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This article[1] attempts to summarize national reports on various aspects of religious freedom. Following a brief introduction in Part I, Part II outlines the approaches of constitutions and constitutional jurisprudence to determine relations between church and state. Part III addresses the ways of understanding the principle of freedom of religion, followed by Part IV which presents various principles of equality in reference to the position of churches and religious groups. Part V outlines the forms of cooperation between church and state, focusing in particular on education and religion teaching.

This article is based on information and reports concerning the case law of constitutional courts in several European countries, including Austria, Belgium, Belarus, Bulgaria, the Czech Republic, the Federal German Republic, France, Hungary, Italy, Liechtenstein, Lithuania, Macedonia, Poland, Portugal, Romania, Russia, Slovenia, Slovakia, Spain, Switzerland, and Turkey.

I. INTRODUCTION

A discussion of freedom of religion requires consideration of relations between churches and the state. Modern Christian societies now generally accept various versions of separation of church and state (mutual autonomy), acknowledging a distinction of domains belonging to each of them. But it is worthwhile to emphasize that, as indicated by Samuel Krislov,[2] separation of church and state is mostly

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1. This presentation is based on the author's General Report, which was delivered at the twenty-first Conference of Constitutional Courts of Europe (Warsaw, May 16–20, 1999). *See* CONSTITUTIONAL JURISPRUDENCE IN THE AREA OF FREEDOM OF RELIGION AND BELIEFS: XI CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS (Leszek Lech Garlicki ed., 2000) [hereinafter CONSTITUTIONAL JURISPRUDENCE].

2. Samuel Krislov, *Alternatives to Separation of Church and State in Countries Outside the United States*, *in* RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 421, 423 (James E. Wood ed., 1985).

found in the doctrine of Western civilization and the great religions of the world adopt various concepts of church-state relations. Judaism was originally linked with the state, and only historical events caused the eventual separation. The rebirth of the State of Israel allowed a return to tradition, and today an interesting symbiosis of religion and state is observed. Christianity originated as a religion separated from its antagonist, the state. Later links developed between Christian churches and various nations, which were understood differently under Catholic, Orthodox, and Protestant traditions. By contrast, Islam, from its very origins, has been aligned with the state; in this tradition, the identity of religion and government has always been one of Islam's fundamental features.[3]

From the European perspective, the Christian tradition is of fundamental significance.[4] Therefore, most European constitutions and jurisprudence assume a predominantly Christian audience since other religions have always been in the minority.

Even assuming this largely Christian audience, individual European nations have adopted vastly different schemes, which flow from their different histories and traditions. Consequently, along with traditionally Protestant states (e.g., Great Britain and the Scandinavian countries) and traditionally Catholic states (e.g., Austria, France, Spain, Ireland, Liechtenstein, Slovenia, Poland, Portugal, and Italy), there are European countries of mixed religious structure (e.g., Germany and Switzerland).[5] Historically speaking, almost all countries formerly had a state church, and the political elite were more interested in establishing and maintaining religious peace than ensuring religious equality. In countries where historical development focused on evolution rather than revolution, there may still be found a very close linkage between a dominant religion and the state, namely Scandinavian countries and the Anglican Church in England. However, in a majority of Continental countries, the official relationship between church and state eventually broke down. This separation of church and state is not meant to result in a lack of assistance or cooperation by the state to churches and does not foreclose the

3. *See id.*

4. Turkey is the only European country today where the Christian religion (or at least tradition) does not dominate.

5. The experience of United States of America is undoubtedly a significant inspiration for this version of church-state relations.

existence of some churches remaining closer to the state than other religious organizations or groups.[6]

It is a self-evident truth that religious freedom—both for an individual and for an institution—should be considered as a primary element of the more general principle of freedom based on pluralism and the protection of the minority. On the other hand, the church-state relations define the approach and scope of individual religious freedoms to a certain extent. Both extreme solutions—a religious state (understood as a single-religion state) and an atheistic state (understood as an anti-religious state)—are very dangerous for the freedom of an individual generally and for religious freedoms specifically.

Between these two extremes there are many versions of separation of and cooperation between church and state. As described by Professor W. Cole Durham, Jr.,[7] there is a range of systems from the most strict—even hostile—separationist models to the most friendly, positive separationist schemes. This range includes models based on accommodation, cooperation, and even churches supported or preferred by the state. Whichever model has been adopted, all democratic European nations begin with the principle of freedom of the individual to hold a particular belief or associate with a chosen religion as provided for in Article 9 of the 1950 European Convention on Human Rights.[8] It should be emphasized at this point that Article 9 sets forth the freedom to manifest religion or belief, in community

6. When speaking about historical experience, one must not neglect the processes of atheism imposed by the communist state, resulting sometimes in an official treatment of ideology in the quasi-religious category and providing an example of almost perfect symbiosis of state and ideology. *See* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 403–04 (1994). It was a short-lived experiment, but it clearly made a significant impact on the constitutional regulations adopted in that region of Europe.

7. W. Cole Durham, Jr., *Bases para un estudio comparativo sobre libertad religiosa*, *in* X ANUARIO DE DERECHO ECLESIASTICO DEL ESTADO 465 (1994).

8. Article 9 of the 1950 European Convention on Human Rights states:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 9, 213 U.N.T.S. 221.

with others and in public, and protects the teaching of religious beliefs as well. Therefore, regardless of different traditions, religious structures, or historical experience, there is a common level of freedom for all democratic European states that must be guaranteed in every country, for every religion, and for every belief.

However, the manner of granting these guaranteed freedoms, including the determination of relations between church and state, varies vastly. No need for uniformity is recognized. On the contrary, the Declaration on the status of churches and non-confessional organizations of the Amsterdam Treaty states: "The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Members States. The European Union equally respects the status of philosophical and non-confessional organizations."[9]

II. THE CONSTITUTIONAL MODEL OF CHURCH-STATE RELATIONS

The issue of freedom of religion (in its individual as well as its collective aspect) is a delicate matter which is reflected in the careful approach taken by the authors of the various European constitutions on this issue. Drafters of European constitutions often encountered historical or social traditions with which they did not want to interfere directly.

A. Constitutional Provisions Regarding Church and State

In Germany, the pertinent provisions of the 1919 Weimar Constitution are still valid on several fundamental issues. Therefore, the decision of the drafters of the 1949 German Grundgesetz to absorb the so-called Weimar church provisions to the Constitutions was the result of "a compromise that become necessary because then proposals made during discussions on the Basic Law for a new regulation of the relationship between State and churches were unable to find any majority."[10] In Portugal, there is a complicated symbiosis maintained

9. 1997 O.J. (C 340) 133 ("L'Union européenne respecte et ne prejuge pas les statut dont beneficient en vertu du droit national, les Eglises et les associations ou communautés religieuses dans les États membres. L'Union européenne respecte également la statut des organisations philosophiques et non confessionnelles.").

10. D. Hoemig & W. Hassemer, *Germany: Rechtsprechung der Verfassungsgerichte im Bereich der Bekenntnisfreiheit*, *in* 1 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 339

between the 1940 Concordat with the Holy See, the 1971 Act on Religious Freedom, and the 1976 Constitution.[11] In Italy, in the course of drafting the constitution, the Lateran Pacts were adopted as the system regulating the relations between the state and the Catholic Church.[12] In France, following the concept of the "bloc of constitutionality,"[13] some fundamental regulations are stipulated in the 1789 Declaration of the Rights of Man and of the Citizen, in the Preamble to the 1946 Constitution, and in the Law of December 9, 1905 (which is considered to proclaim the "fundamental principles of the Republic").[14] For the historical reasons, certain provisions relating to religious freedom flow from the Saint Germain Treaty for Austria and from the Treaty of Lausanne for Turkey, which were concluded after World War I.

B. State Churches and the Separationist Models

Within the above-mentioned meaning, there is no religious state in Europe and, likewise, no atheistic state at present.[15] Nevertheless there are democratic countries which provide for the existence of a state church[16] or an official or dominant state religion.[17] The Swedish

[hereinafter Hoemig & Hassemer].

11. J. de Sousa e Brito, *La jurisprudence constitutionnelle en matière de liberté confessionelle au Portugal*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 555 [hereinafter de Sousa e Brito].

