

February 2018

## The Agreements Between Church and State: The Italian Perspective

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Comparative and Foreign Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

*The Agreements Between Church and State: The Italian Perspective*, 2017 BYU L. Rev. 869 (2018).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2017/iss4/6>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# The Agreements Between Church and State: The Italian Perspective<sup>†</sup>

Elena Ervas\*

*This Article explores the recent approach of the Italian Constitutional Court regarding agreements between the Italian State and religious denomination, which regulate matters of common interest. The Italian approach is compared to the contemporary approach of the Spanish legal system. The Italian approach grants strong discretion in favor of the Government in this context, but by doing so, it risks inadequately protecting the religious freedom of religious denominations in light of current jurisprudence. Moreover, the broad discretion given to the Italian government seems not to be in line with the current jurisprudence of the European Court of Human Rights in defense of collective religious freedom.*

## CONTENTS

INTRODUCTION .....	870
I. THE ITALIAN LEGAL FRAMEWORK: THE RELEVANT	
CONSTITUTIONAL PROVISIONS .....	871
A. The UAAR Request to Launch Negotiations Ex	
Article 8 Paragraph 3 .....	876
B. The Reasoning of the Italian Court of Cassation .....	878
C. The Decision of the Italian Constitutional Court .....	879
II. THE SPANISH CONTEXT: RELEVANT	
CONSTITUTIONAL PROVISIONS .....	881
A. The Principles of Positive Secularity and Cooperation	
Between State and Religion.....	883

---

<sup>†</sup> A shorter version of this essay was presented at the Twenty-Third International Law and Religion Symposium: Religious Rights in a Pluralistic World (Oct. 2–4, 2016).

\* PhD Candidate in Law, Market and Person at the University Ca' Foscari, Venice, Italy.

B. Instruments of Cooperation Between State and Religion. ....	884
C. A Right to be Registered as a Right of Religious Freedom. ....	888
CONCLUSION.....	889

## INTRODUCTION

After the implementation of the Republican Constitution and the end of the formal predominance of the Catholic Church in Italy, the topic of agreements between the State and religious denominations was particularly debated.<sup>1</sup> Recently, the Italian Constitutional Court has issued a decision concerning the right of religious, non-Catholic denominations to stipulate agreements with the State.<sup>2</sup> Paradoxically, the case that led to that decision was brought before the court by the Union of Atheist and Rationalist Agnostics (UAAR), after the UAAR requested to start negotiations to reach an agreement with the Italian State, as provided by the Italian Constitution.<sup>3</sup> This Article explores the issue of the right to stipulate an agreement with the State as considered by the Italian Constitutional Court. Before turning to the recent case law, Part I will give an introductory perspective on the Italian legal framework

---

1. See Francesco Alicino, *La legislazione sulla base di intese. I test delle religioni "altre" e degli ateismi*, Cacucci Editore, Bari, 2013 (It.); Nicola Colaianni, *Confessioni religiose e intese: contributo all'interpretazione dell'art. 8 della Costituzione* (Editore Cacucci 1990) (It.); Nicola Colaianni, *Le intese nella società multireligiosa: verso nuove disuguaglianze?*, 19 STATO CHIESE E PLURALISMO CONFESIONALE (2012) (It.); Jlia Pasquali Cerioli, *L'approvazione delle intese ex art. 8, 3° comma, Cost. nella XVI legislatura: luci e ombre di una nuova «stagione»*, 2 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA (2013) (It.); Pierluigi Consorti, *1984–2014: le stagioni delle intese e la «terza età» dell'art. 8, ultimo comma, della Costituzione*, 1 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA, (2014) (It.).

2. Corte Cost., 10 marzo 2016, n.52, G.U. 2016 (It.).

3. Art. 8 Costituzione [Cost.] (It.) (“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 decision of the Italian Constitutional Court concerned a request submitted by an atheistic association. However, the court’s reasoning affects the general principles governing the agreements between the Italian State and each religious denomination. See Annalisa Poggi, *Una sentenza “preventiva” sulle prossime richieste di Intese da parte di confessioni religiose? (in margine alla sentenza n. 52 della Corte costituzionale)*, 6 FEDERALISMI.IT (2016) (It.).

for church-state relations. Part II will compare the Italian system to the Spanish system, which has a similar tradition and history.

### I. THE ITALIAN LEGAL FRAMEWORK: THE RELEVANT CONSTITUTIONAL PROVISIONS

The Republican Constitution of 1948 pays particular attention to religious freedom both as an individual and as a collective right. According to constitutional jurisprudence, the Italian legal system is informed by the principle of *laicità*, one of the cardinal principles of the State.<sup>4</sup> The Italian concept of *laicità* entails a state that is neutral toward religious and non-religious beliefs and that guarantees equal protection for both. In a system of separation between church and state, *laicità* does not imply the State's indifference toward religions, but rather the State's guarantee to safeguard a religiously and culturally pluralistic regime. Moreover, it fosters the defence of both the individual and the collective side of religious freedom.<sup>5</sup>

Article 19 of the Italian Constitution affirms an individual's freedom to profess and manifest a religious belief, in private or in public.<sup>6</sup> The only limit to religious expression is the respect of public morality.<sup>7</sup> The institutional side of religious freedom received specific protection in Articles 7<sup>8</sup> and 8,<sup>9</sup> which describe the relationship between the State and religious organizations, as explained below. Articles 7 and 8 concern fundamental principles of the legal system.<sup>10</sup>

The Italian Constitution affirms the independence and sovereignty of both the State and the Catholic Church, each within

4. Corte Cost., 11–12 aprile 1989, n.203, G.U. 1989, 5 (It.).

5. *Id.*; see also Alessandro Ferrari & Silvio Ferrari, *Religion and the Secular State: The Italian Case*, in RELIGION AND THE SECULAR STATE: NATIONAL REPORTS 445, 447–48 (Donlu D. Thayer ed., 2015).

6. Art. 19 Costituzione [Cost.] (It.) (“Anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality.”).

7. *Id.*

8. *Id.* 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.”).

9. *Id.* art. 8.

10. Ferrari & Ferrari, *supra* note 5, at 449.

its own sphere.<sup>11</sup> Regarding non-Catholic denominations, the constitution recognizes the right to internal autonomy and free organization, provided they do not compromise the fundamental principles of the Italian legal system.<sup>12</sup> In pursuance of the principle of religious autonomy, the constitution provides that every form of interaction between the State and religion should be governed by agreements between the State and the religious institution.<sup>13</sup> Accordingly, the constitution provides two methods to regulate the relations between the State and a religious denomination.

The second paragraph of Article 7<sup>14</sup> contains the first method and is reserved for the Catholic Church, which has historically enjoyed a significant role on the Italian peninsula. According to the constitution, the relationship between the State and the Catholic Church is ruled by a Concordat.<sup>15</sup> The constitution explicitly refers to the Lateran Pacts that were signed in 1929 and later amended by the Pacts of Villa Madama in 1984 to make them compatible with the principles of the democratic system.<sup>16</sup> The second method concerns religious denominations other than the Catholic Church. The third paragraph of Article 8 provides for a special instrument, called *Intesa*, which is an agreement reached by a religious representative and the government.<sup>17</sup> The content of this agreement, once implemented by a law of the Italian Parliament, regulates relations between the State and the religious denomination.<sup>18</sup>

---

11. Art. 7 Costituzione [Cost.] (It.) (“The State and the Catholic Church are independent and sovereign, each within its own sphere.”).

