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Neutrality, Margin of Appreciation and Religious Autonomy: Advancing Pluralism and Non-Discrimination in Strasbourg

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Résumé

Le principe de la neutralité religieuse et idéologique de l'État et la doctrine de la marge d'appréciation sont deux des critères les plus fréquemment utilisés par la Cour européenne des droits de l'homme pour résoudre les conflits concernant les droits énumérés à l'article 9 de la Convention européenne des droits de l'homme. À l'heure où le Protocole 15 à la Convention, récemment entré en vigueur, répond à la demande de donner plus de poids à la marge d'appréciation, cet article cherche à répondre à la question de savoir lequel de ces deux principes, neutralité ou subsidiarité, a donné jusqu'à présent les meilleurs résultats dans la jurisprudence de Strasbourg pour un domaine très spécifique de la liberté de religion qui est fortement lié à la sauvegarde du pluralisme et à la lutte contre la discrimination fondée sur la religion : le droit à l'autonomie religieuse lorsqu'il concerne les relations extérieures des communautés religieuses.

Abstract

The principle of the religious-ideological neutrality of the State and the doctrine of the margin of appreciation are two of the criteria most frequently used by the European Court of Human Rights to decide conflicts concerning the rights enumerated in Article 9 of the European Convention on Human Rights. At a time when the demand for greater weight to be given to the latter has been addressed through the recently enforced Protocol 15 to the Convention, this article seeks to find a response to the question of which of these two principles, neutrality or subsidiarity, has so far yielded the best results in Strasbourg case law for a very specific area of freedom of religion that is strongly connected

to the safeguarding of pluralism and the fight against religious discrimination: the right to religious autonomy when it concerns the external relations of faith communities.

The principle of the religious-ideological neutrality of the State and the doctrine of the margin of appreciation (MoA) are two of the criteria most frequently used by the European Court of Human Rights (ECtHR) to decide conflicts concerning the rights enumerated in Article 9 of the European Convention on Human Rights (ECHR), in a relationship sometimes marked by an evident tension.[1] This tension is a reflection of a duality that has affected the entire international framework of human rights protection from its very foundations: on the one hand, the logical aspiration towards universality of any plurinational system created with the aim of safeguarding the freedoms derived from human dignity; on the other, the need for any international jurisdiction to recognize the constitutional and historical particularities of very diverse countries and to allow national authorities room for manoeuvre to interpret and modulate the content and limits of fundamental rights.[2]

In matters pertaining to freedom of religion and belief, neutrality is perhaps the greatest exponent of the claim to universality of the rights protected by Article 9 ECHR.[3] Understood as an obligation of both impartiality and non-arbitrariness in the State regulation of religious phenomena, neutrality has the potential to become a common standard of action in matters relating to Article 9 ECHR.[4] From a standpoint deeply rooted in the tenets of classical political liberalism, which denies public authorities any competence

1. D. McGoldrick, « Religious Rights and the Margin of Appreciation », *in* P. Agha (ed.), *Human Rights Between Law and Politics. The Margin of Appreciation in Post-National Contexts*, London, Bloomsbury, 2017, p. 54 ff; M.-J. Valero Estarellas, *Neutralidad del Estado y autonomía religiosa en la jurisprudencia de Estrasburgo*, Valencia, Tirant lo Blanch, 2022, p. 301 ff.
2. On the doctrine of the margin of appreciation, G. Born, D. Morris and S. Forrest, « "A Margin of Appreciation": Appreciating Its Irrelevance in International Law », *Harvard International Law Journal*, 61, 2020, p. 77 ff.
3. M. Evans and P. Petkoff, « Marginal Neutrality. Neutrality and the Margin of Appreciation in the Jurisprudence of the European Court of Human Rights », *in* J. Temperman, T. J. Gunn, M. Evans (eds.), *The European Court of Human Rights and the Freedom of Religion or Belief. The 25 Years since Kokkinakis*, Leiden, Brill Nijhof, 2019, p. 129.
4. J. Martínez-Torrón, « State neutrality and religious plurality in Europe », *in* W. C. Durham, D. D. Thayer (eds.), *Religion, Pluralism, and Reconciling Difference*, London, Routledge, 2019, p. 161; J. Ringelheim, « State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach », *Oxford Journal of Law and Religion* 2017, *passim*.

to assess the validity or legitimacy of religious beliefs and practices, the State is perceived by the ECtHR as a neutral and impartial organizer of the religious life of the *polis* and as the ultimate guarantor of public order and pluralism.[5] Although its predominantly instrumental nature has not always been respected by the ECtHR, this mandate to remain neutral in the exercise of powers related to the regulation of the social projection of religion and to the management of pluralism, can be accepted almost intuitively by all States regardless of their specific system of church-State relations.[6]

