'analyse dans une décision du 2 juin 2017 alors qu'ils étaient saisis d'une nouvelle question prioritaire de constitutionnalité mettant en cause la rémunération des ministres du culte catholiques par la collectivité territoriale de la Guyane (CC, QCP n°2017-633, du 2 juin 2017), reconnaissant ainsi la possibilité d'une laïcité à géométrie variable.

L'enseignement de la religion au sein des établissements scolaires publics en Alsace-Moselle, constitue un autre point de tension fréquent. Les cours de religion et la rémunération des enseignants par l'État porteraient atteinte au principe de laïcité des programmes scolaires et des enseignants, reconnu à travers les lois Ferry du 28 mars 1802 sur l'enseignement primaire obligatoire et du 30 octobre 1806 sur l'organisation de cet enseignement. L'interdiction d'aborder la religion à l'école

est ferme: ni religion, ni faits religieux. Toute tentative de contournement est immédiatement contrée comme cela a pu être observé récemment à travers la mise à pied d'un instituteur pour «faute grave professionnelle» alors que ce dernier avait étudié une dizaine de textes de la Bible avec ses élèves dans le cadre d'un travail autour des «mythes et légendes»[5]. Au contraire, le droit conventionnel des cultes d'Alsace-Moselle permet qu'un enseignement religieux soit proposé dans tous les établissements scolaires publics pour les 4 cultes concernés, à raison d'une heure par semaine pour un programme placé sous la responsabilité des autorités religieuses qui désignent elles-mêmes les enseignants. Il est à noter qu'une dispense reste possible à la demande des parents comme l'a reconnu le Conseil d'État dans un arrêt du 6 avril 2001 (reqs nos 219379, 221699 et 221700). On observe des revendications visant à étendre l'enseignement de la religion au bénéfice de l'islam eu égard à l'implantation d'une importante communauté musulmane dans les départements d'Alsace-Moselle. La question de l'égalité entre les religions mais aussi entre usagers du service public se trouve ainsi posée et alimente le débat autour de l'extension du droit conventionnel local à l'islam.

3.2. Du concordat de l'Espagne confessionnelle franquiste aux accords de la Transition démocratique: un droit conventionnel révélant une hiérarchisation des croyances

Le droit conventionnel espagnol est plus récent. Il est bien connu que l'Espagne Franquiste était un régime confessionnel entretenant des liens privilégiés avec l'église catholique, formalisés par un Concordat conclu avec le Saint-Siège le 27 août 1953. Ce régime confessionnel méconnaissait le pluralisme religieux et empêchait la pratique d'autres cultes sur le territoire national[6]. Au décès de Franco en 1975, l'Espagne

[5] M.-E. PECH, *Malicornay ou quand le fait religieux est interdit à l'école*, in *Le Figaro*, 24 mars 2019.

[6] Le *For des espagnols* promulgué le 17 juillet 1945, prohibait «les cérémonies et manifestations publiques d'une religion autre que la religion catholique», tout en ad-

entre dans une transition démocratique qui permet de reconnaitre le pluralisme religieux. La première étape de la transition en matière religieuse repose sur la révision du concordat de 1953 par l'adoption d'un accord international de coopération avec le Saint-Siège le 28 juillet 1976 portant renonciation au privilège de présentation des évêques et au privilège du for. Cet accord a été complété par quatre conventions internationales du 3 janvier 1979, respectivement relatives aux affaires juridiques, aux affaires économiques, à l'enseignement et aux affaires culturelles, et à l'assistance religieuse aux forces armées[7]. Ces accords assurent à l'Église catholique une position privilégiée par rapport aux autres religions, notamment en matière fiscale, puisque l'Église est la seule à pouvoir percevoir le pourcentage découlant de l'impôt sur le revenu des personnes physiques. La transition démocratique de l'Espagne s'est notamment articulée autour de l'article 16.3 de la Constitution qui a mis un terme à la confessionnalité catholique de l'État et invité ce dernier à «tenir compte des croyances religieuses de la société espagnole et de maintenir les relations de coopération avec l'Église catholique et les autres confessions»[8]. La loi relative à la liberté religieuse du 5 juillet 1980 (LO n°7/1980) est venue accompagner cette évolution majeure en faisant obligation à l'État de conclure des accords de coopération avec les confessions d'enracinement notoire sur son territoire. Sur ce fondement l'État a conclu trois conventions de droit public avec les fédérations représentatives de l'islam, du protestantisme et du judaïsme le 28 avril 1992[9]. Dans chacun des exposés des motifs il est ainsi proclamé:

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mettant que nul ne devait être «inquiété pour ses croyances religieuses et leurs manifestations dans la sphère privée» (article 6).

[7] V. CARCEL ORTÍ, *La Iglesia y la transición española*, Valencia, 2003; J. FORNÉS, *El nuevo sistema concordatario español (los acuerdos de 1976 y 1979)*, Pamplona, 1980; J. PIÑOL, *La transición democrática de la Iglesia católica española*, Madrid, 1999.

[8] Le *Tribunal Constitucional* a affirmé dans un arrêt n°5/1981 du 13 février 1981 que l'Espagne connaissait un «système juridique et politique basé sur le pluralisme, la liberté idéologique et religieuse des individus et l'aconfessionnalité de l'État».

[9] J. MANTECÓN, *Los acuerdos con las confesiones minoritarias. Diez años de vigencia*, Madrid, 2003; C. MUÑOZ Y SALA, *Análisis comparativo entre los acuerdos*

> La Constitución Española de 1978, al configurar un Estado democrático y pluralista, ha supuesto un profundo cambio en la tradicional actitud del Estado ante el hecho religioso, consagrado como fundamentales los derechos de igualdad y libertad religiosa.

Il faut également souligner que ces accords ont été conclus à l'initiative des fédérations religieuses et non de du gouvernement espagnol, comme cela apparaît manifeste à la lecture d'une formulation commune présente dans chacun de trois préambules: «Dando respuesta a los deseos formulados por la (FEREDE/FCJE/CIE) y tras las oportunas negociaciones, se llegó a la conclusión del presente Acuerdo de Cooperación».

Ces trois accords, reconnus par voie législative le 10 novembre 1992 (lois nos 24,25,26/1992), sont construits selon le même schéma: ils envisagent les lieux de culte des trois confessions et consacrent leur inviolabilité (article 2), précisent le statut et les fonctions des ministres des cultes (articles 3 et 4), confèrent une valeur civile aux mariages célébrés selon les rites religieux (article 7), reconnaissent le droit à une assistance religieuse dans l'armée (article 8) et dans les établissements hospitaliers et pénitentiaires (article 9) ou encore le droit de recevoir un enseignement religieux dans les établissements scolaires publics (article 10). Il s'agit en l'espèce d'un inventaire de droits complet qui contribue à offrir aux cultes juif, musulman et protestant un statut privilégié par rapport aux autres confessions minoritaires, qui tout en étant inscrites au registre des entités religieuses et disposant de la reconnaissance de leur «enracinement notoire» par le ministère de la Justice, n'ont pas conclu d'accord de coopération avec l'État comme c'est le cas du culte mormon, du culte des Témoins de Jéhovah, du bouddhisme et du culte orthodoxe[10].

Le droit conventionnel des cultes espagnol est ainsi décrié pour le traitement différencié, voire discriminatoire, qu'il opère entre les cultes: l'Église catholique bénéficiant de privilèges, notamment en matière

firmados por el Estado y las confesiones religiosas de 1979 y 1992 desde la perspectiva de los principios de la Constitución de 1978, Madrid, 2004.

[10] A. FERNÁNDEZ-CORONADO, *Consideraciones sobre una interpretación amplia del concepto de notorio arraigo*, in *Laicidad y Libertades. Escritos Jurídicos*, 2000, pp. 285-302.

fiscale et sociale, qui n'ont pas été étendus aux trois cultes liés par les accords de 1992; ces derniers se trouvant à leur tour dans une situation privilégiée par rapport aux autres confessions d'enracinement notoire. Évoquons en ce sens un arrêt de la Cour européenne des Droits de l'Homme du 3 avril 2012 par laquelle l'Espagne a été reconnue rétroactivement responsable de discrimination à l'encontre de l'Église évangélique par rapport à l'Église catholique: tandis que les prêtres catholiques avaient pu cotiser au régime de la sécurité sociale à compter de 1977, le Législateur avait attendu plus de 20 ans pour étendre le bénéfice de cet avantage aux pasteurs protestants, ce que la Cour de Strasbourg a qualifié de discrimination au sens de l'article 14 de la Convention (CEDH, *Martínez Martínez & Pino Manzano c/ Espagne*, n°61654/08 du 3/4/2012). L'enseignement de la religion à l'école publique constitue un autre facteur de différenciation entre les cultes en Espagne. Chaque parti politique ayant alterné au pouvoir depuis 1978 a proposé un nouvel aménagement des matières d'enseignement confessionnel, de fait religieux, d'éthique ou encore d'éducation à la citoyenneté. Sous le régime de la loi organique d'amélioration de la qualité de l'éducation 2018 (LO n°8/2013, du 9/12/2013), actuellement en vigueur, il est prévu que l'enseignement des 4 religions avec accord soit assuré dans tous les établissements publics; cette matière devant être une option mais comptant dans le calcul de la moyenne. Or, dans les faits, seule la religion catholique est présente dans tous les établissements scolaires publics, sans que les accords de coopération avec les autres cultes ne reçoivent juste application. Il convient en effet de préciser que si l'accord avec le Saint Siège de 1979 sur les affaires culturelle et l'éducation a imposé les cours de religion catholique dans tous les établissements scolaires publics, tous degrés confondus, les accords de 1992 se sont bornés à reconnaître la possibilité d'organiser des cours de religion en cas de demande, laissant planer le doute sur les modalités de formulation de la demande ou encore sur l'existence d'un quota de demandes pour procéder à l'ouverture d'un cours. Il en résulte que seul l'enseignement de la religion catholique est garanti dans tous les établissements scolaires. On estime à ce jour que 3,5 millions d'élèves suivent les cours de religion catholique, tandis que 18 000 élèves sont inscrits en cours de religion protestante et alors qu'aucun enseignement

de religion juive n'est assuré sur le territoire espagnol[11]. On dénombre environ 15 000 élèves suivant des cours de religion musulmane alors que le nombre d'élèves ayant formulé la demande s'élevait à 321 000 selon les estimations de de la *Commission islámica española* (CIE) pour l'année 2013[12]. Si la CIE et le Ministère de la Justice dénoncent la résistance de nombre d'établissements à l'organisation de cours de religion musulmane[13], il convient de saluer que la présence de l'enseignement de l'islam progresse sur le territoire espagnol puisqu'à la rentrée 2019, 13 des 17 communautés autonomes proposaient un enseignement de l'islam dans certains établissements scolaire[14]. Si certains dénoncent un problème de discrimination entre les religions présentes à l'école, on observe surtout un courant dénonçant la présence généralisée de cours de religion catholique dans tous les établissements scolaires: prosélytisme et endoctrinement, statut des enseignants choisis par l'Église et non pas issus d'un concours, confessionnalité déguisée de l'État, sont les principales critiques avancées par les associations laïques de parents d'élèves. À la rentrée scolaire 2019, des parents d'élèves ont dénoncé la combinaison des matières optionnelles offertes dans un établissement scolaire de la région de Galice, puisque par le jeu des parcours et options, les élèves voulant suivre la matière «robotique» devaient obligatoirement l'associer à l'enseignement de la religion catholique. La justice a toutefois estimé que cette circonstance ne constituait pas une atteinte à la liberté religieuse[15].

La place de la religion dans les enseignements constitue en Espagne un facteur de polarisation de la scène politique comme en attestent les programmes électoraux des principaux partis politiques. Ainsi par exemple, lors de la campagne électorale qui avait précédé les élections

[11] *Informe anual sobre la situación de la libertad religiosa en España 2017*, cit., p. 48.

[12] R. TATARY, *Ni inmigración ni religión deben ser materia electoralista*, in *El país*, 28 avril 2019.

[13] *Informe anual sobre la situación de la libertad religiosa en España 2017*, cit., p. 48.

[14] J.-M. AGUILÓ, *Los colegios de Baleares impartirán clases de religion islamice a partir del próximo curso*, in *ABC*, 1 oct. 2019.

[15] CONFEDERACIÓN INTERSINDICAL GALEGA, *Unha sentenza avala a obriga de cursar Relixión no Bacharelato para poder elixir Robótica*, in *INFORMA*, sept. 2019.

législatives de juin 2016, le *Partido socialista obrero español* (PSOE) avait déclaré:

> Los centros escolares públicos y los planes oficiales de estudio se ajustarán a los principios constitucionales de aconfesionalidad propia del Estado laico, conforme a los cuales ninguna religión confesional deberá formar parte del currículo y del horario escolar[16].

Au même moment et dans un sens diamétralement opposé, le *Partido Popular* (PP) affirmait: «Garantizaremos el derecho que asiste a los padres a educar a sus hijos conforme a sus propias convicciones religiosas y morales, tal y como establece la Constitución Española»[17].

Au-delà du présent exemple concernant les cours de religion à l'école publique, la scène politique espagnole est divisée quant à l'existence ou la portée du droit conventionnel des cultes. Cette réalité dépasse la frontière de l'Espagne pour résonner également sur le territoire français.

4. Le droit conventionnel des cultes au coeur des campagnes politiques

En France comme en Espagne, dès lors que l'on s'intéresse aux accords de coopération conclus entre l'État et les confessions religieuses, il apparait impossible d'ignorer le regard porté par les partis et personnalités politiques sur ces accords, qui sont devenus, au fil du temps des outils de propagande électorale.

Alors qu'à la veille des élections générales espagnoles de l'automne 2019, l'imam Riay Tatary, président de la *Comisión islámica española* déclarait par voie de presse que la religion, au même titre que la question migratoire, ne pouvait constituer un argument électoral («ni inmigración ni religión deben ser materia electoralista»)[18], il semble au contraire que les personnalités politiques n'hésitent pas à placer le fait

[16] Programme du PSOE pour les élections générales de 2016, *Por una socialdemocracia*, proposition n°128.

[17] Programme du PP pour les élections générales de 2016, *Seguir Avanzando* 2016-2020, proposition n°54.

[18] R. TATARY, *op. cit.*

religieux au coeur de leurs campagnes électorales, dans des États se déclarant pourtant laïcs et sécularisés. Le droit conventionnel des cultes a constitué un un sujet de débat lors des campagnes électorales de dimension nationale qui ont précédé les suffrages des élections législatives espagnoles du 26 juin 2016 et du 10 novembre 2019 et les élections présidentielles françaises du 23 avril et 7 mai 2017. Les supports de campagne officiels et notamment les programmes électoraux, ainsi que les déclarations faites par les candidats en campagne par voie de presse, témoignent de l'avenir que les politiques entendent réserver aux accords de coopération négociés des décennies plus tôt par leurs prédécesseurs. Or, selon la fiction juridique de la représentation, la diversité des idées défendues sur la scène politique serait à l'image de la diversité des opinions au sein de la société.

Notre analyse s'est tout d'abord centrée sur les campagnes électorales menées en 2016 et 2019 par les 5 principaux partis politiques espagnols briguant des sièges à la chambre basse du Parlement, le *Congreso de los diputados*, à savoir le parti d'extrême gauche *Podemos*, le parti socialiste (*Partido socialista obrero espagnol* - PSOE), le parti populaire de droite (*Partido Popular* - PP), l'alternative de droite *Ciudadanos* et l'extrême droite *Vox*. Notre étude s'est ensuite déplacée vers les campagnes électorales des 7 candidats à la présidentielle française de 2017: Nathalie Artaud pour *Lutte Ouvrière*, Jean-Luc Mélenchon pour *la France Insoumise* (FI), Benoît Hamon pour le *Parti socialiste* (PS), Emmanuel Macron pour *La République en Marche* (LREM), François Fillon pour *Les Républicains* (LR), Michel Dupont-Aignant pour *Debout la France* (DLF) et enfin, Marine Le Pen pour *Le Rassemblement national* (RN).

Sur un total de 19 campagnes électorales étudiées, il convient de souligner que seuls deux partis politiques n'ont jamais exprimé leurs vues quant à l'avenir qu'ils entendaient réserver au droit conventionnel des cultes en cas de victoire; il s'agit des partis espagnols de droite *Ciudadanos* et du *Partido Popular* qui ont gardé réserve à ce propos aussi bien lors de la campagne électorale de 2016[19] qu'en 2019[20]. Au-

[19] Programme de *Ciudadanos* pour les élections générales de 2016, *350 solutionnes para cambra España a mejor* et Programme du *PP*, cit.

delà de ces deux exceptions, l'analyse des campagnes électorales nous permet d'avancer que l'avenir du droit conventionnel des cultes en France et en Espagne pourrait varier, selon les doctrines de partis et les personnalités politiques au pouvoir, de l'abrogation totale de tous les accords de coopération en vigueur à la négociation de nouveaux accords, en passant par l'abrogation partielle de certains accords ou le maintien en l'état du régime conventionnel, tandis qu'on a pu observer en Espagne que la plupart des partis s'étaient abstenus de se prononcer sur cette question et plus largement sur la place de la religion dans la société espagnole lors de la campagne de 2019 alors même qu'ils s'étaient exprimés dans le sens de l'abrogation de tous les accords de coopération conclus avec l'Église catholique et les autres confessions (*Podemos*)[21] ou de leur maintien en l'état (*Vox*)[22] trois ans plus tôt, lors de la campagne de 2016. Un tableau en annexe offre une vision à la fois synthétique et d'ensemble des différentes campagnes électorales étudiées au regard du droit conventionnel des cultes.

4.1. Abroger tous les accords au nom de la laïcité: la voie de l'extrême gauche en France et en Espagne

Au titre des partisans d'une abrogation intégrale de tous les accords de coopération, tous cultes confondus, se placent les partis d'extrême gauche français comme espagnol. C'est ainsi que *Podemos* avait proposé lors de sa campagne de 2016, *Podemos 26 J*, d'abroger tous les accords conclus par l'État avec l'Église catholique et les autres confessions. De l'autre côté des Pyrénées, lors de la campagne à la présidentielle française de 2017, Nathalie Arthaud avait déclaré au sujet du droit

[20] Programme de de *Ciudadanos* pour les élections générales de 2019, España en marcha et programme du PP, *Por todo lo que nos une*.

[21] Programme de *Podemos* pour les élections générales de 2016, *Podemos 26 J*, proposition n°293: «Anulación del Concordato de 1953, de los 5 acuerdos concordatarios que firmó el Estado español con la Santa Sede en 1976 y 1979, y de los signados con otras confesiones religiosas».

[22] Programme de *Vox* pour les élections générales de 2016, *Hacer España grande otra vez*, proposition n°233: «Respecto al Concordato, para VOX no hay nada que objetar en este sentido y la posición que mantenemos es la de estrecha cooperación con la Iglesia».

concordataire alsacien mosellan que *Lutte ouvrière* était «pour sa suppression au nom de la laïcité»[23]. Dans le même sens, le programme *L'avenir en Commun* de *La France Insoumise*, porté par Jean-Luc Mélenchon, préconisait clairement d'«étendre le bénéfice de l'application de la loi de 1905 à tout le territoire de la République (abroger le concordat d'Alsace-Moselle et les divers statuts spécifiques en vigueur dans les Outre-mer)»[24].

4.2. Abroger le concordat avec le Saint-Siège pour mettre fin aux privilèges accordés à l'Église catholique au nom de l'a-confessionnalité: la proposition des socialistes espagnols

Au titre des partisans d'une abrogation partielle des accords de coopération, il convient de citer Pedro Sánchez, leader du PSOE et actuel président du Gouvernement espagnol. Dans son programme électoral de 2016, *Por una nueva socialdemocracia*, le PSOE avait réservé un chapitre à la laïcité et s'était engagé à abroger les accords de coopération conclus avec l'Église catholique[25]. Une fois hissé à la tête du gouvernement, Sánchez n'a pourtant pas concrétisé cette promesse électorale alors même que ce dernier a toujours défendu une vision avant-gardiste et laïque de l'Espagne, comme en a notamment attesté sa prise de fonction lors d'une cérémonie dépourvue de signes religieux, rompant ainsi de manière inédite avec la traditionnelle prestation de serment des chefs de gouvernement espagnols en présence d'une bible et d'un crucifix[26]. Trois ans plus tard, à la veille de l'échéance électorale des législatives de 2019, par lesquelles Sánchez se portait candidat à sa propre succession, ce dernier n'envisageait plus l'abrogation des accords de coopéra-

[23] A. IGHIRRI, G. VARELA, *Présidentielle: Mais au fait que veulent faire les candidats du Concordat d'Alsace Moselle?*, in *20 MINUTES*, 6 avril 2017.

[24] Programme de La France Insoumise pour les élections présidentielles, 2017, *L'avenir en commun*, chapitre 7 «L'urgence démocratique. Une République laïque».

[25] Programme du PSOE pour les élections générales de 2016, cit., proposition n°128.

[26] M. TRÉDEZ-LOPEZ, *Tras 40 años de vigencia: una lectura inédita del texto constitucional en la ascensión de Pedro Sánchez a la Presidencia del Gobierno*, in A. PINILLA, *La Constitución española: 40 años después*, à paraître, Cáceres, 2020.

tion avec le Saint-Siège; le programme de campagne *Haz que pase. Vota PSOE* proposant plutôt l'adoption d'une nouvelle loi relative la liberté de conscience orientée vers la lutte contre l'intolérance en matière religieuse[27].

4.3. La voie du statut quo préconisé du centre à l'extrême droite

Si en Espagne seul *Vox* s'est montré clairement favorable au maintien en l'état du droit conventionnel des cultes, du moins au regard de la coopération avec l'Église catholique dans son programme électoral de 2016 *Hacer España Grande otra vez*, cette voie a au contraire constitué la position dominante au sein de la classe politique française de centre, de droite et d'extrême droite lors de la campagne présidentielle de 2017. C'est ainsi qu'Emmanuel Macron avait affiché une position favorable au maintien du régime local des cultes en Alsace-Moselle tout en déclarant vouloir faire vivre pleinement la laïcité[28]. Pour sa part, François Fillon soutenait que «le régime particulier de l'Alsace-Moselle ne représent(ait) aucunement une menace pour la laïcité»[29], tandis que Nicolas Dupont Aignant déclarait «pas question de toucher au Concordat. Il n'y a pas lieu de le supprimer, la situation actuelle me semble être bonne»[30]. Quant à Marine Le Pen, elle affirmait dans le même sens au sujet du droit conventionnel local: «non, je ne le remets pas en cause»[31].

[27] Programme du PSOE pour les élections générales de 2019, *Haz que pase. Vota PSOE*. Vid. I. CASTRO, *El PSOE deja fuera de su programa la denuncia del Concordato con la Santa Sede*, in *El diario*, 15 avril 2019.

[28] *Ce que proposent les cinq principaux candidats sur la laïcité*, in *Le Républicain lorrain*, 31 mars 2017.

[29] A. IGHIRRI, G. VARELA, *op. cit.*

[30] Direct FM, 27 mars 2017 entretien recueilli par Alex Watrin.

[31] A. IGHIRRI, G. VARELA, *op. cit.*

4.4. La conclusion de nouveaux accords de coopération au nom du principe constitutionnel d'égalité: la voie minoritaire du socialisme français

Enfin, la campagne présidentielle française de 2017 nous a offert une vision minoritaire au regard du droit conventionnel, celle du candidat socialiste Benoît Hamon, partisan de la conclusion d'un nouvel accord de coopération avec le culte musulman qui viendrait s'intégrer au droit local des cultes alsacien-mosellan[32]. C'est une vision qui avait également été défendue une décennie plus tôt par le député mosellan François Grodidier. À travers une proposition de loi (non aboutie), ce dernier déclarait: «Est-il acceptable qu'en 2006, les musulmans, également citoyens et contribuables, soient exclus du droit applicable en Alsace-Moselle au seul motif qu'ils n'étaient pas présents sur le territoire en 1801?». Notons que le président de la République française Emmanuel Macron a récemment déclaré avoir réfléchi «à une approche concordataire» pour asseoir les rapports entre l'État français et le culte musulman au niveau national, avant de déclarer cette idée «inadaptée au temps que nous vivons», estimant que la conclusion d'un accord avec l'islam «aurait créé des ruptures avec les autres religions, son cadre juridique aurait été très fragile, et (…) aurait sans doute d'ailleurs suscité des réflexions contre-productives»[33]. Si cet argument s'entend au regard d'un accord ayant vocation à s'appliquer au niveau national, il ne saurait au contraire faire obstacle à la conclusion d'un accord au niveau local, en Alsace-Moselle, là ou d'autres confessions se sont liées à l'État par accord deux siècles plus tôt.

[32] Programme d'Emmanuel Macron pour les élections présidentielles de 2017, *En Marche*: «Nous appliquerons strictement le principe de laïcité», p. 19.

[33] E. MACRON, *La République en actes: discours du Président de la République sur le thème de la lutte contre les séparatismes*, Les Mureaux, 2 oct. 2020 (*https://www.elysee.fr*).

5. Conclusion: quel avenir pour le droit conventionnel des cultes en France et en Espagne?

L'existence du droit conventionnel des cultes est plus que jamais à l'épreuve des principes constitutionnel de laïcité (ou d'a-confessionnalité) et d'égalité. L'abrogation des accords constituant le droit conventionnel des cultes conduirait-elle à repousser tout fait religieux de la sphère publique? La conclusion de nouveaux accords de coopération conduirait-elle au contraire à une atteinte au principe de séparation ou d'a-confessionnalité? La discordance au sein de la classe politique, à l'image d'une vision hétérogène (ou désintéressé) de la société sur les accords de coopération avec les cultes, nous laisse penser que le droit conventionnel des cultes, bien que dépassé ou imparfait, devrait se maintenir en l'état.

Abandonner le droit conventionnel formel tout en renforçant le droit conventionnel informel qui s'alimente du dialogue entre les pouvoirs publics et les cultes pourrait constituer une voie pérenne et équilibrée d'organisation des rapports entre États et confessions religieuses. Cérémonies de voeux des chefs d'États aux communautés religieuses, tables rondes en faveur d'un dialogue inter-cultuel animées par les municipalités, participation des élus aux célébrations religieuses … et toutes autres pratiques de dialogue et *a fortiori* d'oecuménisme semblent à privilégier dans un contexte où les craintes suscitées par le fait religieux ne font que croître. Il apparait en effet indispensable que tous les cultes soient associés à cette démarche de dialogue, au nom de l'«utilité publique des religions»[34] et du principe d'égalité. L'action coordonnée des autorités civiles et religieuses en vue de sauvegarder la santé publique au plus fort de la première vague épidémique de COVID-19 au printemps 2020 pourrait constituer, dans un élan optimiste, un pas vers une dimension positive de la laïcité[35], ouverte vers une coopération renforcée dans l'avenir. Dans le même sens, le projet d'*Eras-*

[34] *Les expressions de la diversité. Islam en France ou islam de France*, in *Cahiers français*, n°352, 2009, pp. 49-53.

[35] M. TRÉDEZ-LOPEZ, *Confinement, interdiction des rassemblements et distanciation sociale: quelle place pour la liberté religieuse dans le contexte de l'état d'urgence sanitaire?*, in *Quaderni di diritto e politica ecclesiastica*, n°2/2020.

mus des religions lancé par l'Union Européenne à travers la haute représentante aux affaires étrangères Federica Mogherini le 6 septembre 2019, pensé comme une «plate-forme mondiale d'échange de l'Union Européenne sur la religion et l'inclusion sociale»[36] devant pousser les cultes à s'impliquer dans la vie politique et sociale constitue une approche unique, tend à démontrer que la religion ne peut être ignorée par les pouvoirs publics. Reste à repenser de nouvelles voies de communication entre les cultes et les États.

Tableau présentant les principales orientations politiques exprimées lors des campagnes électorales espagnoles (élections générales de 2016 et de 2019) et françaises (présidentielle de 2017) au regard du droit conventionnel des cultes:

Parti politique	Campagne 2016	Campagne 2019	Candidat/Parti	Campagne 2017
Podemos	Abrogation complète de tous les accords de coopération	Néant	Nathalie Artaud - LO	Abrogation complète de tous les accords de coopération
PSOE	Abrogation des accords conclus avec l'Église catholique	Propose une nouvelle loi sur la liberté religieuse mais garde silence sur le droit conventionnel	JL. Mélenchon - FI	Abrogation complète de tous les accords de coopération
Ciudadanos	Néant	Néant	B. Hamon - PS	Conclusion d'un nouvel accord avec l'islam
Partido popular	Néant	Néant	E. Macron- EM	Maintien en l'état
Vox	Maintien en l'état	Néant	F. Fillon - LR	Maintien en l'état
			M. Dupont-Aignan - DLF	Maintien en l'état
			M. Le Pen - RN	Maintien en l'état

[36] La plate-forme se veut un échange entre acteurs communautaires et devrait être opérationnelle début 2020.

THE AUSTRIAN ISLAM LAW ACT 2015: ORIGINS, ENFORCEMENT, INTERPRETATIONS

Kerstin Wonisch

1. Introduction

With the remarkably early enactment of the Islam Law Act in 1912, Austria legally recognized Islam as an official religion and placed Muslims on a de jure equal footing with followers of other officially recognized religious communities. This legal step was a quite early attempt to accommodate a Muslim minority community and its religious needs in a historically Roman-Catholic dominated country and reflected political realities. The occupation and lastly annexation of Bosnia at the end of the 19th, beginning of the 20th century changed the demographic setting as well as the religious policy of the Austrian-Hungarian monarchy. The Constitutional Act on the Fundamental Rights of Citizens of 1867 (StGG)[1] guaranteed respect for all religions present in the monarchy. Additional rights and privileges for Muslims were introduced with the Law of Recognition (Annerkennungsgesetz 1874) in 1874 and a legal agreement between the Ottoman and the Austrian-Hungarian Empire from 1879 safeguarded the right to religious freedom also for the

[1] Constitutional Act on the Fundamental Rights of Citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger für die im Reisrathe vertretenen Königreiche und Länder), RGBl 1867/142 incorporated in the B-VG StGBl. 1920/303 as amended BGBl. 1988/684.

Bosnian Hanafi-dominated Muslim community. The Islam Law Act of 1912 (IslamG 1912) finally placed Muslims on an equal footing with followers of other recognised religious communities. Initially the law recognized the Hanafi Rite only[2] and served as a role model and as the legal basis for the establishment of the Islamische Glaubensgemeinschaft in Österreich (IGGÖ) in 1979[3].

For decades, the Sunni dominated IGGÖ hold the monopoly on the representation of Muslims living in Austria as well as on the organization of Islamic religious education in public schools. Although claiming to represent all Austrian Muslims, irrespective of them being Sunni, Shia or Alevis, in reality, the IGGÖ, composed of diverse but predominantly Sunni Islamic associations and communities with different ethnic backgrounds, clearly fails to address the needs of e.g. the Shia community. Despite the fact of only one Shia believe community (the Islamic Centre Imam Ali, IZIA) being active within the framework of the IGGÖ, Shia dogmas and rituals are not sufficiently, if at all, represented within textbooks or curricula for Islamic religious education.

Only since the recognition of the Islamic Alevite Community (Alevitische Glaubensgemeinschaft in Österreich, ALEVI)[4] in 2013, the organizational domination of IGGÖ ended. Consequently, the need for the abolishment of the IslamG 1912 and for an enactment of a comprehensive, modern legal basis for the governance of Islamic diversity became evident. However, already the drafting process of the new legal basis can be characterized as quite turbulent[5]. Hence it is not surprising that the content of the Law Act on *External Legal Relationships of Islamic Religious Societies* (Islam Law Act 2015; IslamG 2015) was and

[2] In 1987 the Constitutional Court revoked this limited approach in the IslamG 1912 and extended the recognition to all four Sunni and two Shia rites; VfSlg. 11.574/1987.

[3] S. HEINE, R. LOHLKER, R. POTZ, *Muslime in Österreich: Geschichte - Lebenswelt - Religion. Grundlagen für den Dialog*, Innsbruck, 2012, pp. 46-50.

[4] By October 2015, IAGÖ officially changed its name to "ALEVI – Alevitische Glaubensgemeinschaft in Österreich".