12. Article 7 of the 1947 Constitution provides: "The State and the Catholic Church are, each within its own ambit, independent and sovereign. Their relations are regulated by the Lateran Pacts. Such amendments to these Pacts as are accepted by both parties do not require any procedure of Constitutional amendment." ITALY CONST. art. 7, *in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *Italy* 48 (Gisbert H. Flanz ed.) [hereinafter CONSTITUTIONS].

13. *See* DROIT CONSTITUTIONNEL 148 (L. Favoreu ed., 2000).

14. Brigitte Basdevant-Gaudemet, *La jurisprudence constitutionnelle en matière de liberté confessionnelle et le régime juridique des cultes et de la liberté confessionnelle en France*, *in* 1 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 305 [hereinafter Basdevant-Gaudemet]. Furthermore, several eastern French departments have a separate legal system for historical reasons.

15. It should be mentioned that the 1976 Constitution of communist Albania provided for an atheistic state: "The State does not recognise a religion, it supports and develops the atheistic propaganda to strengthen the scientific and material ideology among citizens."

16. The 1953 Constitution of Denmark provides: "The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State." DEN. CONST. art. 4, *in* 5 CONSTITUTIONS, *supra* note 12, at *Denmark* 15.

17. The 1814 Norwegian Constitution provides, "The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same." NOR. CONST. art. 2, § 2, *in* 14 CONSTITUTIONS, *supra* note

Church enjoyed a special constitutional status for many decades until recently when it was disestablished, at least in major part.[18] At least in the traditional sense, the Anglican Church forms a part of the state machinery of England. Moreover, Israel represents a country with a very strong religious component; the very notion of "the Jewish State" speaks of the state's attachment to a particular religion. Finally, Liechtenstein's constitution (Article 37, Section 2, Sentence 1) provides a pertinent example:

> following the previous constitutional tradition, a strong significance of the Roman Catholic Church is recognized, making it the State church (*Landeskirche*), thus in other words, providing with the public and legal status. . . . The model implemented in the Constitution may not be [however] considered as a legal regime setting forth and allowing for only one Church (State Church) or such where the state identifies with one Church only, still it is clearly oriented to the Roman Catholic State Church.[19]

Notwithstanding its preference for the Catholic Church, it is clear that Liechtenstein's constitution and its constitutional practice—as with any of the other countries mentioned herein—respect freedom of religion within the meaning of Article 9 of the European Convention on Human Rights.

On the other hand, some constitutions define the state as "lay"[20] or "secular."[21] This should not necessarily be understood as a rejec-

12, at *Norway* 1. The 1975 Constitution of Greece provides, "The prevailing religion in Greece is that of the Eastern Orthodox Church of Greece," GREECE CONST. art. 3, *in* 7 CONSTITUTIONS, *supra* note 12, at *Greece* 19; *see also* the 1991 Constitution of Bulgaria, *infra* note 37 (Eastern Orthodox).

18. See Kenneth Stegeby, *An Analysis of the Impending Disestablishment of the Church of Sweden*, 1999 BYU L. REV. 703.

19. H. Wille, *Lichtenstein: Rechtsprechung der Verfasssungsgerichte im Bereich der Bekenntisnsfreiheit*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 466–67 [hereinafter Wille].

20. The 1958 French Constitution (as amended July 31, 1995), provides, "France is an indivisible, secular, democratic and social Republic. It assures the equality of all citizens before the law . . . . It respects . . . all beliefs." FR. CONST. art 1, *in* 7 CONSTITUTIONS, *supra* note 12, at *France* 2; *see also* Corte cost., sez., 1989, n.203, (Italy).

21. The 1993 Russian Constitution provides, "1. The Russian Federation shall be a secular state. No religion may be instituted as state-sponsored or mandatory religion. 2. Religious associations shall be separated from the State and are equal before the law." KONST. RF art. 14, *in* 15 CONSTITUTIONS, *supra* note 12, at *Russia* 4. The concept of the "secular state" is also used in Belarus. *Belarus: Constitutional Jurisprudence in the Area of Freedom of Religion and Beliefs*, *in* 1 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 157.

tion of or hostility towards religion.[22] In our contemporary understanding, it is rather a manner of expressing the neutrality of the state: "The judicial system is one of strict separation between the State and religious confessions. This means that the State does not officially recognize any one religion."[23] Another example of secularism is found in Turkey. Article 2 of the 1982 Constitution of Turkey describes the Republic of Turkey as a "secular state."[24] This should be understood against the history of modernization of Turkey in the Ataturk period and against the role that Islam would like to play in modern times. Therefore,

> "the Constitutional Court has based its views regarding the freedom of religion and conscience on the principle of secularism, and it has also provided a contemporary meaning and content to that principle through its decisions. According to the Constitutional Court, secularism cannot be confined to a separation between the public and religious domain. It is an environment of freedom, civilization and modernity with a larger scope and dimension. . . . What are determining and effective over the state are science and wisdom and not religious rules and requirements."[25]

C. The Principles of Non-identification and Neutrality

In general, it seems that constitutions refrain from general definitions such that the model of church-state relations is defined only in a country's constitutional jurisprudence. Almost all national reports refer to two fundamental principles of constitutional jurisprudence on the subject of religious liberty: non-identification and neutrality.

1. The principle of non-identification

Non-identification means that "according to the case law of the Constitutional Court, any system of a state Church, and even any

22. In this context, it is possible to talk about an "aggressive *laicisme*" which existed in France at the end of the nineteenths Century. *See* Basdevant-Gaudemet, *supra* note 14, at 283.

23. "Le regime juridique est celui d'une strict separation entre l'État et les confessions religieuses. Cela implique que l'État ne reconnaisse aucun culte." *Id*. at 306.

24. In addition, Article 174 provides for special protection of this principle: "No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws, indicated below, which aim . . . to safeguard the secular character of the Republic." TURK. CONST. art. 174.

25. *Turkey: Freedom of Conscience and Religion and Doctrines of the Constitutional Court*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 834 [hereinafter *Turkey*].

system of identification of the state with a particular religion or a particular set of ideas, has to be excluded."[26] According to this principle, no state religion or official religion may exist in a country,[27] not even a privileged religion.[28] The rejection of official state churches or religions is best understood against the background principle of pluralism:

> the prohibition of any confusion of the religious functions and the state functions is warranted by the nonconfessional character of the

26. Kucsko-Stadlmayer, *Die Rechtsprechung des Oestereichischen Verfassungsgerichtshofs auf dem Gebiet der Glaubenfreiheit*, *in* 1 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 120 [hereinafter Kucsko-Stadlmayer].

27. The 1919 Constitution of Germany (retained in force by Article 140 of the 1949 *Grundgesetz*) provides, "There shall be no state church." F.R.G. CONST. art. 137 § 1, *in* 7 CONSTITUTIONS, *supra* note 12, at *Germany* 179. *See also* Basdevant-Gaudemet, *supra* note 14, at 307; R. de Mendizabal Allende et al., *Spain: La jurisprudence constitutionnelle en matière de liberté confessionnelle*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1 [hereinafter de Mendizibal Allende et al.]; A. Hungerbuehler & M. Feraud, *Switzerland: Die Rechtsprechung des Schweizerischen Bundesgerichts im Bereich der Bekenntnisfreiheit*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 820 [hereinafter Hungerbuehler & Feraud]; *Russia: La liberté de conscience dnas la Féderation de Russie*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 647 [hereinafter *Russia*].

In the Czech Republic, Article 2, Section 1 of the 1991 Charter of Human Rights and Freedoms provides, "The State . . . must not be tied either to an exclusive ideology or to a particular religion." CZECH REP. CONST., *in* 5 CONSTITUTIONS, *supra* note 12, at *Czech Republic* 152.

In Lithuania, the 1992 Constitution provides:

> 1. The State shall recognize traditional Lithuanian Churches and religious organizations, as well as other Churches and religious organizations provided that they have a basis in society and their teaching and rituals do not contradict morality or the law.
> 2. Churches and religious organizations recognized by the State shall have the rights of legal persons.
> 3. Churches and religious organizations shall freely proclaim the teaching of their faith, perform the rituals of their belief, and have houses of prayer, charity institutions, and educational institutions for the training of priests of their faith.
> 4. Churches and religious organizations shall function freely according to their canons and statutes.
> 5. The status of Churches and other religious organizations shall be established by agreements or by law.
> 6. The teaching proclaimed by Churches and religious organizations, other religious activities, and houses of prayer may not be used for purposes which contradict the Constitution and the law.
> 7. There shall not be a State religion in Lithuania

LITH. CONST. art. 43, *in* 11 CONSTITUTIONS, *supra* note 12, at *Lithuania* 6–7.; *see also* A. Matijosius, Some Legal Aspects of Religion and Belief in Lithuania, Address presented at the J. Reuben Clark Law School Annual Symposium on International Law and Religion (Oct. 2000).