12. *Id.* art. 8.

13. *See id.* art. 7–8.

14. *Id.* art. 7.

15. *Id.*

16. On February 18, 1984, the Italian State and the Holy Church agreed to replace the old Lateran Pacts of 1929 with a new agreement in order to regulate the relations between the State and the Catholic Church in Italy. Legge 25 marzo 1985, n.121, G.U. Mar. 25, n.85 (It.). With the Pacts of Villa Madama began a new era for the relation between the State and the Catholic Church, based on the principle of *laicità*, the separation between State and Church, mutual collaboration, reciprocal independence, and respect. For the full text of the Pact of Villa Madama see [http://presidenza.governo.it/USRI/confessioni/accordo\\_indice.html](http://presidenza.governo.it/USRI/confessioni/accordo_indice.html). The Italian State ratified this agreement in 1985. L. n. 121/1985 (It.).

17. Art. 8 para. 3 Costituzione [Cost.] (It.) (“Their relations with the State are regulated by law, based on agreements with their respective representatives.”).

18. *Id.*

The second paragraph of Article 7 and the third paragraph of Article 8 express the so-called *bilateral principle*.<sup>19</sup> The fathers of the Republican Constitution wanted to avoid a unilateral imposition of legislation regulating religious matters, which would have risked inadequate protection of religious freedom and the distinctive features or needs of the existing religions in the State.<sup>20</sup> According to the constitution, the State should use the instrument of the agreement to deal with the legal organization of a denomination and this agreement should be tailored to the needs and features of each denomination.<sup>21</sup> The main purpose of the instrument was not only to recognize the autonomy of religious organizations but also to allow them to assert their distinctions and demands through a separate and individual negotiation with the State.<sup>22</sup> Once signed by the President of the Council of Ministers and the religious representative and approved by Parliament, these agreements are the base for any law involving the rapport between the State and the religious denomination.<sup>23</sup> To protect the autonomy and liberty of the religious

19. Ferrari & Ferrari, *supra* note 5, at 452.

20. Marco Canonico, *La stipulazione di intese con lo Stato: diritto delle confessioni religiose o libera scelta del Governo?*, STATO, CHIESE E PLURALISMO CONFESSIONALE, Apr. 23, 2012, at 1, 1 (It.), [http://www.statoechiese.it/images/uploads/articoli\\_pdf/canonico\\_la\\_stipulazione2.pdf](http://www.statoechiese.it/images/uploads/articoli_pdf/canonico_la_stipulazione2.pdf).

21. *Id.* at 3.

22. See Corte Cost., 16 luglio 2002, n.346, G.U. 2002, 4 (It.) (“Agreements referred to in art. 8, paragraph three, are in fact the instrument provided by the constitution for the regulation of the relationships of religious denominations with the State for aspects related to the specific feature of the individual confessions or requiring derogations from general law.”) (English translation by the author).

23. See Canonico, *supra* note 20, at 1. In absence of any specific legislative indication, the approval procedure of the Agreement has followed a practice suggested by doctrinal interpretation during negotiations for the Agreement with the Waldensians in 1984; this procedure was considered a direct application of the constitution which requires that any relationship between State and religious denomination be ruled by a state law based on the agreement. See Pierluigi Consorti, *1984–2014: le stagioni delle intese e la «terza età» dell’art. 8, ultimo comma, della Costituzione*, I QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 90, 94, 98 (2014) (It.). In 1988, legislation gave the competence for the State to the Council of Minister. *Id.*; see also Legge 23 agosto 1988, n.400, G.U. Aug. 23, 1988, n.214 (It.). For the *Intesa* with the Waldensians, see *Testo dell’Intesa tra il Governo della Repubblica e la Tavola Valdese in attuazione dell’articolo 8, comma terzo, della Costituzione fermata il 21 febbraio 1984 e approvata con legge 11 agosto 1984* [Text of the Intesa between the Government of the Republic and the Waldensians for implementation of Article 8, third paragraph, of the constitution signed on 21 February 1984 and approved by law no. 449 11 August 1984], It. Waldensians, Feb. 21, 1984, <https://www.chiesavaldese.org/documents/intesa1984.pdf> (It.) [hereinafter *Intesa with Waldensians*].

group, an agreement can be modified only through a new agreement between the State and the denomination.<sup>24</sup>

It is important to specify that a religious denomination is not obliged to enter into an agreement with the State in order to enjoy religious freedom. In the absence of a general law on religious freedom, religious denominations that have not reached an agreement with the State continue to be ruled by *legge sui culti ammessi* (law on admitted cults).<sup>25</sup> This piece of legislation was implemented during the fascist dictatorship and is still in force today.<sup>26</sup> Despite the Constitutional Court's efforts to gradually adapt this law to the constitutional principles of equality and liberty, it still admits a strong government power of control over religious groups' activities.<sup>27</sup> Even if not formally obliged, a religious denomination could have a strong interest in reaching a more favorable status through an agreement. Moreover, another strong motivation arises from the content of these agreements; they tend to have a

---

24. Ferrari & Ferrari, *supra* note 5, at 452; *see, e.g.*, Intesa with Waldensians, *supra* note 23, at 5 (“Changes will be made with the stipulation of a new Intesa with the consequent submission to Parliament of a special draft law of approval, to the senses of Article 8 of the constitution.”) (English translation by the author).

25. Legge 24 giugno 1929, n.1159, G.U. June 24, 1929 (It.).

26. *See* Ferrari & Ferrari, *supra* note 5, at 454; *see also* Consorti, *supra* note 23, at 102 (“The law on admitted cults is ‘not only chronologically obsolete, but ontologically unconstitutional because it is based on the ‘logical, prejudicial assumption’ of the religion of State, ‘or rather on the principle of Catholic, Apostolic, and Roman religion, as religion of the State;’ legislation still in force despite being overcome, fascist, and anti-historical.”) (English translation by the author).

27. Ferrari & Ferrari, *supra* note 5, at 456. For example, the royal decree that implemented the law on admitted cults granted a permission to worshippers of a permitted cult to keep public meetings for the fulfillment of religious ceremonies or other acts of worship in buildings open to the public, provided that meetings were authorized by a minister of worship whose nomination had been duly approved by the Interior Minister of the State. Regio Decreto 28 febbraio 1930, n.289, G.U. 1930 Feb. 28, 1930 (It.). However, the Constitutional Court declared this provision unconstitutional. Corte Cost., 24 novembre 1958, n.59, G.U. 1958 (It.). According to the court, this provision conflicted with article 19 of the Italian Constitution, which grants freedom of religion in any form, individually or with others, and to celebrate rites in public or in private, provided they are not offensive to public morality. *Id.* Although it raised constitutional concerns, the same court considered article 3 of the law on admitted cults legitimate. L. n. 1159/1929 (“The appointment of ministers of religion other than the [official] religion of the State must be notified to the Interior Ministry for approval. No civil effect can be recognized to acts of ministry carried out by ministers of worship if their nomination has not obtained government approval.”) (English translation by the author); Corte Cost., 24 novembre 1958, n.59, G.U. 1958 (It.).