[5] K. ÖKTEM, *Austria*, in O. SCHARBRODT and others (eds.), *Yearbook of Muslims in Europe*, Volume 7, 2016, p. 46.

still is regarded as discriminatory, not only by the IGGÖ but also by legal experts and political scientists[6].

Therefore, this article sets out to elaborate on the general Austrian legal framework for the accommodation of religious diversity, on the remarkably early recognition of Islam in the IslamG 1912, in the first part. In the following, it focuses on the IslamG 2015, on arguments for its creation and on its underlying principles and interests, thereby taking the jurisprudence of the European Court of Human Rights (ECtHR) into account. Finally, current challenges related to the changing legal and political climate regarding the accommodation of Islamic pluralism in Austria will be addressed. The final stage of the analysis will provide some concluding thoughts on changing socio-political realties and their impact on Islamic communities. Methodologically, the article relies to large parts on a teleological analysis of the Islam Law Act 1912 and the new Islam Law Act 2015, of the related explanatory notes and legal reports, of the different legal categories for religious organization as well as of the preconditions for recognition. The jurisprudence of the Austrian Constitutional Court in matters of religious governance and of the European Court on Human Rights (ECtHR) regarding Article 9 in conjunction with Article 14 European Convention on Human Rights (ECHR) serve as the background for an examination of the current

[6] Commentary of the IGGÖ to the draft of the Islam Law Act 2015, available at: *https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_02076/fname_371638.pdf* [last accessed 17.12.2020]. See further: R. DAUTOVIĆ, F. HAFEZ, *MuslimInnen als BürgerInnen zweiter Klasse? - Eine vergleichende Analyse des Entwurfes eines neuen Islamgesetzes 2014 zum restlichen Religionsrecht*, in *Jahrbuch für Islamophobieforschung*, 2015, pp. 26-54; C. GRABENWARTER, B. GARTNER-MÜLLER, *Das österreichische Islamgesetz 2015 und seine rechtliche Genese*, in *Kirche und Recht*, 2015, pp. 47-73; A. KLINGENBRUNNER RAPTIS, *103 Jahre Islam in der österreichischen Rechtsordnung - IslamG 1912 und IslamG 2015*, in *Juridikum*, pp. 164-178; R. POTZ, *Überlegungen zum Entwurf eines neuen Islamgesetzes*, in *Österreichisches Jahrbuch für Politik*, 2014, pp. 361-373; R. POTZ, B. SCHINKELE, *Religion and Law in Austria*, Alphen aan den Rijn, 2016, pp. 117-124; S. SCHIMA, *Gutachten zu Entwurf zum „Bundesgesetz, mit dem das Gesetz betreffend die Anerkennung der Anhänger des Islam als Religionsgesellschaft geändert wird"*, 2014, *https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_02194/imfname_372317.pdf* (last accessed: 17.12.2020).

shortcomings in the Austrian system in terms of effective participation of religious minorities.

2. General legal framework

The Austrian State and religious communities are institutionally separate with no established Church or any reference to a religion or to God in the Constitution. The neutrality of the State in religious matters is a direct consequence of the constitutional guarantee of freedom of religion interconnected with the principle of non-discrimination based on religion[7]. Thus, the Austrian State is bond to denominational neutrality and guarantees corporate activities of religious communities in the public arena[8]. For this purpose, the legal framework contains a system of three different options for the legal status of religious communities. These encompass legally recognized churches and religious societies with public-law status, State-registered belief communities with legal entity under private law and religious associations.

Only legally recognized Churches and recognized belief communities have the right to joint public religious practice, to autonomous arrangement and administration of its internal affairs, to the possession and enjoyment of its institutions, of endowments and funds devoted to worship, to religious instruction in public and private schools and to religious welfare[9]. Preconditions for recognition as enlisted in § 11 Act on the Legal Status of Religious Confessional Communities (BekGG

[7] Art. 7 Federal Constitution-Act (B-VG): BGBl. Nr. 1/1930 idF BGBl. I Nr. 194/1999, see also R. POTZ, B. SCHINKELE, *Religion and Law in Austria*, cit., pp. 81-86.

[8] Constitutionally based on article 15 Constitutional Act on the Fundamental Rights of Citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger für die im Reisrathe vertretenen Königreiche und Länder), RGBl 1867/142 incorporated in the B-VG StGBl. 1920/303 as amended BGBl. 1988/684 (n 1) which reads: "Every Church and religious society recognized by the law has the right to joint public religious practice, arranges and administers its internal affairs autonomously, and retains possession and enjoyment of its institutions, endowments and funds devoted to worship, instruction and welfare, but is like every society subject to the general laws of the State".

[9] Art. 15 StGG.

1998)[10] comprise the need to have at least a minimum number of followers equal to two one-thousandths of the Austrian population (approximately 16.000 persons); income and assets have to be used for religious purposes only, the religious community needs to express a positive attitude to State and society and must have existed at least 20 years in Austria, including 10 years in organised form and at least 5 years as a State-registered confessional community with legal personality linked organisationally and in teaching to an internationally active religious society.

The European Court of Human Rights already criticized these criteria[11]; nevertheless, they remain, with slight changes, in place until today. Sixteen churches and religious communities managed to achieve full legal recognition[12], thus obtained a public-law status. A legal recognition *per se* does not entrust these communities with sovereign powers, nor are they State-established institutions. Rather, they are placed outside of State structures and have their own legislative, administrative, and judicial acts. However, the status of an incorporated body under public-law status (*corporation sui generis*) conferred upon recognition, foresees the consultation of these churches and religious communities in State legislation processes in matters relevant to them. In addition, nine religious communities[13] belong to the category of

[10] Federal Law Act on the Legal Status of Religious Confessional Communities (Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften) BGBl. I Nr. 19/1998 idF BGBl. I Nr. 78/2011.

[11] ECtHR, Religionsgemeinschaft der Zeugen Jehovas v. Austria, 2. Jul. 2008, application no. 40825/98; ECtHR, Verein der Freunde der Christengemeinschaft v. Austria, 26. Feb. 2009, application no. 76581/01.

[12] These are: the Catholic Church, the Evangelical Church A. and H.B., the Greek Oriental Church, the Moscow Patriarchate, the Israelite Religious Community, the Islamic Religious Community in Austria, the Oriental Orthodox Churches, the Old Catholic Church, the Evangelical Methodist Church, the Mormons, the New Apostolic Church, the Austrian Buddhist Religious Community, the New Apostolic Church, the Jehovah's Witnesses, the Alevi Religious Community and Free Churches; see *https://www.bundeskanzleramt.gv.at/kirchen-und-religionsgemeinschaften* (last accessed: 17.12.2020).

[13] These are: the Old Alevi Faith Community (Alt-Alevitische Glaubensgemeinschaft in Österreich), the BAHÁ'Í – religious community Österreich, the Christian Community - Movement for Religious Renewal in Austria, the Hindu religious community, the Islamic-Schia Faith Community, the Church of the Seventh Day Advent-

State-registered confessional communities, which only enjoy the status as entity under private law.

Criteria for achieving State-registration enshrined in § 3 BekGG include the proof of having at least 300 followers residing in Austria who do not belong to any other recognized or State-registered community as well as a statute and a religious doctrine differing from those of any existing religious community irrelevant of their legal status. The Office of Religious Affairs (das Kultusamt), the department within the Federal Chancellery in charge of the administration of religious matters in the country, is legally entrusted to deny acquisition of legal personality if doctrines or practices are a threat to public safety, public order, health, and morals or to fundamental rights and freedoms of others in a democratic society. This is especially true in the case of incitement to unlawful conduct punishable by law, obstruction of the psychological development of adolescents, violation of psychological integrity, and the use of psychotherapeutic methods, especially for the purpose of indoctrination[14].

Main differences in treatment between recognized and State-registered religious denominational communities thus concern the right to self-determination, subsidies of private denominational schools, religious instruction classes, revenue law, labour law, military, and non-military service as well as exemptions concerning the employment of foreigners. These differences have manifold consequences for the religious community in question as well as for individual believers and have been frequently criticized by legal as well as religious studies scholars. Apart from the two above-mentioned legal figures, every religious community has the possibility to found associations related to social and charitable activities of the community by obtaining legal personality under private law based on the Act on Associations 2002 (VereinsG 2002). Any two persons can found such a voluntary organization

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ists, the Pfingstkirche Parish of God, the Unification Church in Austria, and the United Pentecostal Church of Austria; see further *https://www.bundeskanzleramt.gv.at/agenda/kultusamt/religiose-bekenntnisgemeinschaften.html* (last accessed: 17.12.2020).

[14] § 5 (1) BekGG.

based on a statute pursuing non-profit purposes. However, no special legal privileges are conferred to associations[15].

After a very brief outline of the Austrian general legal framework for the accommodation of religious diversity, the following sections will focus on the Islam Law Act of 1912, the first of its kind in Europe and the development of Islamic pluralism in Austria before analyzing the Islam Law Act 2015.

3. The Islam Law Act of 1912

After imperial sanction, the law on the recognition of followers of Islam according to the Hanafi rite as a religious society was proclaimed on 15 July 1912[16]. Content wise, the only two articles and eight paragraphs short law corresponded to standards of the Austrian State-church sovereignty system at that time. Article 1 granted the long-desired recognition as a religious society to the followers of Islam according to the Hanefite rite only, represented in the kingdoms and countries in the Imperial Council, within the meaning of the Law on Recognition of 1867 (AnerkennungsG 1867)[17]. However, seen in connection with Article 1, probably the most important provision within the IslamG 1912 was its § 6, which granted the religion of Islam, its teachings, religious servant's institutions and its rituals/customs of the Hanafi rite the same legal protection as other legally recognized religious communities insofar as they did not conflict with State laws.

As there was no order of external legal relations of the religious community possible, § 1 section 1 enshrined the right to regulate external legal relations of the followers of Islam based on self-administration and self-determination, but under the supervision of the State as soon as the establishment of at least one religious community was ensured.

[15] R. POTZ, B. SCHINKELE, *Religion and Law in Austria*, cit., pp. 216-243.

[16] Law Act on the Recognition of the Adherents of Islam as a Religious Community (Gesetz vom 15. Juli 1912, betreffend die Anerkennung der Anhänger des Islams als Religionsgesellschaft).

[17] Federal Law on Legal Recognition of Religious Communities (AnerkennungsG), RGBl. Nr. 68/1874.

Thus, the missing institutional organization prevented the full enjoyment of the collective dimension of freedom of religion. According to § 1 (2) IslamG 1912, special attention should have been paid to the relationship between the religious organization of local Muslims with those in Bosnia and Hercegovina. However, already prior to the constitution of a religious community, the establishment of pious foundations for religious purposes of Islam (so-called *vakuf*)[18] was possible. At that time, *Vakuf* were typical Islamic institutions with a long-standing Islamic legal tradition, vital for organized religious life in Islam, which paved the way for mosques and worship services, for religious schools as well as for cemeteries[19].

In the context of the latter and considering the missing organizational structure, not to speak about the lack of locally trained religious personnel, Article 2 of the IslamG 1912 contained the important right to recruit religious servants from Bosnia. In this context, the creation of the Islamic Community of Bosnia proved to be vital, not only until the outbreak of WWII, but also for Bosnian religious communities today. The scope of application of the law however was limited to the Austrian half of the Empire and not to Bosnia alike, which as a former part of the Ottoman Empire had its own Islamic religious administration. However, in view of the small number of believers in the Austrian half of the Empire, it was probably necessary to strive for a connection to

[18] In Islamic legal terminology, the term Vakuf (*wakf*) has the meaning of: "to keep a thing away from it; to protect against a third party obtaining ownership of it". There are two types of Vakuf: (a) State land that Muslims acquired by conquest or by contract which subsequently was given as property to the previous owners against payment of property taxes; (b) pious and charitable foundations of Islamic law, defined differently in each madhab (Rechtsschule). Inspite of different definitions with the madhabs, what the Vacuf has in common is that it is always a matter which, while preserving its substance, yields a benefit and where the owner has relinquished his power of disposal over it, albeit with the proviso that its use is used for permitted good purposes. G. RÖSLER, *Die Entstehung des Islamgesetzes für den hanefitischen Ritus und die bosnisch-herzegowinische Verwaltung zwischen 1878 und 1918. Ein Beitrag zum österreichischen Staatskirchenrech*, Doctoral thesis, Universität Wien, Wien, 2002, p. 70.

[19] H. KALB, R. POTZ, B. SCHINKELE, *Religionsrecht*, Wien, 2003, p. 19.

the Islamic Community in Bosnia, especially regarding the training of religious servants[20].

§§ 3 to 5 of the IslamG 1912 contained the States rights of supervision and of intervention. Accordingly, religious events could be prohibited out of public considerations; any religious servant who had been found guilty of crimes or offences arising out of lucre, immoral or offensive behaviour to the public, or whose conduct threatened to endanger public order could be removed from office. Additionally, the State had the duty to ensure that the religious community of followers of Islam, their (future) congregations and organs did not exceed its sphere of activity and complied with the provisions of the law and the proposed ordinance on the external legal relationships of the religious community. Reflecting pre-enactment discussions, § 7-8 IslamG 1912 enshrined the priority of the State marriage law of 1870 over religious ones. Furthermore, any involvement of religious servants in keeping birth, marriage and death registers had to be regulated by an own decree. As a result, Muslims were the first denominational group for which compulsory civil marriage was introduced[21]. Moreover, the recognition by law made the provisions of the Law Act on Inter-Confessional Relations 1868 (InterkonfG 1868)[22] applicable to Islam. As such, the latter introduced legal equality for the newly recognized Islamic community with not only major Christian denominations but also all other recognized religious communities of the Empire in matters such as religious instruction/education for children, or in changing one's religious affiliation[23].

Due to the imminent collapse of the Habsburg monarchy, there was no need to enact the ordinance provided for in the law. The disintegration of the Austro-Hungarian monarchy tore legal ties with Bosnia and Herzegovina apart. Thus, legal effects of the IslamG 1912 concerning

[20] C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*, p. 49.

[21] R. POTZ, *Das Islamgesetz 1912 - eine österreichische Besonderheit*, in *SIAK-Journal - Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis*, 2013, p. 49.

[22] Federal Law Act on Inter-Confessional Relations of Citizens (Gesetz über interkonfessionelle Verhältnisse der Staatsbürger), RGBl. 1868/49 as amended dtRGBl. IS 1939/284.

[23] H. KALB, R. POTZ, B. SCHINKELE, *op. cit.*, p. 626-627.

the intended establishment of a religious community failed to materialize, not least due to the missing numerical threshold of Muslims. However, the IslamG 1912 itself survived the monarch due to legal transmissions in the context of the formation period of the first Republic of Austria. Moreover, it was expressly made applicable to the federal land of Burgenland by ordinance of the federal government of May 30, 1924 (BGBl 1924/176)[24].

Although approximately 1,000 Muslims resided in Vienna, and some institutions in existence since the monarchy continued to seek a connection to Bosnia and Herzegovina, a stable and lasting formation of a Muslim community however failed. Muslims organized themselves in the Union for Islamic Culture, in 1939 however, the Nazis dissolved this organization[25]. Up until the late 1950s thus, Austria remained a predominantly Roman Catholic country, with only small religious minority communities present. Data of the census taken in 1951 substantiating this dominance: 89% of the population associated themselves with the Roman Catholic Church, 6.2% with the Protestant Church and only 3.8% declared themselves to be non-denominational. Muslim population at that time was reduced to a few hundred[26]. Yet, in the following years the Organization of Austria's Muslims (1951) and of the Jami'at ul-Islam (1958-62) was established[27]. And in the 1960s, just before the arrival of the first wave of labor migrants around 8,000 Muslims resided in Austria[28].

[24] *Ibid.*, p. 627.

[25] S. KROISSENBRUNNER, *Islam and Muslim Immigrants in Austria: Socio-Political Networks and Muslim Leadership of Turkish Immigrants*, in *Immigrants & Minorities*, 2003, p. 192.

[26] A. MATTES, S. ROSENBERGER, *Islam and Muslims in Austria*, in M. BURCHARDT, I. MICHALOWSKI (eds.), *After integration: Islam, conviviality and contentious politics in Europe*, in *Islam und Politik*, 2015, p. 130.

[27] S. KROISSENBRUNNER, *op. cit.*, p. 192.

[28] W.T. BAUER, *Der Islam in Österreich. Ein Überblick, http://politikberatung.or.at /fileadmin/_migrated/media/Der_Islam_in_OEsterreich_01.pdf*, p. 16 (last accessed: 17.12.2020).

4. Organized Muslim Life

Bilateral agreements with southern and South-Eastern European countries, including Turkey (1964) and Yugoslavia (1966) facilitated the recruitment of much needed labor force from the 1960s onwards. Thus, an increasing number of guest workers, among them a significant percentage of Muslims and Alevits, started to settle in Austria. Already in 1969, around 76,500 foreign workers from Turkey and Yugoslavia immigrated to Austria with this number almost tripling to 227,000 in 1973. During the oil crisis and the ensuing recession, the same year, these numbers started to decrease, and active foreign recruitment ended. The enactment of the Aliens Employment Act (Ausländerbeschäftigungsgesetz) in 1975 restricted access to the Austrian labor market and numbers of foreign guest workers dropped again. However, migration flows did not stop, rather family reunification processes started with numbers of adherents of Islam increasing again[29].

Continuous wars in the Middle East from the 1970s onwards, wars in the Balkans in the 1990s and not least, the so-called refugee crisis in 2015 contributed to a growing heterogeneous Muslim community in Austria. From approximately 8.000 Muslims in 1971, the number steadily increased to 159.000 in 1991 and 339.000 in 2001[30]. As the religious affiliation is not asked for in census anymore, current estimations suggest 573.876 in 2012 and roughly 700.000 Muslims living in Austria in 2016[31]. Yet, the various governments in place, from the arrival of the first guest workers up until the one of today, failed to set up thoughtful integration policies or respective programs and neglected intra-religious

[29] Z. SEZGIN, *Islam and Muslim Minorities in Austria: Historical Context and Current Challenges of Integration*, in *Int Migration & Integration*, 2018, 42(2), p. 872 f.

[30] K. FLIEGENSCHNEE, A. GOUJON, W. LUTZ, *Neue demographische Szenarien zur Zukunft der Evangelischen Kirche in Österreich*, Wien, 2004.

[31] ÖIF, Institut für Islamische Studien (Universität Wien) and Statistik Austria, *Anzahl der Muslime in Österreich von 1971 bis 2016* (*https://de.statista.com/statistik/daten/studie/312152/umfrage/anzahl-der-muslime-in-oesterreich/ 2017*) (last accessed: 17.12.2020).

pluralism, thereby triggering inner-community splits and groups challenging the existing legal framework.

Obviously, the need for an official representative organization of recognized Islam, so for the foundation of a religious-community as anticipated in the IslamG 1912, became topical again already in the early 1960's[32]. Numerous Muslim organizations and associations campaigned for the constitution of a religious community and even demanded the establishment of a mosque[33]. As such, organized Muslim life started in the shape of social gatherings, in prayer rooms, and as Muslim networks, and has ever since continued to grow, encompassing the entire religious, political, and religious-political spectrum as well as educational oriented organizations, locally active private clubs and nation-wide operating ones. In 1971, the first application for institutional recognition, so for the foundation of a religious community as anticipated in the IslamG 1912, was jointly submitted by the Muslim Social Service, the Muslim Student Union, the Social Association of Turkish Workers of Vienna and Surroundings, and the Iranian Islamic Student Association. Although rejected, the application triggered debates, which strongly resembled similar discussions back in the days of the enactment of the Islam Law Act 1912. To guarantee for the compatibility of the concept of monogamy with Islam, the applicants consulted not only the Al-Azhar University in Cairo, but also the Turkish Office for Religious Affairs (the Diyanet) and obtained a fatwa declaring polygamy as an exception in Islam, which one can only adhere to, if national law provides for it[34]. Moreover, the Diyanet was also consulted with the question of whom, as to which Islam a future representative organization should represent. The Islam law of 1912 only referred to the Hanefite school of law, thus should this restriction be maintained? Interestingly, the Diyanet considered all known schools of thought (madhabs) of Islam to follow the same self-understanding and the same religious path, from which the Austrian authorities concluded that a distinction was not necessary from a legal point of view. Thus, they

[32] G. RÖSLER, *op. cit.*, p. 218.

[33] W. BIEHL, *Zur Stellung des Islams in Österreich*, in *ÖOH*, 1991, 33(3), p. 593 ff.

[34] A. MATTES, S. ROSENBERGER, *op. cit.*, p. 134.

declared this question to one exclusively belonging to the inner autonomy of a religious society[35].

In terms of the necessary organizational structure and hierarchy, the statute of the Islamic community in Bosnia, as well as the internal organization of the Jewish and Protestant community, served as role models[36]. To fulfill the institutionalization criteria, the position of a *mufti* as well as of a president, having religious and representative authority respectively, were set up. Finally, in May 1979, Austria's Federal Ministry of Education, Art and Culture (Bundesministerium für Unterricht, Kunst und Kultur) approved the establishment of the first religious community and the constitution of the "Islamic faith community in Austria" (IGGÖ) by decree[37].

For decades, the Sunni dominated IGGÖ hold the monopoly on the representation of Muslims living in Austria. Yet, with a growing heterogenous Muslim community, the IGGÖ's claim to sole-representation was more and more challenged which rises doubts about its power and legitimacy[38]. Especially the Alevi community, which began to organize itself in the late 1990's tried to achieve State-registration and eventually recognition on its own. In March 2009, the Cultural Association of Alevis in Vienna filed an application for recognition as an "Islamic Alevi Association" with the Office of Religious Affairs. The application however was initially rejected as the IslamG 1912 did not provide for several Islamic religious societies. The Viennese Alevis nevertheless successfully appealed to the Constitutional Court[39].

The Viennese Alevis official broke the representational dominance of the IGGÖ as the Court ruled that neither Article 1 (1) IslamG 1912 nor the Islam Ordinance do require that there be only one legally constituted Islamic religious community. On the contrary, if understood in conformity with the Constitution, the provisions are to be interpreted to the effect that a representation of all followers of Islam by an "unitary

[35] S. HEINE, R. LOHLKER, R. POTZ, *op. cit.*, p. 56.

[36] R. POTZ, *100 Jahre Österreichisches Islamgesetz*, Wien, 2012, p. 15.

[37] S. HEINE, R. LOHLKER, R. POTZ, *op. cit.*, p. 56.

[38] Z. SEZGIN, *op. cit.*, p. 870.

[39] Ö. ERDOGAN, *Alevi Religious Education in Austria*, in *Forschungszeitschrift über das Alevitentum und Bektaschitentum*, 2017, p. 196.

community" is not prescribed, and thus does not prevent the establishment of a further Islamic religious community. Consequently, in December 2010, the Office of Religious Affairs registered the Islamic Alevi Faith Community (ALEVI) as a State-registered confessional community and recognized the very same in 2013[40].

Only since the recognition of the "Islamische Alevitische Glaubensgemeinschaft" (Alevi) as a religious society in 2013, the organizational domination of IGGÖ ended. However, the recognition of the Alevi as an explicitly *Islamic* organization triggered a split within the already disunited Alevi community. Not only the Federation of Alevi Communities in Austria (AABF), which positions itself at the margin of Islam challenged the ALEVI's claim to represent all Austrian Alevis, but also the "Alt-Alevitische Glaubensgemeinschaft" (AAGÖ), which considers itself to be an independent, absolute non-Islamic belief community deeply rooted in pre-Islamic traditions such as e.g. Zoroastrianism, Manichaeism, Sufism and Shamanism, did so. Even though some of the rituals and believes are the same among these groups, they differ in religious practices, in their territorial origins, languages and cultures as well as in their relationship with Islam. Furthermore, these groups need also to be seen and understood in a transnational context, taking developments in Turkey, Northern Syria, Iran and Iraq as well as in Germany into account[41].

5. Prelude to the Islam Law Act 2015

The growing Muslim diversity in Austria coupled with political debates not least since the terror attacks of 09/11 triggered discussions about the need for an adaptation of the Islam Law Act 1912 to modern social realities. Some provisions of the old legal bases were obsolete due to legal or factual reasons. Others, such as those concerning the determination of the external organization only to be regulated by a

[40] VfSlg. 19240, B1214/09, 01.12.2010; R. POTZ, *Aktuelle Fragen des österreichischen Religionsrechts*, in *öarr*, 2009, p. 212 f.

[41] E. MASSICARD, *The Alevis in Turkey and Europe: Identity and managing territorial diversity*, London, 2013.

quite extensive regulation, no longer met the requirements of a modern State committed to the rule of law[42]. Besides, a new legal basis has also been in the long interest of the IGGÖ, which prepared and submitted a draft already in 2005 to the Office of Religious Affairs (Kultusamt), the department within the Federal Chancellery in charge of matters of Churches and religious communities. Yet, to no avail[43].

In 2012 however, the so-called "Dialog-forum Islam", established by the then State Secretary for Integration, Sebastian Kurz, and the then president of the IGGÖ, Fuat Sanac, started its work. Organized in seven different working groups[44], this institutionalised dialogue between the Federal Government, various experts consulted and representatives of the IGGÖ had the aim to counteract social polarisation, to communicate basic values and rights and to promote a sense of belonging among Muslims[45]. Among other outcomes, the Forum confirmed the need for a new Islam Law Act. Subsequently, the formulation and enactment of a new legal basis for Islam, based on the leading principles of the Austrian State-Church system, namely parity, State-neutrality, autonomy, and cost-neutrality, was anchored in the working program of the coalition government formed by the Social Democrats (SPÖ) and the Conservatives (ÖVP) for the years 2013 to 2018[46].

The government involved both main representative organizations, the IGGÖ and the ALEVI in the almost two years long negotiation and

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[42] C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*, p. 47.

[43] Z. SEJDINI, *Das neue österreichische Islamgesetz: Europäische Prägung*, in *Herder Korrespondenz*, 2015, 5, p. 249.

[44] These working groups tackled the following topics: Training and continuing education of Imams in Austria lead by Univ. Prof. Dr. Wolfram Reiss; integration and identity lead by Murat Düzel; values and society lead by Univ. Prof. DDr. Christian Stadler; Islamism/ Islamophobia lead by Prof. Dr. Mathias Rohe; gender roles lead by Dr. Eva Grabherr; State and Islam lead by Univ. Dr. Richard Potz and Islam and Media lead by Claus Reitan, see M. KIENL, A. SCHAHBASI, *Dialogforum Islam*, in *Öffentliche Sicherheit*, 2014.

[45] *Ibid.*; Z. SEJDINI, *op. cit.*, pp. 249-250.

[46] Nationalrat, Bericht des Verfassungsausschusses über die Regierungsvorlage (446 der Beilagen): Bundesgesetz, mit dem ein Bundesgesetz über die äußeren Rechtsverhältnisse islamischer Religionsgesellschaften erlassen wird, 2015, *https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00469/fnameorig_384212.html*.

drafting process. However, the public presentation of the first draft of the Law Act in October 2014 triggered protests not only from the IGGÖ itself, who felt marginalized and rejected the draft completely, but also from members of civil society, from Muslim NGO's and from some working group members of the former Dialog-Forum Islam. During the official assessment procedure of the draft law, some 161 formal statements and opinions of which a clear majority expressed serious concerns and criticism, were submitted to parliament[47]. Especially legal scholars as well as scholars of religious studies considered the draft as being anti-constitutional and discriminatory against Muslims[48]. In contrast, representatives of the ALEVI welcomed and strongly supported the new legal initiative. Nevertheless, ongoing public controversies eventually not only brought Austria into international headlines but lead to an assessment of the draft by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE). In short, the ODIHR welcomed modernization efforts of the Austrian legislator regarding the outdated IslamG 1912 but expressed its concern for various provisions in the new IslamG 2015, as well as in the general framework of legal recognition of religious or belief communities. According to the assessment, both legal bases would need amendment to meet international as well as European standards[49].

However, after some consultation meetings between members of the IGGÖ and the government which resulted in marginal amendments only, the Federal Law on the External Legal Relationships of Islamic Re-

[47] See Islamgesetz 1912, Änderung (69/ME), available at: *https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00069/index.shtml#tab-Stellungnahmen* (last accessed: 15.12.2020).

[48] See Stellungnahme zum Entwurf des novellierten Islamgesetzes (4/SN-69/ME, XXV. GP), available at: *https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_01672/index.shtml* (last accessed: 15.12.2020).

[49] OSCE, Office for Democratic Institutions and Human Rights (ODIHR), *Guidelines on the Legal Personality of Religious or Belief Communities*, Warsaw, 2014.

ligious Societies – Islam Law Act 2015 (IslamG 2015)[50] was finally promulgated in March 2015.

6. The Islam Law Act 2015

The IslamG 2015 creates the legal basis for the recognition of Islamic religious communities within the meaning of Article 15 StGG and at the same time regulates their external legal relationships. As such, the IslamG 2015 constitutes a special law, such as the Protestant Law Act[51], the Law of the Oriental-Orthodox Churches[52] or the Israelite Law Act[53] from 2012 and goes beyond the basic legal frame rooted in the AnerkG of 1874. As a special religious law, the IslamG 2015 has formally as well as content wise strong resemblance of the Israelite Law 2012. Initially enacted in 1890, the Israelite law has been completely revised and modernized in 2012 to regulate the legal recognition and external relationships of the Jewish community. Apparently, this law act served as the blueprint for the IslamG 2015. Thus, both law acts have largely identical headings, and some 22 paragraphs resemble similar content[54].

To no surprise at all, major point of criticism voiced from scholars during the drafting process of the Israelite Act in some way reflect those during the same process of the IslamG 2015. As both legal documents provide for strong supervisory rights of the State, they are considered to breath the spirit of the long-gone State-church sovereignty

[50] Federal Law on External Legal Relationships of Islamic Religious Societies (IslamG 2015), BGBl. 2015/39.

[51] Federal Law Act on the External Legal Relationships of the Protestant Church: BGBl. Nr. 182/1961.

[52] Federal law on external legal relations of the Oriental Orthodox Churches in Austria (Oriental Orthodox Church Act; OrientKG).

[53] Federal Law on the External Legal Relations of the Israelite Religious Society, RGBl. No. 57/1890 amended with BGBl, I Nr. 48/2012.

[54] C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*, p. 55; R. DAUTOVIĆ, F. HAFEZ, *Institutionalizing Islam in Contemporary Austria: A Comparative Analysis of the Austrian Islam Act of 2015 and Austrian Religion Laws with Special Emphasis on the Israelite Act of 2012*, in *Ox J Law Religion*, 2018, p. 7.

period in which religious societies were subjected to strict State control[55]. The IslamG 2015 however does also have parallels to the BekGG, as it enshrines recognition criteria for future Islamic religious societies. Consequently, it can be understood as a *lex specialis* to the Law of Recognition as well as to § 11 BekGG. This constitutes a novelty in the Austrian legal framework of religious laws inasmuch, as previous recognition only regulated the legal status of one concrete religious society or church family and consequently did not have such a broad scope of application. Extending the personal scope of the law to the ALEVI evidentially goes beyond the ratio of the IslamG 1912 and put hopes of the IGGÖ for an individual law, which considers its organizational peculiarities, to an end. Rather the contrary, the IslamG 2015 merges Islamic communities, which seek recognition as religious society, under a uniform recognition law. Those Islamic communities who apply for State registration in a first step, however, still must rely on the BekGG. Conversely not including the ALEVI in the law act would have meant for the community to either strive for an own recognition law – an own legal basis regulating their external relationships – or to remain within the frame of the Law on Recognition[56].

7. Legal Status and Acquisition of Legal Personality

Part one contains general rules concerning the legal status of Islamic religious societies which are, according to § 1 recognized religious societies within the meaning of Art. 15 StGG, and as such public bodies with a right to self-organization and to self-administration of their internal affairs. Free in confession and teaching, recognized Islamic religious societies have the right to public religious practice (§ 2 (1) IslamG 2015; § 6 IslamG 1912) and enjoy the same legal protection as

[55] R. POTZ, B. SCHINKELE, *Stellungnahme zum Entwurf eines Bundesgesetzes, mit dem das Gesetz vom 21. März 1890 betreffend die Regelung der äußeren Rechtsverhältnisse der israelitischen Religionsgesellschaft (IsraelitenG) geändert wird*, in *GPr Regierungsvorlage*, 2010, see also C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*, p. 72.