On the other end of the spectrum, since as far back as *Kokkinakis* the MoA has been used by the ECtHR to bring the principle of subsidiarity into the balancing equation of its jurisprudence on Article 9 ECHR, granting Member States considerable leeway to assess the existence and extent of the need for interference, and conferring on them the primary responsibility for protecting the rights enshrined in it.[7] The ECtHR has often emphasized the subsidiary role of the Convention and stated that where questions concerning the relationship between State and religions are at issue, "national authorities are in principle better placed than an international court to evaluate local needs and conditions".[8] The MoA is tempered by two counter-doctrines: European consensus—the wider the consensus, the narrower the MoA—, and the supervisory role of the ECtHR over both national laws and the decisions applying them.[9]

More often than not the inherent difficulty of balancing the universality of the rights recognized in Article 9 ECHR with national specificities has resulted in the ECtHR alternatively prioritizing either neutrality or the MoA as the deciding factor in its judgments and decisions. In doing so, the ECtHR has to date failed in finding the golden middle way of harmonizing both techniques to the greater benefit of freedom of religion, and of its own legitimacy as an international jurisdiction. After more than 60 years of activity, and despite its unparalleled success, Strasbourg is currently facing a

5. V. *Guide on Article 9 of the Convention – Freedom of thought, conscience and religion*, *passim*: www.echr.coe.int/documents/guide_art_9_eng.pdf [accessed 6 March 2023].
6. J. Martínez-Torrón, « State neutrality… », cit. 4, p. 159-162; S. E. Berry, « Avoiding Scrutiny? The Margin of Appreciation and Religious Freedom », *The European…*, cit. 3, p. 110-111.
7. *Kokkinakis v. Greece*, 25 May 1993, no. 14307/88, § 47. A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford, Oxford University Press, 2012, p. 61.
8. *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, § 112, 26 April 2016; *S.A.S. v. France* [GC], no. 43835/11, § 129, 1 July 2014.
9. *Bayatyan v. Armenia*, no. 23459/03, § 122, 7 July 2011; *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 119, 13 Dec. 2001. S. E. Berry, « Avoiding… », cit. 6, p. 107 ff.

crisis of credibility as a result of a number of factors, not the least of which is the growing dissatisfaction of some the Council of Europe's Member States with what they perceive to be the ECtHR's excessive encroachment on their sovereignty.[10] To address this concern, there is a growing tendency in the ECtHR to favour the MoA over other deciding parameters such as neutrality.[11] The entry into force in the summer of 2021 of Protocol 15 adding a new recital to the preamble of the Convention that explicitly refers to the MoA enjoyed by Member States and to the subsidiary role of the ECtHR, may reinforce this trend in the near future.[12] In cases decided under Article 9 ECHR, some commentators trace this shift back to the first *Lautsi v. Italy* judgment and see in the more recent Grand Chamber *S.A.S. v. France* its most notable example to date.[13]

With this scenario in mind, this is perhaps a good time to stop and momentarily reflect on which principle, subsidiarity or neutrality, has so far yielded the best results for freedom of religion in the case law of the ECtHR.[14] The Solomonic, yet truthful answer, is that it depends. The lack of a solid and unambiguous understanding of neutrality has led the ECtHR to apply it inconsistently despite the apparent simplicity of its seemingly self-explanatory theoretical formulation; just as the ECtHR's easy deference to subsidiarity, paired with a certain lack of consistency in identifying areas of European consensus, has sometimes emptied the MoA of its very *raison d'être*.[15]

This article seeks to find a response to the aforementioned question in connection with a niche aspect of freedom of religion that has gained momentum in the ECtHR for its involvement with two of its main concerns, the safeguarding of the pluralism inherent to democratic societies and the