standardized content and have become an instrument used by political power to regulate a variety of affairs that would potentially interest all religious denominations. Such agreements may include recognition of religious festivities, the possibility of establishing religious schools and the recognition of diplomas granted therein, the possibility for worship ministers to provide spiritual assistance in hospitals or prisons, and the allocation of financial charges.<sup>28</sup> An agreement, therefore, has become a sort of ideal destination for religious denominations, which makes it a privilege held by a fortunate few.<sup>29</sup>

Aside from the Catholic Church, six other denominations signed agreements with the State in the late 1980s and early 1990s that have been approved by Parliament: the Waldensians (1984), the Christian Churches of the Seventh-day Adventists (1986), the Assemblies of God (1986), the Union of Jewish Communities (1987), the Christian Evangelical-Baptist Union (1993), and the Lutheran Church (1993).<sup>30</sup> In 2007, agreements with other denominations were also signed, but they long remained “ghost agreements” because they were approved by Parliament five years after their signing (except in the case of the Jehovah’s Witnesses, who are still waiting for approval).<sup>31</sup> In 2015, the Istituto Buddista

28. See Intesa with Waldensians, *supra* note 23.

29. Andrea Guazzarotti, *Le minoranze religiose tra potere politico e funzione giurisdizionale: Bontà e limiti del modello italiano*, 2 QUADERNI COSTITUZIONALI 213, 216 (2002) (It.).

30. Legge 11 agosto 1984, n.449, G.U. Aug. 11, 1984 (It.) (ratifying Intesa with Waldensians, which was originally signed on Feb. 21, 1984); Legge 22 novembre 1988, n.516, G.U. Nov. 22, 1988 (It.) (ratifying Intesa with Christian Churches of the Seventh-day Adventists, which was originally signed on Dec. 29, 1986); Legge 22 novembre 1988, n.517, G.U. Nov. 22, 1988 (It.) (ratifying Intesa with Assemblies of God in Italy, which was originally signed on Dec. 29, 1986); Legge 8 marzo 1989, n.101, G.U. Mar. 8, 1989 (It.) (ratifying Intesa with the Union of Jewish Communities in Italy, which was originally signed on Feb. 27, 1987); Legge 12 aprile 1995, n.116, G.U. Apr. 12, 1995 (It.) (ratifying Intesa with the Christian Evangelical-Baptist Union in Italy, which was originally signed on Mar. 29, 1993) (later modified by Legge 12 marzo 2012, n.34, G.U. Mar. 12, 2012); Legge 29 novembre 1995, n.520, G.U. Nov. 29, 1995 (It.) (ratifying Intesa with the Lutheran Church, which was originally signed on Apr. 20, 1993). For full text of each law, see [http://presidenza.governo.it/USRI/confessioni/intese\\_indice.html](http://presidenza.governo.it/USRI/confessioni/intese_indice.html).

31. See Consorti, *supra* note 23, at 106. In April 2007, agreements were signed with the Jehovah’s Witnesses, (for full text of the Intesa see [http://presidenza.governo.it/USRI/ufficio\\_studi/normativa/Intesa\\_Congregazione\\_cristiana\\_testimoni\\_geova.pdf](http://presidenza.governo.it/USRI/ufficio_studi/normativa/Intesa_Congregazione_cristiana_testimoni_geova.pdf)), the Italian Buddhist Union, the Italian Hindu Union, the Apostolic Church in Italy, The Church



Italiano Soka Gakkai (IBISG) also reached an agreement with the State.<sup>32</sup>

Some commentators highlight problems that arise from a strict application of the bilateral principle.<sup>33</sup> On one hand, the need for representative institutions at a national level is problematic for some denominations that do not have a strong institutional structure, such as Islam.<sup>34</sup> On the other hand, there has been a focus on “the excessive amount of discretion that the public powers possess in deciding whether to accept” the request of a denomination to begin negotiations to reach an agreement.<sup>35</sup>

*A. The UAAR Request to Launch Negotiations Ex Article 8  
Paragraph 3*

Considering the large amount of discretion left to public powers, it is interesting to analyse the outcome of a recent decision of the Italian Constitutional Court.<sup>36</sup> The decision is the final point of a long process started in 1996, as explained below.

The Italian Constitution protects freedom of religion in Article 19: “Anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate

---

of Jesus Christ of Latter-day Saints, and the Greek Orthodox Archdiocese. Legge 30 luglio 2012, n.126, G.U. July 30, 2012 (It.) (ratifying Intesa with the Greek Orthodox Archdiocese); Legge 30 luglio 2012, n.127, G.U. July 30, 2012 (It.) (ratifying Intesa with The Church of Jesus Christ of Latter-day Saints); Legge 30 luglio 2012, n.128, G.U. July 30, 2012 (It.) (ratifying Intesa with the Apostolic Church in Italy); Legge 31 dicembre 2012, n.245, G.U. Dec. 31, 2012 (It.) (ratifying Intesa with the Italian Buddhist Union); Legge 31 dicembre 2012, n.246, G.U. Dec. 31, 2012 (It.) (ratifying Intesa with the Italian Hindu Union).

32. The agreement was signed on June 27, 2015, and approved June 28, 2016. Legge 28 giugno 2016, n.130, G.U. July 15, 2016, n.164 (It.); GOVERNO ITALIANO PRESIDENZA DEL CONSIGLIO DEI MINISTRI, SERVIZIO PER I RAPPORTI CON LE CONFESSIONI RELIGIOSE E PER LE RELAZIONI ISTITUZIONALI, [http://presidenza.governo.it/USRI/confessioni/intese\\_indice.html](http://presidenza.governo.it/USRI/confessioni/intese_indice.html) (last visited Oct. 7, 2017) (It.).

33. See *infra* notes 35–36.

34. ANDREA PIN, THE LEGAL TREATMENT OF MUSLIM MINORITIES IN ITALY, 77 (2016) (“Traditionally, Islam has no hierarchy and, pursuant to that, no hierarchical structure has appeared in Italy. While many individuals and organizations claim to be representative of the Italian Islamic community, this is hardly confirmed by the religious practices and attitudes of a Muslim community that is deeply divided based on nationality and personal religious inclinations.”).

35. Ferrari & Ferrari, *supra* note 5, at 453.

36. Corte Cost., 10 marzo 2016, n.52, G.U. 2016, (It.).

rites in public or in private, provided they are not offensive to public morality.”<sup>37</sup> Even though the text mentions only religious sentiment, it is without doubt that a democratic and pluralistic society also protects a non-religious attitude, such as the profession of atheism or agnosticism. On these premises, the UAAR assumed entitlement to the same system framed by the constitution for religious denominations.<sup>38</sup> Accordingly, in 1996 the UAAR submitted a request to the Italian government to launch negotiations to reach an agreement under Article 8, Paragraph 3 of the Italian Constitution.<sup>39</sup> The government refused the application on the grounds that the practice of atheism, asserted by the association in question, was not eligible to be considered as equivalent to a religious faith.<sup>40</sup> The decision denied the organization’s religious nature and, accordingly, the capacity to gain access to the system conceived only to religious entities by the Italian Constitution.<sup>41</sup>

Setting aside the issue of the nature of the UAAR, the government’s decision revived an interesting debate on the existence of a right for a religious denomination to initiate negotiations for an agreement under Article 8, Paragraph 3 of the Italian Constitution, and on the nature of the refusal to launch such negotiations. The debate focused on whether a religious denomination had a constitutional right to initiate the negotiation process for a stipulated agreement with the State with the consequence that in case of government’s refusal this right could invoke protection in court.<sup>42</sup>

---

37. Art. 19 Costituzione [Cost.] (It.).

38. Nicola Colaianni, *Ateismo de combat e intesa con lo stato*, 15 ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI [A.I.C.] 1 (2014) (It.).