[56] *Ibid.*, pp. 54-56 ff.

other legally recognized religious societies; their teachings, institutions and customs are legally protected as well, provided they do not conflict with other legal regulations. However, § 2 (2) IslamG 2015 goes further and enshrines the necessity of recognized Islamic religious societies, local communities, or other subdivisions as well as their individual members to affirm precedence of national laws over religious ones and a duty to uphold and respect general public norms. According to the explanatory notes to the IslamG 2015, this provision aims to draw a clear separating line between public law, applicable and binding to all, and inner confessional legal system which cannot unfold legal consequences to the outside[57]. As such, the wording clearly mirrors a persisting concern of previous as well as the current Austrian government, thus it intends to prevent the formation of so-called parallel societies. Yet, it is quite unique and no other law governing the status of a religious community contains a provision of such kind.

The Federal Chancellor holds authority over the acquisition, the denial, and the revocation of legal personality[58]. Conditions and prerequisites for acquiring legal personality are set out in § 4 IslamG and mirror those of § 11 BekGG. Not only have Islamic communities to provide for a secured lasting existence and economic self-sustainability, or to use income and estate exclusively for religious and charitable purposes only, the law also requires them to have a positive attitude towards society and the State. From what emerges from the explanatory notes, the positive attitude needs to be understood as the affirmation of the State order and the acceptance of the pluralistic constitutional State[59]. Moreover, there shall be no illegal disturbance of relationships to other legally recognized Churches or religious communities. From this vague formulation it is not clear, how lawful, and unlawful disruptions are defined and which acts would qualify respectively, leaving room for interpretation.

[57] Bundeskanzleramt, Commentary to the Federal law on the ternal Legal Relationships of Islamic Religious Societies, 2015, p. 2: *https://www.bundeskanzleramt.gv.at/agenda/integration/islamgesetz.html* (last accessed: 17.12.2020).

[58] §§ 3 and 5 IslamG 2015.

[59] Bundeskanzleramt (n 62), p. 5.

Elements such as the secured and lasting continued existence are corresponding to the requirements of § 11 BekGG, thus, Islamic communities applying for recognition need to have at least 2/1000 (two in one thousand; around 17.000 people) of the population of Austria belonging to the applicant community. Despite scholarly criticism and a judgment from the ECtHR in which the Strasbourg Court considered these requirements enshrined in §11 BekGG in violation of Art. 9 ECHR[60], Austria has only marginally reduced the minimum period of existence as State-registered confessional community from 10 years to now 5 years. The numerical threshold enshrined in § 11 BekGG, however, has been reaffirmed by several judgments of the Constitutional court, with the latest dating back to 2015[61].

Yet, from what emerges from the jurisprudence from the ECtHR is that Art. 9 ECHR read in conjunction with Art. 11 ECHR encompasses not only the group-related right to exercise freedom of religion and belief in private and in public, but a group right for the establishment of a corporate legal entity entrusted with self-government rights[62]. Differential treatment in the right to establish a corporate legal entity is only tolerable if it employs careful scrutiny, clear justification, does not place a signification burden on religious groups, and if there is proportionality between means and aims. There might be necessity to differentiate between new religious minority groups, neither internationally nor domestically long established, for which certain legal requirements for registration are permissible, and between religious communities with long-established traditions and with followers on a global scale for which recognition shall be granted within a reasonable short time[63]. Similarly, the United Nations Special Rapporteur on freedom of religion or belief, considers a differentiation between well established reli-

[60] ECtHR, Religionsgemeinschaft der Zeugen Jehovah's and Others v. Austria, application no. 40825/98.

[61] VfSlg. 18.965/2009, VfSlg. 19164/2010 and VfSlg. B1581/2010.

[62] J. MARKO, *From minority protection to multiple diversity governance*, in ID. (ed.), *Human and Minority Rights Protection by Multiple Diversity Governance*, London, 2019, p. 271.

[63] Religionsgemeinschaften der Zeugen Jehovas vs Austria, application no 40825/98.

gious groups present in a certain country for a considerable amount of time and between new religious groups a limitation and infringement the right to freedom of religion and belief. Therefore, the Special Rapporteur emphasizes the need for States to ensure that recognition procedures are quick, transparent, fair, inclusive and non-discriminatory[64].

Still, both, the Israelite Law Act 2012 as well as the IslamG 2015 uphold aforementioned criteria, with the IslamG 2015 even introducing further conditions to the already rigid ones in force. Upon recognition, § 3 (4) IslamG 2015 requires association whose purpose is to spread religious teachings of the respective recognized religious society to dissolve. Although much contested, also § 2 (4-5) BekGG contain a similar requirement. Thus far, this provision has not been applied in any law regulating the external legal relationship of a religious community. Given the organizational make-up and the self-organization of Islamic communities in Austria in which numerous Muslim associations cater for the religious needs of the faithful, a compulsory requirement of dissolution has a server impact on organized Muslim life. Not least as it forces associations which aim to spread religious teachings, to either stop their activities or submit themselves under the leadership and the representation of the IGGÖ[65].

However, in following the ECtHR, pluralism can be considered as the cornerstone of a democratic society and it is not on States to interfere in intra-religious dispute, or to push for a single leadership. Rather, States do have a duty to neutrality and parity, which implies an obligation to foster tolerance between communities[66]. Consequently, the requirement to dissolve associations stands in stark contrast to European as well as international standards. Thus, it is doubtful whether these provisions would withstand the scrutiny of the ECtHR. However, § 23 (4) entrusts both Islamic religious societies with considerable scope for

[64] United Nations, General Assembly 'Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt' (2011) A/HRC/19/60.

[65] C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*, pp. 59-60.

[66] ECtHR, Metropolitan Church of Bessarabia and Others v. Moldova, application no. 45701/99; ECtHR Hasan and Chaush v. Bulgaria, application no. 30985/96; ECtHR, Supreme Holy Council of the Muslim Community, application no. 39023/97; ECtHR, Serif, application no. 38178/97.

conferring legal personality to existing internal subdivisions or associated associations. As such, this provision is softening 3(4) IslamG 2015[67].

The Federal Chancellor may deny or even revoke the acquisition of legal personality in view of the doctrine or its application, if it is necessary for the protection of public safety, public order, health, and morals, or for the protection of the rights and freedoms of others. This is given in the case of incitement to unlawful behaviour punishable by law, when impeding on the psychological development of adolescents, in the case of a violation of psychological integrity and when using psychotherapeutic methods, for the purpose of proselytism[68]. Further, if the prerequisites of § 4 IslamG 2015 are not met.

Accordingly, the controversial issue of a missing positive attitude towards State and society constitutes *de facto* a legitimate reason for recognition as well as for a denial or even revocation of the legal status. However, it is not clear if the provision refers to the attitude of the entire religious community, or if it applies to its leaders only. Following the explanatory notes, a positive attitude is currently reflected in the constitution of the IGGÖ and the ALEVI as well as in the fact that both provide for religious education in public schools respectively[69]. Yet, a clear definition is still missing despite the constitutionally guaranteed principle of legality requires laws to be clear and foreseeable. An undefined wording therefore leaves wide room for interpretations and risks an application in inconsistent manner[70]. Similarly, taking the jurisprudence of the ECtHR into account, any interference into the right to freedom of religion or belief must be narrowly defined and clearly worded, requirements clearly not reflected in §§ 4 and 5 IslamG 2015[71].

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[67] C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*, p. 70.

[68] § 5 (1) 1 IslamG 2015.

[69] Bundeskanzleramt, 'Commentary to the Federal law on the External Legal Relationships of Islamic Religious Societies' (*https://www.bundeskanzleramt.gv.at/agenda/integration/islamgesetz.html 2015*), p. 5 (last accessed: 17.12.2020).

[70] OSCE Office for Democratic Institutions and Human Rights (ODIHR), n 49, p. 9.

[71] The Freedom of Religion or Belief Guidelines, at D; cf. ECtHR, Hasan and Chaush v Bulgaria, 26 October 2000, appl. no. 30985/96, par 62: Metropolitan Church of Bessarabia v. Moldova, appl. no. 45701/99, pars 118 and 123.

8. Structure and tasks of an Islamic religious society

Part two of the law act sets out to regulate central elements regarding the constitutional make-up of an Islamic religious community and contains a ban on the financing of regular activities to satisfy religious needs of its members from abroad. If a constitution does not comply with legal requirements, the law entrusts the Federal Chancellor to refuse legal personality or, to withdraw the recognition of an Islamic religious community[72]. According to § 6 IslamG 2015, the constitution must be written in German and it must include the name of the religious community or a short designation that precludes confusion with other churches or religious societies, associations, institutions, or other legal forms. Furthermore, provisions regulating acquisition and loss of membership, on rights and obligations of members as well as on the internal organization which requires at least the establishment of one religious community are required to be included in a constitution. The requirement to present teachings, doctrine, and a text of the essential sources of faith (Qur'an), which must be distinguishable from existing legally recognized religious societies, confessional communities, or religious societies, enshrined in § 6 (1) IslamG 2015 raised serious concerns among scholars and the IGGÖ itself. Not least due to explanatory notes which go beyond the text of the law itself as they provide for a translation of the Qur'an into German language to be similarly covered by the provision, whereby the translation is an important source for future proceedings to clarify whether a teaching differs from an existing one[73].

Considering the jurisprudence of the Strasbourg Court, it is clearly not on States to assess the legitimacy of a religion or belief system. Though authorities might set up objective criteria to define what constitutes a "religion" or "belief", the latter are not limited to traditional religions and beliefs, or to such with institutional characteristics[74]. In fact, the terms "belief" and "religion" are broadly construed and the applica-

[72] § 5 (1) 3 and § 5 (2) 2 IslamG 2015.

[73] Bundeskanzleramt (n 62), p. 6.

[74] ECtHR, Grzelak v. Poland, application no. 7710/02; ECtHR, Kokkinakis v. Greece, application no. 14307/88; ECtHR, Buscarini and Others v. San Marino, application no. 24645/94.

tion of norms protecting freedom of religion and belief (such as e.g. Art. 18 ICCPR) is not limited to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions only[75]. According to the ECtHR, authorities shall perceive religious diversity as a source of enrichment, thus it is within a States duty of impartiality and neutrality to abstain from any determination of what constitutes legitimate religious beliefs[76]. Furthermore, it is not on States to either impose a definition, a re-classification or even single leadership on religious communities, nor to interfere in internal disputes[77]. Rather, what is crucial is the self-definition of a religious community itself. Therefore, in respecting the autonomy of religious communities, it is on the highest religious/spiritual authorities of a religious community to determine its content, rituals, dogmas, interpretations, and the belonging/affiliation of the community. States therefore are required to abstain from the assessment of legitimacy of religious beliefs or teachings[78].

Consequently, the requirement to submit a translation of the main source of faith serving as a basis for an assessment in future proceedings must be seen as an interference in internal affairs of Islamic communities. As such, it limits the autonomy of Islamic communities and infringes Art. 9 ECHR. Similarly, § 6 (2) IslamG 2015 raises serious concerns in this regard as it obliges Islamic religious societies and its cult-communities to raise funds for regular activities to satisfy the religious needs of its members domestically only. In this context, § 5 of Law on Recognition 1867 equally requires cult-communities of recognized religious societies upon approval by the State, to have sufficient financial resources, or to be able to raise them in a manner permitted by law, to ensure the operation of necessary places of worship, the maintenance of a regular chaplaincy and the provision of religious education.

[75] UN Human Rights Committee, General Comment No. 22, 1993; United Nations (n 64).

[76] ECtHR, Manoussakis and Others v. Greece, application no. 18748/91; ECtHR Bayatyan v. Armenia, application no. 23459/03.

[77] ECtHR, Supreme Holy Council of the Muslim Community v. Bulgaria, application no. 39023/97; ECtHR, Hasan and Chaush v. Bulgaria, application no. 30985/96.

[78] ECtHR Hasan und Eylem Zengin, application no. 1448/04.

The criteria of economic self-sustainability of an Islamic religious community is also a prerequisite for the acquisition of legal personality according to § 4 (1) IslamG 2015. Furthermore, as to the case law of the Austrian Constitutional Court about the legal consequence associated with the recognition of a religious society, it is justified to make the recognition dependent on the forecast of a lasting existence[79]. But, questions of asset management are part of the internal affairs of a recognized religious society, a principle affirmed by the Constitutional Court in 2007[80] and upheld by the ECtHR as well[81].

According to the explanatory notes to the IslamG 2015 however, the principle of self-sustainability of religious communities is not only part of the Law on Recognition 1874 but is also upheld in special laws such as in § 5 Israelite Law Act, in § 2 Orthodox Law Act, as well as in the BekGG. Besides, financial contributions from abroad are not precluded *per se*, only an ongoing financing would qualify for the ban as enshrined in § 6 (2) IslamG 2015. The explanatory notes further accentuate the inadmissibility of ongoing funding from abroad, insofar as this is independent of whether money or in-kind contributions are provided. Continued income generated from abroad would be permissible upon the creation of a domestic foundation. However, the employment of civil servants as employees, imams, functionaries, or pastoral servants from abroad would be impermissible in any case. Thus, the explanatory notes shed light on the underlying socio-political problem the ban aims to tackle[82].

In fact, Muslim chaplains in their function as Turkish religious affairs officers with civil servant status are frequently sent to Austria by the Turkish religious authority, the Presidency for Religious Affairs

[79] VfSlg. 18965/2009; C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*

[80] VfSlg. 3657/2007, 10Ob66/06p.

[81] ECtHR, Jehova's Witnesses of Moscow and others v. Russia, 10 June 2010, application no. 302/02; ECtHR, Kimlya and others v. Russia, application nos. 76836/01 and 32782/03; ECtHR, Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, 31 July 2008, application no. 40825/98; ECtHR 13 December 2001; ECtHR, Koretskyy and Others v. Ukraine, 3 April 2008, application no. 40269/02.

[82] Bundeskanzleramt (n 62), p. 7; C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*, p. 64.

(Diyanet İşleri Başkanlığı), to be primarily working for the ATIB Union, the largest umbrella organization of local mosques with close ties to the Turkish government[83]. The Constitutional Court already had to assess the constitutionality of the ban on foreign funding precisely in a complaint of two Turkish Imams and their families who had been working as an Imam for the ATIB Union in Austria but received their payment through the Turkish Consulate in Austria. In 2017, an extension of their Austrian residence permits was denied on the grounds of unlawful foreign remuneration. In their complaints to the Constitutional Court, they alleged the violation of the constitutionally guaranteed right to equal treatment of foreigners among themselves and the infringement of rights due to the application of an unconstitutional law, namely § 6 (2) Islam Law Act 2015. In its decision the Constitutional Court determined that § 6 (2) of the Islam Law Act 2015 is not to be objected on constitutional grounds considering that the provision was neither discriminatory in nature nor its application unjustified. According to the Court, the provision specifies the principle of self-preservation, as expressed in § 4 (1) Islam Law Act 2015 and § 5 in connection with § 1 (2) Law of Recognition, for Islamic religious communities. The Court further observed that § 6 (2) Islam Law Act 2015 encroaches on associative aspect of the right to freedom of religion by limiting the scope of the communities' financial self-preservation, though not to an extent irreconcilable with Article 9 ECHR. The preservation of the autonomy and independence of recognized religious communities towards unjustified interferences by both the domestic government and foreign States is of interest to the general public, implies that requiring religious communities to cover their expenses solely by domestic financial resources depicts a legitimate aim in accordance with the Constitution. In this connection, the Court further observed, that applying § 6 (2) of the

[83] S. SCHIMA, *Das im Islamgesetz 2015 verankerte Verbot der Auslandsfinanzierung. Anmerkungen vor dem Hintergrund der verfassungsgesetzlich gewährleisteten Religionsfreiheit*, in S. HINGHOFER-SZALKAY, H. KALB (eds.), *Islam, Recht und Diversität*, Wien, 2018, p. 383; A. SKOWRON-NALBORCZYK, *A Century of the Official Legal Status of Islam in Austria: Between the Law on Islam of 1912 and the Law on Islam of 2015*, in R. MASON (eds.), *Muslim Minority-State Relations: Violence, Integration, and Policy*, New York, 2016, p. 72.

Islam Law Act 2015 in conformity with the Constitution would not qualify for an unjustified interference with the rights enshrined in Article 9 ECHR, considering that the provision's intention is to maintain the communities' autonomy and independence. The Court further noted that the provision itself, while serving the legitimate aim of ensuring self-preservation considering the communities' independence and autonomy, does not regulate internal affairs but rather guarantees that they can be exercised freely, thus it ultimately protects the autonomy of Islamic religious communities and the free practice of religion by their members. Against this background, the Court determined that the prohibition of foreign financing entailed in § 6 (2) of the Islam Law Act 2015, does not constitute an inadequate regulation of the internal affairs of Islamic religious communities[84].

Nevertheless, the extend of what exactly belongs to internal affairs is quite exhaustively and it depends on the self-understanding of each religious community to ascertain the range of issues to be determined exclusively by the community in question[85]. The manner of raising funds for financing the activities of legally recognized churches and religious societies however is part of the corporative aspect of the right to freedom of religion as enshrined in Art. 9 ECHR[86]. Thus, the scope of protection of Article 9 also includes the autonomous management of internal affairs by a church or religious body[87]. Considering the jurisprudence of the ECtHR, matters of financing and church taxations are indeed closely linked to historical and traditional specificities of each country. In the absence of common regulations, States have a wide margin of appreciation in regulating the financing of churches and religious societies[88]. Limitations may be justified, if they prove to be nec-

[84] Federal Constitutional Court Austria, Finding of 13 March 2019, E 3830-3832/2018-24, E 4344/2018-20.

[85] VfSlg. 11.574/1987; VfSlg. 16.395/2001.

[86] ECtHR, Vereinigung der Zeugen Jehovas, 30.06.2011, application no. 8916/05.

[87] VfSlg. 17.021/2003; ECtHR, Hasan und Chaush, 26.10.2000, appl. No. 30.985/96, see further UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, para. 6 (f).

[88] ECtHR *Alujer Fernández and Caballero Garcia v. Spain*, appl. No. 53072/99, *Wasmuth*, appl. No. 12.884/03.

essary, proportionate serve a legitimate aim, and are applied in a non-discriminatory way[89]. Given the peculiar context and the underlying social phenomenon, the limitation on foreign influences, by individuals, institutions, or a State, introduced by § 6 (2) IslamG 2015 pursues the legitimate aim to protect the autonomy, religious content, and ultimately the free exercise of religion of recognized Islamic religious societies and their members.

Even if the ban on foreign funding does not violate Art. 9 ECHR and proves to be necessary, proportionate and to serve the legitimate aim of protecting the autonomy and internal affairs of Islamic communities from foreign influence, it is still questionable whether the provision is in line with the principle of parity[90]. Rooted in Art. 15 StGG and in Art. 7 B-VG, every legally recognized religious community must be treated equally, not least in terms of its fundamental legal guarantees. Thus, if a ban on foreign funding serves the legitimate interest of a State to concretize the principle of the self-sustainability and autonomy of legally recognized religious communities, then it is barely justified why it is introduced only for recognized Islamic communities and not for every religious community recognized or still seeking recognition.

9. Rights and Obligations of the IGGÖ and the ALEVI

Part three and four of the Islam Law Act 2015 set out to introduce rights, privileges, and duties of both, the IGGÖ (§§ 9-15 IslamG 2015) as well as the ALEVI (§§ 16-22 IslamG 2015). Except for the provision on religious holidays, both sections are identical and mirror respective provisions in the Israelite Law Act[91].

[89] OSCE Office for Democratic Institutions and Human Rights (ODIHR) (n 63), p. 10-11.

[90] S. SCHIMA, *Das im Islamgesetz 2015 verankerte Verbot der Auslandsfinanzierung. Anmerkungen vor dem Hintergrund der verfassungsgesetzlich gewährleisteten Religionsfreiheit,* cit., p. 391.

[91] §§ 6-14 Federal Law Amending the Law on the Regulation of the External Legal Relations of the Israelite Religious Society, BGBl. I Nr. 48/2012.

As an essential part of their organization, both religious societies have the right to choose a name and an abbreviation, whereby the religious society must be clearly recognizable and any confusion with other churches or religious societies, associations, institutions, or other legal forms must be excluded[92].

The right of assessment enshrined in §§ 10 and 17 IslamG 2015 respectively, entitles the IGGÖ and the ALEVI to submit to legislative and administrative bodies at all level's opinions, statements, reports, and proposals on matters concerning legally recognized churches and religious societies. Besides, legislative measures affecting the external legal relations of the religious society shall be submitted to both organizations prior to their presentation, ordinances prior to their enactment, granting a reasonable period for comment. As such, this right derives from the treated between the Holy See and the Republic of Austria with the principle of parity requiring the State to grant it to all recognized Churches and religious communities equally[93]. A similar provision can be found in a variety of laws regulating external legal relationships such as in the Protestant Law Act, the Oriental-Orthodox Law Act, or the Israelite Law Act.

For the first time ever, recognized Islamic societies are given the right to chaplaincy and military chaplaincy. Both the IGGÖ and the Alevi have the right to provide religious care for their members who server in the Austrian Armed Forces, who are in judicial or administrative custody, or who are in public hospitals or nursing homes. The chaplains are subject to the IGGÖ or the ALEVI in all confessional matters and to the respective competent management of the institution in all other matters. Material and personnel expenses for the military chaplaincy are to be borne by the federal government. Chaplains need an authorization from the respective Islamic religious society, must hold a university degree in theological studies or an equivalent qualification; have to have at least 3 years of relevant professional experience and German language skills at the level of the school-leaving examination. Besides, Islamic religious societies as well as its members are au-

[92] §§ 9 and 16 IslamG 2015.

[93] Bundeskanzleramt (n 62), p. 9.

thorized to raise their children and their youth according to their traditional customs and to educate them according to the religious commandments[94]. The explanatory note to this provision clarifies the meaning of "traditional" which in this context is to be understood as a component of a religious tradition, also referred to as a direction, current or school and thus, it must be grounded in religious doctrine. According to the note, male circumcision qualifies for this. Yet the right does not include harmful practices such as female genital mutilation[95].

Corresponding to the right to chaplaincy is the right to have religious dietary requirements respected for members of the IGGÖ and the ALEVI in the Federal Army, in prisons, in public hospitals, nursing or care institutions as well as in public schools and in daytime care institutions[96]. Both religious societies have the right to organize the production of meat and other dietary products domestically in accordance with internal religious regulations. The goal behind these privileges as stated in the explanatory notes is the empowerment of Islamic Religious societies and not the suppression of general norms such as animal welfare acts or laws regulating trade. Furthermore, the provision seeks to address e.g., worries of parents for their children not receiving religiously permitted food[97].

The only difference regarding the right of Islamic religious societies is manifested in the paragraphs regulating religious holidays. § 13 IslamG 2015 guarantees for religious holidays and the time of Friday prayers of the IGGÖ the protection of the State. Dates of holidays as well as Friday prayers are based on the Islamic calendar; they begin at sunset and last until the sunset of the following day. The prayer time on Friday is from 12:00 noon to 2:00 p.m. Such a precise wording pays respect to the different calculation of a day based on religious teachings[98]. According to § 13 (2) IslamG 2015 holidays are the Ramadan festival (3 days), the Pilgrimage Feast of Sacrifice (4 days) and Ashura (1 day). Similarly, § 20 (2) IslamG 2015 safeguards for religious holi-

[94] §§ 11 and 18 IslamG 2015.

[95] Bundeskanzleramt (n 62), pp. 9-10.

[96] §§ 12 and 19 IslamG 2015.

[97] Bundeskanzleramt (n 62), p. 10.

[98] *Ibid.*, p. 10.

days and worship services such as weekly Cem services on Thursday, Lokma days of the ALEVI, whose holidays are Holidays are the Fasting and Holidays in Memory of Saint Hizir (3 days), the Birth of Saint Ali (1 day), the Proclamation of Ali as the Successor of Muhammad (1 day), the Feast of sacrifice (4 days) and Asure (1 day). During these holidays as well as during Friday prayers and Cem-Services or Lokma days, all avoidable noisy actions that could interfere with the celebration, as well as public gatherings, processions, and parades in the vicinity of places of worship and other places of worship and buildings used for worship purposes are prohibited[99]. Yet it must be noted that no *ex lege* right to exemption from school or from work is conferred upon Muslims or Alevis with these provisions.

The following paragraphs, § 14 for the IGGÖ and § 21 for the ALEVI enshrine the duty of Islamic religious societies to dismiss persons holding an official function with their organizations who have been convicted by a domestic court of one or more criminal acts committed with intent and sentenced to more than one year's imprisonment, or whose conduct endangers public safety, order, health and morals or the rights and freedoms of others in the long term. This requirement mirrors § 13 Israelite Law Act and the criticism of a potential violation of the right to autonomy in internal matters as it does not differentiate between functionaries who are designated to represent the religious society in question and those who are not[100].

Lastly, both, the IGGÖ as well as the ALEVI hold the right to a permanent establishment of cemeteries or cemetery sections. This right guarantees also for burial ceremonies in accordance with religious teachings and customs. Any closure or dissolution of cemeteries or sections thereof is not permitted unless specifically approved by the highest religious authority, respectively[101].

[99] §§ 13 (3) and 20 (3) IslamG 2015.

[100] C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*, p. 69.

[101] §§ 15 and 22 IslamG 2015.

10. Interaction between Religious Societies and the State

The final part of the law act, part five which addresses both religious societies, sets out to re-confirm past recognitions of the IGGÖ and the ALEVI but regulates predominantly supervision rights of the State. Nevertheless, in § 24 IslamG 2015 the law act realizes also one of the central claims of the IGGÖ, namely, to provide for the establishment of an institute of Islamic theological and creates the State's obligation to create and finance 6 positions for the study of Islamic theology at the University of Vienna. Considering inner religious plurality, the law provides for the establishment of a separate branch of study for each religious society. Prior to filling positions, each Islamic religious society shall be contacted about the prospective candidate, with due regard to the fact that, in the core theological area, the candidate shall be an adherent of the religious doctrine represented in the respective Islamic religious society[102]. Yet, the respective Islamic religious society does not have the right to reject a candidate.

The explanatory notes to this provision reveal the goal to provide for a scientific-theological basic education, equally accessible to women and men which qualifies graduates as religious scholars for an employment as Imam, Dede, Baba, or Ana in a Mosque or in a Cem-house respectively. The study programs started in January 2016 and are open to anyone interested. Content-wise the study program contains components of classical Islamic theological education such as training in the Arab language, in the Quran and if required in the science of Hadith, in the biography of the Prophet, in ethics, in Islamic history and philosophy, coupled with pedagogical, inter-religious and intercultural, social, and administrative skills with the goal of the degree to be accepted both, in the Islamic world as well as in religious societies in Austria[103].

Regarding supervision rights, § 23 IslamG 2015 requires the constitution of an Islamic religious society, the statutes of religious communities, the rules of procedures, any amendments thereto, as well as the appointment or election of bodies and religious servants authorized for

[102] § 24 (4) IslamG 2015.

[103] Bundeskanzleramt (n 62), p. 16.

external representation to be approved by the Federal Chancellor. Corresponding to this is the obligation of Islamic religious societies as well as of the Republic of Austria, to inform the other of any events affecting a matter covered by this federal law enshrined in § 25 IslamG 2015. A considerable scope for conferring legal personality under public law for existing internal subdivisions is introduced in § 23(4) IslamG, which therefore softens the requirement to dissolve associations spreading the teachings of a recognized Islamic society enshrined in § 3(4) IslamG[104].

Despite the explanatory notes to § 27 IslamG 2015 emphasizing the States obligation to protect the right to the public exercise of religion from external interference, the provision nevertheless provides for authorities to prohibit gatherings and events that pose an imminent threat to the interests of public safety, order, or health, or to national security, or to the rights and freedoms of others. To some extent, § 3 IslamG 1912 contained a similar authorization and § 18 Israelite Law Act enables the prohibition of religious events as well. Yet, it does not enlist "national security" as a legitimate reason to do so.

§§ 28-30 IslamG 2015 provide for the possibility of the federal chancellor to review electoral processes and electoral supervision complains of Islamic religious societies. Besides, the federal chancellor hast the right to file an application for the appointment of a curator with the competent court, if the religious society fails to elect a representative organ for more than six months[105]. And finally, recalling § 5 IslamG 1912, for an enforcement of official decisions the authority has the competence to annul decisions that are contrary to law and impose fines[106].

[104] C. GRABENWARTER, B. GARTNER-MÜLLER, *op. cit.*, p. 70.

[105] § 29 IslamG 2015; similar provisions can be found in §§ 20-22 Israelite Law Act.

[106] § 30 IslamG 2015.

11. Developments since 2015

The enactment of the IslamG 2015 marked a contrast to Austria's corporatist tradition of mutual consultation and interest representation. Relationships between the IGGÖ and the government soured with the latter using populist rhetoric and political scrutiny to introduce a securitization approach towards Islam and Muslims[107]. As such, securitization contributes to the process of "othering" of Muslims with all aspects of Islam eventually met with distrust and discrimination[108]. In this context, the government declared the fight against Political Islam to one of its primary goals and enacted quite controversial legal measures and policies. In the following only a few of them will be discussed.

In 2017, during the height of the controversy about women wearing a burqa in public places, Austria enacted a law prohibiting the concealment of the face in public[109]. The law, which does not distinguish between Muslim face veils or any other form of face coverage, prescribes for persons breaking the law fines of up to 150 euros. In fact, only a very little number of Muslim women in the country wear a burqa or niqab, thus the law fails to address alleged social problems as such. This became evident as the police in enforcing the law fined a man who was dressed in a shark costume for promotional work, and targeted female tourists from Gulf countries spending their summer in Austria[110].

In 2018, the Federal Chancellor and the Office of Religious Affairs by means of notice and based on §§ 5 and 8 IslamG 2015, revoked the legal personality of the Arab religious community affiliated with the IGGÖ, on grounds of an alleged missing financial self-preservation and closed around 10 mosques belonging to this religious community. Yet, the IGGÖ successfully filed a complaint with the Vienna administrative

[107] Z. SEZGIN, *op. cit.*, p. 885.

[108] J. CESARI, *The Securitization of Islam in Europe*, in *Research Paper No. 15 CEPS Challenge Liberty & Security Program*, 2009, p. 1.

[109] Federal Law on the Prohibition of the Concealment of the Face in Public, BGBl. I Nr. 68/2017.

[110] J. MISCHKE, *Shark costume man bitten by Austria's burqa ban*, 9 October 2017, *https://www.politico.eu/article/shark-costume-man-fined-austria-burqa-ban/*.

court with the later declaring in 2019 the revocation of legal personality in violation of the law with the mosques to be opened again[111].

Regarding Alevi communities not feeling represented by the ALEVI, the situation of the Federation of Alevi in Austria (AABF) aggravated in October 2018 as well. Based on § 3(4) IslamG 2015, the Office of Religious Affairs issued a warning notice and urged the AABF to submit themselves under the organizational framework of the ALEVI. Furthermore, a judgement of the Vienna administrative court in January 2019 denied the AABF state registration and urged the community to change its name and its statute due to similarities with the ALEVI[112]. Yet, in 2020 the AABF changed its name to the European Alevi Faith Community in Austria (EAFG) and filed another application for state-registration, which is still to decided upon by the Office of Religious Affairs.

Back in 2019, the government enacted §43a of the Law on School Education (Schulunterrichtsgesetz, SchUG)[113], which prohibits pupils to wear clothing of an ideological or religious nature that involves covering the head until the end of the school year in which they reach the age of 10. According to this law, the prohibition serves the social integration of children in accordance with local customs and traditions, fosters the preservation of the basic constitutional values and the equality of men and women. In case of a violation, the school directorate shall invite the parents or guardians to an obligatory meeting without delay, at least within 4 school days, any further violation bears quite harsh consequences. The law provides for a fine of up to EUR 440, or, if the fine is uncollectible, with a substitute term of imprisonment of up to two weeks. From the enactment of the law until the end of November 2019, nationwide only 8 cases of girls wearing hijab in school were reported, and in all cases the respective parents complied with legal instruction received by school authorities[114]. However, based on the objection of two parents who raised their children in accordance with

[111] VGW-101/V/014/11867/2018-5.