28. *See Macedonia: Constitutional Jurisprudence in the Area of Freedom of Religion and Beliefs*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 501 [hereinafter *Macedonia*].

> state, which results from the pluralistic structure of religions existing in the society, as well as by the constitutional guarantee of religious freedom which applies to both, individuals and religious groups.[29]

Non-identification should also be viewed as a guarantee of religious freedom (church autonomy) that prohibits the state from usurping functions of religious organizations.

2. The principle of neutrality

Neutrality is to a large extent synonymous with non-identification. It is a result of a plurality of ideologies and religions, and, at the same time, it must mean non-identification. But neutrality does not have to be equivalent to indifference by the state towards religion as a social phenomenon. In this respect, the modern French notion of positive "laicism serves as the foundation of judicial principles that seek to ensure the neutrality of public power regarding religion and to ensure equal treatment of diverse religious expressions."[30]

Neutrality means first of all state impartiality towards various existing religions and ideologies.[31] But it also requires that the state observe principles of freedom[32] and equality.[33] In this sense, neutrality is understood as a consequence of separation.[34] However, neutrality

29. *See* de Mendizabal Allende et al., *supra* note 27, at 767. An understanding of the First Amendment to the U.S. Constitution is instructive in this context: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . ." Everson v. Board of Ed., 330 U.S. 1, 15 (1947). *See also Macedonia*, *supra* note 28, at 503 (referring to a decision of the Constitutional Court concerning the powers of the state authorities regarding in respect to issuing building permits).

30. Basdevant-Gaudemet, *supra* note 14, at 283 ("elle sert de fondement à des principes juridiques qui visent à assurer la neutralité des pouvoirs publics à l'egard du fait religieux et à assurer un traitement égal à ses diverses expressions").

31. For example, the 1997 Constitution of Poland states, "The relationship between the State and churches and other religious organizations is based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the good of the individual and for the common good." POL. CONST. art. 25, § 3, *in* 15 CONSTITUTIONS, *supra* note 12, at *Poland* 6.

32. See the September 4, 1992 decision of the Czech Constitutional Court upholding the constitutionality of prohibition of movements propagating national, racial, class or religious hatred.

33. *See infra* Part IV.

34. *See* de Sousa e Brito, *supra* note 11, at 566.

should not eliminate the cultural tradition of particular societies, which in Europe have always been related to Christianity. Sometimes neutrality is reflected in the language of constitutional texts (e.g., *Invocatio Dei* and preambles to other constitutions,[35] state symbols, the notion of "traditional" or "recognized" churches) and sometimes in ordinary statutes.[36]

D. Separation, Autonomy, and Cooperation

Non-identification and neutrality assume separation of church and state, but generally the separation is not an absolute one. Some constitutions directly set forth this principle of separation.[37] But in post-Communist states, such separationist wording has negative historical connotations[38] and its usage is generally avoided. In Switzer-

35. For example, the Preamble to the 1937 Constitution of Ireland states, "In the name of the Most Holy Trinity . . . We, the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ . . . ." 9 CONSTITUTIONS, *supra* note 12, at *Ireland* 1. The preamble to the 1949 German *Grundgesetz* [Constitution] begins, "Conscious of their responsibility before God and man . . . ." 7 CONSTITUTIONS, *supra* note 12, at *Germany* 105. The Preamble to Poland's 1997 Constitution similarly states, "We, the Polish Nation, all citizens of the Republic, encompassing those who believe in God as the source of truth, justice, goodness and beauty, as well as those who do not share such faith but respect those universal values . . . recognizing our responsibility before God or our own consciences . . . ." XV CONSTITUTIONS, *supra* note 12, at *Poland* 1. The preamble to the 1999 Swiss Constitution begins, "In the Name of Almighty God!" 17 CONSTITUTIONS, *supra* note 12, at *Switzerland* 167.

36. For example, the preamble to a Lithuanian act provides that "the Lithuanian State is based on Christian cultural foundation of United Europe." *Lithuanian Constitutional Jurisprudence in the Area of Freedom of Religion and Belief*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 479 [hereinafter *Lithuanian Jurisprudence*].

37. For example, the 1949 Hungarian Constitution states, "In the Republic of Hungary the Church functions in separation from the State." HUNG. CONST. art. 60, § 3, *in* 8 CONSTITUTIONS, *supra* note 12, at *Hungary* 16. This entails "a consequent separation of the churches from the State, the neutrality of the State in religious matters and the equality of the rights of all churches." Adam, *La jurisprudence constitutionnelle Hongroise en matière de liberté confessionnelle*, *in* 1 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 365. *See also* PORT. CONST. art. 41, § 4, *in* 15 CONSTITUTIONS, *supra* note 12, at *Portugal* 27 ("Churches and religious communities are independent of the State and are free to determine their own organization and to perform their own ceremonies and worship."); SLOVN. CONST. art. 7, § 1, *in* 16 CONSTITUTIONS, *supra* note 12, at *Slovenia* 2 ("The State and religious groups shall separate."); Article 14, Section 2 of the 1993 Constitution of Russia, *supra* note 21; BULG. CONST. art. 13, §§ 2, 3, *in* 3 CONSTITUTIONS, *supra* note 12, at *Bulgaria* 89 ("Religious institutions are separate from the State," however, "[t]he Eastern Orthodox religion is the traditional religion of the Republic of Bulgaria.").

38. *See Slovenia: Constitutional Jurisprudence in the Area of Freedom of Religion and Belief*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 707 [hereinafter *Slovenia*].

land, some cantons (e.g., Geneva and Neuenburg) have introduced the concept of separation of church and state, but in 1980, a popular referendum to implement complete separation of church and state was rejected.[39]

The notion of separation of church and state means autonomy of both entities and should not be understood as a manifestation of state hostility towards religion[40] or even as the manifestation of state indifference towards religion. In Portugal, the Constitution indicates that it "imposes *laicité* [separation of church and state] but not *laicisme* [a hostile implementation of this separation]."[41] Austria is described as "not a completely secular state, since the separation of Church and State has not been clearly conducted."[42] The German Federal Constitutional Court refers to the attitude of "separation not absolute but 'lame' (*hinkende Trennung*) featured as a transformed independence within the coordination system or as the partnership of churches and the State."[43] The system existing in Belgium is presented as the system which "is neither a concordat regime, nor an absolute separationist regime. It is a regime of reciprocal independence combined with a system of benefits accorded by the state to certain religions."[44] In Slovakia, one refers to "the specified separation of the State and churches and religious communities."[45]

In sum, the principal of separation of church and state is considered not only as admitting, but even as assuming, some cooperation between church and state. Even the definition of the state as "secular" is not contradictory to it: "The Constitution does not foresee

39. *See* Hungerbuehler & Feraud, *supra* note 27, at 820.

40. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 314 (1952) (stating, "But we find no constitutional requirement which makes it necessary for the government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.").

41. de Sousa e Brito, *supra* note 11, at 562.

42. Kucsko-Stadlmayer, *supra* note 26, at 121.

43. Hoemig & Hassemer, *supra* note 10, at 339.

44. The original French states, "n'est ni un regime concordataire, ni un regime de separation absolute. C'est un regime d'independence reciproque combine avec un system d'aide positive accordeé par l'État à certains cultes." E. Cerexhe & H. Boel, *Belgium: La jurisprudence constitutionnelle en matière de liberté confessionnelle*, *in* 1 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 197 [hereinafter Cerexhe & Boel].