39. FRANCESCO ALICINO, *la legislazione sulla base di intese. I test delle religioni “altre” e degli ateismi*, 218 (Cacucci Editore, 2013) (It.).

40. The Government affirmed that the profession of atheism was equivalent to religion with respect to free exercise, in any form, individual and associate, provided that it did not produce an act contrary to public morality (Article 19 of the Italian Constitution). However, atheism could not be regulated in a manner explicitly set out by Article 8 of the Italian Constitution for religious confessions only. Il Sottosegretario di Stato alla Presidenza del Consiglio dei Ministri, *Risposta del Consiglio dei Ministri sulla richiesta d’intesa*, UNIONE DEGLI ATEI E DEGLI AGNOSTICI RAZIONALISTI (5 DIC. 2003), [https://www.uaar.it/laicita/ateismo\\_e\\_legislazione/17e.html/](https://www.uaar.it/laicita/ateismo_e_legislazione/17e.html/) (It.).

41. *Id.*

42. See Jlia Pasquali Cerioli, *Accesso alle Intese e Pluralismo Religioso: Convergenze Apicali di Giurisprudenza sulla “Uguale Libertà” di Avviare Trattative ex Art. 8 Cost., Terzo Comma*, 26 STATO, CHIESE E PLURALISMO CONFESIONALE (2013) (It.); Colaianni, *supra*

In the case in question, the government objected to this interpretation<sup>43</sup>. For the State, the refusal to start negotiations was absolutely a free political act, and as such, it could not be subject to judicial review.<sup>44</sup> Accordingly, the government argued, the UAAR could not claim that the initiation of negotiations for a concordat was mandatory.<sup>45</sup>

### *B. The Reasoning of the Italian Court of Cassation*

Before the decision of the Italian Constitutional Court, the UAAR's request was considered before two of the highest Italian courts: first the Council of State and then the Court of Cassation.<sup>46</sup> Both courts focused on the whether the government could refuse to start negotiations with a religious denomination, and both reached similar conclusions.<sup>47</sup> The Council of State adopted a protective approach: once it is proven that an applicant has the features of a religious denomination, the government is obliged to accommodate the request to start negotiations.<sup>48</sup> However, the government ultimately retains the power to decline to enter into an agreement or to decline to translate an agreement into state law.<sup>49</sup>

The Court of Cassation reached the same conclusion.<sup>50</sup> According to the court's reasoning, the third paragraph of Article 8 must be read in light of the first paragraph of the same article, which states that all religious creeds are equal.<sup>51</sup> Therefore, the system of agreements would pursue the same goal of guaranteeing equal religious liberty for all denominations. In other words, the agreements protect the religious organizations' independence, equality before the law, and right to be different from one another.

---

note 1, at 1; Fabio Corvaja, *Rimedi Giuridici Contro il Diniego di Intesa con le Confessioni Religiose*, 2 QUADERNI COSTITUZIONALI (2002) (It.).

43. Corte Cost., 10 marzo 2016, n.52, G.U. 2016, at 2, 3 (It.).

44. *Id.* at 13.

45. *Id.* at 2, 3.

46. Cass., sez. un., 12 marzo 2013, n.16305, 2013 (It.); Cons. Stato, 18 novembre 2011, n.6083, 2011 (It.).

47. *See* Cass., sez. un., 12 marzo 2013; Cons. Stato, 18 novembre 2011.

48. Cons. Stato, 18 novembre 2011, at 6.

49. *Id.*

50. Cass., sez. un., 12 marzo 2013, at 9, 10.

51. *Id.* at 8.

The possibility that each religious group may conduct independent negotiations with the State permits each denomination to reach an agreement whose content is, as much as possible, specifically tailored to the needs of each group. For this reason, the court concluded that this system could not be left to the absolute discretion of the State because of the risk of prejudice and the requirement of the equal protection for all religious faiths.<sup>52</sup> Therefore, to support equal protection, the State must at least accommodate the request of the religious denomination to begin agreement negotiations.<sup>53</sup>

*C. The Decision of the Italian Constitutional Court*

The case was brought before the Italian Constitutional Court.<sup>54</sup> Under the court's reasoning, the proper significance of the constitutional provisions regarding the concordats consists only in the extension to non-Catholic faiths of the "bilateral method" already provided by Article 7 for the Pacts with the Holy See.<sup>55</sup> As such, the regulations of the religious affairs between the temporal and spiritual sphere must be based on a previous agreement whose content is dependent upon the intentions of the parties.<sup>56</sup> The core purpose of the accord's system is both to permit religious groups to give value to the distinct features of their individual religious faiths and to convince the State to take the individual needs of each religious group into account.<sup>57</sup> The agreement in itself is an instrument that reflects the shared intention of both parties; as such, the necessity of sharing will have some consequences not only at the conclusion phase of the agreement but also at the previous step regarding the choice to launch negotiations. The system of cooperation conceived by the constitution assumes the presence of consensus on both sides. Consequently, the government cannot impose regulation on a religious entity that does not discipline its relations within the temporal sphere; however, the State is also free

---

52. *Id.* at 9, 10.

53. *Id.* at 8.

54. Corte Cost., 10 marzo 2016, n.52, G.U. 2016, (It.).

55. *Id.* at 10–11.

56. *Id.*

57. Canonico, *supra* note 20, at 1–2.

not to sign an agreement if it considers that the requirements, interest, or opportunity are not met. Therefore, a right to stipulate the concordat cannot be invoked.<sup>58</sup>

This also has a direct logical implication on the claim to have a right to start negotiations. The court reasoned that, because a religious group lacks any entitlement to the successful conclusion of negotiations, and hence to the conclusion of a concordat, the claim of a right to start negotiations is meaningless. The bilateral method inherent within the rationale of Article 8, Paragraph 3 of the Italian Constitution requires a common intention of the parties not only to conduct and to conclude negotiations but also to launch them in the first place.<sup>59</sup> Consequently, the idea of the bilateral method prevents the judge both from reviewing the decision of the competent state authority and from forcing the government to accommodate the request of the religious party.<sup>60</sup> Thus, the court reasoned that there is no right to stipulate the agreement, and consequently, there is also no right to start negotiations aimed at concluding that agreement.

