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State Neutrality and Legal Status of Religious Groups in the European Court of Human Rights Case-law

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Abstract

From the premise of religious freedom, the European Court of Human Rights (ECtHR) case-law has established a State duty of neutrality concerning religious matters. However, the concept of *neutrality* is not univocal, and the ECtHR uses various different forms of it. States have a duty to allow religious groups access to legal personality, but they are not obliged to grant every religious group the same kind of legal personality. A double or multi-level system of recognition is legitimate under the European Convention on Human Rights (ECHR) if some conditions are fulfilled. The ECtHR has also affirmed that the most radical kind of double or multi-level system, that of an established church, is not contrary to the Convention. In a recent case, however, the ECtHR seems to have adopted a stricter approach to the legitimacy of privileges granted to some church/churches above other ones.

Keywords

religious groups – legal status – legal personality – European Convention on Human Rights (ECHR) – European Court of Human Rights (ECtHR) – religious freedom – freedom of association – state religion

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1 Introduction

The European Court of Human Rights (ECtHR) case-law on religious freedom has been widely studied, and only the main general works on the subject can be cited here.[1] One aspect of this case-law deserves particular attention, both because of its intrinsic importance and because it has been relatively recently developed by the ECtHR. Indeed, it is of utmost importance to know if religious freedom, as it is enshrined in the European Convention on Human Rights (ECHR), imposes a particular attitude on States in the domain of recognition and status of religious groups.

It is well-known that the right to freedom of thought, conscience and religion recognised by Article 9 of the ECHR 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'. It is widely accepted that Article 9 does not deal *directly* with the relationship between churches and States. However, this article *indirectly* regulates the issue, by reference to religious freedom.[2] Therefore, many questions arise: Does Article 9 impose a duty to grant legal personality to religious groups on States? Must States grant a *particular kind* of legal personality to those groups? How can States withdraw legal personality once it has been granted?

Article 9, if read in conjunction with the principle of equality of Article 14, entails an additional problem. The prohibition of discrimination that appears

1 Fernando Arlettaz, *Religión, libertades y Estado. Un estudio a la luz del Convenio Europeo de Derechos Humanos* (Barcelona: Icaria, 2014); Jim Murdoch, *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2012); Fernando Arlettaz, 'La jurisprudencia del Tribunal Europeo de Derechos Humanos sobre la libertad religiosa: un análisis jurídico-político', 27 *Derechos y Libertades* (2012), pp. 209–240; Gideon Cohen, 'Article 9 of the European Convention on Human Rights and Protected Goods', 12:2 *Ecclesiastical Law Journal* (2010), pp. 161–192: Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005); Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2003).

2 Claudia E. Haupt, 'Transnational Nonestablishment', 80:4 *The George Washington Law Review* (2012), p. 1008; Françoise Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism', 30:6 *Cardozo Law Review* (2009), p. 2576; Carolyn Evans and Christopher A. Thomas, 'Church-State Relations in the European Court of Human Rights', 3 *Brigham Young University Law Review* (2006), p. 699. See also Jeroen Temperman, *State-Religion Relationships and Human Rights Law* (Leiden: Martinus Nijhoff Publishers, 2010), pp. 149–150.

in Article 14 could lead to the conclusion that States should recognise the same legal status for all religious groups. Nevertheless, religious groups vary widely in size and historical importance in a given community. How are these differences to be taken into account?

The hypothesis to be presented here is that according to European case-law, States are compelled to recognise legal personality to religious groups that demand it (even if, under certain conditions, it can be denied or withdrawn). However, the ECtHR does not impose a particular model of the relationship between States and religious groups, so the latter are not entitled to the recognition of a *particular* legal status under internal law. Moreover, States are not obliged to grant the same kind of legal status to all religious groups.

But States are not completely free to regulate the status of religious groups either. Religious freedom, taken in conjunction with the equality principle, requires some *minimal conditions* in the relations between States and religious groups. The relations that States establish with religious organisations are not irrelevant from the point of view of religious freedom. Indeed, a picture of greater or lesser compatibility between modes of church-States relations and freedom of religion can be set. For example, a State hostile to religion or a strictly denominational State are incompatible with the maximum extension of religious freedom.[3]

The cornerstone of the regulation of religious groups' legal status is the principle of neutrality. The ECtHR has repeatedly declared that religious freedom requires the State to be neutral regarding religion: 'in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial'.[4]

However, the sole idea of neutrality does not solve the issue of the status of religious groups, for at least three reasons. Firstly, "neutrality" (as well as "impartiality", also used by the Court) is an ambiguous word. As will be demonstrated

3 Jean-François Flauss, 'Laïcité, liberté de religion et Convention européenne des droits de l'homme', 2 *Revue du droit public et de la science politique en France et à l'étranger* (2004), pp. 317–324; Christian Starck, 'Raíces históricas de la libertad religiosa moderna', 47 *Revista Española de Derecho Constitucional* (1996), pp. 253–273.

4 *Metropolitan Church of Bessarabia and others* v. *Moldova*, ECtHR, 13 December 2001, No. 47701/99, para. 116. *See also Religionsgemeinschaft der Zeugen Jehovas and others* v. *Austria*, ECtHR, 31 July 2008, No. 40825/98, para. 97; *Savez Crkava "Riječ Života" and other* v. *Croatia*, ECtHR, 9 December 2010, No. 7798/08, para. 88; *Magyar Keresztény Mennonita Egyház and others* v. *Hungary*, ECtHR, 8 April 2014, Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12, and 5658/12, para. 76; *Fernández Martínez* v. *Spain*, ECtHR, Grand Chamber, 12 June 2014, No. 56030/07, para. 128.

in the next section, there are many different ways to understand the idea of neutrality.

Secondly, the ECtHR has not always been consistent in the application of the neutrality principle. Not only because the Court has used different versions of the principle (issued from different definitions of the idea of "neutrality"), but also because sometimes the ECtHR has directly set it aside, and has relied on a completely different idea (for example, that States have a right to perpetuate a national tradition, even if this involves a religious aspect).

Finally, as there is no European consensus about the meaning of religion in social life, the ECtHR has acknowledged a wide margin of appreciation applicable to the State's attitude towards religion.[5] 'As in the case of "morals",' the Court has held, 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society ... even within a single country such conceptions may vary'.[6]

Rules concerning church-States relations may vary from one country to another. Opinions about relations between States and religions can also vary in a democratic society.[7] There is therefore a wide margin of discretion for States to regulate their relations with religious organisations. As the Court has held,

> Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably

5 About the margin of appreciation in general, see Steven Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?', 3 *UCL Human Rights Review* (2010), pp. 1–14; George Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006), pp. 705–732; Oren Gross and Fionnuala Ni Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the ECHR', 23 *Human Rights Quarterly* (2001), pp. 625–649; Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the European Court of Human Rights* (Antwerp: Intersentia, 2001); Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000). About the margin of appreciation in the context of freedom of religion, *see* Monica Lugato, 'The *Margin of Appreciation* and Freedom of Religion: Between Treaty Interpretation and Subsidiarity', 52 *Journal of Catholic Legal Studies* (2013), pp. 49–70; Kristin Henrard, 'A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to *Church-State Relations* under the Jurisprudence of the European Court of Human Rights', in M.C. Foblets *et al.* (eds.), *Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Farnham: Ashgate, 2012), pp. 59–86.

6 *Otto-Preminger Institut* v. *Austria*, ECtHR, 20 September 1994, No. 13470/87, para. 50. *See also Leyla Sahin* v. *Turkey*, ECtHR, Grand Chamber, 10 November 2005, No. 44774/98, para. 109.

7 *Leyla Sahin* v. *Turkey*, *ibid.,* para. 108; *Dogru* v. *France*, ECtHR, No. 27058/05, para. 63.

> differ widely, the role of the national decision-making body must be given special importance ... Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order.[8]

2 What Is Neutrality About?

European case-law about the status of religious groups is based on the key concepts of "neutrality" and "impartiality". Apart from some specifications in particular cases, which will be addressed below, there is neither a clear definition of these terms in the Strasbourg Court judgements nor a distinction between them in the ECtHR case-law. This work will consider "neutrality" and "impartiality" as synonyms (of course, the suggested synonymy is limited to the analysis presented here; it is not hinted that in a more general context of legal or philosophy debate those terms are used or must be used as synonyms).

To rightly understand the scope of "neutrality" some distinctions must be made. The first one is between "neutrality of ends" and "neutrality of consequences". Sometimes this is referred to as a distinction between "formal" and "substantive" neutrality. The former implies that government cannot use religion as a standard for action or inaction, so law should not establish distinctions on the basis of religion. Substantive neutrality, on the contrary, requires government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or non-practice, observance or non-observance.[9] A piece of legislation that prohibits the use of Jewish yarmulke but permits Catholics to wear a cross is not formally neutral (and of course, not substantively neutral either). But if it prohibits people from covering their heads, it is formally neutral (as no classification is facially established based on religion), but it is not substantively neutral (as the impact for Jews and Catholics is not the same).