[112] VGW-101/073/17170/2017-60.

[113] Federal law amending the School Instruction Law Act, BGBl. I Nr. 54/2019.

[114] See Austrian Broadcasting Company, Kopftuchverbot: IGGÖ-Beschwerde beim VfGH; *https://religion.orf.at/v3/stories/2997144/*.

the Sunni and Shiite tradition respectively, the IGGÖ failed a complaint with the Constitutional Court on grounds of the prohibition ultimately targeting the Islamic headscarf (hijab) which would constitute a disproportionate encroachment on the constitutionally guaranteed right to freedom of religion and the right to religious upbringing of children as enshrined in Art. 2 of the first Protocol to the ECHR. In its decision from December 2020, the Constitutional Court stated that a selective prohibition which in fact only applies to girls and prohibits them from wearing an Islamic headscarf is not suitable from the outset to achieve the objective formulated by the legislator itself. In its reasoning the Court further elaborated on the negative impact the ban can have on the social inclusion of affected schoolgirls as it might jeopardize access to education for Muslim girls. The Court therefore overturned § Section 43a SchUG as it violates the principle of equality in conjunction with the right to freedom of thought, conscience, and religion[115].

In summer 2020, the government established a Documentation Centre for Political Islam to pursue scientific research and documentation as well as the collection of information on religiously motivated political extremism. A scientific council, composed of 8 experts with different national as well as international backgrounds shall oversee the work of the core team of 5-7 experts with different linguistic, scientific and technical competences. Set up as an independent body the Center received start-up funding of 500,000 euros from the Ministry of Integration and aims to analysis the ideology of political Islam, to map stakeholders, networks and associations in Austria with organizational and ideological links abroad as well as to provide analysis of individual networks operating in secret[116]. The IGGÖ immediately protested against the Centre and refused to cooperate as the president fears the

[115] Finding of the Austrian Constitutional Court, VfGH G 4/2020-27, 11.12.2020, available at *https://www.vfgh.gv.at/downloads/VfGH_11.12.2020_G_4_2020_Verhuellungsverbot_in_Volksschulen* (last accessed: 17.12.2020).

[116] Federal Chancellery, news service: *https://www.bundeskanzleramt.gv.at/bundeskanzleramt/nachrichten-der-bundesregierung/2020/integrationsministerin-raab-dokumentationsstelle-politischer-islam-nimmt-arbeit-auf.html* (last accessed: 17.12.2020).

Centre to be a kind of surveillance apparatus to monitor the Muslim population in Austria[117].

12. Conclusions

The remarkably early legal recognition of Islam in 1912, provided Austrian Muslims for more than a century with a stable legal framework which granted legal privileges, fostered Muslim identity and organizational life. For more than 30 years, the IGGÖ was the sole representation organization of Muslims in the country and acted in line with the corporatist tradition as a partner of the Austrian State in various matters. Yet, despite legal privileges, social acceptance of Muslim presence in the public sphere was still at a low level and met with prejudice and societal tensions exploited for political reasons. Consequently, relationships between the IGGÖ and the State changed with the enactment of the IslamG 2015.

On the one hand, the law act entrusts the IGGÖ and the ALEVI with far reaching privileges enshrined in a modern legal basis. The law act sets out some general provisions for already existing as well as future Islamic communities, thereby clearly leaving room for the legal recognition and accommodation of further Islamic communities. Hence, what has been achieved already in court[118], namely the breach of the IGGÖ monopoly on the representation of Austrian Muslims and the fragmentation thereof, has been acknowledge in a separate legal basis as well. However, on the other hand the rigid recognition framework which barely meets European standards has been reinforced and far-reaching supervisory competences of the State introduced.

Therefore, the IslamG 2015 constitutes a kind of a "patchwork" law as it combines matters of integration and security. In introducing requirements such as the need to have a positive attitude towards State and society or the necessity to affirm the precedence of national laws over religious ones, the law clearly mirrors a changing social and polit-

[117] Statement of the IGGÖ, available at: *https://www.derislam.at/iggoe-ad-dokumentationsstelle-zusammenarbeit-unter-diesen-umstaenden-unzumutbar/* (last accessed: 17.12.2020).

[118] VfSlg. 19240, B1214/09.

ical climate and related political debates about the compatibility of Islam with alleged Western values and not least security related concerns. As such freedom of religion is not unlimited but derogable and national security a legitimate reason to do so. Measures adopted in this context though, need to prove to be necessary, proportionate serve a legitimate aim, and are applied in a non-discriminatory way thus it is questionable if some provisions in the IslamG 2015 meet these requirements. Despite all privileges introduced, in some aspects thus, the law act coupled with the political climate of suspicion and distrust risks fostering inequalities and discrimination against Muslims.

PART III

AGREEMENTS, *INTESE* AND BEYOND: THE ITALIAN INSTRUMENTS TO REGULATE THE RELATIONS BETWEEN RELIGIONS AND THE STATE

Francesco Alicino

SUMMARY: *1. Introduction. 2. The Method of Bilateralism. 3. The Method of Bilateralism and Today's Pluralism. 4. The Method of Bilateralism and the Exceptionalism of Islam. 5. The Method of Bilateralism and the Exceptionalism of Atheism. 6. Conclusion.*

1. Introduction

In Italy, the cultural-religious pluralism is certainly less intense than the pluralistic society of other European States, like Germany, France or the UK. Nonetheless, it appears even stronger when compared to the situation the country experienced until three decades ago. Before the recent wave of immigration and the process of globalization, the Italian religious landscape was pluralistic, but with a number of denominations having a similar (Judeo-Christian) tradition. Today the neo pluralism indicates the presence of people from very different cultures that, compared to the Judeo-Christian ones, involve distinctive customs, peculiar value systems and unique religious practices[1].

On the other hand, the current hyperconnected reality is reengineering and reinventing human religious experience, which is frequently reflected in its gradual individualization and privatization: for example, many Catholics see religion from a more intimate point of view, preferring to follow their own ideas on faith, even though they conflict with the Church's official doctrines. At the same time, a growing number of

[1] F. ALICINO, *Western Secularism in an Age of Religious Diversity*, in *International Review of Sociology*, 22, 2, 2014, pp. 305-322.

people, particularly young adults, distance themselves from religious creeds.

All of this proves that in Italy pluralism have increased not only through the proliferation of different confessions living in the same context, but also through the rising presence of at least three socio-cultural categories: unaffiliated believers; believers who, although they remain faithful to their denominational religion, adopt forms of personal spirituality; and nonreligious people who assert patent claims against the public role of religions, as part of what they see as the realization of the promise of the secular democratic State[2].

From here important questions emerge, such as those related to the legal instruments regulating the State-religions relationship. In particular, doubts remain whether these instruments are effective and able to govern the existing cultural-religious diversity. That is even more relevant in the light of the method of bilateralism, as set up by Articles 7.2 and 8.3 of the Italian Constitution. It seems that this method takes into serious account the exigencies of traditional confessions (the Catholic Church and other few creeds that have long co-existed in Italy), while it has become difficult and, at times, harshly contested by other organizations, including the Islamic communities and groups of religious nones (hard and soft atheists, agnostics, rationalists, humanists, secularists), which are now seeking a greater role in the public space as well as in the political arena.

In the first part of this article I will focus the attention on the Italian laws regulating the State-confessions relationship, which is strongly influenced by the traditional role played by the Catholic Church and few other denominations – those that have long-coexisted with the Italian legal system. This will give the opportunity to analyse how the method of bilateralism and the connected system of 'exemption rights' relate to today's cultural-religious pluralism, which includes the rising presence of 'other' communities, besides the traditional ones. This is

[2] R. HIRSCHL, A. SHACHAR, *Competing Orders? The Challenge of Religion to Modern Constitutionalism*, in *The University of Chicago Law Review*, 85, 2018, pp. 424-485; S. FERRARI, *Religion Between Liberty and Equality*, in *Journal of Law, Religion and State*, 4, 2, 2016, pp. 179-193; A. JAMAL, J.L. NEO, *Religious Pluralism and the Challenge for Secularism*, in *Journal of Law, Religion and State*, 7, 2019, pp. 1-12.

particular evident when taking into account Islam(s) and groups of non-religious nones that, not by accident, are considered as 'exceptions' in respect to the both the method of bilateralism and principle of secularism, in the individual and collective sense of the expressions.

2. The Method of Bilateralism

In Italy, the laws regulating the relationship between the State and confessions is strongly influenced by the traditional role played by the Catholic Church. This was evident since Italy became an independent State, in the second half of nineteen century. It is true that the nation's unification, in 1871, abolished the secular-territorial power of the Catholic Church[3]. But it is also true that the predominantly moderate policy of the nascent Italian Kingdom made the relations with the Holy See progressively less tense.

In this sense, the historical turning point was marked during the Fascist regime[4]. Precisely in 1929, when the Italian Government and the Holy See signed the Lateran Pacts, through which the establishment of the Roman Catholic Church was legally affirmed at the legislative level[5]. These Pacts started a specific method of State-Church bilateral collaboration[6] that, after the Second World War and the 1948 Constitution of the Italian Republic entered into force, was partially extended to oth-

[3] This generated the hostility of the ecclesiastical hierarchy towards the new political entity; F. MARGIOTTA BROGLIO, *Italia e Santa Sede dalla grande guerra alla conciliazione*, Roma-Bari, 1966; R. PERTICI, *Chiesa e Stato in Italia. Dalla Grande Guerra al nuovo Concordato. Dibattiti storici in Parlamento*, Bologna, 2009.

[4] A. FERRARI, *The Italian Accommodations. Liberal State and Religious freedom in the "Long Century"*, in L. DEROCHER, C. GÉLINAS, S. LEBEL-GRENIER, P.C. NOËL (eds.), *L'État canadien et la diversité culturelle et religieuse 1800-1914*, Québec, 2009, pp. 143-153.

[5] See F. RUFFINI, *Corso di diritto ecclesiastico. La libertà religiosa come diritto pubblico subiettivo*, Torino, 1924; A.C. JEMOLO, *Chiesa e Stato negli ultimi cento anni*, Torino, 1971.

[6] P. FLORIS, *Laicità e collaborazione a livello locale. Gli equilibri tra fonti centrali e periferiche nella disciplina del fenomeno religioso*, in *Stato, Chiese e pluralismo confessionale*, 2010.

er denominations[7]. This was made possible thanks to Articles 7 and 8 of the Constitution that, on the other hand, continue to emphasise the historical bonds between the State's legal system and Catholicism.

Indeed, Article 7 establishes the mutual independence and sovereignty of both the State and the Roman Catholic Church. Albeit less strong, this principle is also affirmed in Article 8.2 of the Constitution, which guarantees the free organization of other denominations. At the same time, Article 7.2 declares that the relationships between the State and the Catholic Church are regulated by the above-mentioned Lateran Pacts. But it also states that any change to those Pacts, when accepted by both parties, does not require the procedure of constitutional amendments (as provided by Article 138 Const.). It means that, when there is a bilateral agreement, a legislative (not constitutional) act is sufficient in order to amend the 1929 Pacts.

For these same reasons, both the Lateran Pacts and Article 7.2 of the Constitution are seen as legal prototypes of the method of bilateralism, which is also incorporated into Article 8.3. This article affirms that only legislative acts can regulate the relationships between minority religions – which are significantly defined as "denominations other than Catholicism" – and the State[8]. These legislative acts, however, must be based on *intese*, which literally can be translated into 'understandings' between State and denominations other than Catholicism[9].

In other words, once the Italian Government and the representatives of a given religion have signed an agreement (Article 7.2) or an *intese* (Article 8.3), these two documents need to be ratified (for the agreement) or approved (for the *intese*) by specific acts of the Parliament.

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[7] C. CARDIA, *Concordato, intese, laicità dello Stato*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2004, p. 30; N. COLAIANNI, *Confessioni religiose e intese*, Bari, 1990, p. 97.

[8] G. BOUCHARD, *Concordato e intese, ovvero un pluralismo imperfetto*, in *Quaderni di diritto e politica ecclesiastica*, 2004, pp. 70-71; G.B. VARNIER, *La prospettiva pattizia*, in V. PARLATO, G.B. VARNIER (eds.), *Principio pattizio e realtà religiose minoritarie*, Torino, 1995, pp. 8-13.

[9] G. CASUSCELLI, *La rappresentanza e l'intesa*, in A. FERRARI (ed.), *Islam in Europa/Islam in Italia tra diritto e società*, Bologna, 2008, p. 304.

Thus, on 18 February 1984 the State and the Holy See signed an agreement that changed almost entirely the Lateran Pacts. One year later, the so-called *Villa Madama* Agreement was ratified by the Italian Parliament with the 1985 law (no. 121)[10]. This law is an atypical legislation, meaning it can be amended only on the basis of a new agreement between the State and the Catholic Church; no amendment based on a unilateral legislation made by the Parliament is possible. The same can be said about legislative acts approving the thirteen *intese* signed until now: these acts can be changed only via other legislative acts on the basis of other understandings between the State and the confessions concerned. In this manner, the Catholic Church and some other denominations, those that have signed an *intesa*, have the guarantee that their legal status cannot be altered without considering their will[11].

It should be noted that both agreements and *intese* serve to satisfy the exigencies of religious groups by preventing their claims and identities from being compressed under the weight of the State's unilateral legislations. This is because, given their highly general nature, these kinds of legislations are far less willing to meet the peculiar needs of religious groups. On the contrary, the bilateral legislation allows a more consistent implementation of the principle of equality, which implies the rights to be equally free and different before the law. The bilateral legislation does so by promoting new liberties through, for instance, the implementation of exemption rights approach, which aims at combining respect for general legal obligations and attention to specific minority issues[12].

The example is given by the exemption from paying local property taxes (called *ICI* and *IMU*) for religious buildings. The same can be

[10] M. VENTURA, *Creduli e increduli. Il declino di Stato e Chiesa come questione di fede*, Torino, p. 30.

[11] S. FERRARI, *Il Concordato salvato dagli infedeli*, in V. TOZZI (ed.), *Studi per la sistemazione delle fonti in materia ecclesiastica*, Salerno, 1993, p. 127.

[12] B. BARRY, *Culture and equality*, Cambridge, 2001; S. BEDI, *What is so special about religion? The dilemma of the religious exemption*, in *The Journal of Political Philosophy*, 15, 2007, pp. 235-249; M. FESTENSTEIN, *Negotiating diversity: Culture, deliberation, trust*, Cambridge, 2005; M. MINOW, *Should religious groups be exempt from civil rights laws?*, in *Boston College Law Review*, 48, 2007, pp. 781-849.

said about the possibility for religious ministers and religious representatives to enter prison, hospitals, nursing home and rehab centres without special authorization from public authorities. And do not forget the fact that, under Article 9 of the 1984 law (no. 121), every student at any level of public education can choose to attend (1 hour per week) the teaching of Catholic religion[13].

Another important benefit of the method of bilateralism refers to the national fiscal system. In particular, according to Article 47 of the 222/1985 law, which is connected to the 121/1984 law, all Italian taxpayers can participate to a sort of 'poll' to allocate 0.008 of the entire income tax (called *IRPEF*) to one of the following three institutions: the State, the Catholic Church, and one of the minority religions that have signed an *intesa*. The fund (i.e. the overall amount of 0,008 of the *IRPEF*) is divided proportionally amongst the choices made by the taxpayers[14].

In this manner, the method of bilateralism is potentially able to better govern the religious diversity while affirming a sustainable pluralism, whose legal boundaries are established by the constitutional rules. These rules are included in Articles 2, 3, 19 and 20 of the Constitution that, together with Articles 7 and 8, have led the Constitutional Court to define secularism (*laicità*) as one of the supreme principles (*principi supremi*) of the Italian legal order. This principle does not require indifference to religious denominations. It requires the equidistance and the impartiality of the State, especially when related to religious issues[15].

[13] In the last few years about 88% of the Italian students have chosen to attend this teaching. See C. GIORDA, *Religious Diversity in Italy and the Impact on Education: The History of a Failure*, in *New diversities*, 17, 1, 2015, pp. 77-93; R. MAZZOLA, *La religion á l'école en Italie: état des lieux et évolutions*, in J.P. WILLAIME (ed.), *Le défi de l'enseignement des faits religieux à l'école*, Paris, 2014, pp. 103-120.

[14] In this manner, even the taxpayers who did not choose any denomination will end up funding one according to the selection made by those who did sign to give their taxes to a religious group or to the State. See F. ALICINO, *Un referendum sull'otto per mille? Riflessioni sulle fonti*, in *Stato, Chiese e pluralismo confessionale*, 2013, p. 33.

[15] See the following decisions of the Italian Constitutional Court: no. 203/1989; no. 259/1990; no. 13/1991; no. 195/1993; no. 421/1993; no. 334/1996; no. 329/1997; no. 508/2000; no. 327/2002. See also N. COLAIANNI, *Laicità: finitezza degli ordini e governo delle differenze*, in *Stato, Chiese e pluralismo confessionale*, 2013, p. 39; G. DAL-

This also means that, compared to the previous (Fascist) regime, there can no longer be an unreasonable (not constitutionally based) distinction. That is true not only with respect to the comparison between the Catholic Church and other confessional denominations. This is equally true when comparing the minority religions that have signed an *intesa* and those organisations that do not possess any understanding with the State[16].

Yet, it is precisely on this point that the method of bilateralism reveals many interconnected difficulties.

3. The Method of Bilateralism and Today's Pluralism

One of the difficulties is due to the fact that both agreements and *intese* are used by the State to regulate matters related to religious freedom by conceding to some confessions a set of rights or benefits. This is particularly evident in relation to the Catholic Church, the major religion in Italy. So far as minority religions are concerned, in the last 35 years the practical enactment of Article 8.3 of the Constitution has been characterized by the phenomenon of photocopy understandings (*intese fotocopia*), that is to say by the substantial similarity of all *intese*

LA TORRE, *Ancora sulla laicità. Il contributo del diritto ecclesiastico e del diritto canonico*, in *Stato, Chiese e pluralismo confessionale*, 2014.

[16] V. TOZZI, *Le confessioni religiose senza intesa non esistono*, in *Aequitas sive Deus. Studi in onore di Rinaldo Bertolino*, Torino, 2011, pp. 1033-1055; G. CASUSCELLI, *La rappresentanza e l'intesa*, in A. FERRARI (ed.), *Islam in Europa/Islam in Italia tra diritto e società*, Bologna, 2008, pp. 285-322; N. COLAIANNI, *Diritto pubblico delle religioni. Eguaglianza e differenze nello Stato costituzionale*, Bologna, 2012, p. 68; F. FINOCCHIARO, *Diritto ecclesiastico*, updated by A. BETTETINI, G. LO CASTRO, Bologna, 2012, p. 120; A. BETTETINI, *Commento all'art. 20 Cost.*, in B. RAFFAELE, A. CELOTTO, M. OLIVETTI (eds.), *Commentario alla Costituzione*, Torino, 2006, pp. 441-448; M. RICCA, *Art. 20 della Costituzione ed enti religiosi: anamnesi e prognosi di una norma "non inutile"*, in *Studi in onore di Francesco Finocchiaro*, Padova, 2000, pp. 1557-1580; P. DI MARZIO, *L'art. 20 della Costituzione. Interpretazione analitica e sistematica*, Torino, 1999; S. FIORENTINO, *Gli enti ecclesiastici e il divieto di discriminazione*, in G. CASUSCELLI (ed.), *Nozioni di diritto ecclesiastico*, Torino, 2006, pp. 57-68.

(twelve) approved until now. As a result, the large majority of these *intese* have established a *de facto* common legislation, which is far from being considered general legislation[17]: it is common to all religious denominations that have an understanding with the State; but its provisions cannot be applied to other denominations without *intesa*[18]. Here is the reason why minority religions see Article 8.3 of the Constitution more as an instrument of political legitimation than as a legal opportunity to express their specific needs and their identity in Italy[19].

Besides, the absence of any procedure regulating the collaboration between the State and denominations can turn the discretionary of the Government into non-constitutional and unwanted forms of discrimination towards 'other' religions. These confessions are excluded from the method of bilateralism and, for this reason, they are subject to the 1929 law (no. 1159) on "admitted religions" that, approved during the Fascist regime, legitimize an even greater discretionary power of the *Ministero degli Interni* (Home Office). In other words, these denominations are excluded from the provisions of the common legislation based *intese*, which are far more favourable than those provided by the 1159/1929 Law.

Instead of implementing the principle of equality, the method of bilateral legislations has thus become the source of unreasonable privileges, which are accessible only to a limited number of denominations. That is in contrast not only with the Italian Constitution, but also with the European Convention of Human Rights (ECHR).

In this sense, it is important to note that the European Court of Human Rights (ECtHR) has stated that freedom of religion does not require the States to create a particular legal framework in order to grant religious communities a special status entailing specific privileges.

[17] V. CRISAFULLI, voce *Fonti del diritto (dir. cost.)*, in *Enciclopedia del diritto*, 1968, XII, p. 948; F. CARNELUTTI, *Teoria generale del diritto*, Roma, 1951, p. 42; M. RICCA, *Legge e Intesa con le confessioni religiose: sul dualismo tipicità-atipicità nella dinamica delle fonti*, Torino, 1996, p. 25.

[18] B. RANDAZZO, *Diversi ed eguali. Le confessioni religiose davanti alla legge*, Milano, 2008, p. 21.

[19] F. ALICINO, *Un referendum sull'otto per mille? Riflessioni sulle fonti*, in *Stato, Chiese e pluralismo confessionale*, 2013, p. 33.

Nevertheless, a State which has created such a status must not only comply with its duty of neutrality and impartiality but must also ensure that any group has a fair opportunity to apply for this status and that the criteria established are applied in accordance to the principles of proportionality and non-discrimination. These principles do not merely require the measures and the methods chosen to be suitable for the achievement of the aim sought. It must also be shown that it is necessary, in order to achieve that aim, to exclude certain persons, in this instance certain organizations, from the scope of application of those measures and the related methods. Hence, it seems that, in choosing the specific form of the cooperation with the Catholic Church and few other confessions, the Italian system of bilateralism oversteps the State's margin of appreciation as provided by the ECtHR's jurisprudence[20].

This situation has so far proven to be challenging for some minority organizations, such as those referring Islam and associations of nonreligious nones.

4. The Method of Bilateralism and the Exceptionalism of Islam

In the last decades, the changes within Italian society are even more traumatic and the issues to face even more decisive than those related to the presence of Muslims and Islamic groups in the country. These changes do not involve only Islam and Muslims. Nevertheless, given its specificity (especially when compared to religions that have long been present in Italy) and its problematic interconnected issues (which also implies the emergence of transnational fundamentalism and terrorism), Islam highlights the most striking aspects of the Italian neo cultural-religious pluralism: Islam indicates and signals the speed tendency to foster plurality within society[21]. In other words, Islam has become the

[20] ECtHR, *Savez crkava "Riječ života" and others v. Croatia*, 9 December 2010 (application no. 7798/08); ECtHR (Grand Chamber), *İzzettin Doğan and others v. Turkey*, 26 April 2016 (Application no. 62649/10).

[21] S. ALLIEVI, *Immigration, Religious Diversity and Recognition of Differences: The Italian way to Multiculturalism*, in *Identities*, 21, 6, 2014, pp. 724-737; F. PASTORE, *Immigration in Italy Today. A community out of Balance: Nationality Law and Mi-*

discursive substitute for religious and cultural pluralism, which implies other sensitive matters that, in a way or another, are correlated to this religion: gender roles, clothing codes, family models, the relationship between religion and politics, the role of religions within a democratic system, the rights and duties of the major demonisation, the rights and duties of religious minorities. Under these aspects, Islam has become the most extreme example of 'other' religions, other than traditional ones[22].

With the continuous flow of foreign immigrants into Italy, particularly from North Africa and Eastern European Countries, the composition of minority religions is changing. In this new context, Islam is becoming Italy's second or third religion. This is because Islam has a substantial following among the foreign immigrants, who often find in the religion not only a bond with their culture of origin, but also an important factor in the fight for their (individual and group) rights. But, and at the same time, it should be considered that this is happening in a country where the laws regulating the State-religions relationship is usually based on the Catholic Church's needs and the needs of few other confessions with a similar tradition.

From this point of view, it should be noted that in Italy any community with religious aims can operate within the State's legal system. They can do so without authorization or prior registration. The only limit is based on the protection of public order and common decency. Thus, Muslim groups may choose among various types of legal capacity[23]. In practice, these groups are normally regulated by the general legislation concerning association in its double version: recognised and non-recognised associations[24]. This means that in Italy Muslim com-

gration Politics in the History of Post-Unification Italy, in *Journal of Modern Italian Studies*, 9, 1, 2004, pp. 27-48.

[22] F. ALICINO, *The Italian Legal System and Imams: A difficult Relationship*, in M. HASHAS, J.J. DE RUITER, N. VALDEMAR VINDING (eds.), *Imams in Western Europe. Developments, Transformations, and Institutional Challenges*, Amsterdam, 2018, pp. 359-380.

[23] L. PALADIN, voce *Ordine pubblico*, in *Noviss. Digesto it.*, XII, 1965, p. 130.

[24] They, for example, may constitute themselves as 'non-recognized associations' (Article 36-38 of the Italian Civil Code); also used by political parties and trade union organizations, this is the simplest model of association that does not provide particular

munities are not only excluded from some important benefits (like those established by both the *intese* and, with the mentioned problems, the 1159/1929 law)[25], but also from the possibility to be legally recognised by reasons of their religious aims. In brief, they can only enjoy the legal benefits guaranteed to all other private associations, irrespectively of religious connotations[26].

Whatever ideas one may hold about Islam, one can still infer that in Italy many, if not all, Islamic associations may be defined as religious denominations. Therefore, these groups must be recognized, at least potentially, as religious denominations (Article 8, paragraphs 1 and 2, Const.) and, as such, they can sign an *intesa* with the State (Article 8.3 Const.), in accordance with the supreme principles of secularism. In fact, some Muslim organizations have tried to engage forms of cooperation with the State, promoting negotiations with the Italian Government in order to sign an *intesa*. This is the case of *UCOII* (Union of Islamic Communities and Organizations in Italy) that, only two years after its establishment (1990), publicly manifested that intention, issuing a draft agreement and sending it to the Government. The same attempt was made by other Islamic organizations, like the Association of Italian Muslims (1994) and the Islamic Italian Community (1996)[27]. However,

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control from the State's authorities. They can also choose the form of 'recognized associations', which provides legal personality through registration at the local Prefecture (Articles 14-35 of the Civil Code and the 2000 decree of the President of Italian Republic, no. 361). The legal capacity of an Islamic organization may finally be obtained via Article 16 of the Provisions on law in general (*Disposizioni sulla legge in generale*) that, based on the principle of reciprocity, may grant foreign Muslim organizations the same rights guaranteed to the Italian legal bodies.

[25] The only Islamic organisation that is not an association and that, in accordance with the 1929 law (no. 1159), has been recognised as a religious legal entity; that is the Italian Centre of Islamic Culture (*Centro Islamico Culturale d'Italia*). See the decree of the President of the Italian Republic, 21 December 1974. On this point see A. FERRARI, *Libertà religiosa e nuove presenze confessionali (ortodossi e islamici): tra cieca* deregulation *e super-specialità, ovvero del difficile spazio per la differenza religiosa*, in *Stato, Chiese e pluralismo confessionale*, 2011, p. 13.

[26] S. ALLIEVI, *Islam italiano. Viaggio nella seconda religione del Paese*, Torino, 2003.

[27] L. MUSSELLI, *A proposito di una recente proposta di bozza d'intesa con l'Islam*, in *Il Diritto ecclesiastico*, 1997, I, p. 295; M. TEDESCHI, *Verso un'intesa tra la Repub-*

all these efforts have not been taken into consideration by the Italian public authorities that, instead of using Article 8.3, have chosen other solutions.

For example, in 2005 the Interior Minister established the Consultative Council for Islam in Italy (*Consulta per l'Islam italiano*)[28]. In the following years, the Council issued documents that aimed at reaffirming the values of a secular State and religious freedom as well as encouraging the creation of a federation of Islamic groups. The Committee was performing consultative functions and the Ministry listened to its views on some matters. In this context, Charter of values for the integration and citizenship (*Carta dei valori per l'integrazione e la cittadinanza*) was issued by the Interior Minister: it was conceived as the basis for a future understanding between the State and Islam(s)[29]. In this case, the Italian Committee for Islam suggested that Islamic imams should subscribe to the Charter: it should have been done in accordance with the 1159/1929 law that, to that aim, had to be accompanied by a circular of the Home Office[30]. Similarly, in 2010 the Minister of the Interior established a Committee for Islam in Italy (*Comitato per l'Islam Italiano*). Made up of 19 members, this Committee included not only Muslim representatives but also non-Muslim academic experts on Islam and even anti-Muslim prominent figures in journalism. This choice was clearly intended to soften the vague attempt of representativeness of the 2005 Consultative Council. Since then, this approach

blica italiana e la Comunità islamica in Italia?, in *Il diritto di famiglia*, 1996, p. 1574; A. CILARDO, *Diritto islamico, diritto occidentale: ambiguità semantica*, in V. TOZZI, G. MACRÌ (eds.), *Europa e Islam. Ridiscutere i fondamenti della disciplina delle libertà religiose*, Soveria Mannelli, 2009, p. 94.

[28] S. FERRARI, *La consulta islamica*, in *ISMU, Dodicesimo rapporto sulle migrazioni 2006*, Milano, 2007, pp. 249-263.

[29] See C. CARDIA, *Introduzione alla Carta dei valori della cittadinanza e dell'integrazione*, in MINISTERO DELL'INTERNO, *Carta dei valori della cittadinanza e dell'integrazione* (s.i.d.), 2008, p. 8; N. COLAIANNI, *Alla ricerca di una politica del diritto sui rapporti con l'Islam (Carta dei valori e Dichiarazione di intenti)*, in *Stato, Chiese e pluralismo confessionale*, 2009.

[30] See Parere del Comitato per l'Islam Italiano, *Parere su Imam e formazione*, 31 May 2011, p. 6, *http://www.coreis.it/documenti_13/6.pdf* (last accessed 1 November 2020).

has also been followed, at the local level, where consultative forums with representatives of Muslim communities and experts in religion have been established[31]. A few years later (March 2012) the Minister for Cooperation and Integration created a "Permanent Conference on Religions, Culture and Integration (CRCI)", in which there were representatives of Muslim organisations and experts on Islam and on other religions. The CRCI was essentially conceived as a space for meetings and seminars rather than a consultative or decision-making body. In 2015, the Home Office also established the Council for the so-called 'Italian Islam', which included all the major national Muslim associations. One year later, this body was integrated with a board of university professors and experts, who set up a common agenda. In 2016, the same Home Office urged confrontations for the drafting of a document. On the 1st of February, 2017, this Office and the representatives of the major Islamic organizations signed the "National Pact for an Italian Islam expression of an open community, integrated and adhering to the values and principles of State laws"[32]. This Pact is divided into three parts: the first one refers to the constitutional principles and regulations concerning religious freedom; the second and third contain two 'decalogues' engaging representatives of Muslim communities and the Interior Ministry to support the establishment of Italian Islam that, among other things, should contribute in the prevention and the contrast against religion-inspired radicalization. More specifically, the Pact should serve to start process of legal organization of Muslim communities, in accordance with the constitutional rules, including those related to freedom of religion. The Pact also aims at promoting the preliminary conditions to start negotiations related to Article 8.3 of the Constitution as well as to train "imams and religious leaders who can also act as effective mediators to ensure full implementation of the civil principles of coexistence, State secularism, legality and equality of rights between men and women". Furthermore, the Pact supports organization that en-

[31] F. ALICINO, *Costituzionalismo e diritto europeo delle religioni*, Padova, 2011, pp. 86-89.

[32] At *https://www.interno.gov.it/sites/default/files/patto_nazionale_per_un_islam_italiano_en_1.2.2017.pdf* (last accessed 1 November 2020).

sure the utmost transparency in the funds received from Italy or abroad and that deliver the Friday sermons into Italian[33].