10. R. Spano, « Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity », *Human Rights Law Review*, 14, 2014, p. 487 ff.
11. *Ibid*. p. 491; S. Smet, « When Human Rights Clash in "the Age of Subsidiarity" What Role for the Margin of Appreciation? », *Human rights…*, cit. 1, p. 55-56.
12. Article 1 of Protocol 15 to the ECHR. The Protocol entered into force on 1 August 2021. D. McGoldrick, « A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee », *International and Comparative Law Quarterly*, 65, 2016, p. 23; N. Vogiatzis, « When "reform" meets "judicial restraint": Protocol 15 amending the European Convention on Human Rights », *Northern Ireland Legal Quarterly*, 22, 2015, p. 132 ff.
13. *Lautsi v. Italy* (2nd Sect.), no. 30814/06, 3 Nov. 2009; *S.A.S.* (footnote 8). M. Evans and P. Petkoff, « Marginal Neutrality… », cit. 3, p. 129-130; D. McGoldrick, « Religious Rights… », cit. 1, p. 152 ff.
14. D. McGoldrick, « Religious Rights… », cit. 1, *passim*; S.E. Berry, « Religious freedom and the European Court of Human Rights' two margins of appreciation », *Religion and Human Rights*, 12, 2017, *passim*.
15. M.-J. Valero Estarellas, *Neutralidad…*, cit. 1, p. 302 ff.

fight against discrimination based on religion prohibited by Article 14 ECHR: the right to religious autonomy when it concerns the external relations of faith communities.[16] This external projection of autonomy becomes especially relevant when religious groups collide with areas of law that have the potential to limit their right to function peacefully in the social life of the State implicit in the collective dimension of Article 9 ECHR.[17] Using both as argumentative examples and, as a guiding thread, not the latest case law of the ECtHR, but rather some specific landmark cases involving religious groups that have faced restrictions on their external autonomy as a result of the State's (1) secular assessment of religion;[18] (2) application of facially neutral laws; or (3) legal entity or privileged status schemes, this paper argues that the ECtHR has been more successful in protecting freedom of religion through neutrality than through subsidiarity, especially when national authorities have tried to pass off as MoA what was in reality an impartiality deficit in the management of pluralism often aimed at discriminating against minority communities alien to the country's religious tradition.[19]

1. MARGIN OF APPRECIATION, NEUTRALITY AND THE SECULAR ASSESSMENT OF RELIGION

Article 9.1 ECHR states that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others […]." Contrary to the rights of individuals, which are unequivocally included in Article 9 ECHR, in the early stages of the ECtHR's activity the extent to which the collective dimension of freedom of religion was protected under the Convention was the object of some controversy.[20] However, it is now

16. S. Langlaude, « The rights of religious associations to external relations: a comparative study of the OSCE and the Council of Europe », *Human Rights Quarterly*, 32, 2010, p. 502-529.
17. W. C. Durham, « Religious autonomy at the crossroads », *in* W. C. Durham, J. Martínez-Torrón, D. D. Thayer (eds.), *Law, Religion and Freedom. Conceptualizing a Common Right*, London, Routledge, 2021, p. 267-268.
18. For the purpose and in the context of this article, the term "secular assessment" is used to mean any assessment of religion or religious beliefs and/or practices carried out by State authorities from the standpoint of the State's constitutional, legal and organizational principles.
19. *İzzettin Doğan* (footnote 8), §§ 87, 112; *Refah Partisi and Others v. Turkey* [GC], no. 41340/98, § 13, 13 Febr. 2003.
20. M. D. Evans, *Religious Liberty and International Law in Europe*, Cambridge, Cambridge University Press, 1997, p. 286 ff. In its early years the Commission would deny churches

clearly established in the case law of the Court that "churches and other forms of legal persons are, in principle, beneficiaries of the rights set out in Article 9 and can lodge applications in their own name."[21] Read in the light of Article 11 ECHR, which protects freedom of association against unjustified State interference, Article 9 ECHR also guarantees the right of religious communities to function peacefully without arbitrary interference from the State. This general protection afforded to denominations is more specifically channelled through the recognition by the Court of a right to religious autonomy that is aimed at safeguarding both the internal immunity of religious groups, as well as their ability to engage outwardly in the ordinary legal life of the State. One of the main threats to religious autonomy and to the legitimate expectation of faith communities that they will be allowed to exist and function peacefully in keeping with their self-understanding and mission, is the limitation on expressions of belief that result from the State's judgment of strictly religious issues.[22]

Although the ECtHR has always recognized that national authorities have a considerable MoA to manage the relationship with religious communities, the principle of neutrality acts as a counterbalance to that discretion by preventing them from making any secular assessment of religious dogma or practices.[23] However, the ECtHR has on occasion justified, under the MoA, the actions of respondent States which have contravened the mandate of neutrality and acted on their own secular opinion of what may or may not be considered religion or religious.[24] This was the case in *Cha'are Shalom Ve Tsedek v. France*, which exemplifies how the primacy of subsidiarity over neutrality may sometimes interfere with the autonomy of a religious group and its ability to conduct itself outwardly even to the point of placing it at a disadvantage with respect to other communities.[25]

The conflict in *Cha'are* originated in the French government's refusal to grant the applicant, a Jewish orthodox liturgical association, permission to

and religious bodies standing under Articles 9 ECHR and 2 of the First Protocol, on the grounds that the holders of the right to religious freedom were not the denominations, but their individual members. In 1977, the Commission revised its position on the standing of religious groups to be considered as parties before the ECtHR. See M.-J. VALERO ESTARELLAS, *Neutralidad*…, cit. 1, p. 37.