Even in the absence of a specific clarification by the ECtHR, substantive neutrality fits better with the Court's case-law. Through the lens of religious freedom, the Court evaluates the impact of a specific legal measure in the particular circumstances of each case. It decides if the applicant's religious

8 *Dogru* v. *France*, *ibid.*, para. 63. *See also Leyla Sahin* v. *Turkey*, *ibid.*, para. 109; *Fernández Martínez* v. *Spain*, *supra* note 4, para. 130.

9 Douglas Laycock, 'Formal, Substantive, and Disaggregated Neutrality toward Religion', 39 *DePaul Law Review* (1990), pp. 993–1018.

freedom has been affected by government action (or inaction), and judges any such interference. Consequently, this work is going to rely on the concept of substantive neutrality.

But conceptual obstacles do not end here. It can still be asked what it means "not to encourage or discourage religion". Consider the following definition of neutrality, which fits the category of substantive neutrality:

> One is neutral only if one can affect the fortunes of the parties and if one helps or hinders them to an equal degree and one does so because one believes that there are reasons for so acting which essentially depend on the fact that the action has an equal effect on the fortunes of the parties.[10]

According to the definition, acting neutrally is to affect the various parties concerned on equal terms. But this may imply different courses of action. The first and most intuitive form of neutrality is abstention. In a war between A and B, the primary way to be neutral is to abstain from helping or hindering either of them. This can be called "neutrality as non-interference".

There is a second form of neutrality, which can be called "neutrality as equal interference". Consider the example of a car park where all cars must pay the same amount regardless of their size. It is possible to claim that the price of the parking is neutral, in relation to the cars' size, in this second way. Of course, it may not be neutral in this second way in relation to other important aspect of the situation (for example, the time the car is parked in the place).

But being neutral (in the first or in the second way) does not always mean to act fairly. A classic example: if in a dispute between two children the father abstains from intervening, he is being neutral (in the first way) in relation to that dispute. However, if his abstention means that the older and stronger child will come out on top, maybe he is not acting fairly.

Therefore, a third concept of neutrality can be suggested: "neutrality as fair interference". Acting neutrally, in this third way, requires considering the particular situation of all parties involved. If the parties are equal in the particular concerned aspect, neutrality as fair interference coincides with neutrality as non-interference or with neutrality as equal interference, whereas if the parties are not equal, neutrality as fair interference will require taking into account the differences between them. Providing the same social benefit to all families regardless of the number of children they have is to be neutral in

10 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 113. The author proposes it as a definition of neutrality in general, not as a definition of substantive neutrality.

the sense of equal interference; but if one wants to be neutral in the sense of fair interference, one has to consider the family situation and distribute social benefits accordingly.

Consider next the case of funding religious groups. Neutrality as non-interference would oblige States to refrain from giving any money to religious groups. On the contrary, neutrality as equal interference would lead States to finance all religious groups with the same amount of funding, regardless of their characteristics such as number of members, relation to the country's history, etc. Finally, neutrality as fair interference would require taking into account these characteristics.

Of course, neutrality in either of its forms supposes that some definitions are previously given. Thus, acting neutrally towards religious groups (in a "non-interference", in an "equal interference", or in a "fair interference" way) demands a previous definition about what counts as a religious group. For example, would an association of atheists be given money in the same way that the Catholic Church is given money? Would the Catholic Church count as *one* religious group or would each Catholic subdivision (bishoprics, monasteries, etc.) count as such? Neutrality as "fair interference" also requires considering relevant aspects to guarantee the fairness of the intervention: Would the funds be distributed according to the number of adherents of each church or would they be distributed according to the importance of the church in national history?

The ECtHR has not explicitly endorsed either of these possible modalities of neutrality. However, the Court has given particular importance to pluralism.[11] According to Judge Tulkens, religious freedom is one of the elements of pluralism, and pluralism is the background against which the State must act as a 'neutral and impartial organiser of the exercise of various religions, faith and beliefs', as was established in the *Refah Partisi* (*The Welfare Party*) case.[12] As will be shown in the following sections, it can be argued that the use of the concept of "pluralism" as the backbone of the neutrality principle has allowed the Court to give this principle a widely variable content.

It has been pointed out that the Court has failed in a number of cases to advance the pluralism it proclaims. These cases would be related to situations where religion would challenge European secular identity, as in the Muslim headscarves cases.[13] According to this opinion, the Section decision in the

11 Tulkens, *supra* note 2, p. 2579; Zachary R. Calo, 'Pluralism, Secularism and the European Court of Human Rights', XXVI *Journal of Law and Religion* (2010), pp. 101–103.

12 Tulkens, *ibid.*

13 Calo, *supra* note 11, p. 104.

Lautsi case, ordering the withdrawal of crucifixes from Italian classrooms, would also amount to a restriction of religious pluralism.[14] Behind the ECtHR position there would be 'a secular logic that has shaped its interpretation of Article 9 and of the meaning of religious pluralism'.[15]

While the first part of the above-mentioned opinion (that the Court has inconsistently limited private expressions of religious pluralism, as in the Muslim headscarves cases) is correct, the idea that a restriction on State sponsored manifestations of religion is a way to limit religious pluralism in civil society cannot be shared. Nor can the idea that the whole ECtHR jurisprudence is permeated by a secular logic. As will be seen, it seems more accurate to say that the ECtHR case-law is characterised by a strong deference to national decisions. If these decisions promote a more secular State (as in the case of the prohibition of the use of Muslim veils by school teachers) or a more secular society (as in the case of the prohibition of full veils in French streets), the Court accepts them. If the decisions tend to maintain a public and State-sponsored role of a traditional religion (as in the case of the crucifixes in Italian public schools, finally validated by the Grand Chamber), the Court, strikingly, also accepts them.

The ECtHR demands a minimum threshold of State neutrality. Haupt has suggested that these requirements are part of a trend towards a transnational principle of non-establishment under the ECHR.[16] Despite its accuracy, this point of view must be cautiously accepted for various reasons. Firstly, European requirements are extremely minimal. Moreover, as Haupt acknowledges, this trend is part of a multi-level religious policy in Europe: widely diverging national policies of religion-State relations coexist under several shared legal regimes, in particular those of the ECHR and the European Union.[17] Finally, it must be acknowledged that this is an emerging trend (not the end point of a development), and that the trajectory of the ECtHR case-law is nonlinear. A certain degree of convergence is likely to occur in the longer term, but of course religious policy will probably not become exactly the same throughout Europe.[18]

14 *Ibid.*, p. 106.

15 *Ibid.*, p. 108.

16 Haupt, *supra* note 2, pp. 991–1064. The Court does not use the terminology of *non-establishment*. The author uses the expression in a parallel with the American First Amendment religious clauses.

17 *Ibid.*, pp. 991–1064.

18 *Ibid.*

3 Recognition of Religious Groups

Religious freedom can be exercised individually or in a group. From a legal point of view, however, it must be borne in mind that religious freedom as enshrined in the ECHR is not a *collective* right, but an *individual* right that can be exercised in a *collective* way. The ability to constitute a community, for the purpose of worship and other activities related to religion, is a part of the lawful external manifestation of individual religious freedom in its collective dimension. Consequently, religious freedom must be interpreted in the light of the standards which guarantee freedom of association (Article 11). The right to associate for religious ends without arbitrary State interference has been explicitly accepted by the Court:

> The Court recalls that religious communities traditionally and universally exist in the form of organised structures ... Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention. Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference.[19]

Previous registration of religious groups is often a requirement for some activities *related to* religious practice, such as the ownership and registration of property by religious groups. But sometimes States require registration to allow religious bodies to merely exercise religious freedom itself in its collective dimension. While some scholars think that registration cannot be required in this second way,[20] others consider that this is legitimate under the Convention.[21] The ECtHR seems to approach the latter position. Indeed, it has said that *when registration is required for communitarian practice* States cannot deny it arbitrarily (tacitly accepting that States can require registration as a condition for communitarian practice itself).[22]

19 *Hasan and Chaush* v. *Bulgaria*, 26 October 2000, ECtHR, Grand Chamber, No. 30985/96, para. 62. *See also Fernández Martínez* v. *Spain*, *supra* note 4, para. 127.

20 Sylvie Langlaude, 'The Rights of Religious Associations to External Relations: A Comparative Study of the OSCE and the Council of Europe', 32:3 *Human Rights Quarterly* (2010), pp. 510–511.