45. *Slovak Republic: Verfassungsmassige Entscheidungstatigkeit in der Sachen de Glaubensfreiheit*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 670 [hereinafter *Slovak Republic*].

any cooperation between the state and religious communities. Nevertheless, the state shall not ignore religion."[46]

In some constitutions, however, the notion of "separation" is replaced by the notion of "autonomy and cooperation."[47] Such a depiction does not only demonstrate that these constitutions do not prohibit state cooperation with (and thus some assistance to) churches, but also suggests that it is possible to define certain state obligations in this area. Thus, according to Article 16, Section 3 of the 1978 Constitution of Spain, "public authorities take into consideration religion of society and maintain the resulting cooperation with the Catholic Church and other religions." This is linked with the conviction that "respect of religious beliefs belongs to the foundations of democratic cohabitation."[48] In a similar context, the Swiss drafters mention a state obligation to guarantee religious peace[49] and a Hungarian author indicates that "religious values are considered as constitutional values. Therefore, the protection and promotion of religious values by the State is effected through a traditional cooperation."[50] In the Italian system, the principle of a secular state (expressed in Decision Number 203 of 1989) is one of the defining elements of the Italian regime. This does not mean that the state must ignore existing religions but rather constitutes a state guarantee for the protection of religious freedom in the pluralistic religious and cultural system.[51] In the 1987 decision of Constitutional Court of Portugal, it was stated that the state obligation is not only to allow the operation of particular religions but that the state is obliged to cooperate with such religions as "religious needs have become a legally recognized right that the state must ensure."[52] The 1993 decision of the Polish Constitutional Court indicated that separation does not assume isolationism or competitiveness but rather an opportunity to cooperate in domains which serve the common good

46. The original French states, "La Constitution ne prevoit aucune cooperation entre l'État et communautés religieuses. Neamoins, les pouvoirs publics et le legislateur n'ignore pas le fait religieux." Basdevant-Gaudemet, *supra* note 14, at 311.

47. *See, e.g.*, art. 25, § 3 of the 1997 Constitution of Poland, *supra* note 31.

48. de Mendizabal Allende et al., *supra* note 27, at 770.

49. *See* Hungerbuehler & Feraud, *supra* note 27, at 805.

50. Adam, *supra* note 37, at 369.

51. *See Italy: La jurisprudence constitutionnelle en matière de liberté confessionnelle*, *in* 1 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 425 [hereinafter *Italy*].

52. The original French states, "les besoins religieux sont devenus un bien juridique que l'État doit assuré." de Sousa e Brito, *supra* note 11, at 587.

and the development of the individual.[53]

Regardless of the constitutional wording and the language of judicial decisions, the "wall of separation" between church and state is nowhere to be found today. On the contrary, the constitutional pattern of cooperation (sometimes also understood as enhancing positive state obligations to support churches) should be considered as the most commonly accepted model.

III. THE FREEDOM TO ESTABLISH RELIGIOUS COMMUNITIES: "RECOGNIZED CHURCHES"

State approaches to churches and religious communities are primarily determined by the principle that an individual is guaranteed freedom of religion. Thus, the state may not abolish or differentiate the freedom of establishing churches and religious communities nor may it discriminate against or favor individuals because of their religious affiliation (or lack thereof). This prohibition against discrimination is reflected both in constitutional provisions and in the case law of constitutional courts.

In the countries discussed herein, there is a recognized freedom to establish churches and other religious communities. But this freedom does not bar the state from participation in such processes. When a religious community seeks recognition, it usually looks for some support from the state, and thus must undergo some form of state procedures. There are two fundamental models in this area: registration with the state as a religious entity and formation of an association under private law.

A. State Registration and Private Associations

1. State Registration

The first model consists of a uniform requirement of state registration of churches and religious communities. If a given religious community wishes to obtain such status, it has to be registered. Only in a few states is registration an obligatory condition for a church to

53. *See, e.g.*, A. Maczynski, *Poland: Freedom of Religion and Beliefs in the Jurisprudence of the Polish Constitutional Tribunal*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 543 [hereinafter Maczynski]. Since 1997 the principle of cooperation is grounded in Article 25, Section 3 of the Constitution of Poland. *See supra* note 31.

be able to operate at all.[54] As a general rule, there are no legal obstacles to operate without registration,[55] but if a church is not registered, it is impossible to obtain a legal personality and receive some legal benefits.[56] To register a community, several requirements are generally specified: 1) documentation of a specified number of followers (e.g., 10 persons in Russia and Belarus, 15 persons in Lithuania, and 100 persons in Hungary); 2) furnishing the state with internal statutes (this may also include information about the group's doctrine in order to assess the religious nature of the group); and 3) information about the composition of church authorities. As a general rule, the power to register belongs to a state administrative agency (in the form of an administrative decision)[57] and generally, there is a guarantee of judicial review.[58]

Although the registration system is uniform, a different approach is sometimes used for traditional churches. In Lithuania, the Act on Religious Communities and Associations distinguishes "traditional" religious communities (the notion of "church" is not used by this Act), combining the term tradition with a historical, spiritual, and social heritage of Lithuania. Such traditional communities have been recognized *ex lege*. Nontraditional religious communities must be registered. While there is no legal impediment to nontraditional religions being granted the status of traditional communities, this may only occur after twenty-five years.[59] In Russia, the 1997 Act on Freedom of Belief and on Religious Associations provided for a facilitated registration procedure for religious organizations which have existed in a given area for at least fifteen years. Under the Act, other organizations would have to renew their registration annually.[60] The annual re-registration requirement was subsequently challenged before the

54. *See Slovak Republic*, *supra* note 45, at 668; *Macedonia*, *supra* note 28, at 502–03.

55. *See, e.g.*, *Lithuanian Jurisprudence*, *supra* note 36, at 478. *But see Russia*, *supra* note 27, at 651 (noting that in Russia the law requires that the state authorities be notified about the creation of a religious community).

56. *See, e.g.*, *Romania: Rapport relatif à la jurisprudence constitutionnelle en matière confessionnelle*, *in* 2 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 632 [hereinafter *Romania*] (noting significantly the difference between "recognized" and "barely tolerated" religions).

57. *See Slovenia*, *supra* note 38, at 705.

58. In Hungary, a registration, as such, is already made by the court. *See* Adam, *supra* note 37, at 367.

59. *See Lithuanian Jurisprudence*, *supra* note 36, at 487.

60. *See Russia*, *supra* note 27, at 651.

Russian Constitutional Court. In a decision dated November 23, 1999, the Court did not invalidate this provision but, in deciding that it does not apply to churches that had come into existence before the 1997 Act was adopted, the decision left the provision without any real significance.

2. Association Status

The second model consists of admitting churches and religious communities to be organized in the form of an association or other private law organization. According to this model, religious groups fall under a general system of organizations and are not differentiated by a separate (and more restrictive) registration procedure. Notwithstanding this nondifferentiation, in most countries, a group of traditional churches continue to maintain differing legal status, which follows from the understanding that legal provisions do not wish to ignore the sociological fact of the stabilizing effects of certain religions.

Even in France, where the principle of separation of church and state is understood as the strictest, these facts are recognized by law. In principle, there is no need for the state to recognize particular religions. Religious organizations or groups wishing to be included into the structure of state law and to obtain legal personality use the form of an association. Those groups not accorded the status of an *association cultuelle*, cannot be granted some privileges, particularly in regard to financial matters.[61] At the same time, although, "legally speaking, the State does not recognize any religion, in practice it knows six."[62] Notwithstanding the strict separationist French model, in practice six major religions are granted the status of state cooperation. In Belgium, the idea of state recognition was already present in the nineteenths century in the constitutional provisions discussing "recognized religions"[63] or "public worship."[64] This status allows

61. *See* Basdevant-Gaudemet, *supra* note 14, at 303, 310 (giving information about a recent decision of the Lyon Court attempting to define religion).

62. The original French states: "juridiquement, l'État ne 'reconnait' aucun culte, en pratique il en 'connait' six." *Id.* at 306.