21. M. D. EVANS, *Religious*…, cit. 20, p. 287.
22. J. MARTÍNEZ-TORRÓN, « State neutrality… », cit. 4, p. 159-162. *Hasan and Chaush v. Bulgaria*, no. 30985/96, § 62, 26 Oct. 2000.
23. *Ibid.* § 78. J. MARTÍNEZ-TORRÓN, « Manifestations of Religion or Belief in the Case Law of the European Court of Human Rights », *The European*…, cit. 3, p. 59-60.
24. *Valsamis v. Greece*, no. 21787/93 and *Efstratiou v. Greece*, 24095/94, both 18 Dec. 1996.
25. *Cha'are Shalom Ve Tsedek v. France*, no. 27417/95, 27 June 2000.

perform the ritual slaughter of animals which is admitted as an exception under French law, in a way that would ensure that the meat consumed by its members had the level of purity required by their beliefs.[26] The Jewish Consistorial Association of Paris (ACIP) has exclusive authorization in France to practise ritual slaughter according to Jewish law Contradicting its own prior interpretation that ritual slaughter is a form of religious observance—*rite* in the French version of Article 9 ECHR—, the ECtHR upheld the defendant State's view that the applicant's religious freedom only comprised the right to have access to pure meat. It considered, however, that it fell outside of the Convention that its *shochets* directly slaughtered the animals in an act which, according to the French government and contrary to the applicant's claim, did not in any way differ from that carried out by the ACIP. The judgment found that the refusal neither interfered with the right to freedom of religion, nor discriminated the defendant, and relied in the MoA to the point of ignoring that the French authorities had based their decision on the dismissal of the applicant community's right to establish and interpret the scope and meaning of a religious rite that was particularly meaningful to its adherents.[27]

The increased attention that Strasbourg has paid in the last few decades to the protection of minority religious groups from discrimination, has led its jurisprudence to give greater prominence to the principle of neutrality when the secular assessment of religion curtails pluralism, in what may be interpreted as an implicit review of the broad recourse to the MoA that was validated in *Cha'are*. An example of this doctrinal evolution is the two judgments against Turkey *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı* and İzzettin Doğan.[28] Both cases addressed the effects on the ability of the Alevi minority to act on its beliefs publicly and outwardly, because of the Turkish authorities' refusal to recognize the community's status as a religion or as an independent branch of Islam. This secular assessment, which contradicts the community's own self-perception, results in several limitations to the

26. See Ministère de l'Agriculture et de la Souveraineté alimentaire, *Tout savoir sur l'abattage rituel*, 7 juin 2021: agriculture.gouv.fr/tout-savoir-sur-labattage-rituel [accessed 3 March 2023]. A. Fornerod, « L'encadrement de l'abattage rituel en droit français : une irréductible exception ? », *Revue du Droit des Religions*, 12, 2021: journals.openedition.org/rdr/1699 [accessed 3 March 2023].

27. *Cha'are Shalom Ve Tsedek* Dissenting opinion §§ 1, 2. J. Martínez-Torrón, « Religious pluralism. The case of the European Court of Human Rights », *in* F. Requejo, C. Ungureanu (eds.), *Democracy, Law and Religious Pluralism in Europe. Secularism and post-secularism*, London, Routledge, 2014, p. 130.

28. *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı v. Turkey*, no. 32093/10, 2 Dec. 2014; and *İzzettin Doğan* (footnote 8).

exercise of religious freedom that place Alevism in a position of inferiority compared to groups recognized as a religion by the State.

In contrast to the French case, where Strasbourg refused to analyse from a neutrality standpoint whether the government's decision to ignore the opinion of the applicant association on the religious nature of a rite could amount to a breach of Convention, the notion that a State cannot attribute to a religious group an official status that violates its self-perception is very much present in the judgment against Turkey. Also distancing itself from *Cha'are*, in the Alevi cases Strasbourg appealed to the principle of neutrality to avoid intervening in the religious implications of a debate that is rooted in internal theological disagreements within Islam.[29] Finally, while in the judgment against France the ECtHR found that the national authorities had not interfered with the rights protected by the Convention, in the cases against Turkey the State was condemned for violating Article 9 and 14 ECHR on the basis of an interpretation of the principle of neutrality which acted as a limit on the discretion of the public authorities and as a guarantee of pluralism and equality.