21 Murdoch, *supra* note 1, p. 56.

22 See, for example, *Metropolitan Church of Bessarabia and others v. Moldova*, *supra* note 4. In two other cases (*Boychev et autres* c. *Bulgarie*, 27 January 2011, ECtHR, No. 77185/01;

Moreover, according to European case-law, there is a positive obligation incumbent on States to put in place a system of recognition which facilitates the acquisition of legal personality by religious communities.[23] Mere *tolerance* towards a religious group cannot compensate for the absence of recognition of legal personality,[24] nor can the fact that the association to which legal personality is denied was able to act through auxiliary entities.[25] There is also an obligation on all State's authorities to keep the time during which an applicant waits for conferment of legal personality reasonably short.[26] In the *Religionsgemeinschaft der Zeugen Jehovas and others* case, the ECtHR found that a period of about 20 years elapsed between the application and the

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Dimitrova v. *Bulgaria*, 10 February 2015, ECtHR, No. 15452/07), the Court found a violation of Article 9 derived from the fact that the applicants were prosecuted for their belonging to an unregistered religious organisation (the *Church of the Unification* in the first case; *World of Life*, in the second). As the prosecution against the applicants was not based on internal law, it constituted an unjustified interference with religious freedom. The illegality under internal law was due to many procedural irregularities. What is important here is to note that one of those irregularities was that 'the rules of domestic law, as applied by the courts, were not sufficiently clear as to the legality of the activities of unregistered religious communities' (*Boychev et autres* c. *Bulgarie, ibid.*, para. 51; *Dimitrova* v. *Bulgaria, ibid.*, para. 29). It is evident that the Court did not dismiss the possibility that internal law prohibits activities of unregistered organisations. It just affirmed that it was not clear that, in the particular case of Bulgaria, domestic law provided such a solution.

23 *Magyar Keresztény Mennonita Egyház and others* v. *Hungary, supra* note 4, para. 90. Of course, legal recognition of religious groups must be effective and not merely fictitious. In *Arcadie Fusu and others* the Court dealt with the situation of a religious group that had obtained a domestic judgment ordering administrative bodies to issue the certification that would have allowed the group to register as such. However, despite the court ruling, administrative authorities had refused to issue the certificate. The ECtHR considered that this represented an unjustified interference in religious freedom. *Fusu Arcadie and others* v. *Moldova*, 17 July 2012, ECtHR, No. 22218/06. The ECtHR can revise refusals of legal personality, but of course all internal law procedures must be previously exhausted (*see Boychev et autres* c. *Bulgarie, supra* note 22). However, it is not necessary to have a final act of formal refusal (*Ramazanova and others* v. *Azerbaijan*, 1 February 2007, ECtHR, No. 44363/02). A similar approach can be found in the OSCE guidelines, which emphasize that States must ensure access to legal personality for religious groups. OSCE Office for Democratic Institutions and Human Rights, *Guidelines on the Legal Personality of Religious or Belief Communities* (Warsaw: OSCE, 2014), paras. 17 ff.

24 *Metropolitan Church of Bessarabia and others* v. *Moldova, supra* note 4, para. 129.

25 *Religionsgemeinschaft der Zeugen Jehovas and others* v. *Austria, supra* note 4, paras. 67 and 79.

26 *Ibid.*, para. 79.

recognition of legal personality was unreasonably long.[27] Equally, in two cases against Russia, it was found that the legal condition of 15 years of presence in the country prior to demanding legal personality could not be considered *necessary in a democratic society* unless there was a *pressing social need* or at least *relevant and sufficient reasons* to justify it.[28]

The State's duty of neutrality remains the same when the obtaining of legal personality is not a requirement for collective practice as such (as in the landmark case *Metropolitan Church of Bessarabia*, to which reference will be made below), but only for some activities that facilitate religious practice (for example, the ownership and registration of property by religious groups). Even in these cases, an unjustified refusal to recognise personality is a violation of religious freedom. In the case of the *Moscow branch of the Salvation Army*, the Court ruled in favour of the religious entity the Sate's refusal to re-register, which had not been consistently justified, on the basis of Article 11 (freedom of association) read in conjunction with Article 9 (freedom of religion).[29] A similar result was reached in the cases *Church of Scientology of Moscow*, *Kimlya and others*, and *Church of Scientology of St Petersburg and others*, all of them in relation to the Church of Scientology in Russia.[30]

The first key point of this article can now be addressed: in recognising legal personality of religious groups, States must remain neutral towards such groups. It can be argued that neutrality as referred to by the Court in this context oscillates between "equal interference" and "non-interference". In order to get legal personality, religious groups may be subject to some formal procedures. As a matter of principle, the burden that these procedures imply must be the same for all religious groups, therefore constituting an "equal interference". Indeed, in the *Canea Catholic Church* case, the Court found a violation of Article 6 (right to fair trial) in relation to Article 14 (equality principle) because the applicant church had been demanded to perform special legal procedures,

27 *Ibid.*

28 *Kimlya and others* v. *Russia*, 1 October 2009, ECtHR, No. 47191/06, paras. 99–102; *Church of Scientology of St Petersburg and others* v. *Russia*, 2 January 2014, ECtHR, No. 47191/06, para. 47. In the second case the Court found a violation of Article 9 because the government had not acted in accordance with the law. However, even if it was unnecessary, the Court reaffirmed its previous case-law concerning the waiting period.

29 *Moscow Branch of the Salvation Army* v. *Russia*, 5 October 2006, ECtHR, 72881/01.

30 *Church of Scientology of Moscow* v. *Russia*, 5 April 2007, ECtHR, No. 18147/02. *Kimlya and others* v. *Russia, supra* note 28. *Church of Scientology of St Petersburg and others* v. *Russia, supra* note 28.

which other churches were not asked to perform, in order to get personality to stand in court.[31]

But recognition of legal personality may also entail many duties of abstention for States. In the process of recognition of legal personality, States cannot interfere in religious disputes about the existence of religious groups themselves. In the case of the *Metropolitan Church of Bessarabia*, for example, the Court dealt with a dispute between that church and the Moldovan government, which had denied its legal recognition. The government had alleged that the Metropolitan Church of Bessarabia (recognised by all Orthodox patriarchs, except Moscow) had split up from the Metropolitan Church of Moldova, and that recognition could only be granted by the latter church. The Court ruled that the refusal of the Moldovan government amounted to an interference with religious freedom that broke the duty of neutrality, because it meant that the recognition of a religious group (the Church of Bessarabia) was subordinated to the will of another religious group (the Church of Moldova):

> In the present case, the Court considers that by taking the view that the applicant Church was not a new denomination and by making its recognition depend on the will of an ecclesiastical authority that had been recognised—the Metropolitan Church of Moldova—the State failed to discharge its duty of neutrality and impartiality.[32]

In the similar case *Svyato-Mykhaylivska Parafiya*, the ECtHR stated that the refusal to register the religious affiliation of a parish, which had been legally created by the parishioners according to the parish internal rules, amounted to a violation of Article 9 of the Convention.[33]

Also, in the process of recognition, States cannot assess the legitimacy of religious beliefs: 'the Court observes that the State's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs'.[34]

31 *Canea Catholic Church* v. *Greece*, 16 December 1997, ECtHR, No. 25528/94.

32 *Metropolitan Church of Bessarabia and others* v. *Moldova, supra* note 4, para. 123. The Court relied on Article 9. Some scholars have argued that a similar conclusion could be reached through Article 11 (freedom of association). Lance S. Lenhnhof, 'Freedom of Religious Association: The Right of Religious Organizations to Obtain Legal Entity Status Under the European Convention', 2002:2 *Brigham Young University Law Review* (2002), pp. 561–605.

33 *Svyato-Mykhaylivska Parafiya* v. *Ukraine*, 14 June 2007, ECtHR, No. 77703/01.

34 *Metropolitan Church of Bessarabia and others* v. *Moldova, supra* note 4, para. 123. *See also Manoussakis and others* v. *Greece*, ECtHR, 20 September 1996, No. 18748/91, para. 47. *Hasan*

Of course, this duty does not preclude authorities from assessing whether the activities of religious groups may be considered to be a threat to public order, health or morals, public safety, or the rights and freedoms of others. In other words, the Convention does not require that every religious community be accorded recognition.[35] Concerning the registration of religious groups, neutrality forces States to grant legal personality to groups that present themselves as religious, regardless of their doctrines or the relations between the demanding group and other religious groups. Of course, States can deny legal personality for well justified reasons like the ones mentioned above. But the refusal cannot be based on the beliefs of the group. Accordingly, a requirement to present information on the fundamental principles of the religion may be justified by the need to determine whether the denomination seeking recognition presents any danger for a democratic society, but not as a way to evaluate the doctrines of the religious group.[36]

Such a position, nevertheless, presupposes that the group that asks for recognition is truly a *religious* group. As was outlined above, neutrality requires previous definitional choices as to the basic concepts that underlie it. If a business society, for instance, asks for recognition as a religious group, the State could legitimately refuse the application. In that respect, States can legitimately evaluate the religious nature of the applying group without violating neutrality. Neutrality towards religion is possible once it has been defined what counts as religion.