63. The 1831 Constitution provides:

> Education is free; any preventive measures shall be forbidden; the punishment of misdemeanors shall be regulated only by law or decree. The Community shall guarantee the freedom of choice of parents. The Community provides neutral instruction. Neutrality implies, in particular, respect for the philosophical, ideological, or

churches to enjoy support from the state. Historical and sociological realities are decisive in this case.[65]

A historical criterion is clearly articulated in Article 137, Section 5 of the 1919 German Constitution which provided that those religious communities with the status of a public association before the Constitution became effective maintained the same legal position *ex lege*. Other communities may receive status of a public association if their structure and the number of members guarantees their long-term durability.[66] The remaining religious communities may have civil law status which is limited in its privileges.[67]

In Austria, a system of recognized churches is applied. The recognition of churches is effected by statutes of Parliament, and, thus, a church is granted the legal position of a public institution. The above-mentioned regulations date back to 1874 and formulate the most important requirements of recognition (e.g., at least 2,000 followers, a positive faith in God, a defined source of faith, economic and personal ability to establish the church, and at least one religious community). It seems plausible that the Austrian regulation was a distant inspiration of the registration system adopted in the modern Eastern Europe. At present, eleven churches and communities are recognized in this way. The Roman Catholic Church has "historical recognition" attributable to the fact that Catholicism was the state religion in Austria until 1867.[68] In Poland, a registration system is applied. Simultaneously, the Polish Constitution provides for a statutory form of regulation over relations between the state and several

religious conceptions of parents and pupils. The schools organized by public authorities shall offer, up through the end of obligatory schooling, a choice between instruction in one of the recognized religions or instruction in nonreligious morality.

BELG. CONST. art. 24, § 1, *in* 2 CONSTITUTIONS, *supra* note 12, at *Belgium* 4.

64. Article 181, Section 1 provides, "The salaries of ministers of religion are chargeable to the State . . . ." *Id.* at 40.

65. *See, e.g.*, Cerexhe & Boel, *supra* note 44, at 201 (indicating that there are six "recognized cults" and recalling that the 1993 Amendment to the Constitution has extended the application of Article 181 to nonreligious lay organizations).

66. The Federal Constitutional Court has indicated that durability means the ability of a religious community to fulfill for a substantial period its obligation. Of particular importance was the 1991 Decision in the Bahá'í communities case.

67. *See, e.g.*, Gerhard Robbers, *Religious Freedom in Germany*, 2001 BYU L. REV. 650–51 (referring to a pending case concerning the Jehovah's Witnesses' claim to receive "public law association" status).

68. *See* Kucsko-Stadlmayer, *supra* note 26, at 103.

important churches and separately refers to the Catholic Church.[69]

In Switzerland, "main churches" received the status of a public legal corporation. Cantons make such decisions, which are often included in the very text of the cantons' constitutions. In practice, this means that a church is recognized as a legal and public institution "upon a referendum effected in accordance with the requirements of democracy."[70] Accordingly, there are three "traditionally main churches." Other religious communities may be organized only in private-law forms, and if they are established as ordinary associations, then they are exempted from registration. In Liechtenstein, a *Landeskirche* still exists, and the Catholic Church enjoys the status of a public law person. Other religions may be granted such status pursuant to a statute of Parliament, which has not yet been promulgated. Therefore, other religions adopt private law forms for their organization.[71] In Portugal, a unique position for the Catholic Church results from the Concordat, which grants the Catholic Church an international legal person status. Other churches operate now in the form of private law associations but the draft act on religious freedom seeks to amend it.[72]

The Spanish system is seemingly the closest one to registration. Although religious communities may be established without an initial authorization and registration, in order to be granted a special legal status it is necessary to be registered by the Minister of Justice. The principle of concluding agreements between the state and the most significant churches providing for the scope of their relations with the state seems to be of the utmost importance.[73] The 1978 Constitution of Spain refers separately to the Catholic Church.[74] This

69. The 1997 Constitution provides:

> The relations between the Republic of Poland and the Roman Catholic Church are determined by international treaty concluded with the Holy See, and by law.
>
> The relations between the Republic of Poland and other churches and religious organizations are determined by laws adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.

POL. CONST. art. 25, §§ 4, 5, *in* 15 CONSTITUTIONS, *supra* note 12, at *Poland* 6.

70. Hungerbuehler & Feraud, *supra* note 27, at 824.

71. *See* Wille, *supra* note 19, at 464–65.

72. *See* de Sousa e Brito, *supra* note 11, at 580–82.

73. *See* de Mendizabal Allende et al., *supra* note 27, at 775.

74. Article 16, Section 3 provides, "No religion shall have a state character. The public powers shall take into account the religious beliefs of Spanish society and maintain the appropriate relations of cooperation with the Catholic Church and other denominations." 17 CONSTITUTIONS, *supra* note 12, at *Spain* 46.

unique treatment of the Catholic Church is understandable given both the confessional structure of Spanish society as well as the quite recent historical experience of the state church.

B. Concluding Agreements and Concordats

There are different forms of legal regulation of churches and religious organizations. The fundamental issues are decided at the constitutional level in all states (or by other acts of constitutional rank, such as the French Law of 1905). In most countries there are also statutes which specify generally the relation between church and state, and pertain uniformly to all churches and religious groups. Frequently, general Freedom of Religion Acts occupy a privileged position within a country's legal system.[75] Usually, more detailed provisions are laid out in other legislative statutes or in regulations issued by other governmental bodies. The distinction between external and internal matters follows from the general principle of autonomy of churches, and it is assumed that the legislature may regulate only external matters.[76]

In some countries there are separate statutes regulating the position of particular churches and religions. It is typical for states which differentiate recognized churches to regulate them in separate statutes, thereby admitting and even assuming a different position for these particular churches based on their public role. Such regulation may coexist (e.g., Austria and Poland) or replace (e.g., Belgium) the general Freedom of Religion Act discussed above. In Austria, specific statutes are applicable to four churches (and seven more have been recognized by way of ordinance).[77] There are six such recognized churches in Belgium[78] and twelve in Poland. Because, in Poland, the system of separate statutes has been linked to negotiated agreements between the state and various churches, this protection affords more durable relations.

The practice of concluding agreements between the state and particular churches or religious organizations is also widespread.

75. In Romania, it should be adopted as the Organic Act. ROM. CONST. art. 72, § 2(n). In Hungary, its adoption requires an absolute majority of two-thirds of all votes cast. *See* Adam, *supra* note 37, at 361.

76. *See, e.g.*, Hungerbuehler & Feraud, *supra* note 27, at 821 (referring to a 1994 decision of the Federal Supreme Court).

77. *See* Kucsko-Stadlmayer, *supra* note 26, at 122.

78. *See* Cerexhe & Boel, *supra* note 44, at 201.

These concluding documents make it possible to tailor the relationship according to the traits of particular religions. The form of these agreements also provides for additional guarantees for the church because they limit the possibility of unilateral actions of the state.[79]

Such agreements exist in Germany, Italy, Spain, Hungary, Poland, and Romania. In Lithuania, concluding agreements are provided for in Article 43, Section 5 of the Constitution.[80] In Italy, relations between the state and non-Catholic religions may be regulated in the form of accords, as a basis for the issuance of legislative statutes.[81] In Spain, concluding agreements have been formed with three fundamental religions, but in order to come into effect each agreement has to be approved in the form of an legislative act. This means that, among other things, the provisions of the agreement subject to such approval have the legal significance of a statute passed by the legislature.[82] The same regulation is provided for in the draft of the new Portuguese Act on Religious Freedom.[83] The relations between the state and the most prominent churches in Poland are provided for by statute. However, the 1997 Constitution in Article 25, Section 5 requires that these statutes "are adopted pursuant to the agreements concluded between the Council of Ministers and appropriate representatives" of particular churches. Thus, when Parliament adopts these statutes, it is bound by the provisions of the agreements.[84]

The Concordats between the Holy See and particular countries are unique because they specifically apply to the status of the Catholic Church and various aspects of the Catholic Church's cooperation with the state. For example, in Poland, the Constitution adopts the concordat form of regulation.[85] In several other countries, the Catholic Church's special status follows from tradition and a recognition of the particularly important role of the Catholic Church. However, it should be noted that concordats are not utilized in all countries and that it is possible to enter into more than

79. *See* Hoemig & Hassemer, *supra* note 10, at 346.

80. *See supra* note 27.

81. It applies practically to five religions. *See Italy*, *supra* note 51, at 425.

82. *See* de Mendizabal Allende et al., *supra* note 27, at 774.

83. *See* de Sousa e Brito, *supra* note 11, at 579.

84. *See* Maczynski, *supra* note 53, at 549. See also the 1998 decision of the Constitutional Court dealing with rights of the churches to be consulted during the legislative procedure.

85. *See supra* note 69.

countries and that it is possible to enter into more than one international agreement with the Holy See (e.g., Spain and Hungary).