2. MARGIN OF APPRECIATION, NEUTRALITY AND FACIALLY NEUTRAL LAWS

The restrictive interpretation of what constitutes interference with autonomy and the external projection of religious freedom which dominated *Cha'are*, is also present in the Strasbourg jurisprudence when disputes arise from the application by national authorities of formally neutral laws.[30] The ECtHR recognizes a very wide MoA for States to establish general normative provisions and is reluctant to admit that their application may affect the rights protected by Article 9 ECHR.[31] This has proven to be the case with national tax systems and with the urban planning legislation of Member States.

The ECtHR has repeatedly opined that tax schemes and the free exercise of religion are separate issues, allowing national authorities a significant MoA to legislate as long as they do so based on objective criteria that are appropriate to the achievement of the intended taxation purpose.[32] This

29. *Mansur Yalçin and Others v. Turkey*, no. 21163/11, § 70, 16 Sept. 2014.
30. W. C. Durham, « Religious autonomy… », cit. 17, p. 268-270.
31. F. Messner, *Public Funding of Religions in Europe*, New York, Routledge, 2016, p. 14-16. See *Tamara Skugar and Others v. Russia*, dec. no. 40010/04, § 8, 3 Dec. 2009.
32. *Assemblée chrétienne des Témoins de Jéhovah d'Anderlecht et autres v. Belgium*, no. 20165/20, § 46, 5 Apr. 2022.

general rule, however, has an important exception: tax rules or decisions of tax authorities that *de facto* impede, in an unjustified manner, the exercise of religious freedom, will be contrary to Article 9 ECHR.[33] But as with the secular assessment of religion discussed in the previous section, sometimes the automatic deference to the State's MoA has led the ECtHR to validate formally neutral tax schemes which have a negative impact on a religious community, even if its survival is not compromised. This is what happened in *Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*.[34]

In 2009, the applicant Church reached out to the ECtHR on the claim that the UK tax authorities' denial of an exemption for one of its temples from business rates arguing that it was reserved for buildings used for public religious worship, breached Articles 9 and 14 ECHR. Unlike other religious denominations, Mormon churches are not open to all worshippers, as it is one of their main tenets that only the most devout members of the community are allowed access to them. The government, appealing to the MoA, argued the neutrality of a rule that required the self-explanatory objective requirement that a place of public religious worship be effectively open to the public. In its submission, the Mormon Church made it clear that the dispute with the British government concerned the principle behind the exemption, which was based on a series of stereotypes and stigmas that had nothing to do with the neutrality that should characterize state action in religious matters, rather than the actual extent of the exemption. The Church argued that the particularities of access to its temples are a consequence of the very nature of the act of worship as it is conceived by their beliefs, and that national authorities were mistakenly interpreting and applying the legislation in a non-neutral manner by choosing to ignore the particularities of dogmas and practices less recognizable than those of better-known religions. The ECtHR rejected this argument and admitted the State's MoA to establish a neutral social and fiscal policy measure that did not *de facto* affect the Church's exercise of religious freedom.[35]

The neutrality argument has fared better in other instances where allegedly neutral laws have been challenged for impinging on the autonomy of religious groups. The right to establish, own, and maintain places of worship is for

33. *Association Les Témoins de Jéhovah v. France*, no. 8916/05, 30 June 2011. Compare with *Sukyo Mahikari France v. France*, no. 41729/09, 8 Jan. 2013.

34. *Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, no. 7552/09, 4 March 2014. F. Cranmer, « Living Hand-to-mouth: Regulating and Funding Religious Heritage in the United Kingdom », *in* A. Fornerod (ed.), *Funding Religious Heritage*, New York, Routledge, 2016, p. 63-65.

35. *Church of Jesus Christ of Latter-Day Saints* §§ 19-22, p. 30-35.

the ECtHR an essential component of collective religious freedom and a fundamental element of community life.[36] The relationship between the effective enjoyment of buildings and premises for worship and the right of religious communities to externalize their beliefs is, at least in theory, very close, and although the Convention does not place national authorities under an obligation to grant religious groups a place of worship, some restrictions to operate one breach Article 9 ECHR.[37]