This situation also helps us to gain a better understanding of the attempts at the national and local level in finding new instruments (other than those provided by Article 8 of the Constitution) for promoting the collaboration between the State and minority groups. The examples are given by the so-called mini-understandings (*mini intese*) between branches of the Public administration (Ministers of Home Office, Justice, Labour, Public Health) and religions other than Catholicism that do not have an *intesa* yet[34]. In this sense, one should take into account the agreement between the Department of Penitentiary Administration (DAP) and the Jehovah's Witnesses as well as some Protestant Churches with regards to the authorization of religious ministers to enter prisons and nursing homes as well as to benefit health and social security assistance.

The same can be said about the City of Florence and a local Muslim community, which on February 2016 signed a Pact for integration and citizenship, as well as the City of Turin and twenty local Islamic organizations, which on the same period signed the "Pact of shared values" (*il patto di condivisione*) approved in the context of Turin Islamic Forum. We should also focus the attention on the 2020 Protocol signed by DAP and UCOII, which was replied on 8 October 2020 with the Italian Islamic Conference (IIC)[35]. These Protocols allow imams to offer spiritual assistance to Muslim inmates detained in Italian prisons. UCOII and IIC will provide prison administration with a list of people who "perform the functions of imam in Italy" and who are "interested in guiding prayers and worship within prisons nationwide". The list will also specify at which mosque or prayer room each imam normally per-

[33] P. NASO, *For Italian Islam*, in *Intercultural dialogue*, January-February 2017, pp. 1-4.

[34] F. ALICINO, *La legislazione sulla base di intese. I test delle religioni "altre" e degli ateismi*, Bari, 2013, pp. 73-80.

[35] M. BELLI, *Religione in carcere: intesa tra Dap e Comunità Islamiche*, in *gNews*, 5 giugno 2020, *https://www.gnewsonline.it/religione-in-carcere-intesa-tra-dap-e-comunita-islamiche/* (last accessed 1 November 2020). See also at *https://it.italiatelegraph.com/news-40724* (last accessed 1 November 2020).

forms his worship. Imams will have to indicate their preference for three provinces where they would be willing to lead prayers for inmates[36].

It should be noted that, apart from the confusion over their possible or perceived effects, all these proposals and the related documents raise delicate legal questions. First, for what reason do we need ministerial accords to clarify the purpose of the constitutional rules? Second, why must the subscription of some documents, which have no legal status, be considered a prerequisite in order to recognize legally religious denomination or train imams, when these same duties do not take place in relation to other confessions? And, last but not least, why must the public actors, starting with the government, exclude the possibility to regulate these and other issues directly through Articles 8 (in accordance with Articles 2, 3, 19 and 20) of the Constitution?

It seems that all these attempts are based on a basic premise. Islam is not only different from other religious denominations, which is true for all confessions when compared with each other. Islam is an exception in how it relates to Italy's legal instruments regulating the State-confessions, including the method of bilateralism. In this sense, those attempts are based on "Islamic exceptionalism" that, on further scrutiny, seems almost tautological: it discards elements shared between Islam and other religions, and restricting itself to aspects (imams, religion-inspired radicalization, secularism, Friday sermons, funds received from abroad, legality and equality of rights between men and women) in which Islam can be claimed exceptional. For these reasons, those attempts are not coherent and, above all, they do not take into serious consideration the principles and the instruments established by the Constitution. Moreover, they reveal some sort of epistemological obstacles[37], upon which the Italian public actors tend to consider constitu-

[36] See S. ANGELETTI, *L'accesso dei ministri di culto islamici negli istituti di detenzione, tra antichi problemi e prospettive di riforma. L'esperienza del Protocollo tra Dipartimento dell'Amministrazione penitenziaria e UCOII*, in *Stato, Chiese e pluralismo confessionale*, 2018, p. 24.

[37] G. BACHELARD, *La formation de l'esprit scientifique*, Paris, 1938, p. 337: "Les obstacles épistémologiques affirment toujours quelque part des ombres … sur la connaissance du réel, qui n'est jamais immédiate et pleine. Les révélations du réel sont

tional rules unable to govern Islam and its exceptionalism. It should be note that a different approach was followed during the emergency situation caused by the spread of SARS-CoV-2. The example is given by the Protocols "concerning the resumption of religious rituals in public", which were part of the Government's coronavirus 'phase 2' lockdown measures. They were signed on May 2020 by the President of the council of Minister Giuseppe Conte, the Home Minister Luciana Lamorgese and representatives of religious groups, including those referring to group without *intese* or even not formally recognized as religious denominations, like many Muslims communities[38]. It remains that these Protocols do not fall under articles 8.3 of the Constitution and the relative bilateralism principle. From a legal point of view, it may be interpreted in the light of unilateral law regulating public procedure: under this law individuals, associations or committees (that have concrete interest for the defense of legally important situations and that could be prejudiced by the measure taken by public authorities) have the right to intervene during rulemaking proceedings[39].

All of this shows that in Italy the implementation of the method of bilateralism reveals interconnected problems. That is even more evident when considering today's neo-religious and cultural pluralism, which also implies an increasingly important role for organisations of nonreligious nones, who often consider that method of bilateralism as the major driving force behind Italy's limited *ex parte Ecclesiae* secularism.

toujours récurrentes. Le réel n'est jamais "ce qu'on pourrait croire" mais il est toujours ce qu'on aurait dû penser".

[38] See The Italian Government, Protocollo con le Comunità Islamiche, available at *https://www.interno.gov.it/sites/default/files/2020.05.14_protocollo_comunita_islamiche.pdf* (last accessed 1 November 2020).

[39] Law 7 August 1990 no. 241, *Nuove norme sul procedimento amministrativo*, OGIR 192 (18 August 1990). See G. CIMBALO, *Il papa e la sfida della pandemia*, in *Stato, Chiese e pluralismo confessionale*, 9, 2020, p. 15.

5. The Method of Bilateralism and the Exceptionalism of Atheism

Instead of emphasizing the collective dimension of their attitude, nonreligious nones are largely considered as individualistic. Recent signs of revers still remain though. These signs see an expanding number of nonreligious people organize themselves into associations, which helps atheists fight for their rights, including the right to not believe in god(s) and propagate their arguments either alone or in community, public or/and private. It remains that the position of religious nones takes different forms. Indifference to religious belief on the one hand and the criticism of confessional traditions on the other exemplify various way of being nonreligious[40]. Thus, as in the case of Islam, the rising presence of religious nones in the country raises a number of questions about when, where, and how they should engage with religious issues and the legal degree to which such engagement becomes 'religion-like'[41]. In the last three decades atheist organizations have evolved the ability to make their voices heard. They are successful in doing so through various forms of judicial activities, like those being prompted and promoted by the Union of Rationalist Atheists and Agnostics (*Unione degli Atei e degli Agnostici Razionalisti*) also known as UAAR. And it is not by accident that one of these actions involve judicial review proceedings against the pro-religion *ex parte Ecclesia* method of bilateral legislation, as laid down in articles 7.2 and 8.3 of the 1948 Constitution. After a protracted legal battle, in 2016 this initiative resulted in the judgement (no. 52/2016) of the Italian Constitutional Court, and it is now waiting for a decision of the European Court of Human Rights.

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[40] On the working definition of atheism A. PAYNE, *Redefining "Atheism" in America: What the United States Could Learn from Europe's Protection of Atheists*, in *Emory International Law Review*, 2013, 27, pp. 663-703; G.M. EPSTEIN, *Good Without God: What a Billion Nonreligious People Do Believe*, New York, 2009; R. ARONS, *Living Without God: New Directions for Atheists, Agnostics, Secularists, and the Undecided*, Berkeley, 2008.

[41] J. THIESSEN, S. WILKINS-LAFLAMME, *None of the Above: Nonreligious Identity in the US and Canada*, New York, 2020; J. SCHUH, C. QUACK, S. KIND, *The Diversity of Nonreligion: Normativities and Contested Relations*, London, 2020.

In reality, UAAR has asked for the outlawing of many practices related to the privileged position of religions (especially of the Catholic Church) in public life, as demonstrated by several indicators (i.e. the display of the crucifix in classrooms, the legal impossibility of renouncing one's baptism[42], the teaching of religion in classes, the 0.008 of the *IRPEF*). In doing so, UAAR argues that, even if atheists can enjoy many rights as individuals, it is difficult for them to identify with the State's law as a group. In this sense, the legal system weakens the sense of belonging of many nonreligious nones, giving them the impression that they are condemned to remain eternally beyond the constitutional boundary of the Italian citizenry. With this spirit, UAAR has therefore sued the State authorities on several occasions, challenging their activities on religious issues, including the method of bilateralism. Moreover, in this specific matter UAAR has demonstrated its intention to take the bull by the horns.

The most important example of that is given by the 1996 request to initiate negotiations with the Italian Government to sign an *intesa* as provides by Article 8.3 of the Constitution[43]. The President of the Council of Ministers replied that this is not possible, simply because the applicant is not eligible to be included in the national list of religious denominations. In addition, the President held that the refusal to accept an association's request to launch negotiations could not be subject to judicial review, as this would violate the sphere of constitutional powers vested in the Government[44].

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[42] In this sense UAAR offers the 'Debaptism Certificate,' see *https://www.uaar.it/laicita/sbattezzo/* (last 10 October May 2019), whose procedure has been partially validated by the Italian Data Protection Authority (*Garante per la protezione dei dati personali*), see *https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1090502* (last accessed 1 November 2020). See also the ITALIAN BISHOPS' CONFERENCE (CEI), 1999. Decreto Generale, *Disposizioni per la tutela del diritto alla buona fama e alla riservatezza. Prot. n. 1285/99, art. 2, par. 9.*

[43] F. ALICINO, *La legislazione sulla base di intesa. I test delle religioni "altre" e degli ateismi*, Bari, 2013, p. 218.

[44] See the President of the Council of Ministers of the Italian Republic, 1996. *Atto protocollato DAGL 1/2.5/4430/23 e comunicato all'UAAR con lettera datata 20 febbraio 1996*. See also Consiglio di Stato, Parere 29 ottobre 1997, n. 3048.

Nonetheless, UAAR decided to bring the case before the Court, which has resulted in a long legal battle, marked by several judicial decisions. Some of them have been issued by the administrative authorities (the regional administrative tribunals and the Council of the State)[45]. Others by ordinary judges, including the Italian Court of Cassation. In 2013, this Court held that the original goal of the *intese* is to make the constitutional right of religious freedom better implemented, more widely valued, and equally enjoyed by all[46]. The Court of Cassation also affirmed that through the phenomenon of photocopy understandings, the instrument of the *intesa* has been transformed into a sort of legislative framework, which is accessible only for few minority religions at the exclusion of all other denominations[47].

Another major problem concerning *intese* is that there is no formal procedure of using article 8.3 of the Constitution, which can turn the discretionary power of the Government into unreasonable discrimination towards some minority groups. For this reason, in 2013 the Court of Cassation ruled that the decision to initiate negotiations could not be left to the absolute discretion of the Government: negotiations should be considered as a corollary of the equal freedoms guaranteed to all religious faiths. It follows that the Government's refusal to launch these negotiations cannot be considered as a political act. This refusal should instead be qualified as a legal act that, as such, is subject to judicial review[48].

The Italian Constitutional Court (ICC) sees the matter in a different way, to such an extent that in 2016 they adopted the exact opposite approach: *intese* are no longer bound to equal freedom of all beliefs before the law[49]. According to ICC, the significance of the provision under article 8.3 of the Constitution consists in the extension of the bilateral method from the Catholic Church to non-Catholic faiths; this is possible only where the method reflects the common intentions of both

[45] TAR Lazio (sede di Roma), sent. del 5 novembre-31 dicembre 2008, n. 12539. Consiglio di Stato, sent. 18 novembre 2011, n. 6083.

[46] Corte di Cassazione, Sez. Un. civ., sent. 28 giugno 2013, n. 16305.

[47] *Ibid.*

[48] *Ibid.*

[49] Corte costituzionale, sent. 10 marzo 2016, n. 52.

religious minorities and the Government not only to conclude an agreement, but also to initiate negotiations[50]. As far as the supreme principle of secularism is concerned, ICC affirmed that this principle certainly implies impartiality and equidistance with regard to each religious faith. However, the Court also ruled that the conclusion of an *intesa* does not involve the right to profess religious belief. This right, ICC clarified, is protected overall by other constitutional rules[51], starting with those guaranteeing the right to profess individually or together with other any religion or to profess no religion at all[52]. It means that, along with the method of bilateralism, the Government holds a broad margin of discretion, which implies the power of defining what religion is, as well as the responsibility of deciding whether to initiate a negotiation with any religious group.

It is important to note that the Constitutional Court supported the 2016 decision by an *obiter dictum* which seems to involve strange allies, atheists and Muslims. Indeed, in the *obiter* ICC held that

> the changing and unpredictable reality of national and international political relations, which may lead the Government to conclude that it is not appropriate to allow an association that requests it to launch negotiations. When confronted with this considerable variety of situations, the Government is vested with a broad discretion[53].

Strangely enough, this fragment has little to do with the Italian atheism and more to do with the confessional organisations that would subscribe an *intesa* in the near future. The *dictum* is indeed important not only for UAAR case law, but also for the entire system of State-confessions relationship in Italy. Moreover, the fragment uncovers that the 2016 constitutional decision can be fully understood when considering the presence of new religious creeds, such as those made up of Muslim immigrants. It reveals that, along with new forms of militant

[50] *Ibid.*

[51] In particular those of Articles 3, 8.1, 8.2, 19 and 20 of the Constitution.

[52] Corte costituzionale, sent. 10 marzo 2016, n. 52.

[53] Corte costituzionale, sent. 10 marzo 2016, n. 52, para. *5.2 conclusion on points of law* (translation mine).

atheism, Islam(s) is now the most illustrative example of Italy's current cultural-religious diversity.

6. Conclusion

In the light of the right of all religious denomination to be equally free before the law (Articles 8.1 and 19 Const.) and the right of the religious organizations and associations not to be subjected to special limitations (article 20 Const.), the Italian way of regulating the new religious pluralism is potentially innovative and highly effective. The fact is that the way of implementing these rights at the legislative level is not new at all. The result is that the bilateralism system can be perfectly used when referring to traditional denominations. On the contrary, this system can hardly be taken into account for other minority groups, other than Catholicism. That also explains why the bilateralism system seems now attractive for some religious denominations, while it is seen as discriminatory by other confessions and the relative members. Moreover, incapable of describing and even governing today's religious scenario, both the bilateral legislation and the 1929 law are becoming increasingly difficult and, at times, harshly contested. This is even more complicated by the fact that religious and nonreligious groups in the Country are now seeking a greater role in the public space as well as in the political arena.

On the one hand, the Catholic Church seeks to preserve its special status and the relative privileges by marking the traditional connection among Italian society, national identity and the major religion. In this perspective, the State is requested to recognize "the value of the religious culture and the principles of the Catholic Church", which are considered integral "part of the historical heritage of the Italian people". It is no coincidence that these ideas are expressly affirmed in Article 9.2 of the 1984 Agreement modifying the 1929 Lateran Pacts. It should be noted that this Agreement is the most important example of the method of bilateralism, which has traditionally regulated relationship between the State and religions, as set by Articles 7.2 and 8.3 of the Constitution. The fact is that, together with the 1159/1929 law on ad-

mitted religions, that method seems to privilege traditional denominations, while not taking into serious accounts the needs of different neo religious groups.

At the same time, these neo religious groups operate with the aim to improve their legal status. In doing so, they too refer to the 1948 Constitution, where it is stated that "[a]ll religious confessions enjoy equal freedom before the law" and that "[e]veryone has the right to profess freely their religious faith in any form, individually or in association, to disseminate it and to worship in private or public"[54]. It also implies the fundamental right of neo religious communities and their adherents to be different. In other words, the bilateralism system seems to be trapped in its own past, when a weak pluralism landscape characterized the Country, which makes it difficult to reasonable govern today's cultural and religious claims.

Thus, most of the current questions involving the bilateralism are strictly related with at least two main factors: the historical roots of the system of State-Churches relationship; the presence of some different conspicuous forms of religious affiliation. Both factors complicate the interpretation of the separation between religion and State, as requested by the supreme principle of secularism which, not by accident, remains largely undefined[55].

[54] Articles 8 and 19 of the Italian Constitution.

[55] F. ALICINO, *La libertà religiosa*, in F. BUFFA, M. GIULIANA CIVININI (eds.), *La Corte di Strasburgo*, Roma, 2019, pp. 458-467.

ITALY AND RELIGIONS UNDER PRESSURE: AGREEMENTS AND BILATERAL CONVENTIONS TO THE TEST OF PANDEMIC

RETHINKING A RELATIONSHIP MODEL

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SUMMARY: *1. Religious freedom or protection of health? A difficult balance. 2. The Italian choices in the emergency regulation: exception or violation of the agreement-based bilateral principle? 3. The opportunities opened up by the protocols with the religious denominations. 4. From danger to opportunity: initial considerations.*

1. Religious freedom or protection of health? A difficult balance

The restrictions on fundamental freedoms and the limitations posed by states in response to the global crisis caused by coronavirus SARS-CoV-2 have changed all societal categories as known so far, including those of religion and law[1].

The whole framework of agreements, bilateral conventions and norms to regulate the relationships between states and religious denom-

* This contribution is the product of the research and personal interaction of the Authors and is to be attributed as a whole to them. Nevertheless, they have authored single sections and, specifically, Erminia Camassa is the author of sections 1 and 2, and Francesca Oliosi of sections 3 and 4.

[1] Maria D'Arienzo has referred to a «dilemma of choices. The prevalence given to the needs of protection of health acquires a specific dimension in the health sector, where the decision concerning the "right choices" involves a delicate balance amongst science, professional conscience and personal conscience». See M. D'ARIENZO, *Scienza e coscienza ai tempi dell'emergenza sanitaria da Covid-19*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 22, 2020, p. 1. All quotations – in this and subsequent footnotes – have been translated into English.

inations has been changed, as well, often by giving absolute priority to the right to (and protection of) public health. In this unprecedented picture, there have been numerous areas of possible conflicts concerning religious denominations (suffice it to think of the closure of places of worship or the prohibition to celebrate any type of religious and other ceremonies).

Whereas in what is now called "the first wave" it seemed for a few weeks that only in Italy – among the European countries – the epidemiological impact of coronavirus was especially virulent, as weeks passed by all the states had to deal with the first world pandemic defined as such by the WHO[2] and with what it implies and has implied also in terms of rethinking of personal freedoms including – and certainly not secondarily – religious freedom.

In fact, the exponential and continuous growth of contagion has led all legal systems to adopt strictly restrictive measures, characterized by a progressive incisiveness reflecting and following the growing trend of the epidemic curve.

The remodulation of the rights and freedoms recognized by constitutions and by the Universal Declaration of Human Rights has taken place in different, and sometimes, opposite ways, but with a common element: the central role of the debate about the limitations on religious freedom. The reason is simple: on the one side because of the nature itself of the manifestation of freedom of worship (aggregating and community-based); on the other side because the subjects concerned, at the institutional, political and religious level, have brought a continuous and heated debate concerning not only the measures to adopt (and their necessariness) but also their nature and legitimacy[3].

[2] The term pandemic, as its etymology suggests (πάνδημος, that is, "what concerns all persons"), indicates the spread of a pandemic disease in large geographical areas on a global scale, thus involving a great part of the world's population. On 11 March 2020, the World Health Organization communicated that the levels of infection from Sars-CoVid19 had reached such a level as to consist in a pandemic. See WORD HEALTH ORGANIZATION (WHO), *Director-General's opening remarks at the media briefing on COVID-19*, 11 March 2020, in *www.who.int*.

[3] This heated debate may be found amongst scholars, too. See M.L. LO GIACCO, *In Italy the Freedom of Worship is in Quarantine, too*, in P. CONSORTI (ed.), *Law, Religion and Covid-19 Emergency*, DiReSom Papers, 2020, pp. 37-44, F. BALSAMO, *The loyal*

Considering how every state has intervened to regulate and find the difficult balance between the right to (and protection of) health on the one hand and freedom of religion and worship on the other hand, it is possible to identify models of relationships which, to a certain extent, retrace and relive each nation's history of relationships with religious denominations[4].

After the first, strictly emergency-related phase when states imposed prohibitions and limitations often unilaterally[5], in the subsequent modalities of agreement and dialogue with the representatives of religious denominations it is easy to find the peculiar notion of secularism characterizing, with all its unprecedented nuances, every single nation.

On the other hand, virtually in all Europe religious denominations have taken charge of a role of mediation and facilitation of the respect for the limitations prescribed by state authorities. There have certainly been different approaches, sometimes in open contrast with state limitations[6], but most religious denominations have endorsed such measures,

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collaboration between State and religions at the testing bench of the Covid-19 pandemic. A perspective from Italy, in P. CONSORTI (ed.), *Law, Religion and Covid-19 Emergency*, DiReSom Papers, 2020, pp. 47-55; V. PACILLO, *La sospensione del diritto di libertà religiosa nel tempo della pandemia*, in *Olir.it*, 16 March 2020; ID., *La libertà di culto al tempo del coronavirus: una risposta alle critiche*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 8, 2020, pp. 85-94.

[4] Suffice it to think to the French case, where the total and non-derogable prohibition to gather in places of worship has been regarded as disproportionate with regard to the aim to protect human health. After the total and *de auctoritate* closure of places of worship by virtue of the Decree of 11 May 2020, the administrative court defined this measure a serious violation of the freedom to manifest a religious belief, being religious freedom completely sacrificed in the balance of the interests at stake. For a comment, see A. LICASTRO, *La Messe est servie. Un segnale forte dal Consiglio di Stato francese in materia di tutela della libertà religiosa*, in *ConsultaOnline.it*, II, 2020, pp. 312-323; M.C. IVALDI, *La via francese alla limitazione delle libertà e il dialogo con le religioni al tempo del coronavirus*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 14, 2020, pp. 70-121.

[5] In this phase the need to protect public health also prevailed on that to find a dialogue. On this issue, see V. PACILLO, *op. cit.*

[6] Only the most integralist or traditionalist segments of religious denominations have had a different approach. See J.L. SCHLEGEL, *La religion au temps du corona-*

inviting the faithful to abide by any limitations prescribed by law and also anticipating the state restrictions[7], by adopting self-limiting measures even before the intervention of state's emergency legislation, which confirms the goodness of the trend followed without being forced[8].

On closer inspection, Covid-19 pandemic is not challenging only the health or economic system, but also the legal system itself and the lawmakers who – in the face of the adoption of decisions which were unthinkable until a few months ago – are forced to rethink of the set-up itself of Western constitutionalism and of the possibility to envisage limitations (and to do legitimately so) on freedoms regarded undisputedly as universally recognized and thus untouchable.

In the range of the adopted solutions and in the analysis of possible balances, the Italian example is very interesting both for the modalities of adoption of emergency-related measures and for its contents in some ways unprecedented. In the country of the so-called inclusive, «Italian-style» secularism, in the definition of what belongs to Caesar and what belongs to God in the time of a pandemic Italy has found itself to deal with religious denominations in order to find solutions sometimes hasty and other times definitely satisfactory.

virus, in *Esprit*, 5, 2020, p. 70, at *https://esprit.presse.fr/article/jean-louis-schlegel/la-religion-au-temps-du-coronavirus-42714*.

[7] Suffice it to think to the Catholic Church. When the pontiff decided the suspension of the celebrations *coram populo* in March, he anticipated in fact the restrictions that the State (in France as well as in Spain and Portugal) later introduced.

[8] In a press release of 5 March 2020, the Italian Bishop's Conference declared to «share the situation of uncomfortableness and sufferance of the country» and to «adopt initiatives in a co-responsible way to contain the spread of the virus», thus supporting the decision taken first by the Diocese of Milan and the Dioceses of Lumbardy and then by other Italian Dioceses to suspend Sunday celebrations, weekdays Masses *coram populo* and more generally all types of celebration.

2. The Italian choices in the emergency regulation: exception or violation of the agreement-based bilateral principle?

Everybody's mind is imprinted with dates which in a way or another have marked permanently their life, and it does not seem exaggerated to state that in Italy the date of 8 March 2020 should be added to them.

It was on that date that the first act – in the form of a Decree of the President of the Council of Ministers (DPCM) – impacting significantly on some of our freedoms, including religious freedom, was adopted in order to face the health emergency[9]. Since that day and for a few months all organized manifestations as well as events in a public or private place, «including those having a cultural, recreational, sports, *religious* and trade fair character, even in enclosed spaces open to the public» were suspended. Starting from that day and still nowadays the opening of places of worship has been subjected to the adoption of such organization-related measures as to avoid big gatherings of people, taking into account the dimensions and characteristics of such places, and

[9] The DPCM of 8 March was not the first and only measure adopted by the government. See also Law-Decree no. 6 of 23 February 2020 (converted into Law no. 13 of 5 March 2020 with amendments), Law-Decree no. 19 of 25 March 2020 (converted into Law no. 35 of 22 May 2020 with amendments), DPCM of 8 March 2020, 9 March 2020, 1 April 2020, 10 April 2020 and 26 April 2020, by virtue of which the government progressively adopted the measures regarded as necessary and urgent in order to contain and manage the Covid-19-related epidemiological emergency. DPCM of 8 March 2020 expressly prescribed: «g) all organized manifestations as well as events in a public or private place, including those having a cultural, recreational, sports, religious and trade fair character, even in enclosed spaces open to the public, like for example big events, cinemas, theatres, pubs, dance schools, amusement arcades, betting sites and bingo halls, discos and similar, are suspended; in the abovementioned places all activities are suspended» (Art. 1). Further, «i) the opening of places of worship is subjected to the adoption of such organization-related measures as to avoid big gatherings of people, taking into account the dimensions and characteristics of such places, and to guarantee that attending people may respect social distancing of at least one meter between each other according to Attachment 1, letter d). All civil and religious ceremonies, including funerals, are suspended» (Art. 1). DPCM of 9 March 2020 (extending the rules prescribed by DPCM of 8 March 2020 to the entire national territory) further stipulated that «all forms of gatherings of people in public places or places open to public is prohibited on the entire national territory» (Art. 1 § 2).

to guarantee that attending people may respect social distancing of at least one meter between each other.

The emergency rules further prescribed the suspension of civil and religious ceremonies, «including funerals» – a measure which, albeit perhaps proportionate to the seriousness of the health situation, has left deep wounds in people who, in those days, lost a dear one and could neither render a final salute nor provide for a burial consistent with their religion's rules[10].

The measures adopted to counteract the pandemic have been much hotly debated, and criticism has been raised inter alia with regard to the strict limitations imposed not so much on religious freedom as such, as on freedom of worship, especially because, in the first phase of the emergency, the government adopted them in quite an autonomous way, without any sort of involvement by religious authorities.

The Central Office for Religious Affairs (*Direzione Centrale degli Affari dei Culti*) intervened in the interpretation of the DPCM and subsequent Law-Decrees and clarified, given the uncertainty of the moment, that «no closure of places of worship has been prescribed except in the case of a different decision by the religious authorities»; that the liturgical celebrations are «not forbidden *per se*, but they may be still performed without the faithful's participation, in order to avoid gatherings which may become possible occasions of contagion»[11].

[10] For a first appraisal, see A. GIANFREDA, *Tra cielo e terra. Libertà religiosa, riti funebri e spazi cimiteriali*, Tricase, 2020.

[11] «Liturgical celebrations without the faithful's participation, limited only to the celebrant and acolytes necessary for the celebration, are not included in the normative prohibition, because they are activities involving a small number of people. By respecting social distancing and taking the necessary precautions, they do not result in large gatherings or situations of possible infection which may justify a normative intervention prescribing limitations». The document specifies that «similar considerations may apply to marriages, which are not prohibited *per se*» since the rule prohibits public ceremonies – civil and religious – only in order to avoid gatherings that may be an occasion of viral infection. Where the rite is performed only at the presence of the celebrant, the spouses and the witnesses – and social distancing amongst the participants is respected – «it is not to be included in the prohibition prescribed by the measures to contain the current epidemiological spread of Covid-19».

These rules have deeply changed the modalities of religious manifestation for all believers[12], although the government's measures to contain the pandemic have been immediately complied with by religious denominations, groups and communities on the territory[13].

The Catholic Church first of all[14], but also the Union of the Methodist and Waldensian Churches (*Tavola Valdese*), the Orthodox Church,

[12] Many religious denominations have resorted to participation *via streaming* by their own faithful, so that the pandemic has affected not only the right to religious freedom but also the liturgical and sacramental aspects of religious denominations, shifting the participation in the rites to the virtual reality. Social platforms have provided for moments of aggregation, for a long a time and in periods liturgically rich of meaning for all religious denominations (Jewish Carnival, Christian Easter, *Id al-Fitr*, that is, the celebration ending the Ramadan for Muslims).

[13] See Law-Decree no. 6 of 23 February 2020 (converted into Law no. 13 of 5 March 2020 with amendments), Law-Decree no. 19 of 25 March 2020 (converted into Law no. 35 of 22 May 2020 with amendments), DPCM of 8 March 2020, 9 March 2020, 1 April 2020, 10 April 2020 and 26 April 2020. Here the heated debated developed amongst scholars concerning the legitimacy of the limitations imposed by the measures concerned, especially with regard to the manifestation of worship, will not be dealt with. On the main points of this debate as well as on the different positions emerged therefrom, see M.L. LO GIACCO, *In Italia è in quarantena anche la libertà di culto*, in *Diresom.net*, 12 March 2020; V. PACILLO, *op. cit.*; A. GIANFREDA, *Libertà religiosa e culto dei defunti nell'epoca del Coronavirus*, in *Olir.it*, 17 March 2020; A. FERRARI, *Covid 19 e libertà religiosa*, in *Settimananews.it*, 6 April 2020; N. COLAIANNI, *La libertà di culto al tempo del coronavirus*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 7, 2020, pp. 25-40; A. FUCCILLO, M. ABU SALEM, L. DECIMO, *Fede interdetta? L'esercizio della libertà religiosa collettiva durante l'emergenza COVID-19: attualità e prospettive*, in *Calumet. Intercultural law and humanities review*, 10, 2020, pp. 87-117.

[14] In this sense see the ITALIAN BISHOPS' CONFERENCE, *Una Chiesa di terra e di cielo*, 12 March 2020: «It is with this look of trust, hope and charity that we aim to face this season. Sharing the limitations to which each citizen is subject is part of it. Everyone, in particular, is asked to pay the utmost attention, because any carelessness on his/her part may in observing the health measures may endanger other people. The decision to close the churches may be an expression of this responsibility. This is not because the State is imposing this on us, but for a sense of belonging to the human family, exposed to a virus whose nature or spread is still unknown. The ministers celebrate every day for the People, live the Eucharistic adoration with a greater addition of time and prayer. While abiding by the health measures, they get closer to their brothers and sisters, especially the neediest ones. We know we can rely on a continuous prayer for

the Union of the Italian Jewish Communities, numerous Muslim communities, the Italian Buddhist Union and many others, have immediately complied with these rules with a great sense of responsibility, sharing the preoccupations with the protection of public health, avoiding polemics in most cases[15], and showing the readiness also on the part of religious denominations, in such a difficult moment and without abdicating their mission, to do their own part by accepting the rules progressively imposed.

These were painful decisions also because of the temporal coincidence with Easter rites for Catholics, with Pesach for Jews, whereas the renunciation of collective celebrations marking the end of Ramadan was equally tormented for Muslims.

Beyond the aspects related to liturgy and law of religions concerning them "from within", it is interesting to note how, from the legal point of view, the deepest criticism was raised in particular with regard to the first phase when, according to some scholars, the balance between the necessity to protect public health and that to guarantee the faithful's fundamental rights resulted in the complete prevailing of the former also to the detriment of constitutional norms.

Since the Italian legal system is characterized by the so-called agreement-based bilateral principle in the regulation of the relationships with religious denomination (consisting in the concordat with regard to the Catholic Church), the decisions adopted *inaudita altera parte* might have changed «the legally binding concordatarian regime in *de facto* jurisdictionalism»[16], at least in the first phase of the pandemic.

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the Country from monasteries and religious communities. With this spirit, we are living the days which are ahead: those up to 25 March (*end of the currently binding decree*), [and] the following ones, when the former decree remains in force *(until 3 April)*».