Moreover, the Constitutional Court relied on other arguments of institutional and constitutional significance to sustain its reasoning. For the court, this is a context strictly related to the political discretion of the government. The changing reality of national and political relations could lead the government to decide that it is not appropriate to grant the request to launch negotiations at a particular moment or with a particular social group. According to the court, currently the *Intesa* is clearly also used as an instrument of social and political legitimization.<sup>61</sup> This assessment of appropriateness could induce the government to refrain from

---

58. See also Corte Cost., 16 luglio 2002, n.346, G.U. 2002, n.29 (It.).

59. Corte Cost., 10 marzo 2016, at 11, 13.

60. *Id.* at 10–11 (“It is precluded first and foremost by the reference to the bilateral method inherent within the rationale of Article 8(3) of the constitution which—especially given the absence of specific procedural provision—requires a joint intention of the parties not only to conduct and conclude negotiations, but also to launch them in the first place. The assertion that a refusal to launch negotiations is subject to review before the courts 11/15—with the resulting possibility for mandatory enforcement of the ‘right’ recognised, and the related obligation for the Government to launch negotiations—would by contrast be at odds with the bilateral method provided for under the constitutional provision under examination.”).

61. *Id.* at 12.

granting even the implicit de facto legitimizing effect that an association could obtain from the mere initiation of negotiations. Moreover, the normative scenario lacks a general law on religious freedom that would clearly impose such an obligation on the State.<sup>62</sup>

Finally, the court noted that, notwithstanding the broad discretion granted to the state, this discretion is not absolute. The court noted that article 2(3)(1) of Law 400/1988 states that “acts concerning the relations provided for under Article 8 of the Constitution must be resolved upon within the Council of Ministers.”<sup>63</sup> According to the court, this means that the government retains a political responsibility for its determination.<sup>64</sup> As such, the government may be held responsible on a political level for that decision before Parliament, but not before the courts. To conclude, the Constitutional Court held that the refusal of the request to launch negotiations is a political act that falls within the margin of discretion of the government.<sup>65</sup>

Some suggestions may derive from a comparative approach. This Article will now discuss the approach of another European legal system, comparable to the Italian system, regarding church-state relations. Specifically, a similar issue was decided by the Spanish Constitutional Court in 2001, which partly reached a more protective approach to religious denominations.<sup>66</sup>

## II. THE SPANISH CONTEXT: RELEVANT CONSTITUTIONAL PROVISIONS

The Spanish Constitution of 1978 marked a substantial innovation in the legal treatment of relations between the State and religious denominations. Except for the short break of the Second

---

62. *Id.* at 14.

63. *Id.* at 12.

64. *Id.* at 12–13 (“The reservation to the Council of Ministers of competence over the decision as to whether or not to launch negotiations has the effect of establishing the possibility—in accordance with the principles of parliamentary government—of effective control by Parliament from the stage preliminary to the actual launching of negotiations, a control which is certainly justified in the light of the delicate interests protected by Article 8(3) of the Constitution.”).

65. *Id.* at 13.

66. S.T.C., Feb. 15, 2001 (B.O.E., No. 65, p. 83) (Spain).

Republic (1931–1939), the confessional model was a constant in Spanish constitutional history. In particular, the State had a long tradition of favoring the Catholic Church.<sup>67</sup> During Franco’s dictatorship, Catholicism was the state-established religion and was the only religion to receive official protection.<sup>68</sup> Ceremonies and other expressions of worship were authorized only if they were Catholic. Moreover, the expression of other religions was tolerated only when confined to the private sphere.<sup>69</sup> The new Republican regime represented a substantial step toward a new concept of religious freedom: Spain transitioned from a confessional state to a secular state based on the principles of religious freedom, equality, and cooperation between the State and religious denominations.<sup>70</sup>

The essential provision within the constitutional text is Article 16.<sup>71</sup> Paragraph 1 recognizes religious freedom as a fundamental right of individuals and communities and provides that “freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.”<sup>72</sup> This entails the recognition of a sphere of freedom free from any form of coercion of the State in religious matters and includes the right to not be obliged to declare ideology, religion, or personal conviction.<sup>73</sup> In addition to the protection of this internal dimension, this freedom entails an external dimension of *agere licere*, the right to manifest or

---

67. Zoila Combalía & María Roca, *Religion and the Secular State of Spain*, in RELIGION AND THE SECULAR STATE *supra* note 5, at 656, 657.

68. *Id.* at 630.

69. *Id.*; Miguel Rodríguez Blanco, *Spain*, in RELIGION AND DISCRIMINATION LAW IN THE EUROPEAN UNION 307, 310 (Mark Hill QC ed., 2012).

70. Maria Elena Olmos Ortega, *Personalidad jurídica civil de las Entidades religiosas y Registro de Entidades Religiosas*, in LA LIBERTAD RELIGIOSA Y SU REGULACIÓN LEGAL: LA LEY ORGANICA DE LIBERTAD RELIGIOSA 576, 585 (Rafael Navarro-Valls et al. eds., 2009) (Spain); *see also* Combalía & Roca, *supra* note 67, at 658.

71. C.E., B.O.E., n. 16, Dec. 29, 1978 (Spain) (“1. Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law. 2. No one may be compelled to make statements regarding his or her religion, beliefs or ideologies. 3. 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.”).

72. *Id.*

73. S.T.C., July 18, 2002 (B.O.E., No. 188, p. 51, 59) (Spain).

express religious beliefs, even collectively. The only limit to free expression of religious beliefs is the protection of public order.<sup>74</sup>

*A. The Principles of Positive Secularity and Cooperation Between State and Religion*

Article 16, Paragraph 3 of the Spanish Constitution<sup>75</sup> affirms the so-called principle of positive secularity, which follows from the principles of neutrality and cooperation.<sup>76</sup> On one hand, the State must not be confessional; on the other, it must have a positive attitude towards religion. Accordingly, the Spanish idea of secularism is closer to the Italian *laicità*. State neutrality does not require the State to adopt a stance of indifference toward religion in the name of a sort of “*secular confessionality*,”<sup>77</sup> rather, the State recognizes and favors religious presence in society. The Spanish Constitution itself considers religion to be a present component of the Spanish community and requires public authorities to cooperate with the Catholic Church and other religious denominations to make the rights and freedoms of individuals and groups real and effective,<sup>78</sup> as provided by Article 9 Paragraph 2.<sup>79</sup>

---

74. *Id.*

75. C.E., B.O.E. n. 16, para. 3 (“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.”).

76. Combalá & Roca, *supra note* 67, at 629–30.

77. Javier Martínez-Torrón, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, 2001 BYU L. REV. 711, 717.

78. S.T.C., Feb. 15, 2001 (B.O.E., No. 65, p. 83, 87) (Spain) (“[A]rt. 16.3 of the Constitution, after formulating a declaration of neutrality (SSTC 340/1993, of November 16, and 177/1996, of November 11), considers the religious component perceivable in Spanish society and orders public authorities to maintain ‘the consequent relations of cooperation with the Catholic Church and the other confessions, thus introducing an idea of non-confessionality or positive secularism that prevents any kind of fusion between religious and state purposes.’”) (English translation by the author).

79. C.E., B.O.E. n. 9, para. 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, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.”).