This particular aspect could of course be the source of huge controversies, as the definition of religion is not unequivocal. For example, it is a matter of discussion if Scientology can qualify as a religion. The ECtHR has stated that, in the absence of a European consensus, it must rely on the position of the domestic authorities and determine the applicable Convention provision in the light of it.[37] This may be a dangerous solution, as it leaves the decision on

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and Chaush v. *Bulgaria, supra* note 19, para. 78. *Refah Partisi* (*The Welfare Party*) *and others* v. *Turkey*, 13 February 2003, ECtHR, Grand Chamber, Nos. 41340/98, 41342/98, 41343/98, and 41344/98, para. 91. *Leyla Sahin* v. *Turkey, supra* note 6, para. 107. *Dogru* v. *France*, *supra* note 7, para. 61. *Fernández Martínez* v. *Spain, supra* note 4, para. 129. *Magyar Keresztény Mennonita Egyház and others* v. *Hungary, supra* note 4, para. 76.

35 Murdoch, *supra* note 1, p. 57.

36 *Cârmuirea Spirituală a Musulmanilor din Republica Moldova* v. *Moldova*, 14 June 2005, ECtHR, No. 12282/02.

37 *Church of Scientology of Moscow* v. *Russia*, *supra* note 30, para. 64; *Kimlya and others* v. *Russia, supra* note 28, para. 79. *Church of Scientology of St Petersburg and others* v. *Russia, supra* note 28, para. 32. It must be noted that in the first two cases Russian authorities had accepted the religious character of Scientology, while in the second they had denied it.

what constitutes a religious group entirely in the hands of States. Traditional and well-established religious groups are widely recognised as such, and so cannot be easily denied registration. On the contrary, smaller and recently established groups are much more vulnerable to State discretion.

Fortunately, in other cases the ECtHR nuanced its position, saying that although States enjoy a certain margin of appreciation, the Court can review States' qualifications about the religious nature of a group:

> this approach cannot automatically be transposed to situations where a religious group is simply not recognised legally as a fully-fledged church in one or more European jurisdictions . . . The Court therefore considers that, although States have a certain margin of appreciation in this field, this cannot extend to total deference to the national authorities' assessment of religions and religious organisations.[38]

The distinction between a "religion" and a "cult" or "sect" is used by certain governments to deny protection to some groups under the freedom of religion clause. A "religion" would be a respectable system of doctrine and practice, while a "sect" or "cult" would be a deviated one. In four cases, the ECtHR addressed the issue of groups explicitly qualified as "sects" by the French government. However, as the Court found that the interference with religious freedom of the groups was not prescribed by law, it did not consider the core of the subject, that is, the distinction between a "religion" and a "sect".[39]

It can be contended that the refusal of recognition to a religious group cannot be justified on the qualification of the applying group as a "sect" or "cult",

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The Court, however, assimilated the last case to the others considering that the relevant factor for the denial of recognition had been the lack of the 15 years period of activity on Russian territory required by the law, and not the supposed non-religious nature of the organisation. For the determination of what counts as a religion under the European Convention on Human Rights, *see* Mauro Gatti, 'Autonomy of Religious Organizations in the European Convention on Human Rights and in the European Union Law', in: L.S. Rossi and G. Di Federico (eds.), *Fundamental Rights in Europe and China. Regional Identities and Universalism* (Naples: Editoriale Scientifica, 2013), pp. 132–153.

38 *Magyar Keresztény Mennonita Egyház and others* v. *Hungary, supra* note 4, paras. 88–89.

39 *Association Les Témoins de Jéhovah* c. *France*, 30 June 2011, ECtHR, No. 8916/05 (available only in French). *Association des Chevaliers du Lotus d'Or* c. *France*, 31 January 2013, ECtHR, No. 50615/07 (available only in French). *Association Cultuelle du Temple Pyramide* c. *France*, 31 January 2013, ECtHR, No. 50471/07 (available only in French). *Église Évangélique Missionnaire and Salaûn* c. *France*, 31 January 2013, ECtHR, No. 25502/07 (available only in French).

as the distinction between them and the *truly religious* groups is highly controversial. The refusal can be considered legitimate if the group represents a danger to a democratic society, but this danger must be proven in the particular case on the basis of reliable evidence.

It is worth mentioning the *Leela Forderkreis E.V. and others* case, even if it is not about legal personality. Adherents of the Osho movement had alleged that the classification of their religious organisation as a "sect" by a German public information campaign had denigrated their faith and had infringed the State's duty of neutrality. The ECtHR assumed that such labelling had involved an interference with Article 9 rights, as the terms used to describe the applicant movement may have had negative consequences for them. But it held that no violation of that Article had taken place, as States are entitled to verify whether a movement or association carries on activities which are harmful to the population or to public safety.[40]

The position of the German government was somehow self-contradictory, a contradiction that the Court failed to point out. On the one hand, the German government developed a public campaign to inform the population about the dangerous nature of the religious movement. But on the other hand, the Court acknowledges that the applicant association's exterior manifestation of their religion was not prohibited. If the group was dangerous enough to warn the population about it, why did the German government not act directly against it? If the limitation of the freedom to manifest their religion by the group itself was not justified on public order (or other similar) grounds, nor was the public warning campaign.

Fortunately, in a later case the ECtHR restricted the States' margin of appreciation about the dangers a religious group may pose. In *Gorzelik* it stated that

> The State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a "pressing social need"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable".[41]

The State's duty of neutrality on religious matters also forbids it to intervene in favour of one dissident faction within a religious community. The recognition of

40 *Leela Forderkreis E.V. and others* v. *Germany*, 6 November 2008, ECtHR, No. 58911/02.

41 *Gorzelik and others* v. *Poland*, 17 February 2004, ECtHR, No. 44158/98, para. 79.

a group of dissidents not elected according to the church statutes as the legitimate representatives of it implies a violation of Article 9 of the Convention.[42]

4 Withdrawal of Legal Personality and Dissolution of Religious Organisations

Just as the State cannot arbitrarily deny registration to religious groups, it cannot arbitrarily withdraw the previously given recognition.[43] The same principle of neutrality applies here. A decision to dissolve a religious community amounts to an interference with the right to freedom of religion under Article 9 of the Convention interpreted in the light of the right to freedom of association enshrined in Article 11 of the Convention.[44] It must therefore be justified in accordance with these Articles.

In the case of *Jehovah's Witnesses of Moscow and others*, the ECtHR decided that the dissolution of a religious association decreed by the Russian government, who argued that it was harmful to people and public safety, was illegitimate. The Court held that it is legitimate for States to verify whether the activities of religious groups may produce such damages. But it is necessary that the sanction is based on proven facts and proportionate to the offense committed:

> The Court finds that the interference with the applicants' right to freedom of religion and association was not justified. The domestic courts did not adduce "relevant and sufficient" reasons to show that the appli-

42 *Miroļubovs et autres* c. *Lettonie*, 15 September 2009, ECtHR, No. 798/05 (available only in French).

43 According to the general jurisprudence on freedom of association, States have a right to satisfy themselves that an association's aims and activities are in conformity with legislation, but they must do so in a manner compatible with their obligations under the Convention. *Sidiropoulos and Others* v. *Greece*, 10 July 1998, ECtHR, No. 26695/95, para. 40. In *Islam-Ittihad Association and others* v. *Azerbaijan* the Court found that the dissolution of an association on the grounds that it promoted religious activities when legislation on associations banned such activities to them was illegitimate under the Convention because it was not sufficiently clear what counted as a *religious activity*. The Court found a breach of Article 11 alone. *Islam-Ittihad Association and others* v. *Azerbaijan*, 13 November 2014, ECtHR, No. 5548/05.

44 *Jehovah's Witnesses of Moscow and others* v. *Russia*, 10 June 2010, ECtHR, No. 302/02, paras. 99–103; *Biblical Centre of the Chuvash Republic* v. *Russia*, 12 June 2014, ECtHR, No. 33203/08, para. 52.

> cant community forced families to break up, that it infringed the rights and freedoms of its members or third parties, that it incited its followers to commit suicide or refuse medical care, that it impinged on the rights of non-Witness parents or their children, or that it encouraged members to refuse to fulfil any duties established by law.[45]

It could be argued that the Court failed here to distinguish between legitimate and illegitimate reasons for the dissolution of religious groups. Dissolution could be decreed on the grounds established in Article 9, paragraph 2: public safety, the protection of public order, health or morals, and the protection of the rights and freedoms of others. On the contrary, it would be illegitimate to dissolve a religious association only on the basis that it infringes or may infringe *the rights and freedoms of its members*, at least as long as the members consent the limitation of their rights and the activities of the group do not constitute a violation of public order. Such a dissolution would amount to an unacceptable form of paternalism,[46] which is not only at odds with a literal reading of Article 9 but also with the ECtHR case-law.[47]

Moreover, the dissolution cannot be decreed if there are other less restrictive means to make the organisation comply with legal rules. In *Biblical Centre of the Chuvash Republic*, the Court dealt with the situation of a Pentecostal group (the *Biblical Centre*) that had founded a Biblical College and a Sunday School for children. The Russian Supreme Court had ordered the dissolution of the group on the grounds that the Biblical College and the Sunday School dispensed education without the (allegedly) required licence for that activity, and that the conditions in which students were educated at the Sunday school and the Biblical College fell short of the sanitary standards. The Strasbourg Court observed that such a licence was not required by internal law and that after breaches of sanitary standards were uncovered the applicant organisation should have been granted the opportunity to remedy the alleged irregularities.[48]

45 *Jehovah's witnesses of Moscow and others* v. *Russia*, *supra* note 44, para. 160.