Despite this doctrine, based on the MoA the ECtHR has been reluctant to accept that national interventions relating to places of worship, including planning provisions, can affect the rights recognized in Articles 9 and 11 ECHR.[38] However, Strasbourg has identified in the prohibition of arbitrariness that accompanies the mandate of neutrality the main limitation to State action in the area of the exercise of collective freedom that concerns places of worship.[39] Since the 1996 *Manoussakis v. Greece* case, the ECtHR has ruled against several Member States for having inadequate administrative procedures in place to authorize communities to build, adapt or operate houses of prayer and assembly and finding that these procedures, in these cases, were used to hinder minority groups' practice of their religion.[40] Once again, as with the Alevi cases, it is the protection of pluralism that should characterize European societies, and the concern for discrimination on religious grounds that has led the ECtHR to limit the MoA in the face of arbitrary State actions which, justified as the application of formally neutral laws, were in fact the result of a negative assessment of the beliefs and practices of minority churches and communities and of a wish to curtail their social presence.[41]

36. *Kimlya and Others v. Russia*, no. 76836/01, § 86, 1 Oct. 2009; *Religious Denomination of Jehovah's Witnesses in Bulgaria v. Bulgaria*, no. 5301/11, § 97, 10 Nov. 2020.
37. *Rymsko-Katolytska Gromada Svyatogo Klymentiya v Misti Sevastopoli v. Ukraine*, dec. no. 22607/02, § 62, 3 May 2016.
38. *Juma Mosque Congregation and Others v. Azerbaijan*, dec. no. 15405/04, 8 Jan. 2013; *Gromada Ukrayinskoyi Greko-Katolytskoyi Tserkvy Sela Korshiv v. Ukraine*, dec. no. 9557/04, 3 May 2016; *Ukrainian Orthodox Parish of the Holy Trinity Church in Noginsk and others v. Russia*, dec. no. 78909/17, § 20, 13 Sept. 2022.
39. *Griechische Kirchengemeinde München und Bayern*, dec. no. 52336/99, § 19, 18 Sept. 2007.
40. *Manoussakis and Others v. Greece*, no. 18748/91, § 48, 26 Sept. 1996. More recently *Association for Solidarity with Jehovah's Witnesses and others v. Turkey*, no. 36915/10, 24 May 2016; *Religious Community of Jehovah's Witnesses of Kryvyi Rih's Ternivsky District v. Ukraine*, no. 21477/10, 3 Sept. 2019; *Religious Denomination of Jehovah's Witnesses in Bulgaria* (footnote 36).
41. E. Fokas, « The legal status of religious minorities: Exploring the impact of the European Court of Human Rights », *Social Compass*, 65, 2018, p. 28-30; J. T. Richardson, « Update on Jehovah's Witness cases before the European Court of Human Rights: implications

3. MARGIN OF APPRECIATION, NEUTRALITY AND ACCESS TO LEGAL ENTITY OR TO A PRIVILEGED STATUS

The same concern shown by the ECtHR to preserve the pluralism of European societies and avoid discrimination against non-conventional religious groups identified in the preceding sections, explains why the area of Strasbourg case law relating to the autonomy of religious communities where the MoA has been limited the most is that concerned with national schemes for acquiring legal entity status and their effects on the ability of religious groups to operate and externalize their beliefs.[42] Since as far back as *Metropolitan Church of Bessarabia v. Moldavia*, the first judgment to invoke the principle of neutrality to analyse the relationship between Article 9 ECHR and the power of public authorities to subject religious groups to qualification requirements or procedures prior to their legal recognition, it has been a constant concern of the ECtHR to prevent arbitrariness in the way these procedures are designed, interpreted and applied, for fear they may be more or less covert mechanisms of discrimination or social alienation of non-majority religious groups.[43]

The ECtHR does not dispute that the choice of the system of cooperation with churches or the scheme for acquiring legal personality or a privileged status fall within the MoA of each Member State,[44] but the goal is to prevent an improper assessment of the legitimacy of religious beliefs or practices or an arbitrary application of the scheme resulting in a violation of the rights protected by the Convention.

Paradigmatic in this area of ECtHR case law are the judgments against Russia *Moscow branch of the Salvation Army*, *Moscow Church of Scientology* and *Moscow Jehovah's Witnesses*, recently joined by *Taganrog LRO*.[45] In 1997 Russia

of a surprising partnership », *in* E. Fokas, J. T. Richardson (eds.), *The European Court of Human Rights and Minority Religions: Messages Generated and Messages Received*, London, Routledge, 2020, p. 67 ff.

42. J.-P. Schouppe, *La dimension institutionnelle de la liberté de religion dans la jurisprudence de la Cour Européenne des Droits de l'Homme*, Paris, Pedone, 2015, p. 259 ff.