*B. Instruments of Cooperation Between State and Religion*

The Spanish legal system presents three levels that manifest the principle of cooperation between the State and religious denominations.<sup>80</sup> The first instrument of cooperation is the possibility of a religious denomination to reach an agreement with the State. In 1979, the Spanish State and the Holy See signed four agreements concerning issues of common interest, such as the recognition of legal personhood to the Catholic Church in Spain, the right to receive religious education and teach religious classes, the right to give religious assistance to the armed forces, as well as agreements on fiscal and economic issues.<sup>81</sup> In addition to the Concordat with the Holy See, article 7 of the Organic Law of Religious Freedom<sup>82</sup> allows the government to sign cooperative agreements to regulate issues of common interest with registered religious groups of particular social significance, known as *notorio arraigo* or “well-known roots.”<sup>83</sup> The law requires such arrangements to be approved by an act of Parliament.<sup>84</sup> Agreements were signed with the Federations of Protestants, Jews, and Muslims

---

80. Just as anticipation, in Spain there are religious denominations (1) that have reached an agreement with the State; (2) that have obtained registration in the Ministry of Justice’s Religious Entities Register; and (3) that, without being enrolled in the Register, exist only as religious entities in Spain. The three levels are described in this way by Judge Manuel Jiménez de Parga y Cabrera in S.T.C., Feb. 15, 2001 (B.O.E., No. 65, p. 83, at 91) (Spain).

81. Acuerdo entre el Estado español y la Santa Sede sobre asuntos jurídicos. Acuerdo entre el Estado español y la Santa Sede sobre enseñanza y asuntos culturales. Acuerdo entre el Estado Español y la Santa Sede sobre la asistencia religiosa a las Fuerzas Armadas y el servicio militar de clérigos y religiosos. Acuerdo entre el Estado español y la Santa Sede sobre asuntos económicos. For the full text of the agreements, see B.O.E, n. 300, Jan. 3, 1979, p. 28781–82, 28784–85 (Spain).

82. Ley Orgánica de Libertad Religiosa art. 7 (B.O.E. 1980, 15955) (Spain) (“The State, taking into account the existing religious beliefs in Spanish society, shall, where appropriate, establish agreements or cooperation agreements with the Churches, Confessions and Religious Communities registered in the Register whose area and number of believers have reached deeply rooted in Spain. In any case, these agreements must be approved by Act of Parliament.”); see Martínez-Torrón, *supra* note 77, at 717.

83. Several factors are considered to determine if a religious denomination is well rooted in the Spanish State: for example, the years of presence in the state, the number of believers, the performance of charitable activities, the participation in public life. The requirements and the recognition process have been detailed by the Royal Decree 593/2015 (Spain), [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2015-8642](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8642).

84. Ley Orgánica de Libertad Religiosa art. 7 (B.O.E. 1980, 15955) (Spain).

in 1992.<sup>85</sup> These agreements followed the scheme of the Concordat with the Holy See. As in Italy, they provided a general legal framework for all religious confessions. In general, they give civil effect to religious marriages, allow religion classes in state schools, permit the ability to obtain fiscal benefits, and admit spiritual assistance for individuals in hospitals, prisons, military, or other public institutions.<sup>86</sup> However, it is important to emphasize that the agreements “are not a constitutional requirement as they are in Italy.”<sup>87</sup> The Spanish Constitution requires only cooperation between State and each religious denomination, but the way in which this should be carried out is not specified.<sup>88</sup>

Moreover, different from those in Italy, these agreements are just one of the ways by which each religious denomination can relate to the Spanish State, in light of the principle of cooperation. The second level of protection is reserved for religious denominations that are recorded in the Ministry of Justice’s Religious Entities Register (the “Register”). This registration is voluntary and a precondition (in addition to well-known roots) to access any agreement with the State.<sup>89</sup> The registration submission must present the requirements listed in article 5, paragraph 2 of Ley Organica de Libertad Religiosa (LOLR), particularly the religious nature and

85. Acuerdo de Cooperación del Estado con la Federación de Entidades Religiosas Evangélicas de España (B.O.E. 1992, 24853); Acuerdo de Cooperación del Estado con la Federación de Comunidades Israelitas de España (B.O.E. 1992, 24854); Acuerdo de Cooperación del Estado con la Comisión Islámica de España (B.O.E. 1992, 24855).

86. Acuerdo de Cooperación de Evangélicas; Acuerdo de Cooperación de Israelitas; Acuerdo de Cooperación con la Islámica; *see also* Augustin Motilla De La Calle, *Ley orgánica de libertad religiosa y Acuerdos con las confesiones: experiencia y sugerencias de iure condendo*, [Organic Law of Religious Freedom and Agreements with Confessions: Experience and Suggestions by Iure Condendo], in LA LIBERTAD RELIGIOSA Y SU REGULACIÓN LEGAL: LA LEY ORGANICA DE LIBERTAD RELIGIOSA 576, 585 (Rafael Navarro-Valls et al. eds., Justel 2009) (Spain).

87. Combalá & Roca, *supra* note 67, at 632.

88. *Id.* *See generally* C.E., B.O.E. n.81, Dec. 29, 1978 (Spain) (stating that the implementation of the Constitutional principles should take place through organic laws) (“1. Organic laws are those relating to the development of fundamental rights and public liberties, those which establish Statutes of Autonomy and the general electoral system, and other laws provided in the constitution.”). For a more detailed overview of the principle of cooperation in Spain, see Ana Fernandez-Coronado, *Sentido de la cooperación del estado laico en una sociedad multirreligiosa* [Sense of Cooperation of the Lay State in a Multi-religious Society], in LA LIBERTAD RELIGIOSA Y SU REGULACIÓN LEGAL, *supra* note 86, at 679.

89. *See* Fernandez-Coronado, *supra* note 88.

purposes of the organization.<sup>90</sup> As a primary effect of the registration, the religious group obtains legal capacity. As affirmed by the Constitutional Court, this entails “the identification and the admission into the legal system of a group of people that aim to exercise, with immunity from coercion, their fundamental rights to collective exercise of religious freedom, as established in article 5, paragraph 1 of the LOLR.”<sup>91</sup>

At the same time, registration affects the autonomy and right of self-organization of the group.<sup>92</sup> According to the Constitutional Court, the recognition of legal capacity confers a peculiar status on the entity, which above all is expressed in the full autonomy attributed to it by article 6, paragraph 1 of the LOLR.<sup>93</sup> This rule provides that registered religious entities may establish rules of organization, internal regime, and administration of their personnel.<sup>94</sup> Moreover, the registration produces positive effects on the external dimension of religious freedom; members belonging to a registered group can more quickly manifest their religious beliefs “with immunity from coercion, hindrance or interference of any kind.”<sup>95</sup>

Finally, the third level of protection is recognized for individuals or religious groups that exist in Spain without being enrolled in the Register.<sup>96</sup> In fact, the registration is not required for free exercise of

---

90. Ley Orgánica de Libertad Religiosa art. 5 para. 2 (B.O.E. 1980, 15955) (Spain) (“Registration shall be made by an application, accompanied by a document evidencing the foundation roots or establishment in Spain, the expression of the religious purposes, name and other identification data, operating regime and representative bodies, with the indication of their powers and requirements for their valid designation.”) (English translation by the author).