46 See Fernando Arlettaz, 'Paternalismo jurídico y convicciones religiosas', 19(1) *Ius et Praxis* (2014), pp. 223–254. Legal paternalism in general has been dealt with in many classic studies. Joel Feinberg, *Harm to Others* (*The Moral Limits of the Criminal Law*) (New York: Oxford University Press, 1986); Joel Feinberg, *Harm to Self* (*The Moral Limits of Criminal Law*) (New York: Oxford University Press, 1986); Gerald Dworkin, 'Paternalism', in R. Sartorius, *Paternalism* (Minneapolis: University of Minnesota Press, 1983), pp. 19–34; Joel Feinberg, 'Legal Paternalism', in Sartorius (ed.), *ibid.*, pp. 3–34.

47 See the landmark case *Kokkinakis* v. *Greece*, 25 May 1993, ECtHR, No. 14307/88.

48 *Biblical Centre of the Chuvash Republic* v. *Russia, supra* note 44.

5 Different Levels of Recognition

According to ECtHR case-law, religious communities have a right to be granted legal personality, that is, the legal capacity to act as civil law entities. States enjoy a certain margin of appreciation to decide what kind of personality they confer them, for example to decide if it is public or private law personality.[49] The functioning of the principle of State neutrality is, in principle, easily understandable in this field.

There is, however, a more complex aspect about legal personality. Some States establish a system of various levels of registration. According to it, there is a *basic* mode of registration which grants the groups some basic rights (such as the possibility to own property), and one or more *premium* modes of registration which open the door to special benefits (tax exemptions or state subventions, for instance).

This double or multi-level system would not pass a test of *neutrality as non-interference* or *neutrality as equal interference*: religious groups do not receive the same benefits from the law; they are not treated on equal terms. However, the ECtHR has considered a double or multi-level system to be consistent with the Convention. The hypothesis that will be explored here is that the ECtHR jumps from the two kinds of neutrality used to evaluate the granting of legal personality itself (*non-interference* and *equal interference*) to the third kind of neutrality presented above: *neutrality as fair interference*.

Indeed, according to the jurisprudence of Strasbourg, it is not contrary to the Convention to establish different legal statuses for religious groups, provided that these statuses have an *objective and reasonable justification*. Thus, a double or multi-level system would be justified only if it is proportionate to the differences between existing religious groups:

> The Court reiterates that Article 14 does not prohibit every difference of treatment in the exercise of the recognised rights and freedoms. A difference in treatment will only be discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[50]

49 *Canea Catholic Church* v. *Greece, supra* note 31, para. 47.

50 *Alujer Fernández and Caballero García* v. *Spain*, 14 June 2001, ECtHR, No. 53072/99. The OSCE guidelines mention exactly the same requirements for the legitimacy of differences of treatment. OSCE Office for Democratic Institutions and Human Rights, *Guidelines on the Legal Personality of Religious or Belief Communities* (Warsaw: OSCE, 2014), para. 39.

This idea was reiterated in a more recent case, emphasising this margin of appreciation of States to establish and manage a double or multi-level system:

> The Court reiterates that Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of that Article . . . The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.[51]

According to the traditional ECtHR case-law, if the double or multi-level system is to be found legitimate, two conditions must be fulfilled: all groups must have equal opportunity to reach the top status and access criteria must be applied in a non-discriminatory manner. In the words of the Court,

> In view of these substantive privileges accorded to religious societies [the *premium* level of recognition in the facts of the case, as opposed to *religious communities*], the obligation under Article 9 of the Convention incumbent on the State's authorities to remain neutral in the exercise of their powers in this domain requires therefore that if a State sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner.[52]

In the landmark case *Religionsgemeinschaft der Zeugen Jehovas*, from which the previous quotations have been taken, the Strasbourg Court endorsed the legitimacy of the Austrian dual system itself (because it was reasonable), but not its application in the particular circumstances (since the application had been discriminatory). Although the Court endorsed in general the requirement of a waiting period before reaching *premium* personality, it understood that it was unlawful to require it to Jehovah's Witnesses community. Because of its historical roots in Austrian territory, the authorities should have been able to verify whether it fulfilled the requirements of the relevant legislation within a period considerably shorter than the legally required period.[53]

51 *Religionsgemeinschaft der Zeugen Jehovas and others* v. *Austria, supra* note 4, paras. 96–97.

52 *Ibid.*, para. 92.

53 *Ibid.*, paras. 98–99. The case concerned two related, but different, issues. The Austrian government had denied the religious group the status of a *religious society* (a more favoured

The reasonableness of the multi-level system must be strictly scrutinised if it entails a waiting period before a religious group can access the *premium* level of recognition. However, such a waiting period is not in itself illegitimate.[54] The same conclusion was reached by the Court in *Verein der Freunde der Christengemeinschaft* (against Austria)[55] and in *Savez Crkava "Riječ Života"* (against Croatia).[56] In all these cases the Court also found that the recognition criteria had been applied in a discriminatory manner.

However, in a more recent case, *Magyar Keresztény Mennonita Egyház and others*, the ECtHR adopted a position that is not entirely consistent with its previous judgements. Firstly, the Court affirmed that there is no right under the Convention, for the communities, to claim a specific legal status:

> The Court further considers that there is no right under Article 11 in conjunction with Article 9 for religious organisations to have a specific legal status. Articles 9 and 11 of the Convention only require the State to ensure that religious communities have the possibility of acquiring legal capacity as entities under the civil law; they do not require that a specific public-law status be accorded to them.[57]

Note that the Court is not merely affirming, as it is generally accepted,[58] that religious communities are unable to choose freely the type of legal entity that

level of legal personality) but had recognised it as a *religious community* (a less favoured level) 20 years after the application had been lodged. The Court found two violations of European standards: first, a violation of Article 9, because of the extremely long period passed between the application and the recognition of legal personality itself; second, a violation of Article 14 taken in conjunction with Article 9, because of the kind of legal personality granted (it was not reasonable to grant the group the less favoured kind of legal personality).

54 *Ibid.*, paras. 96–97.

55 *Verein der Freunde der Christengemeinschaft and others* v. *Austria*, 26 February 2009, ECtHR, No. 76581/01.

56 *Savez Crkava "Riječ Života" and others* v. *Croacia, supra* note 4. In this case the national authorities had considered that a second criterion, about the number of adherents, had not been fulfilled. About the case, see below.

57 *Magyar Keresztény Mennonita Egyház and others* v. *Hungary, supra* note 4, para. 91. About the Hungarian law reform that led to the complaint before the ECtHR, see Renáta Uitz, 'Hungary's New Constitution and Its New Law on Freedom of Religion and Churches: The Return of the Sovereign', 3 *Brigham Young University Law Review* (2012), pp. 931–965. The author's account of the state of law, and her criticism to it, was presented prior to the ECtHR judgment.

58 Langlaude, *supra* note 20, p. 512.

they will be granted. The Court goes further and says that religious groups cannot claim, under the Convention, a *particular* legal status. But this is exactly the opposite of what the Court recognised in the three cases mentioned above (against Austria and Croatia), when it accepted that the applicants *had* a right, under the Convention, to claim a specific legal status. Of course, this status was not a freely chosen one; it was the status reasonably established in a general way by the internal law and of which the applicants were discriminatory deprived.

Indeed, the *Magyar Keresztény Mennonita Egyház and others* case points at the very core of the issue of a multi-level system and the problems it poses. The applicants were many religious communities which had operated lawfully in Hungary as churches registered in conformity with the 1990 Church Act. In 2011 a new Church Act was passed, according to which all the previously recognised churches lost their status as such, unless they were listed in the Appendix to the 2011 Church Act or if they were later re-granted this status by Parliament. De-registered groups could continue their activities as associations, but they lost some advantages (such as the one per cent of income tax which taxpayers may donate to churches). The applicants complained that the de-registration and discretionary re-registration of churches amounted to a violation of their right to freedom of religion and their right to freedom of association.