43. *Metropolitan Church of Bessarabia* (footnote 9), § 123; *Moscow Branch of The Salvation Army v. Russia*, no. 72881/01, § 76, 5 Oct. 2006; *Church of Scientology Moscow v. Russia*, no. 18147/02, § 86, 5 Apr. 2007; *Case of Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, no. 40825/98, § 67, 31 July 2008; *Bulgarian Orthodox Old Calendar Church and Others v. Bulgaria*, no. 56751/13, § 55, 20 Apr. 2021.

44. *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, no. 70945/11, §§ 100, 108, 8 Apr. 2014.

45. See footnote 43; *Taganrog LRO and Others v. Russia*, no. 32401/10, 7 June 2022.

enacted a *Law on Freedom of Conscience and Religious Associations* that has been interpreted as a barely disguised attempt to favour Orthodox Christianity whilst both hindering recognition of other communities and impairing their ability to exercise certain relevant aspects of collective religious freedom.[46] In the case of the Jehovah's Witnesses, the Russian authorities later forced the dissolution of several of its congregations around the country under the 2002 *Suppression of Extremism Act*.[47]

In response to the Russian government's attempt to justify its actions under the blanket argument of the MoA, the applicants claimed that the arbitrary interpretation and application of the legislation had directly affected the free exercise and externalization of their beliefs. The ECtHR found bad faith in all the cases along with a lack of neutrality and impartiality in the actions of the national authorities, recalling that where exceptions to the rule of freedom of association are concerned, member States have only a limited MoA, which must be under rigorous conventional supervision. In *Taganrog LRO*, the ECtHR found that since the banning of the applicant organization had been based on an assessment of Jehovah's Witnesses' religious beliefs and practices, the Russian authorities had breached both the State's duty of neutrality and the principle of effectiveness that requires that the permissible exceptions to the right to freedom of association be narrowly interpreted.[48]

The ECtHR has also relied on the principle of neutrality to prevent certain religious groups from being discriminated against when trying to access or benefit from a more favourable legal status. Although freedom of religion does not require Member States to create a particular framework to grant religious communities a special or privileged status, neutrality and impartiality do require that where this possibility exists, all religious groups have a fair opportunity to apply for this status without being subject to discrimination.[49] Consequently, Strasbourg has limited the MoA in this area by finding national legislations that subject the religious groups' access to a more beneficial situation to formal compliance with requirements not directly linked to their

46. B.J. Grim and R. Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the 21st Century*, Cambridge, Cambridge University Press, 2011, p. 37 ff.; J.A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, London, Routledge, 2013, p. 215; G. Fagan, *Believing in Russia: Religious Policy after Communism*, London, Routledge, 2013, p. 69-70.

47. *Taganrog LRO* (footnote 45), § 245. See also *Biblical Centre of the Chuvash Republic v. Russia*, no. 33203/08, 12 June 2014; *Bryansk-Tula Diocese of the Russian Orthodox Free Church v. Russia*, no. 32895/13, 12 July 2022.

48. *Taganrog LRO* (footnote 45), § 187.

49. *Ancient Baltic religious association Romuva v. Lithuania*, no. 48329/19, § 126, 8 June 2021.

activities or that are not sufficiently transparent and impartial incompatible with the ECHR. In the ECtHR's view, such systems may result in unequal treatment of the different religious communities that coexist in the same territory, which may not always be justifiable under Article 14 ECHR.

Pioneering this limitation of the MoA was the Austrian case *Religionsgemeinschaft der Zeugen Jehovas*,[50] in which the ECtHR reiterated how neutrality is directly linked to pluralism and to the dual prohibition of arbitrariness and discrimination. The ECHR allows Member States a MoA to treat groups differently to correct factual inequalities between them, and to assess whether and to what extent differences in otherwise similar situations justify different treatment. However, a difference in treatment will be discriminatory and contradict the State's duty of neutrality and impartiality if it has no objective and reasonable justification, does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought.[51]

The ECtHR's choice in the case against Hungary *Magyar Keresztény Mennonita Egyház* to limit the ability of Member States to define the requirements for access to a qualified legal status by dispensing with the argument of discrimination against which Article 14 ECHR protects seems to be less reasoned.[52] Decided from the perspective of the positive obligation of States to establish recognition procedures that facilitate the acquisition of legal personality for religious entities and in spite of the constant references in the judgment to the prohibition of discrimination,[53] the ECtHR decided not to analyse the case under the lens of Article 14 ECHR. This would imply, as the dissenting opinion points out, that the ECtHR interprets Article 9 ECHR as granting all religious denominations a right, in an absolute and undifferentiated manner, to access public privileges and benefits initially

50. See footnote 43. Also, *Verein der Freunde der Christengemeinschaft and Others v. Austria*, no. 76581/01, 26 Febr. 2009; *Savez crkava "Riječ života" and Others v. Croatia*, no. 7798/08, 9 Dec. 2010.