91. S.T.C., Feb. 15, 2001 (B.O.E., No. 65, p. 83) (Spain) (English translation by the author).

92. See Maria Elena Olmos Ortega, *supra* note 70.

93. S.T.C., Feb 15, 2001 (B.O.E., No. 65, p. 87–88) (Spain).

94. Ley Orgánica de Libertad Religiosa art. 6 (“The registered Churches, Confessions and Religious Communities will have full autonomy and will be able to establish their own rules of organization, the internal regime and personnel regime. These rules, as well as those governing their institutions created for the fulfillment of their purposes, may include provisions for safeguarding their religious identity and their own character, as well as the due respect for their beliefs, without prejudice to the respect of rights and freedoms recognized by the constitution, especially those of freedom, equality and non-discrimination.”) (English translation by the author).

95. S.T.C., Feb. 15, 2001 (B.O.E., No. 46, p. 88) (Spain).

96. See S.T.C., July 18, 2002 (B.O.E., No. 188, p. 51, 59) (Spain).

religion in Spain, which is always guaranteed by Article 16 of the Spanish Constitution: “[W]ith no other restriction on their expression than may be necessary to maintain public order as protected by law.”<sup>97</sup> All religious groups benefit not only from the general provisions protecting religious manifestation,<sup>98</sup> but also from the prerogatives derived from the right of association guaranteed by Article 22 of the Spanish Constitution.<sup>99</sup>

As in the Italian system, in the Spanish system it cannot be said that religious denominations have a right to stipulate a cooperative agreement with the State.<sup>100</sup> The agreement is not a constitutional requirement, nor does the text of the law itself leave room for a different outcome. In particular, the expression “where appropriate”<sup>101</sup> leaves a margin of discretion to the government in the interest and convenience of starting negotiations.<sup>102</sup> The government can decide, according to reasonable motivations but within the margin of its discretion, which deeply rooted religious denominations may benefit from cooperation with the State through an agreement. The administrative decision falls de facto outside the judicial review, provided that it does not constitute a means of arbitrary discrimination.<sup>103</sup> In fact, there are registered religious denominations, like Jehovah’s Witnesses or The Church of Jesus Christ of Latter-day Saints, that have been recognized as deeply rooted in Spain but were unable to conclude any agreement.

97. Martínez-Torrón, *supra* note 77, at 717 n.10 (quoting C.E., B.O.E. n. 16, Dec. 29, 1978 (Spain)).

98. Ley Orgánica de Libertad Religiosa art. 2.

99. C.E., B.O.E. art. 22 para. 1, Dec. 29, 1978 (“The right of association is recognized.”).

100. See Miguel Rodríguez Blanco, *Il Principio di Laicità in Spagna*, STATO, CHIESE E PLURALISMO CONFESSIONALE 1–2, n.1 (2011) (Spain) (quoting C.E., B.O.E. art. 16, Dec. 29, 1978 (Spain)).

101. Ley Orgánica de Libertad Religiosa art. 7 (B.O.E. 1980, 15955) (Spain), <http://bit.ly/QpA4Ld> (“The State, taking into account the religious beliefs existing in Spanish society, shall, where appropriate, establish agreements or cooperation agreements with the Churches, Confessions and Religious Communities registered in the Register whose area and number of believers have reached deeply rooted in Spain. In any case, these agreements must be approved by Act of Parliament.”) (English translation by author).

102. Motilla De la Calle, *supra* note 86, at 850, 851.

103. *Id.*

*C. A Right to be Registered as a Right of Religious Freedom*

Though the wording of LOLR excludes a claim to enter into an agreement with the State, a different issue is whether there exists a right for a religion to be registered in the Registry of Religious Entities. As mentioned above, the registration not only constitutes a condition to conclude an arrangement with the State but also, and with no less importance, grants to a religious entity a favored status and related benefits.

This issue of registration was the object of an important decision of the Spanish Constitutional Court in 2001.<sup>104</sup> The case originated from the request of the Church of Unification, also referred to as the Moon Sect, to officially register as a religious group.<sup>105</sup> The administrative authorities refused the application, arguing that the Moon Sect was not a religious group but rather a “dangerous sect” carrying out activities contrary to the public order.<sup>106</sup> Regarding the application for enrollment in the Registry, the court held that the administrative authorities must act in a space strictly regulated by law and that the authorities have no room for discretion.<sup>107</sup> The administrative authorities have no margin to decide whether or not to grant the request and, in particular, have no authority to examine the religious nature of any group that has applied to register.<sup>108</sup> On the contrary, public authorities should verify only the formal presence of the requisites listed in article 5, paragraph 2 of LOLR<sup>109</sup> and ensure that the group is not one of those excluded by article 3, paragraph 2.<sup>110</sup>

---

104. S.T.C., Feb. 15, 2001 (B.O.E., No. 46/2001, p. 83) (Spain).

105. *Id.*

106. *Id.*

107. *Id.* at 89 (“[L]a Administración responsable de dicho instrumento no se mueve en un ámbito de discrecionalidad que le apodere con un cierto margen de apreciación para acordar o no la inscripción solicitada.”).

108. *Id.*

109. Ley Orgánica de Libertad Religiosa art. 5 para. 2 (B.O.E. 1980, 15955) (Spain).

110. Ley Orgánica de Libertad Religiosa art. 3 para. 2 (B.O.E. 1980, 15955) (Spain) (“Activities, purposes and entities relating to or engaging in the study of and experimentation with psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims do not qualify for the protection provided in this Act.”).

According to the Constitutional Court, the registration is designed to facilitate the collective exercise of the right to religious freedom.<sup>111</sup> The registration is an instrument ordered to make rights real and effective, to “remove obstacles,” and to promote the conditions for freedom and equality of individuals and groups.<sup>112</sup> As such, it must not suffer further limitations than those necessary to safeguard public order, such as the protection of fundamental human rights, public health, security, and morality. According to the decision, the improper refusal to accommodate the registration requested is an unwarranted obstacle that undermines the full exercise of the fundamental right of religious freedom.<sup>113</sup> Furthermore, it involves an unjustified disadvantage when compared to the faith-based organizations that have obtained official status and the connected benefits<sup>114</sup>.

To summarize, in Spain, because registration is a function of the protection of religious freedom, the government does not enjoy a margin of discretion to deny religious organizations who apply to be registered. Moreover, any restriction must be justified for the protection of public order and must be considered with strict scrutiny.<sup>115</sup>

#### CONCLUSION

The Spanish Constitutional Court considers enrollment in the official Register to be a tool to ensure easier and effective enjoyment of religious freedom.<sup>116</sup> Accordingly, the Spanish Constitutional Court held that religious groups have a right to access the more favorable status granted by the registration. Registration can be refused only for the absence of the formal prerequisites required by the law, and the administrative decision will be under the strict scrutiny of the judicial power.<sup>117</sup> Otherwise, an improper refusal

---

111. S.T.C., Feb. 15, 2001 (B.O.E., No. 46/2001, p. 83, 89) (Spain).

112. *Id.*

113. *Id.*

114. *Id.*

115. On the contrary, the four dissenting judges excluded that the inscription in the Registry is part of the essential content of the freedom of religion. *Id.* at 91–94.

116. *Id.* at 89.