According to the interpretation of the majority of the Court, this was a case about the unjustified de-registration of religious groups. It was therefore for the government to show that it was necessary, in pursuit of the legitimate aims which they relied on, to bar already recognised churches from maintaining their status with regard to confessional activities. However, the interpretation of the dissenting opinion was much more plausible. Since the applicants could be registered and function as associations, what was at stake was not the right of the religious groups to be registered and have legal personality as such, but their (more controversial) right to access to a *premium* level of registration (that of the "churches", which are entitled to some legal privileges, as opposed to mere "associations").[59]

The majority insisted on the fact that there is no right for religious organisations to have a specific legal status. However, they also said that distinctions in the legal status granted to religious communities must not portray their adherents in an unfavourable light in public opinion, which is sensitive to the official assessment of a religion. Apparently, this was the situation in the case:

59 *Magyar Keresztény Mennonita Egyház and others* v. *Hungary, supra* note 4, dissenting opinion of Judge Spano joined by Judge Raimondi.

the withdrawal of the recognition as "churches" would present the concerned groups as dubious "sects".[60] The majority opinion was ambiguous: had they really believed that the case was about a right to registration, and not about a right to registration under a *specific* category, the statement on the illegitimacy of the distinction between "churches" and "sects" would have been unnecessary. The majority implicitly admitted that the main problem was the legitimacy of a multi-level system, and not legal personality itself.

Suppose now that the argument of the public image of the religious community could be seen as a derivation of the requirement of reasonableness and non-discrimination in the multi-level system, traditionally accepted by the Court. If this were true, the distinction itself between "churches" and mere "associations" with religious ends would be illegitimate if it portrays the associations as "sects". But the Court went further in affirming much more broadly that:

> [it] cannot overlook the risk that the adherents of a religion may feel merely tolerated—but not welcome—if the State refuses to recognise and support their religious organisation whilst affording that benefit to other denominations.[61]

If this affirmation is to be taken seriously, no distinction between different kinds of legal personality could be put in practice. The State could not choose to cooperate in a deeper way with some religious groups. In the *Magyar* case, the concerned religious groups did not lose their capacity to act as such in civil law: they were just not eligible to benefit from privileges, subsidies and donations any more. They became *second-class* religious groups. However, the existence of two or more classes of religious groups was not precluded by the previous European case-law.[62] This point was emphasised by the dissenting

60 Compare this approach about the importance of the public qualification of a religious group as a *sect* with the more restrictive one used in *Forderkreis E.V. and others* v. *Germany, supra* note 40.

61 *Magyar Keresztény Mennonita Egyház and others* v. *Hungary, supra* note 4, para. 94.

62 As it has been rightly explained, the existence of multi-level systems has generally not been held to violate antidiscrimination law not only because of the objective differences that may exist between religious groups themselves but also as a matter of political prudence based on social and historical considerations. See W. Cole Durham, 'Facilitating Freedom of Religion or Belief through Religious Association Laws', in T. Lindholm, W.C. Durham and B.C. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook* (Dordrecht: Nijhoff, 2004), pp. 329–330.

opinion: the applicants were not de-registered as such, only reclassified for the purposes of receiving State benefits or being eligible for cooperative agreements with the State. Moreover, they were not under threat of being dissolved through State action, with the exception of those groups not declaring their intention to continue with their activities. Whether adherents of a religious community felt like second-class citizens is immaterial for the purposes of Articles 9 and 11, as traditionally interpreted by the ECtHR, if they are unimpeded in manifesting their religious beliefs, in form and substance, within legally recognised associations.[63]

The majority was aware of the difficulties that had arisen as a consequence of their considerations. Consequently, they added that a two-tier system of church recognition may per se fall within the States' margin of appreciation, in a way that was not consistent with its previous affirmation that seemed to prohibit any double or multi-level system. And they quoted the *Darby* case (which will be further studied in more detail):

> Nevertheless, any such scheme normally belongs to the historical-constitutional traditions of those countries which operate it, and a State Church system may be considered compatible with Article 9 of the Convention in particular if it is part of a situation predating the Contracting State's ratification of the Convention.[64]

Clearly, the Court added one or two more conditions (depending the point of view) to the classical *reasonableness and non-discrimination test* for the validity of a double or multi-level system: the scheme must belong to the constitutional traditions of the country and must pre-date the State's ratification of the Convention. This ECtHR decision is much more restrictive about the possibility of a double or multi-level system than previous ones. Accordingly, only if the scheme belongs to the constitutional tradition and predates the Convention can the State rely on neutrality as *fair interference*; in other cases, it must act according to neutrality as *non-interference* or as *equal interference*. This new requirement is of utmost importance as to the consideration of the existence of an established religion, which will be addressed in section 7.

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63 *Magyar Keresztény Mennonita Egyház and others* v. *Hungary, supra* note 4, dissenting opinion of Judge Spano joined by Judge Raimondi.

64 *Ibid.*, para. 100.

6 Consequences of a Multi-level System

To summarise what has been said so far: it is legitimate for the State to establish different legal status for different religious groups, provided that differences of status are proportionate to factual differences between religious groups, and that all groups have a possibility to access the favoured status. More recent case law has added another requirement for the difference of treatment to be justified: it must correspond to the constitutional traditions of the country and must predate the Convention. However, this new requirement does not seem to be well established in ECtHR case-law.

Differences of legal status between religious groups may result in very concrete differences in, for example, delegation of civil functions such as marriage or State funding.[65] In the case of *Savez crkava "Riječ života" and others*, the Court explicitly admitted that the existence of agreements between the State and some (but not all) religious organisations was a situation comparable to that of the applicant in the *Religionsgemeinschaft der Zeugen Jehovas* case. Religious communities which had legal personality but not an agreement with the State were unable to obtain a similar privileged status that would entitle them, for example, to provide religious education in public schools and nurseries and to have religious marriages recognised by the State.[66] The Court stated that, given that the existence of different categories of religious organisations established according to objective criteria is not itself discriminatory, it is not discriminatory either for the State to sign agreements with some religious organisations, and not with others. But such difference of treatment may become illegitimate if there is no objective and reasonable justification:

> 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 there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other religious communities wishing to do so.[67]

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65 See generally, Haupt, *supra* note 2, p. 1036; Evans, *supra* note 2, pp. 82–83; Evans and Thomas, *supra* note 3, p. 713.

66 *Savez Crkava "Riječ Života" and others* v. *Croatia, supra* note 4, para. 89.

67 *Ibid.*, para. 85. See also *Alujer Fernández and Caballero García* v. *Spain, supra* note 50. The ECtHR has also stated that the Convention does not require States to provide religious groups a different treatment to that of common associations or societies. But if States grant such a particular treatment, for example paying the electricity bills of worship places, they

In this case, the Court found that the refusal of the Croatian Government to conclude an agreement with the applicants while such agreement had been concluded with other churches of similar characteristics amounted to a violation of Article 14 in conjunction with Article 9.

According to the ECtHR, all religious communities must be treated on equal terms regarding the possibility to enter into an agreement with the State. But, to what extent is a religious community entitled to demand a particular content for that agreement? In *Alujer Fernández and Caballero García*, the Court considered the demand of two members of an Evangelical church who complained about the fact that due to an international agreement between the Holy See and the State, Catholics could allocate a percentage of their income tax for the financing of their Church, while Evangelicals could not. The Court emphasised the fact that the agreement between the State and the Evangelical churches did not foresee such possibility, but found that this difference did not amount to a violation of the Convention, as the Federation of Evangelical Churches could enter into a similar agreement with the State. Indeed, the agreement in force was:

> an open-ended one, since supplemental provision no. 2 to the Law provides that it may be amended on the initiative of either party. However, the court notes that neither the Church to which the applicants belonged nor the FEREDE [the Federation of Evangelical Churches] wished to enter into an agreement with the Spanish State regarding the allocation of part of the revenue raised by income tax to the applicants' Church.[68]

It must be admitted that this is quite a strange solution since it implies that there is no violation of the Convention by the current state of law because that state of law can be changed. Moreover, it entails that, should the Evangelical churches wanted to enjoy the same tax regime as the Catholic Church, they would be entitled to such regime. However, a global approach to Strasbourg

must do it in a non-discriminatory manner. In two cases with a similar background, the Court arrived at opposite conclusions on the basis of the particular circumstances: *The Church of Jesus Christ of Latter-Day Saints*, 4 March 2014, ECtHR, No. 7552/09, stating that there was not a violation of Article 14 taken in conjunction with Article 9; *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfi* c. *Turquie*, 2 December 2014, ECtHR, No. 32093/10 [available only in French], stating that there was a violation of Article 14 taken in conjunction with Article 9.

68 *Alujer Fernández and Caballero García* v. *Spain*, *supra* note 50.

case-law shows that it is quite unlikely that the Court would be ready to grant this right to minority religious organisations.