51. *Religionsgemeinschaft der Zeugen Jehovas* (footnote 43), §§ 91, 92, 96, 97.

52. S. Langlaude, « Religious Organizations, Internal Autonomy and Other Religious Rights before the European Court of Human Rights and the OSCE », *Netherlands Quarterly of Human Rights*, 34, 2016, p. 24, 25.

53. Though once restrictively interpreted by the ECtHR, the now widely accepted positive obligations "place a duty on State authorities to take active steps in order to safeguard Convention rights. In most cases these are not stated explicitly in the text but have been implied into it by the Court." (see Council of Europe, *Some definitions*: www.coe.int/en/web/echr-toolkit/definitions [accessed 3 March 2023] and B. Rainey, E. Wicks and C. Ovey, *The European Convention on Human Rights*, Oxford, Oxford University Press, 6th ed. 2014, p. 102,103).

reserved by domestic law for religious groups in which certain requirements are met, regardless of whether the respondent State can demonstrate that the difference in treatment is not arbitrary and can be justified objectively and reasonably. It is arguable that such an expansive interpretation of Article 9 ECHR would considerably diminish States' MoA to shape their own systems of relations with religious groups. In order to assess the conformity with the Convention of the State's MoA to set up its own registration scheme, the ECtHR has so far consistently subjected each individual case to strict scrutiny in the light not only of Articles 9 and 11 ECHR, but also of Article 14 ECHR.[54] This *ad hoc* proportionality check seeks to balance respect for the MoA and the prohibition on discrimination on the grounds of religion, and, in my opinion, should not be replaced by the recognition of a generic right for religious groups to claim specific treatment. As the separate opinion in İzzettin Doğan also suggested, national authorities must be able to justify, in exercising their MoA, why they limit access to a differentiated legal status to some of the communities that make up the country's religious landscape.[55]

4. CONCLUSION

At a time when Member States of the Council of Europe are calling for greater weight to be given to the principle of subsidiarity, some of the judgments analysed in this article demonstrate that Strasbourg has a record of sometimes invoking the MoA as a convenient argument to avoid the strict judicial scrutiny of limitations on freedom of religion under other reasoning parameters such as neutrality. Whilst acknowledging the limitations of any niche study such as the one carried out in these pages and the impossibility of automatically extrapolating it to other litigious areas of the right to freedom of religion and belief, this article nevertheless highlights the corrective effect that the principle of neutrality may have on the automatic and broad deference to the MoA for the protection of religious pluralism and equality when the external autonomy of religious communities is at stake.

In the specific field of Article 9 ECHR, particularly in countries with strong constitutional models of secularism—such as France and Turkey—or historically influenced by majority churches deeply embedded in their social and political fabric—such as some Eastern European States—, subsidiarity and

54. *Magyar Keresztény Mennonita Egyház* Dissenting opinion §§ 14, 15.
55. *İzzettin Doğan* Dissenting opinion §§ 7 ff.

neutrality often represent the opposite poles of the approach to the religious plurality that became one of the ECtHR's major focus in *Kokkinakis*. By systematically favouring recognition of a wide MoA, the ECtHR could end up endorsing domestic responses to the challenges posed by beliefs and their public expressions that are often more the result of decisions of political opportunity, historical continuance or social convenience than of considerations aligned with universal standards for the protection of human rights.[56]

I do not dispute that some MoA is necessary to accommodate national particularities, but not to the extent of subjecting minorities to the systematic prevalence of majorities or of watering down the review standards of the Strasbourg jurisdiction.[57] The ECtHR will be doing itself no favours if it chooses to address its current legitimacy crisis by losing sight of the fact that the reason for its existence—and for its international prestige—is the protection of human rights against undue State interference. As it stated in *Manousakkis v. Greece*, in delimiting the extent of the margin of appreciation "the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society".[58]

56. E. Benvenisti, « Margin of Appreciation, Consensus, and Universal Standards », *New York University Journal of International Law & Politics*, 31, 1999, p. 852; M. Evans and P. Petkoff, « Marginal Neutrality… », cit. 3, 130 ff.
57. S. Smet, « When Human… », cit. 11, p. 56-57; S.E. Berry, « Avoiding… », cit 6, p. 109.
58. *Manoussakis v. Greece*, no. 18748/91, § 44, 26 Sept. 1996.