117. *Id.*

would give registered groups an unfair advantage over those to whom the same request was denied.<sup>118</sup> In Spain, the presence of a general law regarding religious freedom permitted the Constitutional Court to reduce the margin of discretion of the public authority. In Italy, the lack of this general regulation seems to have prevented the Italian Constitutional Court from reaching a similar result.<sup>119</sup>

Therefore, it is still unclear whether the Italian approach guarantees adequate protection of religious denominations' interests. Currently, the State uses agreements to grant a general set of rights that express the general needs of all religions to "recognized denominations." These general rights could conceivably compose the content of a general law on religious freedom or at least of a new version of the law on admitted cults.<sup>120</sup> Some commentators argue that this de facto tendency is problematic in light of the principle of non-discrimination.<sup>121</sup> Because the agreement has become a sort of general law, religious denominations left without an agreement cannot benefit from these general provisions. In this way, unrecognized denominations are treated inequitably.<sup>122</sup> Moreover, because a general religious freedom law has not yet been enacted in Italy, the agreement is the only way for a religious denomination to

---

118. *Id.*

119.

The conclusion might have been different, also with regard to the question raised by this dispute, had the legislator decided through an act of discretion to introduce comprehensive regulation of the procedure governing the conclusion of concordats, laying down also objective parameters suitable for guiding the Government as regards its choice of interlocutor. Were this to occur, compliance with those restrictions would constitute a prerequisite for the legitimacy and validity of the choices made by the Government, which could be reviewed in the appropriate fora . . . .

Corte Cost., 10 marzo 2016, n.52, G.U. 2016 (It.).

120. Jlia Pasquali Cerioli, *L'approvazione delle intese ex art. 8, 3° comma, Cost. nella XVI legislatura: luci e ombre di una nuova «stagione»*, 2 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 404, 405 (2013) (It.).

121. Annamaria Poggi, *Una sentenza "preventiva" sulle prossime richieste di Intese da parte di confessioni religiose?*, FEDERALISMI.IT, Mar. 2016, at 2 (It.).

122. Colaianni, *supra* note 38, at 9; *see also* Nicola Colaianni, *Le intese nella società multireligiosa: verso nuove disuguaglianze?*, STATO, CHIESE E PLURALISMO CONFESIONALE, May 2012, at 7 (It.).

avoid the restrictive limits of the illiberal law on admitted cults, the *legge sui culti ammessi* of 1929.<sup>123</sup>

This means that the religious denominations that do not successfully enter into an agreement are excluded from the more favourable provisions and from the benefits reserved for “agreed religions.”<sup>124</sup> The absence of any procedural limit to the discretionary powers of the Government can easily result in discrimination against denominations excluded from the agreements.

In this regard, the jurisprudence of the European Court of Human Rights (ECtHR) can provide some reflections. The ECtHR has repeatedly stated that a state enjoys a broad margin of appreciation in the matters of church-state relations.<sup>125</sup> Nevertheless, this “does not mean that the relations between a Contracting State and religious communities lie completely outside the Court’s scrutiny.”<sup>126</sup> According to the ECtHR, “the conclusion of agreements between the State and a particular religious community establishing a special regime in favour of the latter, does not, in principle, contravene the requirements of Articles 9 and 14 of the Convention,” provided that the principle of non-discrimination is respected.<sup>127</sup> This means that there must be “an objective and reasonable justification for the difference in treatment and . . . similar agreements may be entered into by other religious communities wishing to do so.”<sup>128</sup> This concept is explained by Judge Tulkens:

[P]ublic authorities are under no obligation to provide an identical legal status to each community. Nevertheless, the Court will control with severity the conformity with the Convention of advantages granted exclusively to one religious community. Any advantage conferred to a religious community to the exclusion

123. Canonico, *supra* note 20, at 2.

124. Ferrari & Ferrari, *supra* note 5, at 455.

125. Leyla Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, 204.

126. EUROPEAN COURT OF HUMAN RIGHTS, OVERVIEW OF THE COURT’S CASE-LAW ON FREEDOM OF RELIGION 15 (2013), [http://www.echr.coe.int/Documents/Research\\_report\\_religion\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_religion_ENG.pdf).

127. Savez Crkava v. Croatia, App. No. 7798/08, ¶ 85 (Eur. Ct. H.R. Dec. 9, 2010), [https://hudoc.echr.coe.int/eng#{"fulltext":\["SavezCrkava"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-102173"\]}](https://hudoc.echr.coe.int/eng#{).

128. *Id.*; *see also* Alujer Fernández v. Spain, 2001-VI Eur. Ct. H.R. 7.



of the others must rest on a legitimate justification and remain proportionate.<sup>129</sup>

Regarding the assignment of a particular status to a religious denomination, the ECtHR has reiterated under Article 9 of the Convention that state authorities have an obligation to remain neutral when exercising their powers in this domain.<sup>130</sup> Accordingly, if a state sets up a framework for granting preferential legal status to religious groups, all religious groups must have a fair opportunity to apply for this status.<sup>131</sup> The criteria established must be applied in a non-discriminatory manner, especially when the privilege and “the advantage obtained by religious societies is substantial and this special treatment undoubtedly facilitates a religious society’s pursuance of its religious aims.”<sup>132</sup> In any case, the imposition of such criteria in this delicate matter, calls for *particular scrutiny* on the part of the court.<sup>133</sup>

In conclusion, under current Italian Constitutional Court precedent, a religious entity has no right to negotiate with the Italian government in an attempt to enter into an agreement with the State. In this context, the Italian government enjoys broad political discretion. Although under the Spanish system, like the Italian system, there is no right to sign an agreement with the State under the LOLR, the Spanish Constitutional Court has reached a different outcome than the Italian Constitutional Court with respect to a religious group’s right to access and enroll in the official Register. According to the Spanish Constitutional Court, the Spanish government does not enjoy discretion when assessing a religious entity’s registration claim. Rather, any religious group that meets the formal requirements prescribed by the law has the right to access the

---

129. Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, 30 CARDOZO L. REV. 2575, 2585 (2009).

130. Religionsgemeinschaft der Zeugen Jehovas v. Austria, App. No 40825/98, ¶ 92 (Eur. Ct. H.R. July 31, 2008), [https://hudoc.echr.coe.int/eng#{"fulltext":\["religionsgemeinschaft"\],"documentcollectionid":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-88022"\]}](https://hudoc.echr.coe.int/eng#{).

131. *Id.*

132. *Id.*

133. *Id.* ¶ 97.

Register because the purpose of the registration process is to promote the full enjoyment of religious freedom.

After the decision of the Italian Constitutional Court, the UAAR decided to bring its claim before the ECtHR.<sup>134</sup> In the Italian system, religious denominations without an agreement suffer under a legal regime that denies them many of the rights that recognized religions enjoy. The Italian legal landscape is characterized by the absence of a general law on religious freedom, the existence of a law on admitted cults dating back to the Dictatorial Period, and broad governmental discretion. Moreover, the Italian system, in which the Italian government enjoys complete discretion over the agreements process, does not protect collective religious rights as required by the European Convention of Human Rights. Although the ECtHR has not ruled on the question of whether Italy's system violates principles of the European Convention, there appears to be a legitimate argument that they do, particularly the principle of non discrimination.

---

134. The application has been brought before the Strasbourg Court but details are not yet available. See the declaration of Mr. Carcano, UAAR's Representative, after the decision of the Italian Constitutional Court, available at <https://blog.uaar.it/2016/03/11/corte-costituzionale-legittimo-no-governo-intesa-uaar/>.