The concrete implementation of a multi-level system may also be problematic. A legitimate system can be applied in a discriminatory way, for example if a group that should be registered under a favoured category is registered in a less advantageous one. In this case, the consequences that follow from the application of the system will also be considered discriminatory. Consider for example the *Gütl* case. Austrian law envisaged the possibility for ministers of religious societies (i.e. legal status of first level) to be exempted from social service (the substitute of the military service), but that possibility was not available to ministers of religious communities (i.e. legal status of second level). Given that the application of the double level system to Jehovah's Witnesses was considered discriminatory, the Court held that it was also discriminatory to deny a minister of Jehovah's Witnesses the possibility to be exempted from the alternative social service.[69]

For the same reason, in *Jehovas Zeugen in Österreich* the Court decided that it was discriminatory to make a religious community undergo certain administrative conditions for the recruitment of foreign employees that were not required for religious societies (violation of Article 14 in relation to Article 9). It was also discriminatory to subject religious communities to a tax from which religious societies were waived (violation of Article 14 in relation to Article 1 of Protocol 1 on the right of property).[70]

7 State Religion

In previous sections double or multi-level systems have been considered in the light of European case-law. As it has been explained, European case-law has accepted that different levels of recognition for religious groups are not illegitimate under the European Convention, provided that some conditions are fulfilled. According to the *classic* case-law (recently challenged by a Court decision) these conditions are that the different categories are reasonably justified according to the nature of religious groups and that all groups can access the *premium* category(ies) on equal terms.

69 *Gütl* v. *Austria*, 12 March 2009, ECtHR, No. 49686/99, para. 39. See also *Löffelmann* v. *Austria*, 12 March 2009, ECtHR, No. 42967/98; *Lang* v. *Austria*, 19 March 2009, ECtHR, No. 28648/03.

70 *Jehovas Zeugen in Österreich* v. *Austria*, 25 September 2012, ECtHR, No. 27540/05.

However, the Court has not been consistent with this affirmation. Indeed, it has considered legitimate under the ECHR many models of church-State relations, in a way that does not always respect the two conditions mentioned above. Of course, not every model of church-State relations would pass European control (for instance, a proposition for a theocratic State was condemned by the Court, as will be explained at the end of this section). But the Court has validated the existence of established churches in a way that is really difficult to reconcile with the two requirements for the legitimacy of a double or multi-level system of recognition.

The recognition of a national, official, or established church is perhaps the most radical form of double or multi-level system. One religious organisation is recognised to be the representative of a nation's religion, whose existence is intimately linked to the existence of the State, while other religious groups are pushed into the background. Of course, it is possible to have, besides the national, official, or established religion, many categories of non-official religious groups.

According to the Parliamentary Assembly of the Council of Europe, one of Europe's shared values, transcending national differences, is the separation of church and State.[71] However, there are varying degrees of separation between government and religious institutions in full compliance with the Convention, and member States have the right to organise and enact legislation regarding the relationship between the State and the church.[72] Even if a *minimum* of separation is required, governments enjoy a certain margin of appreciation in State-religion relations:

> Various situations coexist in Europe. In some countries, one religion still predominates. Religious representatives may play a political role, as in the case of the bishops who sit in the United Kingdom House of Lords. Some countries have banned the wearing of religious symbols in schools. The legislation of several Council of Europe member states still contains anachronisms dating from times when religion played a more important part in our societies.[73]

A similar approach about the margin of appreciation is to be found in the ECtHR jurisprudence. A renowned scholar has affirmed that the Court controls

71 Parliamentary Assembly of the Council of Europe, *Recommendation 1804 (2007). State, religion, secularity and human rights*, para. 4.

72 *Ibid.*

73 *Ibid.*, par. 15.

with severity the conformity with the Convention of advantages granted to *only one* religious community.[74] It is not certain that this is always the case.

The leading case concerning the regime of State churches remains *Darby*. The applicant attacked the legitimacy of a tax that Sweden had established in favour of the official church. However, since the Court managed to resolve the conflict by the application of the rules of protection of property, it avoided examining allegations relating to Article 9 (taken alone or in relation to Article 14).[75] The Commission had performed an analysis under Article 9, and had held that to satisfy the requirements of this Article, a system of State Church should include specific safeguards of freedom of religion, in particular, that no one could be forced to enter or to remain in the favoured church:

> [A] State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion. In particular, no one may be forced to enter, or be prohibited from leaving, a State Church.[76]

Thus, to be completely compatible with religious freedom, a State church system must not interfere with the freedom of people or groups who do not belong to the favoured confession. This means, first, that no one may be compelled to belong to the official church or to finance it. In addition, those who belong to it must have the right to quit at any time, in an expeditious manner and without any explanation. On the other hand, the existence of an official church must not be an obstacle for the legal recognition of other religious organisations. Also, the existence of an official church must not imply any restriction on the freedom of not favoured groups and its members to express their beliefs individually or collectively.

However, even if it is possible to reconcile the existence of an official church with religious freedom (Article 9 taken alone), it is really difficult to reconcile it with religious equality (Article 9 taken in conjunction with Article 14). This point has been considered by Temperman, who has argued that the establishment of a national or official church not only raises equality concerns from a principled point of view (similar to those that could be raised by a Constitution

74 Tulkens, *supra* note 2, p. 2585.

75 *Darby* v. *Sweden*, 23 October 1990, ECtHR, No. 11581/85.

76 *Darby* v. *Sweden*, 11 April 1988, European Commission of Human Rights, No. 11581/85.

establishing a preference for a race or a sexual orientation for example) but also in practice, as sociological data shows that it generally correlates with governmental and societal restrictions on minority rights.[77]

In the *Ásatrúarfélagið* case, the Court addressed an issue similar to that posed in *Darby*: an Icelandic religious association complained that the State funding system for religious groups violated its rights under the Convention. According to Icelandic law, the State collected a fixed amount called *parish charge* from every person aged sixteen or older by means of the general tax system, and allocated these funds to the religious organisation to which he or she belonged. Consequently, religious groups were funded according to the number of members they had. But the State also only allocated specific funding from the State budget to the national church.

The applicant's complaint was two-fold. First, the applicant complained under Article 9 (alone and together with Article 14) about the allocation of the additional funding to the national church. Second, a complaint was made under Article 1 of Protocol 1 (right to property) that a certain percentage of its members' income tax had been allocated to the national church, a church to which they did not belong, through the additional funding this church was provided. The Court found no breach of Article 9, saying that the founding system did not limit or hinder the exercise of the rights of the applicant association and its members. As to the breach of Article 9 in conjunction with Article 14, the Court found that the difference on treatment was justified by the differences in the functions accomplished by the national church and other religious groups:

> The statutory obligations imposed on the National Church and its employees by the abovementioned Act on the Position, Administration and Procedures of the National Church and by other acts pertaining to the National Church and its activities, cannot be compared to those imposed on the applicant association. Thus, in so far as there was a difference of treatment, the Court is satisfied that it pursued a legitimate aim and was objectively and reasonably justified.[78]

The Court did not answer the questions raised under Article 1 of Protocol 1 because it considered that in that respect domestic remedies had not been exhausted.

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77 Jeroen Temperman, 'Are State Churches Contrary to International Law?', 2(1) *Oxford Journal of Law and Religion* (2013), pp. 119–149; Temperman, *supra* note 2, p. 161.

78 *Ásatrúarfélagið* v. *Iceland*, 18 September 2012, ECtHR, No. 22897/08, para. 34.

In sum, national, official, or established churches are not proscribed by the Convention. However, the Court has traditionally been extremely laconic about the conditions that such systems must satisfy to be valid under the Convention. In the more recent *Magyar Keresztény Mennonita Egyház and others* case, the Court was more explicit, and came back to the well-known *reasonability test*, used to check the suitability of a double or multi-level system of recognition, to evaluate also the suitability of an official religion system:

> wherever the State, in conformity with Articles 9 and 11, legitimately decides to retain a system in which the State is constitutionally mandated to adhere to a particular religion . . ., as is the case in some European countries, and it provides State benefits only to some religious entities and not to others in the furtherance of legally prescribed public interests, this must be done on the basis of reasonable criteria related to the pursuance of public interests . . .[79]

European case-law about double or multi-level systems is hard to reconcile with European case-law about official religions. The latter can be seen, of course, as a sub-type of the former. To be legitimate a double or multi-level system must allow all religious groups to get the *premium* category on equal terms. But this is not the case with official religions. The definition of a church as national or official is usually to be found in constitutional texts or fundamental legal texts. Other religious groups seeking to have the same incorporated status would need to lobby for changes in constitutional or legal texts. Now, in the *Magyar* case the Court explicitly found (about a double level system) that a regime that subordinates granting or refusal of church recognition to political events or situations is not legitimate under the Convention:

> As a result, the granting or refusal of church recognition may be related to political events or situations. Such a scheme inherently entails a disregard for neutrality and a risk of arbitrariness. A situation in which religious communities are reduced to courting political parties for their votes is irreconcilable with the requirement of State neutrality in this field.[80]

It is true that the ECtHR made this statement in the context of what it declared to be an issue of *recognition of legal personality* and not of *recognition of a particular kind of legal personality*. But the principles involved are the same:

79 *Magyar Keresztény Mennonita Egyház and others* v. *Hungary, supra* note 4, para. 113.

80 *Ibid.*, para. 102.

religious groups should not be forced to court political parties or the government to get a particular status under internal law.