Some countries do not see the need to enter into a concordat.[86] The consequence of entering into a concordat (or other similar agreements) is that the relation between the state and the Catholic Church is partially transferred into the domain of international law. Consequently, concordats are a more complete guarantee that the agreed-upon regulatory arrangement will not be unilaterally changed by the state. Nevertheless, the provisions of the concordat must conform to pertinent constitutional provisions.[87]

In Italy, Article 7 of the 1947 Constitution refers the regulation of the relations of the state and the Catholic Church to the 1929 Lateran Pacts, at the same time providing that "the amendment to the Pacts approved by both parties does not require the Constitution to be amended." Against this backdrop, there are several significant decisions of the Constitutional Court connected with the 1984 Amendment to the Concordat.[88] Moreover, in Portugal, the concordat precedes the Constitution, but as opposed to the situation in Italy, the Portuguese Constitution does not deal with this issue. It provides grounds to the statements about a silent repeal of certain concordat provisions, and the courts do not have an easy task in adjusting these documents.[89]

C. State Limitations on Religious Freedom

The general principle of freedom to establish churches and religious organizations is not absolute and may be subjected to certain limitations.[90] In the countries discussed herein, mechanisms of state supervision exist. Most notably, two important limitations include: 1) repeal of state-granted registration status; and 2) dissolution of an

86. *See, e.g.*, *Lithuanian Jurisprudence*, *supra* note 36, at 484; *Slovenia*, *supra* note 38, at 701.

87. See the 1957 decision of the German Constitutional Court on the effects of the constitutional principle of federalism on the provisions of the 1933 Concordat.

88. See, in particular, decision no. 203/1989 of the Constitutional Court which provides for the verification of the conformity of the Concordat provisions with the "supreme principles of the Constitutional order."

89. *See* de Sousa e Brito, *supra* note 11, at 555.

90. Article 9, Section 2 of the European Convention on Human Rights discusses appropriate state limitations that may be placed upon religious liberty. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 9, 213 U.N.T.S. 221.

association created under private law. These two limitations are particularly significant in light of the development of new churches and para-religious groups.

1. The phenomenon of so-called sectes

In the countries discussed herein, there are no legal provisions directly referring to the phenomenon of so-called *sectes*.[91] Indeed, "the notion of a *secte* does not correspond with any legal category in our system."[92] However, the issue has already emerged in the political sphere.[93]

In principle, *sectes* may invoke principles of religious freedom and act within the system of churches and religious organizations.[94] But to do so, a registration would be required or, at least, a recognition by the state, if a given religious organization is to receive support from the state. For this reason, it becomes necessary to determine whether a given group is indeed religious. It is beyond doubt that the status of a religious group may not be granted to an organization that, for example, represents national socialist ideology or is based on a particular language or ethnic identity.[95] The law may also require that the motivations or objectives of a group are "not directed to achieve only worldly goods."[96] A registration or recognition may also be rejected if religious activity is not the only objective of the group.[97]

In Portugal, the 1971 Act does not allow any activities related to the metaphysical or parapsychological phenomena to be included in

91. *Secte* translates directly into English as "cult."

92. de Mendizabal Allende et al., *supra* note 27, at 763; *accord* Basdevant-Gaudemet, *supra* note 14, at 301; Kucsko-Stadlmayer, *supra* note 26, at 118; *Russia*, *supra* note 27, at 646; *Lithuanian Jurisprudence*, *supra* note 36, at 483; Wille, *supra* note 19, at 463. For Portugal, de Sousa e Brito draws attention to the fact that the very use of the notion of *secte* may raise constitutional doubts. *See supra* note 11, at 565.

93. For a discussion of parliamentary actions in France, see Basdevant-Gaudemet, *supra* note 14, at 301–02; for the same in Spain, see de Mendizabal Allende et al., *supra* note 27, at 763–64.

94. *See Slovenia*, *supra* note 38, at 677.

95. See Kucsko-Stadlmayer, *supra* note 26, at 98 (citing decisions of the Austrian Constitutional Court).

96. See the 1998 decision of the Polish Supreme Administrative Court regarding the Church of Scientology.

97. *See* Basdevant-Gaudemet, *supra* note 14, at 303 (citing several decisions of the French Conseil d'État pertaining to Jehovah's Witnesses).

the notion of religion.[98] In Italy, the religious nature of a group has to be proven, at least where a group claims tax exemptions or seeks other benefits from the state.[99] In Bulgaria, the state seeks to limit the establishment of associations whose activities are not covered by the constitutional freedom of religion.[100]

Even if it were possible to categorize a *secte* as a religious organization,[101] limitations still exist that even recognized churches or religious groups must respect. The activities of *sectes* are protected by religious freedom principles if "protection granted is not contradictory to other constitutional values and if their behavior does not cause a noticeable harm for society or fundamental rights of other people."[102] Thus, activities of *sectes* must be in compliance with the law.[103]

The role of the state is particularly strong in countries which adopt the registration system because groups whose activities violate the law (and in particular threaten the interests of minors) may not be registered or their registration may be revoked.[104] The question arises to what extent the criterion of loyalty to the state should be considered.[105]

In deciding whether a particular limitation of para-religious practices should be allowed, the courts have adopted a test of proportionality.[106] Of course a question arises whether such limitations can also be imposed on traditional churches with an international presence. The general boundary of such limitations is set by the prohibition of discriminatory treatment, to be discussed below.

98. *See* de Sousa e Brito, *supra* note 11, at 565.

99. *See Italy*, *supra* note 51, at 396.

100. *See Bulgaria: Constitutional Jurisprudence in the Area of Freedom of Religion and Beliefs*, *in* 1 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 227 [hereinafter *Bulgaria*].

101. *See id.* at 303 (citing a 1997 French case involving the Church of Scientology).

102. Hoemig & Hassemer, *supra* note 10, at 329 (citing a 1972 decision of the Federal Constitutional Court).

103. *See Slovenia*, *supra* note 38, at 697; *Romania*, *supra* note 56, at 629.

104. *See Czech Republic: Constitutional Jurisprudence in the Area of Freedom of Religion and Beliefs*, *in* 1 CONSTITUTIONAL JURISPRUDENCE, *supra* note 1, at 265 [hereinafter *Czech Republic*]. See also the examples from Russia, *Russia*, *supra* note 27, at 654, and Belarus, *Belarus*, *supra* note 21, at 156.

105. For example, since Jehovah's Witnesses refuse any kind of military service (even the so-called *Ersatzdienst*), their church still lacks the status of a "public law association" in Germany. *See* Hoemig & Hassemer, *supra* note 10, at 351.

106. *See Czech Republic*, *supra* note 104, at 265 (describing the ban on the cult of Satan due to the protection of morals in that country).

The constitutional courts are also ready to affirm that *secte* membership may have adverse effects on the exercise of other rights and freedoms. For example, the Swiss Federal Court affirmed the withdrawal of a license for a security guard company that was linked to a dangerous *secte*. The same court refused a license to establish a private school to an entity close to the Church of Scientology.[107] Moreover, a 1992 French court decision affirmed the denial of permission to adopt children for those who are prohibited by their religion to accept blood transfusions.[108] Finally, there is no constitutional violation if the state undertakes or financially supports activities aimed at informing young people about the dangerous activities of specific *sectes*.[109]

In conclusion, churches or religious organizations, from the moment of establishment or recognition by the state, are not treated in the same way. It should be regarded as an expression of certain regularity: within the general principle of equality and nondiscrimination there is a difference in the placement of particular churches and religious groups. In the doctrine, this phenomenon is described as the "defined multi-tiered structure of religious entities."[110]

IV. THE PRINCIPLE OF EQUALITY: CRITERIA OF PERMITTED DIFFERENTIATION

A. The Principle of Equality of Individuals in the Religious Liberty Context

All civilized legal orders provide for the general principle of equality concerning the legal status of their citizens. At the same time, many constitutions make special reference to the principle of equality as it specifically pertains to religion. Many constitutions clearly prohibit discrimination based on religion.[111]

107. *See* Hungerbuehler & Feraud, *supra* note 27, at 819–20.

108. *See* Basdevant-Gaudemet, *supra* note 14, at 304.

109. *See* Hoemig & Hassemer, *supra* note 10, at 348; Hungerbuehler & Feraud, *supra* note 27, at 820, 822.