[15] As regards the sustainability from the Canon Law perspective of the decision to suspend public celebrations, see G. DALLA TORRE, *Gli ordini dati dallo Stato e gli ordini interni della Chiesa*, in *Avvenire*, 22 March 2020.

[16] See Vincenzo Pacillo, who holds that the Constitution was breached in respect of the Catholic Church insofar as the choice to suspend the celebrations did not receive «an explicit backing by the Holy See, or better from the joint commission (*commissione paritetica*) which – under Art. 14 of Villa Madama Agreement – should intervene every time difficulty of interpretation of the agreement-based norms arise. The failure to convene the committee thus starts a constitutional practice: when those who can decide on

These measures – also at the level of scholarly debate – have challenged from the very beginning not only the individual and collective right to religious freedom guarantee by Art. 19 const. and its declinations, but also Arts. 7 and 8 regulating the relationships between the State and religious denominations.

The polarized debate – on this and many other aspects – has been characterized by the contrast between those who deemed this way to act as a violation of the agreement-based bilateral model envisaged by the Constitution (which should have been respected also in this emergency situation), and those who regarded the resort to unilateral norms as legitimate in the context of the current situation endangering the right to life and to health[17]. In addition to this opposition, another equally interesting debate among scholars of constitutional law has concerned the sources of law of emergency-related measures[18].

In this perspective, the opinion of those defining such measures, formally administrative, as substantively sources of primary law, may be certainly endorsed[19]. This view is confirmed by the simply remark that all of their contents are aimed at derogating from constitutional and statutory norms.

The prolongation in time of the limitations has nevertheless raised legitimate concerns about the fairness of the balance which was being

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the state of exception think they can suspend the concordatarian regulation, they will do so *inaudita altera parte*, thus turning the concordatarian regime into one of *de facto* jurisdictionalism. It thus belongs to the State, under Art. 7 § 1 const., to decide how, how long and under what conditions the Church's freedom may be restricted, regardless of the fact that the other party agrees on such restrictions» (V. PACILLO, *op. cit.*).

[17] See N. COLAIANNI, *op. cit.*, p. 32.

[18] For a general treatment of this issue, M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, in *Rivista AIC*, 2, 2020, pp. 109-141. On the complex interactions between the different normative levels – national and regional – see F. RUGGIERO, A. BARTOLINI, *Sull'uso (e abuso) delle ordinanze emergenziali regionali*, in *Giustizia Insieme*, 23 aprile 2020. Specifically on religious freedom, see P. CONSORTI, *La libertà religiosa travolta dall'emergenza*, in *Forum di Quaderni Costituzionali*, 2, 2020, pp. 369-388.

[19] See Francesco Alicino, who grounds this opinion on «their tendency to derogate from constitutional and statutory norms». F. ALICINO, *Costituzione e religione in Italia al tempo della pandemia*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 19, 2020, p. 6.

struck between the rights to health and to religious freedom of the citizens-faithful, and it has led the Italian Bishops' Conference (vehemently) as well as the representatives of other religious denominations to claim, albeit with the necessary caution, the resumption of collective worship[20]. A dialogue has thus started, which had been completely lacking in the first phase, characterized by the State's imposition of limitations without any involvement of religious denominations.

Following this dialogue, on 7 May 2020 a *Protocol concerning the gradual resumption of liturgical celebrations with the people* was issued by the Ministry of Interior Affairs (Office for civil freedoms and immigration), in application of the measures of containment and management of Covid-19-related epidemiological emergency prescribed by DPCM of 26 April 2020. Both parties took part in drafting the text, which is thus the fruit of the joint effort of the Ministry of Interior Affairs and the Italian Bishops' Conference, and which was signed by President of the Council of Ministers Giuseppe Conte, the Minister of Interior Affairs Luciana Lamorgese as well as by the President of the Italian Bishops' Conference Cardinal Gualtiero Bassetti.

This is undoubtedly a peculiar act which may make the disenchanted think of a sort of «health jurisdictionalism»[21] with regard to its content and above all to the intertwining of norms for the protection of public health with specifically liturgical aspects, such as the modalities of the Eucharist as well as those of the administration of other sacraments, like baptism, marriage and funeral service.

If what has just been described has effectively redesigned (and in a negative way) the system of public worship in Italy with regard to the Catholic majority, in this "phase 2" this potentially destabilizing "precedent" may in exchange achieve (albeit partial) agreements with reli-

[20] On the position of the ITALIAN BISHOPS' CONFERENCE, see C. MELZI D'ERIL, G.E. VIGEVANI, *Messe ancora senza fedeli: perché la reazione della Cei è eccessiva. La Chiesa «esige» di poter riprendere la sua azione pastorale ma il rischio di contagio è ancora troppo elevato*, in *Il Sole – 24 Ore*, 27 April 2020. Criticism has been raised also by A. FERRARI, *Cei, un'occasione mancata*, in *SettimanaNews.it*, 29 April 2020.

[21] See A. TIRA, *Libertà di culto ed emergenza sanitaria: il protocollo del 7 maggio 2020 concordato tra Ministero dell'Interno e Conferenza Episcopale Italiana*, in *Giustizia insieme*, 16 May 2020.

gious denominations not regulating their relationship with the state by virtue of a bilateral agreement *ex* Art. 8 const., which would stop them from being still subject to the so-called *Law on admitted cults*.

3. The opportunities opened up by the protocols with the religious denominations

In Italy, «the religious denominations lacking a bilateral agreement with the State do not exist»[22], as it is provocatively written in authoritative literature. However, this is evident.

They do not exist because, without the agreement set out in Art. 8, the religious rights – especially in their collective dimension – which should be granted to *everyone* remain in fact partially precluded or difficult to enjoy.

We have seen a striking exception to this during the health emergency caused by the pandemic.

A few days after the signing of the protocol with the Italian Bishops' Conference, the conditions for the safe resumption of the participation in collective rites have been established also for the other denominations (with or without an agreement) through protocols concluded between the Central Office for Religious Affairs and the representatives of many religious denominations[23].

News of the new protocols pertain to a new phase of reorganization of the legal subsystem now in force concerning the health emergency, a subsystem which, since last February, has been stratifying with not always harmonic results[24].

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[22] V. TOZZI, *Le confessioni prive di intesa non esistono*, in *Stato, Chiese e pluralismo confessionale*, January 2011.

[23] While the denominations with a bilateral agreement (Jews, Waldensians, Buddhists…) resorted to the same interlocutors and representatives they had identified by themselves, in the case of Islam the age-old issue of representation was solved by identifying as interlocutors the presidents of the Muslim associations or communities (including the Great Mosque of Rome, UCOII, COREIS).

[24] A. TIRA, *Normativa emergenziale ed esercizio pubblico del culto. Dai protocolli con le confessioni diverse dalla cattolica alla legge 22 maggio 2020, n. 35*, in *Giustizia insieme*, 8 June 2020.

This state of sources resembles a «*regulatory matryoshka*, in which the higher-ranking measures have been somewhat shaped on the measures of different rank (the protocols)»[25], which had come to light prior to or during the development of the new regulations and fill with concrete content the higher-ranking provisions.

The pandemic has given new meanings to the principle of collaboration between the State and the religious denominations.

The path chosen by the Ministry of Interior Affairs to regulate the resumption of public worship of religious denominations other than the Catholic one was not to adopt a single document applicable to everyone, but a series of protocols concluded with the representatives of one or more religious denominations[26].

As written in the short preamble – the same for everyone –

> the need to adopt measures to contain the epidemiological emergency caused by SARS-CoV-2 makes it necessary to draft a protocol with the religious denominations. The protocol, while complying with the right to religious freedom, does not depend on the existence of bilateral agreements, and balances the exercise of religious freedom with the need to contain the current epidemic.

The reference to the agreements with the State pursuant to Art. 8 § 3 const. highlights that the main point of the documents is one aspect of the exercise of religious freedom that is not the valorization of the specificities of the denominations. In fact, all religious denominations that have expressed an interest in the protocols are guaranteed the exercise of one of the rights provided for by Art. 19 const. (i.e., worship in asso-

[25] A. TIRA, *ult. op. cit.*

[26] The six protocols of 15 May were entered into with, respectively, the representatives of the Jewish Communities; the Church of Jesus Christ of Latter-Day Saints; the Islamic Communities; the Hindu, Buddhist, Baha'i and Sikh denominations; the Protestant, Evangelical and Anglican Churches; and the Orthodox Communities. They were joined by a seventh protocol concerning the Christian Congregation of Jehovah's Witnesses, which appears to have been drafted autonomously by the Congregation and then submitted to the Ministry for approval, following a procedure similar to the one followed by the Italian Bishops' Conference for the Catholic Church. For an in-depth examination of the protocols, see A. TIRA, *ult. op. cit.*

ciation with others) in the current conditions of emergency and, therefore, according to a rigorous balance with other constitutional rights[27].

What the protocols emphasize is that even religious denominations cannot act – even if it is for a fundamental freedom such as religious freedom – in a way that is potentially detrimental to other constitutionally protected interests or outside the scope of the procedures required for a reasonable balance of social needs of which the State is the guarantor.

It is worth discussing the government's decision to proceed through the identification of individual or small groups of interlocutors. This is an intermediate solution between a single legislative act (which would have had the merit of guaranteeing full equality of treatment for all religious denominations, including those not involved in the debate, but perhaps also the flaw of sacrificing at the outset the albeit limited specificities that emerge from the texts) and the conclusion of protocols with individual interlocutors (which, conversely, would perhaps have led to more "personalized" contents, but at the cost of greater practical difficulties). A «criterion of 'religious familiarity' has prevailed, whereby similar needs have been grouped together as much as possible», in the view of «a need for practicality and common sense»[28]. The protocol signed by the Jehovah's Witnesses at a later date shows in any case that this is an open system, to which single religious denominations that have not yet done so can access rather quickly and with predictable results.

The protocols are certainly part of a provisional system which, in the case of denominations without an agreement, has the merit of solving the age-old issue of *representation* pursuant to Art. 8 § 3, succeeding in

[27] Art. 32 const., which treats health not only as a «fundamental right of the individual» but also as an «interest of the community», as well as the fundamental principle enshrined in Art. 2, according to which «The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed», and at the same time requires from both individuals and groups that «the fundamental duties of political, economic and social solidarity be fulfilled».

[28] P. Consorti in L.M. GUZZO, *Riprendono anche i riti non cattolici. Per la prima volta accordi con islamici e confessioni senza intesa Intervista al Prof. Pierluigi Consorti*, in *Diresom.net*, 16 May 2020, pp. 3-4.

identifying valid interlocutors also for the Islamic communities (albeit for a measure that has very limited scope).

Remaining in the path of the same constitutional provision, it is worth noting how the preparation of the protocols with denominations without an agreement (or a part of them) has shown once again the tendency to adopt a standard text (at least as far as the denominations other than the Catholic one are concerned), to which the religious parties directly concerned have made small variations, in agreement with the Ministry, to adapt them to their respective specificities. In doing so, it echoes the all-Italian tendency to make *carbon-copy agreements*, entered into by the religious denominations that are ready to renounce their own prerogatives and characteristics in order to reach an agreement with the State and escape from the «anonymous indistinct mass»[29].

Furthermore, and in particular (but not only) with regard to places of worship, it is evident that, for those denominations that have not reached an agreement with the State, enjoying the rights of religious freedom guaranteed by the Constitution is certainly more difficult. The same risk could have occurred in this case: the denominations that do not sign the protocols would certainly not be denied the possibility for their believers to participate in collective rites but would at least find more difficulties in regulating and agreeing on the terms under which to do it.

From a systematic point of view, we should ask ourselves whether and in what way the unprecedented use of protocols has changed the type of collaboration between the State and religious denominations envisioned by the Constitution.

The academic literature is considering the issue of which type of collaboration between the State and the denominations exists after the use of such instrument[30].

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[29] See G. PEYROT, *Significato e portata delle intese*, in C. MIRABELLI (ed.), *Le intese tra Stato e confessioni religiose. Problemi e prospettive*, Milan, 1978, p. 50.

[30] According to some scholars, several aspects suggest that the protocols are alien to the law on inter-governmental relations between the Republic and the religious denominations set out in Art. 7 § 2 and Art. 8 § 3 const., whose purpose is to regulate disposable interests, hence beyond the spheres in which each of the parties exercises its sover-

Formally, they are protocols of the Ministry of Interior Affairs which, even if signed by religious representatives, are not based on higher-ranking bilateral framework texts and, above all, they are unrelated to the procedures of co-management of the political direction of the Government and Parliament that characterize the agreements.

What is evident is that the protocols concern matters that are not subject to negotiation. There is no constitutional duty to negotiate bilaterally their content because the primary interest to be protected is the individual and collective health, with regard to which the State maintains the power to intervene (as shown in the case of the protocol with the Italian Bishops' Conference) by re-qualifying religious conducts as civil-law facts, thus also considering the internal conducts of religious denominations in the same way as any other fact of social and health relevance.

Whatever the most formally coherent solution may be, on a substantive level the solutions prepared with the religious denominations show the interest of the State in cooperating with them, in order to achieve a more effective balance between the needs of preventive healthcare and

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eign powers in an exclusive manner. See V. PACCILLO, *La sospensione del diritto di libertà religiosa nel tempo della pandemia*, in Olir.it, 16 March 2020, and ID., *La libertà di culto al tempo del coronavirus: una risposta alle critiche*, in *Stato, Chiese e pluralismo confessionale*, 8, 2020. Other scholars highlight how, albeit in a formally unprecedented way, the protocols have in essence respected the principle of bilaterality: a new way to apply the constitutional principles that govern the relations between the State and the religious denominations, even in the simplified and sector-specific forms required by the health emergency, which are ultimately justifiable in view of the provisional nature of the measures. See N. COLAIANNI, *La libertà di culto al tempo del coronavirus*, in *Stato, Chiese e pluralismo confessionale*, 7, 2020, p. 32. A third opinion sees in the ministerial protocols the signs, although only at the beginning, of experiences of religious dialogue with the denominations which, by overcoming the structural rigidity of the traditional methods of the agreement-based bilaterality, could suggest future developments. Thus, «The comparison between century-old systems (agreement-based bilaterality) and contemporary experiences (religious dialogue) requires creativity and new energies». P. CONSORTI, *Esercizi di laicità: dalla bilateralità pattizia al dialogo interreligioso (a causa del Covid-19)*, 7 May 2020, available at *https://people.unipi.it/pierluigi_consorti/esercizi-di-laicita-dalla-bilateralita-pattizia-al-dialogo-interreligioso-a-causa-del-covid-19/*, accessed 21 December 2020.

the needs of religion, which would otherwise remain unsatisfied and potentially in conflict with the former.

There is therefore the problem of assessing whether the pandemic has caused in Italy a derogation or a violation of the agreement-based bilateral principle[31].

The answer is complex and implies a rethinking of the very meaning of the entire system in the light of an unprecedented situation such as the one in which we find ourselves.

As is well known, Art. 117 § 1 const. forces state and regional legislative power to comply with the Constitution and the constraints deriving from EU law and international obligations. The reference, then, is not only to Art. 7 (or 8) const. but also to Art. 9 ECHR, according to which the protection of health is one of the grounds prescribed by law that allow member countries to limit the freedom of expression, assembly, association, movement, and manifestation of a belief or religion. The key principles, then, are not only those concerning the agreement-based bilateralism, but also the precautionary principle[32] and the principle of necessity.

That said, we should also point out that the use of unilateral sources only formally signed by the religious denominations does not automatically mean a reduction in the space for participation and collaboration of religiously classified collective entities. On the contrary, following "phase 1" in which, because of the emergency, the executive branch centralized all powers, phase 2 has inaugurated an era of dialogue with the religious denominations, including those without an agreement. This event has actually started an intense dialogue with the representatives of religious communities, regardless of the previous signing of any agreement pursuant to Art. 8 § 3.

[31] According to Francesco Alicino, it has not: «The provision is applicable only to the Pacts of 1929 and not to all the bilateral agreements of the republican period. This is why that provision cannot be used for the provisions set out in the Agreements of 1984 and the related ratification and implementation law no. 121 of 1985». See F. ALICINO, *Costituzione e religione in Italia al tempo della pandemia*, in *Stato, chiese e pluralismo confessionale*, 19/2020, p. 16.

[32] According to which protective measures may be taken without having to wait until the actual existence and seriousness of such risks have been fully proved.

This formal dialogue between the government bodies (namely the President of the Council of Ministers and the Ministry of Interior Affairs) and the representatives of the religious denominations does not seem to have reached its end but seems to have instead given a new impetus to the Ministry of Interior Affairs which, on 20 December 2020, appointed the new members of the "Council for relations with Italian Islam". Far from being close to a stable and lasting solution with one of the numerically most important denominations in Italy, this is nevertheless a signal, albeit a small one, which should be emphasized and which, we hope, will give way to a new era for the agreement-based bilateral principle.

4. From danger to opportunity: initial considerations

Religion teaches, threatens, inspires, comforts, provokes, guides our habits, or calls us to get our lives together[33]. As the Iranian sociologist and reformer Ali Aharyati said: «Religion is an extraordinary phenomenon that has contradictory consequences for people's lives. It can destroy or revitalize, numb, or awaken, enslave or emancipate, teach docility or revolt»[34].

It should come as no surprise that in the last fifty years religions have regained the public prominence that they had long lost[35]. The revival of religious affiliation and its importance in the public debate,

[33] As said by Craig Calhoum, who also points out how «The relevance of religion still amazes the secular thinkers who clearly felt it was destined to disappear under the blows of the Enlightenment and modernity». C. CALHOUM, *I molti poteri della religione*, in E. MANDIETA, J. VAN ANTWERPEN (ed.), *Religioni e spazio pubblico. Un dialogo tra J. Habermas, C. Taylor, J. Butler e C. West*, cit., p. 112.

[34] Quoted in L. HAZLETON, *After the Prophet*, New York, 2009, Kindle edition.

[35] Cardia points out that this phenomenon is not only attributable to a process of secularization that is physiological in wealthy societies «but, if we look at it as a whole, we can see that the secular-separatist perspective of the Enlightenment has constantly pursued the objective of depriving man of religion, rendering religious doctrines irrelevant, and erasing any significance of religious legal systems in the world of law itself». C. CARDIA, *Democrazia, multiculturalismo, diritti religiosi*, in *Daimon*, 7/2007, pp. 7-8.

certainly due to other multiple and heterogeneous factors[36], ultimately manifests itself in the need to belong to a community (κοινωνία) within which individuals feel fulfilled and understood, and which, above all, they trust. The advent of religions that are substantially new to Europe has led not only to a revolution in the confessional (now multi-confessional) order of the West, but also to the exponential multiplication of these "communities within communities" that are increasingly making claims and demanding rights that they sometimes formalize and make public, qualifying themselves as interlocutors of the institutions, while others apply and impose internally certain behaviors, which remain latent at the public level but are, in fact, fully binding on their members.

If this social order is often lived «with difficulty» by the institutions, the pandemic has shown the other side of the coin: religious denominations speak, communicate, teach, invite, indicate, forbid. And they do so with a strength and persuasion towards their own followers that probably no secular institution can have. The role played by the religious denominations, both during the initial phase of the health emergency and afterwards, has been far from secondary and is far from being over.

The religious rights have proved once again their ability to adapt and their elasticity that often remain in the background or concealed by the idea of the immutability of divine rights[37].

Moreover – and more importantly – the collaboration between State and religious denominations has led to a widespread circulation of the hygienic-sanitary indications and to a prevailing attitude of loyal col-

[36] Among these, the multicultural structure of society obviously stands out for its importance and relevance: «The shock is very intense when Western society and European societies in particular are for the first time in their history hit by the phenomenon of multiculturalism and have to deal with people who see religion as a reason to live and to be socially and publicly engaged. Multiculturalism shatters right down to the last piece the ideological mosaic built up by nineteenth-century separatism». C. CARDIA, *ult. op. cit.*, p. 10.

[37] This is true both for the rites, reorganized in such a way as not to expose the population to the risk of contagion (especially thanks to YouTube and the streaming of services), and for the exceptions to the precepts (for instance, Sunday for Christians, who have been invited to resort to the so-called *spiritual communion*).

laboration, which has led to the voluntary closure of places of worship or to invitations to comply fully with the health regulations, even at the cost of modifying the liturgy. If this is not surprising for the Catholic Church or for the Jewish communities (historically present in Italy and accustomed to an institutional collaboration with the State), we should point out that even Italian Islam has taken steps to reiterate and apply what has been established by the state authorities, giving indications to its members about the procedures to be followed to protect the health of both individuals and the community.

Islamic communities have autonomously decided the temporary closure of the places used for communal prayer and the suspension of all activities (daily and weekly prayers, as well as conferences, lectures, Koranic school).

Islam, too, has indicated alternative modes to public prayers, replacing *jumaat* (the Friday noon prayer) with the prayer at home with family members[38]. Like in Catholic churches, health and hygiene instructions were also posted and given for health protection (including the prohibition of shaking hands for the greeting, which also occurred in churches when the handshake during the liturgy was removed from the service) and the sanitation of places of worship was arranged at the end of each service.

Since the collective aspect of belonging to a community has proved to be an important channel for conveying messages, Islam has acted as a bridge between the demands and needs arising from the pandemic and the people (often immigrants from different cultures and with significant cultural and linguistic barriers) who, most likely, would not have received any guidance outside of their religious group.

It should be noted that before embarking on any kind of dialogue with state institutions, Muslim communities and organizations present on the national territory in various capacities had already forbidden

[38] As pointed out by Miriam Abu Salem: «Moreover, in Islam it is not only the practical/external fulfillment of religious prescriptions that is of central importance, but rather the *nyya* – the actual intention – the absence of which invalidates the actions performed» (in A. FUCCILLO, M. ABU SALEM, L. DECIMO, *Fede interdetta? L'esercizio della libertà religiosa collettiva durante l'emergenza COVID-19: attualità e prospettive*, in *Calumet*, online journal, April 2020).

their members the communal celebration of the end of Ramadan, inviting them to replace it with a domestic celebration.

Another significant example in this period is the attempt to solve the issues related to the burial of the deceased Muslims, which has become very problematic in recent months[39]. Funerary freedom has become relevant in this situation for two aspects: the first concerns the liturgical-ritual adaptation for which it was necessary to identify, within the funeral rite, what was allowed and what was not. The second aspect is instead connected to the places of burial, in view of the impossibility of repatriating the bodies to their countries of origin.

The various documents issued after the suspension of funeral ceremonies and the subsequent ban on repatriation introduced a number of adjustments for both aspects.

The communities throughout the country have taken on the role of *pontifex* (in the epistemological sense of "builder of bridges") between their members and the state requests resulting from the health emergency[40]. If this was to be expected from the Catholic Church, which led the way, and from all other denominations with an agreement, it certainly was not from Islam. Apart from the interesting aspects concerning the content[41], we should point out that the Italian Islamic authorities have also spontaneously instructed their believers, prior to the beginning of the dialogue with government institutions. This spontaneous, grassroots and therefore widespread participation did not even need formal chan-

[39] The Islamic experience in relation to liturgical-ritual adaptation but also to burial and the places used for it is the most significant and dense of contents, in particular with regard to cemeteries. Suffice it to say that while Catholics, Jews, Waldensians, and all other denominations have their own cemetery spaces, this is not the case for Muslims. The reason is also due to the practice of repatriation of the body that has significantly decreased the demand (including political-institutional demand in terms of local administration) making the issue suddenly "blow up" when repatriation became no longer possible.

[40] UCOII (Community Circular 1/2020, followed by a special Guide on funerals), the Great Mosque of Rome (*Guidelines of the Islamic Cultural Center of Italy on funerals during the CoVid-19 pandemic*, 19 March 2020), COREIS (which translated into Italian the *fatwa* the Islamic Community of Bosnia and Herzegovina on funerals) have acted in this direction.

[41] A. GIANFREDA, *Tra cielo e terra*, cit., pp. 363-365.

nels (such as protocols) but was immediately understood as binding by the believers and only later was it incorporated into the protocols.

The call for compliance – with commitment – and obedience to the health and safety protocols established by Italy concerned all denominations and, perhaps, made it possible to open a new era for the agreement-based bilateral principle which – finally free from the shackles of agreements (as designed and, above all, not applied by the executive power) – took a leap forward for a constructive dialogue filled with results.

Moreover, religious communities (including Islam, which is organized on a communitarian basis and not in a universally recognized hierarchy) have provided interlocutors, acted in a compact but organized manner, outlined behaviors, and delimited by themselves the freedoms of their believers with a self-restraint that, in reality, should not be surprising. It was about pursuing a transversal but common goal (protecting public health):

> religions are not an opponent to the State, but entities capable of encouraging and facilitating the success of measures taken in the collective interest, by activating their own spiritual energies, in addition to the networks of solidarity that are linked to them[42].

In pursuit of this goal, they have also shown their strong potential, not only for the immediate threat of this pandemic but also in the reconstruction of what is now a multiethnic and multicultural society, fragmented and yet (sadly) united by the invisible threat of this pandemic. After all, as John Kennedy said: «When written in Chinese, the word 'crisis' is composed of two characters. One represents danger and the other represents opportunity».

It is up to us to seize it.

[42] P. CONSORTI, *Esercizi di laicità: dalla bilateralità pattizia al dialogo interreligioso (a causa del Covid-19)*, cit.

FREEDOM OF RELIGION: IS A GENERAL LAW MISSING IN ITALY? THE DOCTRINAL DEBATE AROUND A GENERAL LAW AND THE 2019 ASTRID LAW PROPOSAL

Carla Maria Reale

SUMMARY: *1. The constitutional framework of freedom of religion and conscience in Italy. 2. Concordats, agreements and religious organisations: how much space is left for religious freedom? 3. The doctrinal debate around a general law on religious freedom and proposed legislation. 4. An overview of the 2019 Astrid Bill. 5. Some conclusive remarks.*

1. The constitutional framework of freedom of religion and conscience in Italy

The Constitution, written after the collapse of the Fascist regime, adopts a complex approach towards religion. As a matter of fact, some of the arrangements created during the Fascist period are still in force (i.e. the Lateran Treaties between the State and the Catholic Church, Law 1159/1929 on *Admitted cults*), while at the same time new provisions on religious freedom were discussed and approved[1].

Article 7 of the Constitution explicitly refers to the Lateran Treaty, signed between the Catholic Church and the Italian State in 1929. Religious freedom is mentioned and regulated in four articles of the Republican Constitution: article 7, article 8 and articles 19 and 20.

[1] The issue of religious freedom and religious regulation was at the centre of a long and complex debate during the Constitutional Assembly, both in the Commissions and in the plenary sessions. Religion, in fact, represents, for sure, an emblematic battleground for the historical compromise between the political forces right after the end of World War II and the fall of the Fascist regime. On this aspect see: G. LONG, *Alle origini del pluralismo confessionale: il dibattito sulla libertà religiosa nell'età della Costituente*, Bologna, 1990.

While articles 7 and 8 pertain to the relationship between religious confessions and the State, from a more institutional/collective perspective, articles 19[2] and 20 concern freedom of religion as an individual right.

According to article 19 everyone has the right to religious freedom, irrespective of citizenship[3]. This article protects both freedom of religion and from religion. The former is to be interpreted in a broad way: it encompasses the right to propagandise religion publicly, the right to religious cemeteries, the right to have places of worship as well as ritual animal slaughtering[4]. The possible limits to the exercise of these rights are determined in the Constitution and are to be found in the notion of public morality. Thanks to the Constitutional interpretation, article 19 openly became the gateway to recognising and protecting all positions related to matters of conscience and atheistic and agnostic beliefs[5]. This is also the article in which conscientious objection finds its justification inside the Italian legal system[6]. Article 20[7] protects and ensures the

[2] M. RICCA, Art. 19, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds.), *Commentario alla Costituzione*, I, Torino, 2006, p. 433; F. FINOCCHIARO, *Art. 19*, in V. BRANCA (ed.), *Commentario della Costituzione*, Bologna-Roma, 1977, vol. II, p. 262.

[3] It clearly emerges from the Constitutional jurisprudence and scholarship that religious freedom is granted to everyone, and it is not anchored to Italian citizenship. See, for example the Constitutional Court Judgement n. 432/2005.

[4] A. FERRARI, S. FERRARI, *Religion and the Secular State: The Italian Case*, in J. MARTÍNEZ-TORRÓN, W. COLE DURHAM JR. (eds.), *Religion and the Secular State: National Reports*, Madrid, 2015, pp. 445-465.

[5] At the beginning, the Constitutional Court framed atheistic beliefs within the freedom of expression, protected by art. 21 of the Italian Constitution; see, for example Judgement n. 58/1960 where it was stated that the protection of atheism started at the end of religious life ("comincia dove finisce la vita religiosa"). Then with Decision no. 117/1979, the Constitutional Court affirmed that, based on the principle of non-discrimination, the protection of atheistic beliefs could be also found in article 19 ("il nostro ordinamento costituzionale esclude ogni differenziazione di tutela della libera esplicazione sia della fede religiosa sia dell'ateismo, non assumendo rilievo le caratteristiche proprie di quest'ultimo sul piano teorico"). For a theoretical approach on the issue see: P. BELLINI, *Ateismo*, in *Dig. disc. pubbl.*, vol. I, Torino, 1987, pp. 513 ff.

[6] Conscientious objection is allowed, in Italy, by special rules, based on article 19 of the Constitution. Conscientious objection is possible in the field of military service (Law no. 772/1972), abortion (Law no. 194/1978), medically assisted reproduction

right, for religious people, to come together in associations and organisations. This article forbids any discriminatory intervention against religious organisations, providing that they must not suffer from any form of restriction or specific taxation regime. Religious denominations[8], which are modelled through the prism of the relationship between State and Catholic Church, are the most structured and protected form of religious associations. They are regulated by articles 7 and 8 of the Constitution: the former pertains to the Catholic Church, while the latter regulates all other (non-Catholic) religious denominations. Article 7, rooted in the legal history of Italy, opens with the statement of mutual independence and sovereignty of the State and Catholic Church: for this reason, the State cannot interfere with internal church laws and statutes, which are exclusive competence of the ecclesiastical authorities. The principle of religious autonomy is implemented through the method of bilateralism. This principle requires the State to regulate religious matters and, if necessary, specific religious needs and rights, through an agreement (*Intesa*) with the specific religious denomination. The agreement is the result of a process of negotiation between the State's interests and those of the religious denominations. This system was devel-

(Law no. 40/2004) and animal testing (Law no. 413/1993). A. PUGIOTTO, *Obiezione di coscienza nel diritto costituzionale*, in *Digesto delle Discipline pubblicistiche*, vol. X, Torino, 1995, pp. 240 ff.; R. BERTOLINO, *L'obiezione di coscienza*, in *Diritto ecclesiastico*, 1983, pp. 331-32; ID., *L'obiezione di coscienza moderna. Per una fondazione costituzionale del diritto di obiezione*, Torino, 1994. For a critical view on conscientious objection see: C. PICIOCCHI, *Diritto e coscienza: circoscrivere per garantire, in nome del pluralismo*, in *Biolaw Journal. Rivista di BioDiritto*, 1, 2016, pp. 115-130.

To explore new issues surrounding the spread of new religious beliefs in Italy and conscientious objection see: V. TURCHI, *I nuovi volti di Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea*, Napoli, 2010.

[7] F. FINOCCHIARO, *Art. 20*, in V. BRANCA (ed.), *op. cit.*, p. 308.

[8] There is a complete absence of statutory definitions on what a religious denomination is, and the issue became prominent in Italy, especially in the last few decades. Some decisions of the Constitutional Court (See Judgment no. 467/1992) stated the need for an objective base for the definition of religious denominations. On this definition and scholarly debates see: S. FERRARI, *La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)*, in V. PARLATO, G.B. VARNIER (eds.), *Principio pattizio e realtà religiose minoritarie*, Torino, 1995, pp. 19-47; B. RANDAZZO, *Diversi ed eguali. Le confessioni religiose davanti alla legge*, Milano, 2008.

oped on the already existent agreement between the State and the Catholic Church, the so-called *Concordato*, which is explicitly mentioned in article 7. Nowadays, the relationship between the Catholic Church and the State is regulated by the Agreement of Villa Madama[9], which in 1984 replaced the Lateran Concordat (1929), and other minor and more specific agreements[10].