On the other hand, the criterion of the historical tradition pre-dating the Convention is more befitting a test to evaluate the legitimacy of an official religion than one to evaluate the legitimacy of other double or multi-level systems. In any case, however, it is difficult to reconcile it with the necessity of the *equal access* to the *premium* level of recognition (be it that of official religion or the most favoured general category in other double or multi-level systems).

The wide margin of appreciation conferred by the ECtHR implies that even a system of established church does not violate the Convention, provided that the freedom to manifest one's religion is guaranteed to all. But this consideration does not take the concept of equality properly into account. The ECtHR approach neglects non-dominant, disadvantaged groups, by confirming and strengthening the dominant position of the preferred church.[81] Giving a single religious group a particular legal status, as well as the symbolic and material advantages associated to it, which other groups cannot obtain, may amount to discrimination in the exercise of religious freedom (Article 9 taken in conjunction with Article 14). Moreover, this particular status may also imply discrimination on the basis of religion (Article 1 Protocol 12) to the extent it carries out the idea that there are first class and second class citizens.[82] Even if, as it has been shown above, there are many possible definitions of neutrality, it would be very odd to say that favouring the established church fits any of these. The assumption that an established church is not contrary to the Convention is difficult to reconcile with the idea of state neutrality, even in its widest and vaguest forms.

The position of the ECtHR about the status of national churches is, however, coherent with other ECtHR decisions. Thus, in the well-known *Lautsi* case, the Grand Chamber reversed the Chamber judgement and sentenced that hanging crucifixes in public schools' classrooms fell within the State margin of appreciation.[83] *Lautsi* was not a case about the formal status of the Catholic

81 Henrard, *supra* note 5, p. 69.

82 Transmitting a message that there are second class citizens damages the equal consideration and respect that every citizen is entitled to. This idea is developed in Martha C. Nussbaum, *Liberty of Conscience. In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008).

83 *Lautsi and others* v. *Italy*, 18 March 2011, ECtHR, Grand Chamber, No. 30814/06. Many works have been devoted to the case in the specialised literature. *See*, among many others, Jeroen Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden: Martinus Nijhoff Publishers, 2012); Fernando Arlettaz, 'Las sentencias *Lautsi* en el contexto de la jurisprudencia del Tribunal Europeo de Derechos Humanos', 10 *Revista Electrónica de Derecho de la Universidad de La*

Church, but about the possibility of symbolic promotion of a particular religion by the State. The decision of the Grand Chamber accepting the legitimacy under the Convention of the crucifixes in public schools is clearly in line with the case-law about the status of established churches.[84]

The ECtHR has only rejected the most radical forms of established churches, that is, theocratic regimes. The *Refah Partisi* (*Welfare Party*) case is the leading case in this matter. The *Refah Partisi* (*Welfare Party*) was a Turkish political party. It was dissolved in 1998 by the Constitutional Court, which alleged that some of the party's objectives (such as the introduction of *sharia* and a pluralistic legal regime) were incompatible with the Turkish constitutional principle of secularism. The ECtHR dismissed the claim that the dissolution amounted to a violation of freedom of association (Article 11) and considered that a political party may campaign for a change in the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the proposed change must itself be compatible with fundamental democratic principles. Provided that it satisfied the two conditions set out above, a political party animated by the moral values imposed by a religion could not be regarded as intrinsically inimical to the fundamental principles of democracy.[85]

Rioja (2012), pp. 27–44; Grégor Puppinck, 'The Case of *Lautsi* v. *Italy*: A Synthesis', 2012:3 *Brigham Young University Law Review* (2012), pp. 873–927; Malcolm D. Evans, '*Lautsi* v. *Italy*: An Initial Appraisal', 6:3 *Religion and Human Rights* (2011), pp. 237–244; Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in Lautsi v. Italy', 13:3 *Journal of Ecclesiastical Law* (2011), pp. 287–297; Fulvio Cortese, 'The *Lautsi* Case: A Comment from Italy', 6 *Religion and Human Rights* (2011), pp. 221–230; Roland Pierek and Wibren van der Burg, 'The Neutral State and the Mandatory Crucifix', 6 *Religion and Human Rights* (2011), pp. 267–272.

84 It is interesting to compare the ECtHR case-law with the approach of the Special Rapporteur on Freedom of Religion or Belief, whose recent reports are much less lenient on state churches. In a 2016 report, for instance, the use of religion for demarking national identity is indicated as one of the causes of violation of religious freedom. The rapporteur explains that formal entrenchment of one or various religions in the Constitution or in other legal statutes is a way States use to distinguish between national religions worthy of support and foreign religions deemed dangerous or destructive. *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc. A/71/269, paras. 28–30. In a report of 2011 it had been affirmed that even if the establishment of an official religion is not per se contrary to human rights standards, it seems difficult, if not impossible, to conceive of an application of the concept that in practice does not discriminate against religious minorities. *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt*, UN Doc. A/HRC/19/60, paras. 59–66.

85 *Refah Partisi* (*The Welfare Party*) *and others* v. *Turkey*, *supra* note 34.

The Court remembered then its emphasis on the State's role as the neutral and impartial organiser of the exercise of various religions, and the importance of pluralism.[86] Consequently, the Court found that the imposition of *sharia* (for the regulation of relations between Muslims and non-Muslims, and between Muslims themselves) was incompatible with the fundamental principles of democracy:

> The Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it... It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.[87]

It is true that the reason given to ban the establishment of a religious legal system is not its religious nature itself, but the particular content of *sharia*. However, the Court also rejected the possibility of a plural legal system, according to which each religious group would be governed by its own religious rules.[88]

> The Court takes the view that such a societal model cannot be considered compatible with the Convention system, for two reasons. Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to

86 *Ibid.*, para. 90.

87 *Ibid.*, para. 123; quoting the first instance, *Refah Partisi* (*The Welfare Party*) *and others* v. *Turkey*, 31 July 2001, ECtHR, Nos. 41340/98, 41342/98, 41343/98, and 41344/98, para. 72.

88 As the Grand Chamber rightly points out, it is not self-contradictory to say that the *Refah* party wanted to establish *sharia* and a plurality of legal systems at the same time. Within the framework of a plurality of legal systems, *sharia* would play a fundamental role, ruling not only relations between Muslims themselves, but also between Muslims and non-Muslims. *Refah Partisi* (*The Welfare Party*) *and others* v. *Turkey*, *supra* note 34, paras. 126–128.

> waive them, the rights and freedoms guaranteed by the Convention… Secondly,… [a] difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination.[89]

8 Conclusions: Status of Religious Organisations in the Context of ECtHR Case-law

Throughout this article, it has been shown that ECtHR case-law has affirmed a duty of State neutrality concerning religious matters. However, the concept of *neutrality* is not univocal: in a non-exhaustive way, three different (possible) definitions for it have been delimitated. It has also been demonstrated that the ECtHR *jumps* from one concept of neutrality to other depending on the facts and the legal framing of the case.

Recognition of legal personality for religious groups is a fundamental element of collective religious freedom. States have a duty to allow religious groups access to legal personality, provided of course that some minimal conditions are satisfied (for example, respect of public order). But, according to the ECtHR, States are not obliged to grant every religious group the same kind of legal personality. A double or multi-level system of recognition (with more and less favoured categories) is legitimate under the European Convention if two conditions are fulfilled: distinctions between religious groups must be reasonable and all religious groups must have an equal possibility to get the most favoured type of legal personality.

The most radical kind of double or multi-level system of recognition is that of a national, official, or established church. The ECtHR has affirmed that this system is not contrary to the Convention. The legitimacy of an established church system stems from the wide margin of appreciation allowed to States in State-religion matters, and it is coherent with the position of the ECtHR in other cases of State-religion relations, not directly related to the legal status of religious groups.

Nevertheless, even if European case-law on legal status of religious groups is, generally speaking, coherent with other sectors of case-law on State-religion relations, there seems to be a problem of consistency *within* it. The possibility of equal access to the preferred legal status is a condition for the legitimacy of

89 *Ibid.*, para. 119; quoting the first instance, *Refah Partisi* (*The Welfare Party*) *and others* v. *Turkey*, *ibid.*, para. 70.

a double or multi-level system. But this possibility is, by definition, excluded in the most striking case of double or multi-level system: that of an established church. Established churches have this character because their historical links with a particular State and national society. It is unlikely, even impossible, that a different church could occupy that place. The ECtHR seems not to have noticed this discrepancy.

In a recent case, the ECtHR seems to have interpreted more strictly the possibility of a double or multi-level system that concedes privileges to some church or churches above other church or churches. This could be a manifestation of an emerging common European standard, that some scholars have identified, about the existence of a baseline, namely that an established church would not be acceptable in terms of human rights obligations.[90] Such a stricter standard may be more coherent with the equality requirements springing from Article 14, and with the idea of State neutrality preached by the ECtHR itself. At this point, it is not well-established in jurisprudence. Time will tell.

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90 Henrard, *supra* note 5, p. 70.