110. Silvio Ferrari, *Church and State in Europe: Common Patterns and Challenges*, *in* WHICH RELATIONSHIPS BETWEEN CHURCHES AND THE EUROPEAN UNION?: THOUGHTS FOR THE FUTURE (H.-J. Kiderlen et al. eds., 1995) (citing opinions of W. Cole Durham, Jr.).

111. *See, e.g.*, ITALY CONST. art. 3, *in* 9 CONSTITUTIONS, *supra* note 12, at *Italy* 47 ("All citizens . . . are equal before the law, without distinction as to . . . religion . . . ."); F.R.D.

This understanding of equality of individuals resulted in the development of case law in many countries, which treats the ban of discrimination as one of the premises of freedom of religion. "The principle of equality prevents all types of discrimination between citizens and religious communities based on their ideology or beliefs, such that religious attitudes can not justify difference of treatment under the law."[112] In this area, general interpretation of the principle of equality, in particular the principle of proportionality, are applied.

B. The Principle of Equality of Groups in the Religious Liberty Context

In contrast to its application to individuals, the application of the principle of equality to churches and religious groups is far more complex. Some constitutions explicitly provide for equality before the law for churches or religious groups (e.g., Article 7, Section 2 of the 1991 Slovenian Constitution[113] and Article 14 of the 1993 Russian Constitution.)[114] In Poland, the 1997 Constitution provides for "equality of rights" of churches and religious organizations,[115] which is, however, not equivalent to the general notion of equality. In Hungary, the 1990 Act on Freedom of Religion and on Churches provides for that "churches exercise identical rights and are encumbered with identical duties." The Italian Constitution, although it refers specifically to the Catholic Church, assumes as a general principle that all religions are equal before law.

CONST. art. 3, § 3, *in* 7 CONSTITUTIONS, *supra* note 12, at *Germany* 106 ("Nobody shall be prejudiced or favoured because of their . . . religion . . . ."); RUSS. CONST. art. 19, § 2, *in* 15 CONSTITUTIONS, *supra* note 12, at *Russia* 6 ("The State shall guarantee the equality of rights and liberties regardless of . . . attitude to religion . . . . Any restriction of the rights of citizens . . . on religious grounds shall be forbidden."); HUNG. CONST. art. 70/A, § 1, *in* 8 CONSTITUTIONS, *supra* note 12, at *Hungary* 17 ("The Republic . . . guarantees for all persons in its territory human and civil rights without discrimination on account of . . . religion . . . ."); LITH. CONST. art 29, § 1, *in* 11 CONSTITUTIONS, *supra* note 12, at *Lithuania* 4 ("A person may not have his rights restricted in any way, or be granted any privileges, on the basis of . . . religion . . . ."); *see also* Article 6 of the 1955 Staatsvertrag von Wien.

112. de Mendizabal Allende et al., *supra* note 27, at 766 (quoting a 1982 decision of the Constitutional Court of Spain) ("Le principe d'égalité pour sa part empêche d'établir tout type de discrimination entre les citoyens et les communautés religieuses en fonction de leur ideologie ou croyances, de façon que les attitudes religieuses des sujets de droit ne peuvent justifier de difference du traitement juridique."); *see also* Cerexhe & Boel, *supra* note 44, at 178–79 (citing a 1993 decision of the Cour d'Arbitrage of Belgium).

113. *See supra* note 37.

114. *See supra* note 21.

115. "Churches and other religious organizations shall have equal rights." POL. CONST. art. 25, § 1, *in* 15 CONSTITUTIONS, *supra* note 12, at *Poland* 6.

However, at the constitutional level, the differentiation of churches is often implied or allowed. Clearly, it is seen in all countries where there is an official state church. Even where there is not a state church, constitutions may refer to a particular church. Such is the case with the Constitutions of Spain[116] and Poland,[117] which refer specifically to the Catholic Church. Similarly, the Orthodox Church is referenced in the 1991 Constitution of Macedonia[118] and in the 1991 Constitution of Bulgaria.[119] In Portugal, the 1940 Concordat requires that the state recognize "the principles of Christian doctrine and morality, traditional for the country."[120] The 1997 Russian Law on Freedom of Conscience and Religious Associations recognizes "a particular role of Orthodox religion in the history of Russia, for the future and the development of spirituality and culture" and expresses respect for Christianity, Islam, Buddhism, Judaism and other religions.[121] Other constitutions, like that of Belgium, name no religion but formulate a category of recognized religions or cults. These examples all suggest situations "in which main religions are privileged to some extent,"[122] and this observation seems to be representative for almost all countries discussed herein.[123]

The scope of privileges granted to "main churches" depends on many factors but primarily on the religious structure of society. Privileges for traditional churches will be found in particular in those

116. *See supra* note 74.

117. *See supra* note 69.

118. The precise language states:

> The freedom of religious confession is guaranteed.
>
> The right to express one's faith freely and publicly, individually or with others is guaranteed.
>
> The Macedonian Orthodox Church and other religious communities and groups are separate from the state and equal before the law.
>
> The Macedonian Orthodox Church and other religious communities and groups are free to establish schools and other social and charitable institutions, by way of a procedure regulated by law.

MACED. CONST. art. 19, *in* 11 CONSTITUTIONS, *supra* note 12, at *Macedonia* 10.

119. *See supra* note 37.

120. de Sousa e Brito, *supra* note 11, at 571.

121. *Russia*, *supra* note 27, at 650 (according to the authors, this law "is not logical in this context with respect to all its provisions").

122. Hungerbuehler & Feraud, *supra* note 27, at 821.

123. It should be noted, however, that constitutional courts remain sensitive to inequalities. *See, e.g.*, *Italy*, *supra* note 51, at 436–38 (discussing Italian decisions involving blasphemy or construction permits).

countries where one religion dominates.[124] These privileges manifest themselves in different ways,[125] including procedures for recognizing and establishing churches, regulation of relations between particular churches, religious teaching and education, direct and indirect financing or state support, and various other forms of state cooperation and assistance.

C. Differential Treatment of Religious Groups

Constitutional courts are charged with the responsibility to uphold or to invalidate provisions that in theory give differential treatment to churches and to determine the permissible scope of differential treatment between churches and religious groups. In making these determinations it is important to distinguish between theory and practice. For example, "the French system is the system of a strict equality—in the legal meaning—of religions," while in practice "the legal equality is not matched by an actual equality."[126] This absence of actual equality impinges on legal equality and may be used as a justification for legal differentiations. "The principle of equality does not mean an absolute equality, it is relatively understood.. . . The absolute equality could lead to an unequal treatment of religious organizations."[127]

Various European courts have expressed this same principle. The German Constitutional Court stated in a 1965 opinion: "The Constitution does not require the State to treat equally religious communities in a schematic way."[128] Similarly, the Belgian Council of State held in a 1996 case: "Religious equality does not mean that the same regime must be applied to all religions."[129] The Austrian Constitutional Court in a 1972 decision stated: "Differentiation between religious communities which are recognized by statute and other re-

124. For statistical data on Lichtenstein, see Wille, *supra* note 19, at 457, and for Portugal, see de Sousa e Brito, *supra* note 11, at 554. *See also Czech Republic*, *supra* note 104, at 267; *Slovenia*, *supra* note 38, at 677.

125. *See Italy*, *supra* note 51, at 438 (providing examples in the realm of tax regulation in that country).

126. Basdevant-Gaudemet, *supra* note 14, at 307.

127. *Slovenia*, *supra* note 38, at 702.