Article 8 opens by affirming freedom of organisation for religious denominations, which implies the right to have their own internal rules to be respected by State authorities, with the limit of the respect for the fundamental principles of the State's legal system. In line with the method of bilateralism, Article 8 provides the instrument of agreements (*intese*) for religious denominations to be recognised and protected by the State. The agreements need to be signed by the President of the Council of Ministers and the representative of the religious denomination. Then, the Parliament needs to approve (*intese*) or ratify (Concordat) them with a law. However, in compliance with the principle of bilateralism, once the law is approved it cannot be amended unilaterally by the State: a new agreement must be found each time. Of course, this system represents a guarantee on the position of the religious denominations before the State, against any possible arbitrary action against their legal status.

To understand the Constitutional experience on religious issues it is not sufficient to rely on the Constitutional provisions only[11], on the contrary, the Constitutional jurisprudence and the comprehensive evolution of the legal system must be taken into account.

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[9] S. FERRARI, *The new concordat between church and state*, in *Italian Politics*, Vol. 1, 1986, pp. 134-145.

[10] These new agreements pertain, as summed up by A. Ferrari and S. Ferrari, to: the regulation of Church entities and property (1984), Catholic religious education in State schools (eight agreements from 1985 to 2004), Church holidays (1985), protection of cultural and religious heritage (three agreements from 1996 to 2005), religious assistance and police force (1999). It must be noted that, unlike the Concordato, all these agreements are subject to the ordinary control of the Constitutional Court (see Judgment no. 1/1977) and must be compatible with the Constitution (not only with the "supreme principles"). See: A. FERRARI, S. FERRARI, *op. cit.*, pp. 437-438.

[11] As expressed by P. FARAGUNA, *Regulating Religion in Italy: Constitution does (not) matter*, in *Journal of Law, Religion and State*, 7, 1, 2019, pp. 31-56.

This broader framework reveals a pluralistic and liberal view of ecclesiastical religious matters. However, for a long time, due to the Constitutional incorporation of the Lateran Pacts, two different approaches to religion co-existed in the Constitutional system.

On the one hand there is a pluralistic view of religion, on the other some provisions incorporate the notion of Catholic religion as the State religion. The latter principle was further reinforced by law no. 1159/1929 on admitted cults, which is however still in force today despite the numerous decisions by the Constitutional Court.

Prominent changes were enacted in the '80's, thanks both to a general process of secularisation of society – which also led to the reform of the Concordat – and to the central role of the Constitutional Court. A major decision was Judgement no. 203 of 1989, which reshaped the Italian approach to secularism. In this decision, on a case concerning the teaching of Catholic religion in public schools, the Court clearly affirmed the secular nature of the Italian State. The Constitutional judges went even further by stating that *laicità* must be considered one of the supreme principles of the Italian constitutional system, therefore becoming one of the fundamental constitutive rights of the Republic. It must be noticed that this notion of secularism does not imply the State's «indifference towards the experience of religions» but a specific State guarantee «that religious freedom will be safeguarded, in a framework of denominational and cultural pluralism»[12]. As scholars have observed, secularism according to the Italian constitutional Court is not «an instrument for fighting the presence of religion in the public square or for fostering the secularisation of the Italian State and civil society»[13]; on the contrary, it is a tool for promoting diversity in the public sphere. *Laicità*, in its dynamic concept, embraces the existence of multiple beliefs all with the same dignity, and it ensures for them equal protection

[12] The translation of this sentence, extracted from Judgement no. 203/1989, was made by the author. Here is the passage in the original language: "il principio di laicità, quale emerge dagli artt. 2, 3, 7, 8, 19 e 20 della Costituzione, implica non indifferenza dello Stato dinanzi alle religioni ma garanzia dello Stato per la salvaguardia della libertà di religione, in regime di pluralismo confessionale e culturale".

[13] A. FERRARI, S. FERRARI, *op. cit.*, p. 432.

in every sphere of social life and «equidistance and impartiality»[14] from the State. Emblematic of this approach is, for example, another decision on the criminal offence of blasphemy, pronounced a few years later. With a clear overruling, the Constitutional Court declared the constitutionality of article 724 of the Criminal Code, by manipulating the text of the Criminal Code. Actually, with this decision the Court explicitly excludes the existence of a State religion, and extends the protection granted by this article to every form of religion and divinity[15].

If the doctrine of the Constitutional courts appears to be embedded in pluralism, the situation is different when looking at the jurisprudence of lower courts as well as the legislative and political framework. At this level, in fact, there is still a prevalence of the mono-confessional view, which negatively affects the principle of *laicità*, and favours religious over non-religious beliefs[16].

In the following paragraph, the Italian religious system in action will be analysed in depth, together with the main critical issues surrounding it. In the last part the proposal on a general law on religious freedom will be considered. The latter is regarded by many scholars as one of the possible ways to cope with the main criticalities of this system.

[14] Secularism was described in these terms in some recent decisions by the Italian Constitutional Court. See Judgements No. 508 of 2000 and No. 52 of 2016.

[15] Amongst the many comments see: M. D'AMICO, *Una nuova figura di reato: la bestemmia contro la "Divinità". Osservazione a C. Cost. 18 ottobre 1995, n. 440*, in *Giurisprudenza costituzionale*, 5, 1995, pp. 3487-3499; L. PASQUALE, *Corte costituzionale e art. 724 c.p.: cronaca di una incostituzionalità annunciata e dichiarata. Osservazione a C. Cost. 18 ottobre 1995, n. 440*, in *Giurisprudenza costituzionale*, 6, 1995, pp. 4542-4554, F. PALAZZO, *La tutela della religione tra eguaglianza e secolarizzazione (a proposito della dichiarazione di incostituzionalità della bestemmia)*, Nota a C. Cost. 18 ottobre 1995, n. 440, in *Cassazione penale*, 1, 1996, pp. 47-57.

[16] Ferrari observes that, due to Italian history, it might be believable that full secularism in Italy it is not possible; he uses the terminology "baptised *laicità*". See A. FERRARI, *De la politique à la technique: laïcité narrative et laïcité du droit. Pour une comparaison France/Italie*, in B. BASDEVANT GAUDEMET, F. JANKOWIAK PEETERS (eds.), *Le droit ecclésiastique en Europe et à ses marges (XVIII-XX siècles)*, Leuven, 2009, pp. 333-345.

2. Concordats, agreements and religious organisations: how much space is left for religious freedom?

The principle of secularism, with its specific constitutional meanings sketched out above, appears to be challenged by the reality of the Italian ecclesiastical system. The latter, in fact, is the result of the complex interaction between constitutional provisions, pre-constitutional law, *Concordato* and agreements (*intese*), in the intricate scenario that characterises the religious phenomenon today.

This system faces the main challenge of finding a correct balance and relationship between liberty and equality for religious denominations, while not neglecting individual freedom of religion. From this point of view the agreement system was aimed at having a common legal framework, still capable of dealing with specific religious needs and enforcing a "custom-made" set of rules and rights[17]. Differentiation, in fact, is compatible with the Constitutional provision, which requires religion to join equal freedom (art. 8, co. 1); what is not compatible with the Constitution is the creation of inequality between individuals based on these differentiations[18].

The system, as it is, can be described as a four-step ladder. The top step is occupied by the Catholic Church, thanks to the Agreement of Villa Madama and other ordinary laws. In a lower step, there are all those denominations which decided, and were allowed, to sign an agreement with the Italian State. Amongst these are groups which have existed in Italy for a long time, and more recent denominations. Their position is described as equivalent (though not equal)[19] to that of the Catholic Church. Some of the rights recognized in these agreements are: religious education in school, moral and spiritual assistance through the presence of religious ministries in the army, jails and hospitals; funding and regional benefits for the construction of places of wor-

[17] This expression is used by S. BERLINGÒ, G. CASUSCELLI, S. DOMIANELLO, *Le fonti e i principi del diritto ecclesiastico*, Torino, 2000.

[18] On this point: S. FERRARI, *Libertà religiosa individuale ed uguaglianza delle comunità religiose nella giurisprudenza della Corte costituzionale*, in *Giurisprudenza Costituzionale*, 1997, pp. 3085.

[19] A. FERRARI, S. FERRARI, *op. cit.*, pp. 441.

ship, the possibility of taking part in the 0.8% (*Otto per mille*) financing system, access to the financing system for non-profit organisations, no taxation on donations and a general tax reduction for religious activities.

As already mentioned, on a lower step there are those denominations with no agreements with the Italian State. Law no. 11159/1929 applies to all religious organisations that do not clash with public order and public morality[20], two requisites that must be assessed by the *Consiglio di Stato* (which is an advisory body to the Italian government on administrative matters). The consequences of the acknowledgment according to Law 1159/1929 are the following: tax reduction for religious activities, the possibility of regional facilities for financing places of worship and, under State control and certain conditions, a mitigated form of religious presence in schools, in the army, in prisons and in hospitals.

The last rung of this ladder is for all those religions whose doctrines and acts of worship are considered to be, in most interpretations, against public order[21]. For these groups the general law on (non-religious) associations applies and for this reason all the main religion-based privileges mentioned above are denied to them. They should not be excluded, however, from accessing public financing for places of worship[22]. What is problematic in this system is the way the instrument

[20] M. TEDESCHI, *La legge sui culti ammessi*, in *Diritto ecclesiastico*, II, 2003, p. 641; F. DI PRIMA, *Le Confessioni religiose "del terzo tipo" nell'arena pubblica nazionale: problemi, dinamiche e tendenze operative*, in *Quaderni di diritto e politica ecclesiastica*, n. 1, aprile 2014, p. 125.

[21] On this point, emblematic are the debate and the jurisdictional saga around the Church of Scientology. The literature on the issue is very broad. To approach the issue, in the first place, the suggestion is to read: G. D'ANGELO, *Nuovi movimenti religiosi tra (pretesa) uniformità di qualificazione e (reale) diversificazione dei relativi profili disciplinari: la Chiesa di Scientology nella più significativa giurisprudenza*, in *Il Diritto ecclesiastico*, 2, 1, 2003, pp. 710-761.

[22] However, regional authorities often create a different treatment for more broadly recognised and institutionalised religions, while at the same time, tax reduction is applied by the competent authorities only to the groups who are organised in the forms prescribed by Law no. 1159/1929. For a first approach on the issue, its legislative aspects and jurisdictional evolution before and after the 2001 Constitutional reform see:

of agreements has been originally regulated, but also how it has developed in recent decades. As far as the original downsides of this system are concerned, two aspects in particular must be considered. First of all, the law requires religious denominations to provide an institutional representative at the national level in order for him/her to be part of the agreement with the State. This requirement proved to be highly problematic for those religions, such as Islam, that are not hierarchically organised and are represented by many different communities, an expression of different positions which might even be in conflict[23]. Secondly, the Government enjoys political discretion in deciding whether to accept the proposal to enter into a negotiation for an agreement with a religious denomination. This process completely lacks any form of regulation, and – as recently stated by the Constitutional Court – the decision of the Government cannot be appealed before any jurisdictional authorities[24]. On the whole, the fact that this decision is above any form of regulation and control opens the door to possible abuses.

A. ROCCELLA, *Gli edifici di culto nella legislazione regionale*, in *Stato, Chiese e pluralismo confessionale*, June 2007, pp. 1-37.

[23] In this volume on the organisation of Islam in the Italian system see F. ALICINO, *Agreements, intese and Beyond*.

[24] Constitutional Court, Judgement no. 52/2016. The decision was widely debated by scholars. For some comments see: N. COLAIANNI, *La decadenza del "metodo della bilateralità" per mano (involontaria) degli infedeli*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (*www.statoechiese.it*), 28, 2016; M. CROCE, *Alla Corte dell'arbitrio: l'atto politico nel sistema delle intese*, in *Giur. cost.*, 2/2016, p. 560 ff.; D. FERRARI, *Libertà nell'intesa e libertà dall'intesa. Osservazioni a margine di due recenti sentenze della Corte costituzionale*, in *Pol. dir.*, 2016, p. 437 ff.; S. LARICCIA, *Un passo indietro sul fronte dei diritti di libertà e di eguaglianza in materia religiosa [?]*, in *Stato, Chiese e pluralismo confessionale*, 20, 2016; S. LEONE, *L'aspettativa di avviare con lo Stato una trattativa finalizzata alla stipula di un'intesa ex art. 8, comma terzo, Cost. non è assistita da* enforcement *giudiziario. Ma il diniego governativo non pregiudica, ad altri fini, la posizione giuridica dell'istante (Corte cost. n. 52/2016)*, in *Fo rumcostituzionale.it*, 1 aprile 2016; P. FLORIS, *Le intese tra conferme e ritocchi della Consulta e prospettive per il futuro*, in *Stato, Chiese e pluralismo confessionale*, 28, 2016; G. MACRÌ, *Il futuro delle intese (anche per l'UAAR) passa attraverso una legge generale sulla libertà religiosa. Brevi considerazioni sulla sentenza della Corte costituzionale n. 52 del 2016*, in *Osservatorioaic.it*, 3/2016; I. NICOTRA, *Le intese con le confessioni religiose: in attesa di una legge che razionalizzi la discrezionalità del Governo*,

These two aspects show the questionable side of a strict application of the bilateral method. Bilateralism became, in fact, an instrument for the State to select which religious interests and identities are to be recognised and protected on a national level, and which are not. At the same time, it should be noted that all the agreements signed resemble each other quite dramatically. This phenomenon is known amongst the scholars as *intese fotocopia* (photocopy agreements)[25].

The metaphor of the ladder highlights this different treatment for religious entities, which is worsened by the evolution of the instruments

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in *Federalismi.it*, 8/2016; F. ALICINO, *La bilateralità pattizia Stato-confessioni dopo la sentenza n. 52/2016 della Corte costituzionale*, in *Osservatoriosullefonti.it*, 2/2016; A. FERRARA, *Corte cost. n. 52 del 2016, ovvero dello svuotamento delle intese Stato-Confessioni religiose e dell'upgrading del giudizio concernente il diniego all'avvio delle trattative*, *ibidem*; J. PASQUALI CERIOLI, *Interpretazione assiologica, principio di bilateralità pattizia e (in)eguale libertà di accedere alle intese ex art. 8, terzo comma, Cost.*, in *Stato, Chiese e pluralismo confessionale*, 26, 2016; A. POGGI, *Una sentenza "preventiva" sulle prossime richieste di Intese da parte di confessioni religiose? (in margine alla sentenza n. 52 della Corte costituzionale)*, in *Federalismi.it*, 6/2016; A. PORENA, *Atti politici e prerogative del Governo in materia di confessioni religiose: note a prima lettura sulla sentenza della Corte costituzionale n. 52/2016*, in *Federalismi.it*, 7/2016; A. RUGGERI, *Confessioni religiose e intese tra iurisdictio e gubernaculum, ovverosia l'abnorme dilatazione dell'area delle decisioni politiche non giustiziabili (a prima lettura di Corte cost. n. 52 del 2016)*, *ibidem*; A. PIN, *L'inevitabile caratura politica dei negoziati tra il Governo e le confessioni e le implicazioni per la libertà religiosa: brevi osservazioni a proposito della sentenza n. 52 del 2016*, *ibidem*; V. VITA, *Della non obbligatorietà dell'avvio delle trattative finalizzate alla conclusione di un'intesa. Riflessioni a margine della sentenza n. 52 del 2016*, in *Osservatorioaic.it*, 2/2016; M. PAPPONE, *L'apertura delle trattative per la stipula di intese costituisce attività politica non sindacabile in sede giurisdizionale*, *ibidem*; R. DICKMANN, *La delibera del Consiglio dei ministri di avviare o meno le trattative finalizzate ad una intesa di cui all'art. 8, terzo comma, Cost. è un atto politico insindacabile in sede giurisdizionale*, in *Forumcostituzionale.it*, 21 marzo 2016.

[25] According to Domianello these photocopy agreements tend to grant the same treatment to all denominations, rather than making the reasonable differentiation needed. Here is the original quotation in Italian: "ad assicurare irragionevolmente a tutti lo stesso, piuttosto che ragionevolmente a ciascuno il suo". See: S. DOMIANELLO, *La proposta di legge in materia di libertà religiosa nei lavori del gruppo di studio Astrid. Le scelte operate in materia matrimoniale e per la stipulazione delle intese*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (*www.statoechiese.it*), 20, 2017, p. 5.

provided by the Italian legal system. In fact, agreements are used by the State not to grant non-discrimination and equal protection on the individual side, not to customise religious rights for various denominations, but on the contrary, to concede a predetermined set of rights to certain denominations, with great political discretion. In this scenario agreements become, for religious denominations, a way to enter the public arena and be legitimised. This legitimisation allows the enjoyment of certain rights and privileges which, far from being rooted in specific religious needs, are standardised and part of what some scholars provocatively have called the «general law of *intese*»[26].

Under this condition, discriminations against those denominations excluded from the agreements are prominent, and hardly compatible with the Constitutional system. Therefore, the Constitutional Court affirmed[27] that signing an agreement with the State is not a condition for religious associations to enjoy the freedom of assembly and organisation, which, on the contrary, is recognised by the Constitution[28]. Despite this, it should be noted that an unreasonable treatment for religious denominations is easily turned into an unequal treatment for an individual's religious rights, against art. 8 co. 1 of the Constitution. Thus, some scholars sustain the idea of general law on religious freedom, in order to fully apply the Constitution and the principle of secularism.

[26] See R. MAZZOLA, *Ordinamento statale e confessioni religiose. La politica delle fonti di diritto in Italia*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (*www.statoechiese.it*), 34, 2018, p. 6.

[27] The Constitutional Court jurisprudence is clear in affirming that it is not possible for the legislator to discriminate amongst religious denominations depending on the existence or not of a signed agreement with the State (Decision no. 346/2002 and no. 195/1993).

[28] Constitutional Court, decision no. 43/1988.

3. The doctrinal debate around a general law on religious freedom and proposed legislation

In 1984 the Concordat between the Catholic Church and the Italian State was reformed in a more constitutionally compatible way, with the entry into force of the *Accordo di Villa Madama*[29]. This was a stimulus for the beginning of a new season of agreements between the State and religious denominations: since then, twelve *intese* have been signed[30]. With these agreements the distance between the status of the Catholic Church and the status of other religious organisations was progressively shortened. At the same time, a new kind of disparity was created: the one between those religious denominations covered by an agreement with the State, and those without this recognition.

As mentioned earlier, *intese* are being used by Governments and politics in a conservative way, rather than in a progressive way. This is representative of a particular approach towards the management of the new religious make-up of the population in Italy, which attempts to push so-called "minoritarian religions" towards the edge of society. In fact, these religious entities, far from having a hierarchical and vertical structure, and being absolutely unwilling to reduce their complexity to a national organism, do not have any chance of signing an agreement with the State[31]. At the same time, they tend to refuse the regulation under law no. 1159/1929 because of pervasive State control, so that in the end they need to jeopardise their religious status in order to find a form of recognition under the general law on organisations.

The result is a fragmented system that responds to political rather than legal stances, with the goal of contrasting and slowing down the

[29] This is the name of the new *Concordato* signed by the Italian state and the Vatican City. Its name comes from the place where the agreement was signed, a mansion (Villa Madama) located in Rome.

[30] In the XVI and XVII legislature some relevant agreements were signed, such as the ones with Apostolic Christians, Orthodox Christians, Mormons, Buddhists and Hindus. The 13th is still not complete. The agreement with Associazione "Chiesa d'Inghilterra", signed on the 30 July 2019, remains unapproved.

[31] At the same time, they probably do not have the numbers, the extension and the connection with the territory which are considered a pre-condition for signing an agreement.

integration of cultural and religious (numerical) minorities. Along these lines, the current legal instruments are inadequate in representing the religious pluralism that comes both from the Constitution and the Italian social fabric. Starting from this factual situation, some scholars observed the need to create new comprehensive legal categories, in order to contrast the multiplication of inequality in the religious field. Given that, the inequalities in the field of collective rights inevitably have major repercussions on the individual side of religious freedom[32].

In such a way, a new general discipline on religious freedom would be an opportunity to establish a legal framework compatible with the Constitutional system and suited to the principle of Italian secularism[33]. In addition, this law would end the discretion, unpredictability and lack of justiciability of the decision of the public power in relation to religions that presently characterises the Italian system[34]. In this case it would be the national legislator who defines the conditions for the recognition of religious denominations and determines a procedure to be followed, instead of having this circumstance determined by politi-

[32] See G. MACRÌ, *Il futuro (ancora incerto) della libertà religiosa in Italia: alla ricerca di un nuovo bilanciamento tra interessi collettivi (frazionati) e bisogni (flessibili) delle persone*, in *Stato, Chiese e pluralismo confessionale*, 28, 2017, p. 28. He states that: "C'è bisogno, in sintesi, di categorie elastiche e comprensive, altrimenti il moltiplicarsi espansivo di sistemi frazionati, posti in essere per dividere e negoziare col potere vantaggi di parte, acuisce le linee di confine non solo tra soggetti e interessi collettivi, ma tra persone, col rischio di maggiori e inedite minacce".

[33] See: A. LICASTRO, *Garanzie per la persona nelle formazioni sociali a carattere religioso: adesione flessibilità e recesso*, in V. TOZZI, G. MACRÌ, M. PARISI (eds.), *Proposta di riflessione per l'emanazione di una legge generale sulle libertà religiose*, Torino, 2010, p. 153.

[34] "Tuttavia, nel silenzio di un diritto che definisca le condizioni di riconoscibilità, agli effetti civili, delle diverse identità religiose, abbandonate all'aleatoria e difficilmente giustiziabile discrezionalità dei poteri pubblici, risulteranno scarsamente garantiti sia l'efficacia dell'autoqualificazione religione e/o confessionale nell'ordine dello Stato sia il conseguente accesso ai diritti a prestazione positiva da quest'ultimo garantiti per l'esercizio del diritto di libertà di coscienza e religione, a cominciare dall'assistenza spirituale e dall'esercizio pubblico del culto". See G. CASUSCELLI, *Una disciplina-quadro delle libertà di religione: perché, oggi più di prima, urge "provare e riprovare" a mettere al sicuro la pace religiosa*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (*www.statoechiese.it*), 26, 2017, p. 7.

cal discretion. At any rate, these conditions and procedures would undergo an evaluation on their reasonableness, through their Parliamentary approval, in order to comply with the constitutional principles on religious pluralism[35].

More reasons for a general law on religious freedom can be found by adopting a comparative law perspective[36]. In the European Union, 16 States approved some form of general law on religious freedom. Moreover, amongst these 16, nine States regulate the relationship between State and religious denominations through agreements, as in the Italian model. This model can be found in Spain (1980), Hungary (1990), Slovakia (1991), Latvia (1995), Portugal (2001), Bulgaria (2002), Croatia (2002), Estonia (2002), the Czech Republic (2002), Rumania (2007) and Slovenia (2007). The general laws in question regulate the issue of the relationship with religious communities, but also individual rights, religious teaching in public schools as well as spiritual assistance in hospitals, jails and so on[37]. The data emerging from the European countries' legal approach suggest the idea that a general law on religious freedom is necessary to support the development of any system based on the instrument of agreements[38]. Actually, it might be argued that without a general law on religious freedom the system would lack a solid base for more specific agreements with religious denominations[39]. Even though the Italian experience differs from

[35] See G. CASUSCELLI, *La tutela dell'identità delle minoranze religiose deve potersi avvalere di "un giudice e un giudizio". Ancora sulla sentenza della Corte costituzionale n. 52/2016*, in *Stato, Chiese e pluralismo confessionale*, 21, 2018, p. 7.

[36] S. FERRARI, *La proposta di legge sulla libertà religiosa. Tante luci (e qualche ombra)*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *La legge che non c'è. Proposta per una legge sulla libertà religiosa in Italia*, Bologna, 2019, p. 294.

[37] S. FERRARI, *Perché è necessaria una legge sulla libertà religiosa? Profili e prospettive di un progetto di legge in Italia*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (*www.statoechiese.it*), 21, 2017.

[38] S. FERRARI, *op. ult. cit.*

[39] S. FERRARI, *op. ult. cit.*

the ones of the abovementioned countries[40], recent Italian history shows the importance of creating a common platform of rights to be recognised to religious communities. This would also follow the international recommendations on this field, according to which the procedures for the recognition of religious denomination should be quick, transparent, equal, inclusive and non-discriminatory[41].

However, if the need to overcome the law on admitted cults from 1929 is widely shared amongst scholars, the same cannot be said on the possibility of a general law on religious freedom. Two of the main critiques tend to doubt the compatibility of such a law with the Constitution, in particular with the principle of bilateralism and the division of competences between State and Regions, after the Title V[42] reform in 2001.

The first critique is based on article 8 of the Constitution: according to some scholars the principle of bilateralism must be considered an obligation for the State to always use an agreement when regulating non-Catholic religious issues. According to this interpretation the principle of bilateralism constitutes a restriction on the contents of the legislative act, which must be previously agreed with the specific religious denomination[43]. This principle would limit, for the sake of the Constitution, the supremacy of the Parliament, so that – in this view – any form

[40] Most of these countries have a recent history of dictatorship, which probably highlighted the need to strongly re-affirm religious freedom to be applied to many sectors where religious rights can be exercised.

[41] See: Human Rights Council, Nineteenth session A/HRC/19/60, *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt*, 22 Dec. 2011, n. 54-55; OSCE/ODIHR, *Guidelines on the legal personality of religious or belief communities*, Warsaw, 2014, pp. 18-36. Both documents clearly state that the procedure for recognising and registering religious denominations must be quick, transparent, equal and predictable.

[42] Title V of the Italian Constitution is in the second part of it, concerning the organisation of the Republic. In particular, Title V contains dispositions on the Regions, Provinces and Municipalities.

[43] M. CANONICO, *L'idea di una legge generale sulle libertà religiose, prospettiva pericolosa e di dubbia utilità*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (*www.statoechiese.it*), gennaio 2010; P. CAVANA, *Libertà religiosa e proposte di riforma della legislazione ecclesiastica in Italia*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (*www.statoechiese.it*), 41, 2017.

of unilateral legislation on the relationship between State and non-Catholic religions is to be considered unlawful. As such, a general law on religious freedom would violate this constitutional regulation on the sources of law, eluding the discipline contained in article 8 paragraph 3 of the Constitution[44].

The second critique focuses on the potential risk of the partial lack of State jurisdiction around a general law on religious freedom. Undeniably, after the reform of the V Title of the Constitution, the prominent national role on these issues was challenged, and many relevant competences were given to Regions, for example in the field of religious buildings. A general law would probably violate, at least in certain sections, the distribution of competences between State and Regions established in article 117.

Both these points find, however, some interesting counterarguments. As far as the first critique is concerned, it must be noted that, even in the most backdated literature, there were different positions on the interpretation of the principle of bilateralism. Indeed, some scholars always supported the idea that article 8, co. 3, was to be considered an impediment for the State in approving a unilateral discipline regulating the relationship with a specific religious denomination. On the contrary, a general law to protect the comprehensive aspects of religious freedom would not find any limit in the abovementioned constitutional article[45].

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[44] This was the position also of A.C. JEMOLO, *Lezioni di diritto ecclesiastico*, Milano, 1979, p. 117; who stated that general law could not contain provisions on non-Catholic religions.

[45] C. CARDIA, *Manuale di diritto ecclesiastico*, Bologna, 1996, p. 248-249. Here is the relevant quotation in the original language: "l'articolo 8 non può essere interpretato nel senso che tutte le confessioni devono stipulare un'Intesa … Nulla impedisce che si approvi una legge che si proponga i seguenti obiettivi: a) indicazione, armonizzata con i principi costituzionali, delle libertà fondamentali riconosciute, in materia religiosa, ai cittadini e delle libertà riconosciute a tutte le confessioni religiose operanti in Italia; b) disciplina dei requisiti, e delle procedure, necessarie per il riconoscimento civile delle confessioni o dei loro enti esponenziali; c) disciplina finalizzata al riconoscimento degli effetti civili del matrimonio celebrato in forme religiose; d) indicazione delle procedure da seguire per l'avvio delle trattative in vista della stipulazione di Intese ex articolo 8 della Costituzione; e) disciplina sulle tutela penale del sentimento religioso. Un simile risultato permetterebbe di superare globalmente la legislazione ecclesiastica del

It must also be noted that, nowadays, this kind of objection is to be contextualised in the current evolution of the system, which caused many scholars to reconsider their position on the possibility of a general law[46]. That is why a general law is considered by many a necessary remedy to balance the system, provide a solid base for agreements[47] and ensure equal liberty of action and organisation to every religion (in accordance with Judgement 43/1988 of the Constitutional Court).

According to some scholars, nowadays the argument of strict bilateralism is not deeply rooted, but it represents an attempt to circumscribe religious pluralism. Seen in this perspective, the issue of strict bilateralism would enforce a "selective" view of positive rights in the religious field. This means that, according to this view, the acquisition of certain rights in this field must be subordinated to the stipulation of an agreement with the State[48]. Hence, these rights must be obtained after an advanced process of integration of the religious community into society[49]. The position sustains the idea of an imperfect religious plural-

1929-1931, e di colmare gli squilibri determinatisi con il nuovo sistema pattizio che riguarda solo alcune confessioni religiose escludendone altre". But see also F. FINOCCHIARO, *Diritto ecclesiastico*, Bologna, 2003, p. 144 ("è stata ventilata la possibilità di emanare una legge generale sulla libertà religiosa che, fra l'altro, abrogherebbe le citate norme del 1929-1930. Ma tale idea, se è probabilmente eccedente rispetto al fine di svecchiare l'ordinamento, giacché le norme sulla libertà religiosa contenute nella Costituzione e nelle altre leggi – alcune delle quali di autorizzazione alla ratifica e di esecuzione di trattati internazionali – garantiscono appieno tale valore, non sembra organizzare in modo adeguato il trattamento delle confessioni senza intesa. In proposito, ove il legislatore pensasse di innovare nel settore in esame, per salvare la legittimità costituzionale delle norme abrogatici del precedente regime in relazione all'art. 8 3° comma Cost., basterebbe l'introduzione di opportune norme transitorie, che valessero a far salvi i diritti quesiti").

[46] A.G.M. CHIZZONITI, *Il rapporto fra istituzioni civili e soggetti religiosi collettivi a livello amministrativo, interventismo, sussidiarietà e rapporti con le autonomie*, in V. TOZZI, G. MACRÌ, M. PARISI (eds.), *op. cit.*, p. 107.

[47] See V. TOZZI, *Necessità di una legge generale sulle libertà religiose*, in V. TOZZI, G. MACRÌ, M. PARISI (eds.), *op. cit.*, p. 125.

[48] P. CAVANA, *op. cit.*, pp. 9-10.

[49] P. CAVANA, *op. cit.*, pp. 19-20.

ism[50], that subordinates the guarantee of rights to a retributive, selective and institutional mechanism, against the Constitutional framework of freedom of religion. In the end, it has been observed how this argument is no longer based on Constitutional issues, but on a political issue with the intention of maintaining the status quo[51].

As far as the second point on Title V is concerned, it must be said that this evaluation needs to be carried out in a concrete way, by considering the positive content of each proposal. In any case, some scholars observed that, for example in the field of religious buildings, what often happened is that Regions invaded the State's jurisdiction, as emerged in Judgement no. 67/2017 from the Constitutional Court[52]. To a certain degree, again, a general law regulating these aspects would serve as a remedy.

Alongside the ongoing doctrinal debate, the 30-year-long vicissitudes of a general law on religious freedom in Italy have seen many draft laws. The first proposal dates back to 1990, and is connected to the name of Giuliano Amato, who promoted inside the Council of Ministry a draft law «Norme sulla libertà religiosa e abrogazione della legislazione sui culti ammessi». The proposal, however, was presented in Parliament with a different Government and it was never really discussed.

Despite this, the proposal constituted the base for many draft laws up to the XVI legislature, but also during the XVII legislature, all with the same imprinting. Here it is worth mentioning the proposal «Norme

[50] A. FERRARI, *Le linee generali della Proposta di legge sulla libertà di coscienza e religione*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, p. 101.

[51] G. CASUSCELLI, *"Volendo togliere ogni dubbio…"*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, p. 268.

[52] The decision concerned the issue of religious buildings. In this judgement the Constitutional Court censored a Regional Law from Veneto, which asked religious denominations to use the Italian language in relation to their non-strictly religious activity as a precondition for entering a convention with Municipalities to build places of worship. Here the Court stated that the Region exceeded its jurisdiction. For a comment on this decision see: F. OLIOSI, *Libertà di culto, uguaglianza e competenze regionali nuovamente al cospetto della Corte Costituzionale: la sentenza n. 67 del 2017*, in *Stato, Chiese e pluralismo confessionale*, 29, 2017.

sulla libertà religiosa e abrogazione della legislazione sui culti ammessi» presented by MPs Boato (no. 36), Spini and others (no. 134) to the Chamber of Deputies in April 2006, the proposal drafted by Zaccaria presented in 2008 («Norme sulla libertà religiosa» no. 448), and another one presented by the same person in 2009[53].

4. An overview of the 2019 Astrid Bill

A new stimulus to revive this issue is represented by the latest draft law presented by a group of scholars reunited in a working group on religious freedom. In 2003, right after the settlement of the XVII legislature, the Astrid foundation[54] reunited a group of scholars with expertise in ecclesiastical law, with the aim of creating a draft law on religious freedom, based on a renovation and extension of the one already examined in the Parliament, elaborated during the '90s. Despite being aware of the unfavourable political circumstances, the group decided to work on the idea of a general draft law mainly for three reasons: I. to contrast the tendency to regulate on specific religious issues (such as burkas, imams and others) in a securitarian and propagandistic way; II. to contrast inequalities arising from the current development of the "Intese" system; III. for the important points of contact between the topic of religious freedom and key contemporary issues such as citizenship, migration and integration.

The proposal represents the result of almost eight years of debates between scholars from the field of ecclesiastical and constitutional law as well as representatives of religious organisations. Hence, it represents an attempt to keep the debate on this issue alive and provides a good starting point while waiting for a more mature political time. In

[53] For more detailed information on the existent proposals and their content see: L. DE GREGORIO, *La legge generale sulla libertà religiosa. Disegni e dibattiti parlamentari*, Tricase, 2012.

[54] This foundation was established in 2001 and reunites more than 300 scholars for the analysis, design and implementation of public policy, institutional and administrative reform and for the regulation of the economy and EU issues. For further information see *http://www.astrid-online.it/chi-siamo/chi-siamo.html*.

the words of some of the most prominent scholars involved in this project the work represents a perfectible proposal which is not and was not meant to be the perfect choice, but for sure represents a way to fairly apply the constitutional principles on this matter[55].

After three years and many meetings, in 2017, the group decided to organise a seminar in the Senate[56], which was the occasion to discuss the first draft of the proposed legislation. After that debate, the group reunited again on other occasions to discuss again certain features of the proposal which was presented in its final version in 2019.

First of all, it is important to examine how the proposal constitutes a link between already existent principles from national and international law, jurisprudence and some innovative proposals in the field of religious rights. In the following part of the paragraph a general overview on the main content of the draft law will be provided. Then, there will be a focus on some specific articles, which for their innovative nature represent some important features of the draft.

The proposal opens by delimiting the scope and aims of the law (Article 1). The goal is to protect the individual exercise of freedom of conscience and religion, the liberty of association for religious purposes, to protect the exercise of religious belief and equal freedom for each religion. This article represents a connecting link between articles 19 and 20 of the Constitution and articles 7 and 8[57]. Moreover, the proposal establishes a procedure for the approval of agreements with religious denominations, without touching the already existent *Concordato* and *Intese*. Article 2 continues by sketching the fundamental principles of the law, which represents the implementation of the principle of sec-

[55] A. FERRARI, *Le linee generali della Proposta di legge sulla libertà di coscienza e religione*, cit., p. 101 e L. DE GREGORIO, *Le alterne vicende della proposta di legge sulla libertà religiosa*, in V. TOZZI, G. MACRÌ, M. PARISI (eds.), *op. cit.*, p. 67.

[56] Pietro Grasso, President of the Senate, opened it, with an introduction by Professor Giuliano Amato and a conclusion by Professor Silvio Ferrari. The round table comprised Professor Cesare Mirabelli, Eugenio Bernardini from the Valdese Church, Professor Francesco Margiotta Broglio and Professor Giuseppe Casuscelli. The seminar and the debate were well attended by both members of the Senate and scholars, but also by people from civil society.

[57] A. FERRARI, *Le linee generali della Proposta di legge sulla libertà di coscienza e religione*, cit., p. 87.

ularism in the Italian system, in a regime of cultural and religious pluralism. The law aims at establishing, in accordance with art. 117 co. 2 and the State/Regions jurisdiction, the minimum standards of rights in the field of religion.

The structure of the law follows the Constitutional approach to religion. The second part of the law is actually dedicated to individual and organised freedom of religion, in line with article 19 of the Constitution. The law embraces the notion of freedom of conscience and religion that has been affirmed by the Constitutional Court since 1979[58], by including in the freedom of religion the freedom of conscience of non-religious people.

However, the proposal distinguishes between form of protections and needs that can be recognised both to positive and "negative" (non-religious) beliefs, and others to be applied to religious beliefs only. Article 3, on the general content and limits of religious freedom, is to be applied to every form of belief. The proposal, in line with the Constitutional jurisprudence, provides that the exercise of freedom of religion can be limited by other constitutional interests, however these restrictions must be reasonable, necessary and not disproportionate.

The following articles represent specific articulations of the regime of cultural and religious pluralism outlined in article 3. Article 4, for example, is dedicated to conscientious objection; article 5 protects freedom of religion and conscience for minors; article 7 provides workplace-related rights and article 8 is about spiritual and moral assistance in the army, in jails, hospitals and other similar institutions. All these rights, however, are balanced by the need to ensure that the principle of solidarity in article 2 of the Constitution is always respected[59]. Specifically, conscientious objection finds its limit in the respect of article 97 co. 2 of the Constitution and on the organisational needs of the workplace (art. 4, co. 3); educational rights for parents find their limits in the best interest of the child (art. 5 co. 2); the contrast of religion-based discrimination in the workplace finds it limits in organisational needs and in the urge to grant essential services (art. 7 co. 3). Furthermore, the

[58] Constitutional Court, Judgement no. 117/1979.

[59] R. MAZZOLA, *Le istanze di libertà individuale*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*

provision on television and radio programs concerning the pluralism of the public service broadcasters (art. 9), together with the new aggravating circumstances to be added to article 61 of the criminal code (art. 3, co. 7), applies both to religious and non-religious beliefs.

On the contrary, the dispositions in Article 14-Article 19 apply to religious association only. This is because, according to the authors of the proposals, the legal framework provided for non-confessional associations is already satisfying[60]. The proposal creates a new discipline to be applied to religious entities, and it extends to them the form of recognition of legal personhood already provided by the general law on associations (art. 14, co. 3). At the same time, the proposal creates, for these entities, an innovative system of Registers at the local *Prefetture*, accompanied by a regulated and justiciable procedure, which follows the rules of technical discretion (art. 16 and art. 17). The registration of a religious association implies the recognition of facilitations and advantages, partially shared with non-religious associations according to the general law, partially specific for religious entities. Religious associations are not compelled to enter this system. However, by asking to specify their identity and goals in order to obtain a particular form of State recognition, the proposal attempts to balance the recognition of some positive religious rights and the need for transparency, certainty and security in social relationships[61].

Article 20 specifically mentions non-religious associations, by plainly extending to them the right to education in public schools and the rights concerning funeral rites; by giving them the possibility of exercising spiritual assistance in jails and hospitals according to their regulation (in general, under less favourable condition if religious associations are considered).

[60] On the contrary, religious entities are penalised by the current regime of the "Third sector" and the application from them to the general law of association (as long as it is verified that their main goals are of a religious nature). For a brief overview of this issue and the impact of the latest reform on this sector for religious organisations see: P. FLORIS, *Enti religiosi e riforma del Terzo settore: verso nuove partizioni nella disciplina degli enti religiosi*, in *Stato, Chiese e pluralismo confessionale*, 3, 2018.

[61] A. FERRARI, *Le linee generali della Proposta di legge sulla libertà di coscienza e religione*, cit., p. 93.

The third part of the proposal (art. 21-37) is dedicated to religious denominations, with their specific provisions and constitutional guarantees. Article 21 provides a definition of religious denomination. Religious denominations are religious associations with religious goals and a proper organisation and structure, which represent a community of believers at the national level. Given this, the proposal explicitly states the principle of equal freedom for each and every religious denomination, regardless of any form or registration (disciplined in the following articles) (article 22) and the principle of confessional autonomy (art. 23), in line with the Constitutional jurisprudence.

Articles 24, 25, 26, 27 and 28 provide a discipline for the registration of religious denominations. A national register has been set up for religious denominations at the Ministry of Internal Affairs (art. 24): the subscription implies the recognition of legal personality, to be understood not as a pre-condition for the enjoyment of certain rights, but as an additional form of guarantee[62]. The registration is obtained through the deposit of the Statute of the religious denomination, and it follows an administrative procedure. The denomination is required to produce a statement on its religious identity and its religious nature, which will be verified according to the abovementioned procedure, under some predetermined requisites and in a predictable time frame. The administrative procedure is regulated under article 24, 25, and 26 of the Bill.

This procedure grants the possibility, for religious entities, to obtain a sort of legal document in order to exercise a set of effective civil activities (art. 28). Some of these are shared with registered religious organisations, while others are exclusive prerogatives of the denominations. Amongst these are the possibility of opening places of worship (art. 11); the nomination of religious ministries (art. 30, 41), the celebration of religious marriage with civil effects (art. 31-34), the possibility of signing an agreement with the State according to article 8 of the Constitution. On this point it must be said that the proposal establishes a new procedure for *intese*, aimed at granting the justiciability of

[62] P. FLORIS, *Le istanze di libertà collettiva e istituzionale*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, p. 150.

the denial from public authorities to protect the role of confessional groups during negotiations.

5. Some conclusive remarks

This draft law brings a new approach to the panorama of the discussion on a general law on religious freedom. Undoubtedly, if the previous projects adopted a precautionary approach, on the contrary the work of the Astrid group is highly far-reaching, bold and innovative, while at the same time deeply rooted in the national and international principles on freedom of religion.

Of course, the proposal cannot be exempt from some critical remarks that can be applied to some of the specific choices of the working group. For example, for some scholars, the latest version of the draft (2019) is weaker than the one presented in 2017. If this is not the appropriate place in which to discuss any critiques in detail, I would like to share a couple of remarks on some of the weakest points of the proposal.

One of these is, for example, an observation related to the 8X1000 IRPEF financing system[63], upon which the authors of the proposals decided to stay silent. The proposal decided not to challenge or modify this system, which was demolished by the *Corte dei Conti* (Court of Audit) in four different decisions, and which is highly controversial in the scholarship as well. One of the options was to extend to every religious confession this possibility of receiving public funding[64], but the working group decided not to intervene on the system so as not to reinforce the main criticisms of it. In this way, however, an important dys-

[63] F. ALICINO, *I problemi pratici e attuali della libertà religiosa*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, pp. 235-246; A. LICASTRO, *Una legge per la libertà di coscienza e di religione*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, pp. 303-314, S. FERRARI, *La proposta di legge sulla libertà religiosa. Tante luci (e qualche ombra)*, cit., pp. 293-302.

[64] F. ALICINO, *I problemi pratici e attuali della libertà religiosa*, cit., pp. 235-246.

functional and discriminatory aspect of the current *Intese* system remains untouched, together with its distorting effects[65].

Another relevant issue pertains to the difference of treatment between registered associations with religious purposes and atheistic and agnostic unregistered associations. First of all, the idea of modifying the approach adopted by art. 17 co. 2 of TFUE, which is already part of the Italian legal system, is not fully justified. The risk of this choice is multiplying the relevant categories in this field with effects on potential conflicts of interpretation and growing uncertainty. In the whole, it should be considered that the detrimental treatment reserved to agnostic and atheistic associations might be incompatible with both Constitutional and EU law, as interpreted by the Court of Justice. Moreover, some scholars noticed how, in this aspect, the proposal fails in embracing a forward-looking approach. Undeniably, it fails to include and protect all those growing new spirituality movements such as New Age, Zen and others that do not fall under the umbrella of atheistic and agnostic organisations[66].

Overall, some scholars observed that the proposal risks stiffening the Constitutional provision on religious freedom, rather than fully implementing it[67]. Undeniably, the Constitution aims at providing protection to religions regardless of any form of registration and State recognition. Nonetheless, such a comprehensive and specific discipline on religion might relativise this principle. An example is the definition of religious confession, or the proposed distinction between religious denominations and religious associations[68]. Besides, the draft Law might make the discipline to obtain legal personality more rigid: for example,

[65] Of a different opinion: J. PASQUALI CERIOLI, *Una proposta di svolta*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, pp. 349-356.

[66] S. FERRARI, *La proposta di legge sulla libertà religiosa. Tante luci (e qualche ombra)*, cit., pp. 293-302. Of a different opinion: E. CAMASSA, *Per una tutela dei livelli essenziali della libertà religiosa*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, pp. 251-260.

[67] M. VENTURA, *op. cit.*, pp. 357-364.

[68] M. VENTURA, *op. cit.*, pp. 357-364.

it suggests that before signing an agreement a religious group should seek recognition as a religious denomination[69].

The value of this proposal, however, goes beyond its specific contents and the critiques that might arise from them. This draft is an important step in contrasting the idea that a legislative silence in this area is desirable and to disprove the opinion that a general law would force the integration process of migrants and religious minorities[70]. On the contrary, it is vital to consider that, where fundamental rights are at stake, there is a need for the legislative framework to be clear and transparent[71].

The law would also finally set the minimum standard in the field of religious freedom[72] to be granted uniformly and equally at the national level. What is remarkable in this law is the attempt to find a new balance between the collective-communitarian dimension of religious freedom and its individual-personalist aspect. Thanks to its asset, which tributes the European approach, the individuals are framed in their important role, and they are given a wide range of collective entities to look to and to realise their religious freedom, outside of the circuit established by the Concordat and agreements[73].

Further, the law would be the preferential tool for the fulfilment of religious pluralism as understood through the prism of promotional secularism promoted by the Constitutional Court since 1989. The pro-

[69] M. VENTURA, *op. cit.*, pp. 357-364.

[70] See: P. CAVANA, *op. cit.* In particular the original quotation: "rischia di bruciare anziché promuovere percorsi di maggiore integrazione sociale e culturale necessari ma che, al tempo stesso, possono richiedere tempo e adattamenti reciproci".

[71] Constitutional Court, Judgement n. 306/2019. The original quotation is: "in ogni settore dell'ordinamento caratterizzato dalla presenza di un diritto fondamentale, vi è l'esigenza che il quadro normativo sia ricondotto a trasparenza e chiarezza".

[72] E. CAMASSA, *op. cit.*, pp. 251-260.

[73] S. FERRARI, *Perché è necessaria una legge sulla libertà religiosa? Profili e prospettive di un progetto di legge in Italia*, cit. Looked through this lens, the parallel system of the two registers should not be seen with scepticism and in a hierarchical way. The two different registers offer the suitable instruments to different communities to act in their context. See: P. NASO, *Una risposta costituzionale al nuovo pluralismo religioso*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, p. 338.

posal would affirm a principle of *laicità* aimed at promoting the value of numeric minorities and different identities[74], in the broader context of an increasingly diverse Italian demography seeking legal recognition. On the legal level, given this undeniable growing diversity, it is possible to find some small grains of sand trying to sabotage the mechanism of a mature and sustainable pluralism. These are represented by some jurisdictional decisions[75], by the enlargement of the base of racist and xenophobic political parties and movements, by regional laws such as the ones from Lombardy[76] and Veneto on places of worship, by

[74] G. DISEGNI, *Libertà religiosa, tra intese e laicità dello Stato*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, p. 289.

[75] See, for example, the approach adopted by the Corte di Cassazione on the issue of Kirpan, with decision no. 24048/2017. What is emblematic is not the final decision of the Court, but the motivation behind it, which argues against cultural pluralism. For some comments see: A. NEGRI, *Sikh condannato per porto del Kirpan: una discutibile sentenza della cassazione su immigrazione e "valori del mondo occidentale"*, Nota a Cass., sez. I, sent. 31 marzo 2017, n. 24048, in *Penale contemporaneo*, 7-8/2017; F. BASILE, M. GIANNOCCOLI, *Il coltello "kirpan", i valori occidentali e gli arcipelaghi culturali confliggenti. A proposito di una recente sentenza della Cassazione*, Nota a Cass. sez. I pen. 15 maggio 2017, n. 24084, in *Diritto, immigrazione e cittadinanza*, fasc. 3, 2017, pp. 7; A. BERNARDI, *Populismo giudiziario? L'evoluzione della giurisprudenza penale sul "kirpan"*, in *Rivista italiana di diritto e procedura penale*, fasc. 2, 2017, pp. 671-709; G. CAVAGGION, *Diritto alla libertà religiosa, pubblica sicurezza e "valori occidentali". Le implicazioni della sentenza della Cassazione nel "caso kirpan" per il modello di integrazione italiano*, Nota a Cass. sez. I pen. 31 marzo 2017, n. 24084; A. LICASTRO, *La "sfida" del "kirpan" ai "valori occidentali" nelle reazioni della dottrina alla pronunzia della Cassazione penale*, Sez. I, 15 maggio 2017, n. 24084, in *Quaderni di diritto e politica ecclesiastica*, fasc. 3, 2017, pp. 983-1007.

[76] The issue related to buildings of worship and Regions in Italy is quite complex and long-lasting. The national legislator never provided a discipline, even after the Constitutional reform in 2001. This is the reason why many Regions decided to legislate locally with often restrictive provisions, which were often censored by the Constitutional Court (see decisions no. 195/1993, no. 346/2002; no. 63/2016; no. 67/2017; no. 254/2019). The outcome of this legislation is to subordinate the right to build places of worship with the prior approval of certain organisms, which decide under the principles of public order and security. For a focus on the issue in Lombardy see: R. LEONARDI, *L'edilizia di culto tra libertà religiosa e tutela del territorio: il caso Lombardia*, in *Nuove Autonomie*, fasc. 3, 2019, pp. 509-535.

some measures from the local administrations and by the already obsolete contract of Government between M5S and Lega Nord[77].

A general law on religious freedom could be a possible antidote against this phenomenon: it might be a possible way to recognise religious diversity as a source of common good and, ultimately a way to grant, cultivate and strengthen democracy[78]. It is important, accordingly, to not forget that the Constitution outlines an idea of pluralist democracy that recognises the social function of religions and their important role in promoting and developing the personality of individuals. Protecting religious interests, according to the Constitution, means securing the right of each individual to express their own identity in society.

In conclusion, working on a general draft law on religious freedom means keeping the dialogue alive on the legal models of implementation and expression of already existent pluralism in our society. Doing this, by following the Constitutional path and the promotional secularist principle, implies developing instruments to build social cohesion. Social cohesion is the main way to contrast the issue of radicalisation of those who – due to injustice and discrimination – are relegated and constrained in a marginalised place in our societies.

In the end, discussing a new legal framework for religious freedom means engaging in the building of communities and democracy.

[77] This document contained an important number of points dedicated to the regulation of religion, and in particular for Islam, inspired by an emergency and securitarianist approach. For example, it suggested the need, in order to prevent terrorism, to establish a register of Muslim ministers of worship and a system for tracing the funding for the construction of mosques. The document also mentioned the urgency of having adequate tools to allow the control and immediate closure of radical Islamic associations as well as illegal mosques and places of worship.

[78] E. PACE, *Ripensare la libertà religiosa in società ad elevate diversità di fedeli*, in R. ZACCARIA, S. DOMIANELLO, A. FERRARI, P. FLORIS, R. MAZZOLA (eds.), *op. cit.*, p. 342.

FROM CONCORDATS TO DIALOGUE. THE MUTATING PICTURE OF LAW AND RELIGION IN EUROPE. CONCLUDING REMARKS

Marco Ventura

The chapters in this book witness the dynamic complexity of 'agreements and conventions' between civil and religious authorities, within the broader mutating picture of the interaction of law and religion in Europe and beyond. In these concluding remarks I would like to focus first on the evolving role and experience of the Roman Catholic Church, the key reference in the predominant, concordat-based understanding of 'agreements and conventions', and secondly suggest that a dialogue-based approach seems to be emerging, which prioritises exchange and cooperation between civil and religious authorities over whether or not relations take the shape of formal, bilateral instruments, possibly offering a more accurate description and facilitating sound governance of the mutating picture of law and religion in Europe.

1. From concordats…

The common understanding in Europe of 'agreements and conventions' between civil and religious authorities has been historically and conceptually based on Roman Catholic concordats, international treaties signed between the Holy See and states, with the aim of settling matters of common interest. In the last few decades, countries with concordats still in force, in particular Italy and Spain, have extended bilateral instruments to non-Catholic religious organisations through contracts – *Intesa* in Italy and *Acuerdo* in Spain – which replicate concordats in almost all aspects except the international law status. In these countries, reference to 'agreements and conventions' is usually meant to broaden the traditional area of concordats in the direction of both non-Catholic

denominations and the Roman Catholic Church itself, in case Catholic bodies other than the Holy See (e.g. Bishops' conferences) happen to sign contracts with states. In countries with no concordats the area of religion-related 'agreements and conventions' is likely to be understood as simply not applicable. In these countries (e.g. France and the UK) experts and bureaucrats usually understand their own system as one where 'agreements and conventions' with religious organisations are not practiced, to the extent that their identity is defined in the negative by the lack (e.g. in the UK) or the rejection (e.g. in France) of bilateral contracts between civil and religious authorities.

The distinction between countries with and without concordats, with and without 'agreements and conventions', is loaded with theological, political and legal implications[1]. Crucial is the significance of concordats as the symbol and instrument of the self-understanding of the Roman Catholic Church as a sovereign body, equal to sovereign states, and the recognition by the international community of the Holy See as a sovereign subject for the purpose of international law and diplomacy. If over the centuries Protestant and Orthodox churches did not conceive of themselves as sovereign entities the way the Roman Catholic Church did, and therefore did not consider entering pacts with states the like of concordats, Catholic countries struggled with the tradition of concordats especially during the 19th century, and even more after World War II, when the ideal of separation of church and state, and law and religion, became synonymous with modernity and liberty. In France the rejection of the concordat of 1801 with Napoleon paved the way for the law of separation of 1905 and the adoption of *laïcité* in the Constitution of 1946, to the point that *laïcité* is commonly deemed the opposite of, and incompatible with, concordat-based systems. For peoples and countries which rejected concordats, either from outside or from within the Catholic tradition, concordat-based systems were synonymous with static, Catholic monarchies with a preference for authoritarian regimes, an assumption reinforced by concordats with Mussolini (1929), Salazar (1940), Franco (1953) and to some extent with Hitler (1933).

[1] See M. VENTURA, *The Changing Civil Religion of Secular Europe*, in *The George Washington International Law Review*, 41/4, 2010, pp. 947-961.

Although critics might still hold that the survival of concordats today points to the lack of dynamic, democratic renewal in the relevant countries, I would rather argue that if concordats have proved resilient, and have even been widely adopted, it is because of their creative reinvention by the Holy See and its state partners in the last few decades. Since the concordat with Italy of 1984, concordats have stopped being used in order to protect the Roman Catholic Church from authoritarian regimes the appeasement of which was the strategic priority, and have been reinvented in view of building better relations with liberal democracies[2]. Sometimes, the Holy See and the partner state have preferred the term 'agreement' to the term concordat for the sake of marking a departure from the age of concordats with Mussolini, Hitler, Salazar and Franco. Again, the agreement with Italy of 1984, the so-called *Accordo di Villa Madama*, was the template, and since then concordats have no longer been synonymous with Catholic states. Also witnessing the dynamic reinvention of concordats are local concordats, as with the German Lander, as well as other forms of *sui generis* contracts through which the Holy See has variously settled issues with, for example, Morocco (1983 and 1984), Israel (1993), the Palestinian Authority (2000 and 2015) and China (2018).

However, the reinvention of concordats has gone well beyond their democratisation, decentralisation, de-Europeanisation, and the end of Catholic States.

Highly significant is the case of the Rome Call for AI Ethics, which was signed in the Vatican City on 28 February 2020 between the Pontifical Academy for Life, Microsoft, IBM, FAO and the Italian Ministry of Innovation. Clearly, however creatively concordats might be reinvented, the Rome Call is not a concordat, and yet it bears some resemblance to a concordat if one looks at the signatories and considers their international dimension[3]. Indeed the Holy See was the initiator of the process through the Pontifical Academy for Life, a body of the Roman

[2] For the turning point of 1984 in Italy, and beyond, see M. VENTURA, *Creduli e credenti. Il declino di Stato e Chiesa come questione di fede*, Torino, 2014.

[3] The interpretation of the Rome Call for AI Ethics as a *sui generis* concordat was first advanced in M. VENTURA, *Il concordato sull'algor-etica del Papa con Microsoft e IBM*, in *Corriere della Sera, la Lettura*, 8 March 2020, p. 17.

Curia, the central government of the Roman Catholic Church based in the Vatican City. A state was also part of the pact, as the Italian government was involved through the Ministry of Innovation. The international dimension was further expanded by multinational actors such as FAO, Microsoft and IBM. Still, the differences between the 2020 Rome Call for AI Ethics and a concordat are remarkable. While the Holy See would typically attend to concordats through the Secretariat of State, in this case the Pontifical Academy for Life was in charge, and similarly the government of Italy was not represented by the office of the Prime Minister, but by the Ministry of Innovation. This means that in both cases, the authorities in question were identified based not on their overall competence as the representatives of the government in its entirety, but on their specific competence on ethics, in the case of the Pontifical Academy, and digital innovation, in the case of the Italian Ministry. Also, a typical concordat would be bilateral, whereas the Rome Call was signed by five parties, and no international or private organisation was involved, whereas FAO, Microsoft and IBM were co-signatories of the Rome Call. The peculiarity of the Rome Call, compared to concordats, is not limited to actors. While a typical concordat would be legally binding and therefore articulated in legally enforceable contract provisions, the Rome Call is a set of principles the parties endorse without assuming any obligations.

2. …to dialogue

The dynamic reinvention of concordats through both a new Catholic bilateralism and the extension of ‘agreements and conventions’ to other religious communities, not to mention the expansion of religion-related multilateral interaction in the context of the European Union, the Council of Europe, the Organisation for Security and Cooperation in Europe and the United Nations, is a challenge to perceptions, scholarship and policies. Still dominant is the pattern that identifies any given national experience and system with a specific approach to ‘agreements and conventions’. With the development of systematic comparative studies in the area of church/religion and state relations in Europe after World

War II, experts have categorised European countries based on whether or not they adopted concordats. As far as concordats have been synonymous with Catholic countries, concordat-based countries were a subcategory of countries with established churches/religions. Since the late 1980s, when the Holy See signed agreements with non-majority Catholic countries or with states which had renounced being Catholic, the two criteria have been divorced, resulting in the threefold European categorisation of a) concordat-based countries, largely coinciding with former Catholic states, b) countries with established churches or religions, now almost exclusively Protestant (e.g. England and Denmark) and Orthodox (e.g. Greece), and c) others, sometimes labelled as separation-based countries. Such categorisation is highly relevant for our investigation, reliant as it is on a predominant emphasis on 'agreements and conventions'. According to this approach, 'agreements and conventions', just like 'concordats' in the past, are prioritised over other identifying variables to such an extent as to define the identity of countries and fundamentally divide them into distinct categories. At the same time, the need for an efficient and objective categorisation makes for 'agreements and conventions' to be formalistically understood as coinciding with 'formal agreements and conventions'.

The objective, formalistic understanding of 'agreements and conventions' and their decisive role in categorising the diversity of countries and systems in church and state and law and religion is highly questionable. Such 'concordat-based approach' risks exaggerating past assumptions and divisions, while obfuscating the dynamic complexity of a mutating context.

Here, I argue that it if the concordat-based approach is still undeniably rooted in the minds and hearts of citizens, officials, believers and experts, we need to relativize both the significance of formal 'agreements and conventions' and their defining weight in the categorisation of countries and systems. The argument is both descriptive and prescriptive, as I suggest a paradigm shift in the approach to the creative reinvention of old tools and the invention of new ones for the sake of a better description and governance of the interaction of law and religion in Europe.

As a matter of fact, an alternative paradigm is already in place if we consider the emerging framework of dialogue between civil and religious authorities across contemporary Europe, as epitomised in the law of the European Union with the inclusion of a dialogue clause in the draft constitutional treaty of 2000 and in the actual treaty on the functioning of the European Union of 2007[4]. If dialogue is placed at the centre, and its dynamic and creative unfolding is acknowledged, the distinction between formal and informal relations of civil and religious authorities is relativized and the rich variety of forms of consultation and participative decision-making is properly taken into consideration, thus prompting better knowledge on the mutating reality of law and religion, and awareness of the many policy tools available for sound governance.

The shift during the first decade of the 2000s is eloquently expressed by the experts' meeting of the European Consortium for Church and State Research of 18-21 November 2004 in Tübingen. The meeting was devoted to 'Religion and law in dialogue: covenantal and non-covenantal cooperation between state and religion in Europe', with the title assuming the resisting salience of the difference between the covenantal and non-covenantal approach, and yet identifying 'dialogue' and 'cooperation' as a superior principle, possibly articulated in a wide variety of forms[5]. It was not a coincidence that the meeting took place in Germany, a crucial laboratory of formalised and non-formalised exchange between civil and religious authorities at the federal and regional level.

If we depart from a focus on concordats as the template for 'agreements and conventions', and the consequent categorial division of

[4] According to Article 17, no. 3 'Recognising their [of churches and religious associations or communities and philosophical and non-confessional organisations] identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations'. See M. VENTURA, *L'articolo 17 TFUE come fondamento del diritto e della politica ecclesiastica dell'Unione europea*, in *Quaderni di diritto e politica ecclesiastica*, 22/2, 2014, pp. 293-304.

[5] See M. VENTURA, *Religion and law in dialogue: covenantal and non-covenantal cooperation of state and religions in Italy*, in R. PUZA, N. DOE (eds.), *Religion and law in dialogue: covenantal and non-covenantal cooperation between state and religion in Europe*, Leuven, 2006, pp. 115-129.

countries into concordat-based and separation-based, towards an understanding of 'dialogue' as the dominant contemporary feature of relations between religious organisations, states and international organisations, the category of 'agreements and conventions' can no longer be understood in restrictive terms, as limited to formal contracts, but needs to be understood in inclusive terms as an open category encompassing all forms of dialogue and cooperation, formal and informal, old and new, bilateral and multilateral. The example of the Rome Call could then be seen not as a bizarre departure from a model, but as an example of a new dispensation.

Crucial for the paradigm shift from 'concordats' to 'dialogue' is the methodological shift from the formal approach identifying concordats (and the like) as the key, reductively and simplistically objectivised factor for classifying countries, to the substantial approach recognising cooperation as a feature common to all European countries and consequently encompassing different techniques of dialogue between civil and religious authorities, both at the national and transnational level. As a result, the category of 'agreements and conventions' could be understood in formalistic terms, and thus relativized, or could be broadened so as to include all forms of interaction, contractual or not, or formal or not.

Because they apply a fresh look to national and international developments, the chapters of this book challenge factual and conceptual assumptions, and corroborate the view that while a 'concordat-based' approach is still needed in order to grasp and govern the reinvention of traditional instruments and the invention of new ones, a 'dialogue-based' approach is equally necessary to reorient research and action in the direction of real needs in the area of freedom of religion or belief, equality and non-discrimination, individual and collective rights, the articulation of religious laws and the law of the land, and the harmonisation of domestic, transnational and international law[6].

[6] See M. VENTURA, *Non discrimination and protection of diversity and minorities*, in G. AMATO, E. MOAVERO-MILANESI, G. PASQUINO, L. REICHLIN (eds.), *The History of the European Union. Constructing Utopia*, Oxford, 2019, pp. 239-255; M. VENTURA, *The Formula "Freedom of Religion or Belief" in the Laboratory of the European Union*, in *Studia z Prawa Wyznaniowego*, 23, 2020, pp. 7-53.

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