128. Hoemig & Hassemer, *supra* note 10, at 345 (quoting a 1965 decision of the German Constitutional Court).

129. The original French states: "L'egalité des cultes n'implique pas que le même regime soit appliqué à tout les cultes." Cerexhe & Boel, *supra* note 44, at 179 (quoting a 1996 decision of the Belgium Council of State).

ligions does not infringe the principle of equality."[130] Finally, "[t]he legislature is not prohibited by anything to include the specificity of religion and churches when establishing legal regulations implementing the fundamental right to the freedom of religion."[131]

Thus, differentiation may be allowed provided that it is justified. The justification for differentiation must be substantial. Because "the general constitutional principle of equality also applies to churches and religious organizations . . . the differentiation before law requires a *substantial justification* which may be attributed to specific features of a given church or religious organization." It is defined as "the parity in substantive law."[132] In Switzerland, the differentiation is admitted: "the significance of main religions as regards their strength and history, their public and charity tasks effected by national churches."[133] The German Federal Constitutional Court indicated that the premises of providing public and legal status to a given church are "a conviction of the State that such churches are particularly effective when provided with the status of public institution, that they enjoy a very important position in the society, and that there is a guarantee of durability resulting from it."[134]

Fundamental differentiation flows from a division between recognized churches and others churches and religious organizations. In registration systems, churches and religious groups which fail to become registered may even be deprived of the possibility to act. And equality is not even assured for churches that do become registered. In this context, the German Constitutional Court emphasized:

> it is forbidden to make a further differentiation inside religious groups of recognized religious communities of public institution status unless unequal treatment would be permissible under the general principle of equality. The Federal Constitutional Court has rejected the attempts to indicate tradition and history or religious thesis as substantial justification for unequal treatment.[135]

130. Kucsko-Stadlmayer, *supra* note 26, at 124 (quoting a 1972 decision of the Austrian Constitutional Court).

131. Adam, *supra* note 37, at 366.

132. Kucsko-Stadlmayer, *supra* note 26, at 124.

133. Hungerbuehler & Feraud, *supra* note 27, at 821 (quoting decisions of the Swiss Federal Court from 1917 and 1997).

134. Hoemig & Hassemer, *supra* note 10, at 344.

135. *Id.*

But at the same time, in Austria, certain privileges for the Catholic Church "may be to a large extent both justified by the fact that we deal with the former state religion and approximately 78% of the Austrian population is still in the Catholic church as well as by the existing concordats with the Holy See."[136] The Italian Constitutional Court, in reviewing penal sanctions for blasphemy, observed that the argument of a number of church members may not justify the reference of contempt of religious feelings only to the Catholic religion as the difference between the Catholic religion as the only state religion and other religions recognized by the state is no longer valid in Italy.[137]

In conclusion, the limits of permitted differentiation are determined by the scope of the prohibition against discriminatory treatment. It is inappropriate, for instance, to grant unjustified privileges to only one church, namely, to make its position more advantageous in contrast not only to other churches but also to citizens generally.[138] The differences in approach may not be significant enough to prevent the existence of a given religious community, but each community has to be guaranteed "a possibility of some form of legal existence."[139] Thus, the regulations of the principle of equality may not be transformed into the regulation of freedom to establish churches and to exercise religion.[140]

V. RELIGIOUS TEACHING AND THE EDUCATIONAL SYSTEM[141]

Religious teaching constitutes one of the fundamental elements of religious freedom.[142] Putting aside purely private religious instruction in church or at home, which in principle is beyond any state interference, religious teaching in the public sphere may not be viewed separately from the regulations governing the educational system

136. Kucsko-Stadlmayer, *supra* note 26, at 124.

137. *See Italy*, *supra* note 51, at 427.

138. The Spanish Judgment of 1993 regarding the legislation on lease is an example of this point.

139. The German Judgments. *See* Hoemig & Hassemer, *supra* note 10.

140. For an example of this, see the Turkish Judgment applicable to the Jehovah's Witnesses and disqualifying the differentiation into "celestial" and "non-celestial" religions.

141. See XIIE TABLE RONDE INTERNATIONALE: L'ÉCOLE, LA RELIGION ET LA CONSTITUTION, XII ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 125 (1996) [hereinafter L'ÉCOLE ET LA RELIGION].

142. This principle is illustrated in Article 9 of the European Convention. *See supra* note 8 (reprinting Article 9).

generally. There are two fundamental issues implicated here. First is the issue of freedom to establish private schools that are affiliated with particular churches or religious organizations. A subsidiary question arises about the permissibility and the range of state support for such schools and their students. But it should be remembered that the role of private schools is defined primarily by the presence of religious instruction in public schools[143] and the scope of direct financial support of the state for churches and religion organizations.

Second is the issue of the permissibility and the scope of religious teaching in public schools. A question arises as to how to relate particular churches with the operation of public school system. Both issues have been extensively addressed in the case law of constitutional courts.

A. Private Schools

1. Constitutional provisions relating to religiously-affiliated private schools

Generally, the constitutional position of private schools is determined by freedom of instruction, which, in many countries, is clearly guaranteed in the Constitution.[144] The role of private schools is particularly emphasized in Germany: Article 7, Sections 4 and 5 of the *Grundgesetz* describe private schools as "supplementing [the] public school system." Thus, the "guarantee for a private school as an institution" is appropriately provided for.[145] In Italy, Article 33 of the

143. Only in France, secular public education is understood to mean the exclusion of religious teaching.

144. *See, e.g.*, SPAIN CONST. art. 27, § 3, *in* 17 CONSTITUTIONS, *supra* note 12, at *Spain* 48–49 (providing generally for the freedom of teaching) ("The public authorities shall guarantee the right which will assist parents to have the children receive religious and moral formation which is in keeping with their own convictions."); ITALY CONST. art. 33, § 3, *in* 11 CONSTITUTIONS, *supra* note 12, at *Italy* 54 ("Organizations and private citizens are entitled to found schools and educational institutions which do not involve charges on the State."); BELG. CONST. art. 24, quoted *supra* note 63; POL. CONST. art. 70, § 3, *in* 15 CONSTITUTIONS, *supra* note 12, at *Poland* 16 ("Parents have the right to choose schools other than public for their children. Citizens and institutions have the right to establish primary and secondary schools and institutions of higher education . . . ."). In France, freedom of instruction is considered one of the fundamental principles recognized by the Laws of the Republic. *See* Basdevant-Gaudemet, *supra* note 14, at 313.

145. Hoemig & Hassemer, *supra* note 10, at 338–39 (citing a decision of the Federal Constitutional Court referred therein.

1947 Constitution guarantees the right to establish schools "without encumbering the State." The 1976 Constitution of Portugal at first, characterized private schools as "supplementary education" (Article 75, Section 1). However, in the 1982 Amendment, private and public education were set on equal footing. Article 2 of the First Protocol of the European Convention on Human Rights ensures freedom of religious instruction, at least with respect to the teaching of religious and philosophical beliefs.[146]

Freedom of religious instruction is understood to mean the freedom to establish and operate private schools, the freedom to determine the content of the curriculum, and freedom of parents to choose an appropriate school for their children.[147] In particular, it is the freedom to create a school with a character that may include "an attachment to religious values."[148] Thus, this freedom includes "that which concerns form as well as the content of education."[149]

It follows that a private school may be affiliated with a specific religion. Indeed, it is very rare for religious organizations to be banned from establishing private schools.[150] In many countries, there is no difference in the legal requirements for private religious schools as opposed to schools with no religious character. However, sometimes schools that are operated by or affiliated with religious entities are granted privileges, namely granting rights of public school and state financial support (e.g., Austria and Hungary). This is partially attributable to concordat provisions (e.g., Spain, Austria, Italy, and Portugal), but mostly to the more general constitutional context of religious freedoms. If the freedom of parents to choose a school is to be real then not only religiously-affiliated schools must be able to exist but the state has to treat them in a similar manner as public

146. *See* Wille, *supra* note 19, at 474 (citing a 1995 decision of the State Court).

147. *See* de Mendizabal Allende et al., *supra* note 27, at 892–93 (discussing a 1991 decision of the Constitutional Court).

148. Basdevant-Gaudemet, *supra* note 14, at 321.

149. Cerexhe & Boel, *supra* note 44, at 188 (citing a 1992 decision of the Cour d'Arbitrage) ("ce qui concerne la forme que pour ce qui est du contenu d'enseignement.").

150. *See Turkey*, *supra* note 25, at 847. In Macedonia "public and private schools are secular, that is, religion neutral." *Macedonia*, *supra* note 28, at 509.

schools.[151] Finally, only recognized or registered religions are generally allowed to run private schools.[152]

2. Limitations on the freedom of religious instruction

As with religious liberty generally, freedom of instruction is not absolute. All countries have established state supervisory measures to monitor the establishment and operation of private schools. Usually, a state authorization is required to establish a school. However, it is virtually impossible to refuse permission if a school fulfils the requirements provided for by law.[153] State authorities are entitled to request reports and information from schools and have the power to lustrate the operation of the school. In sum, private schools fill a substantial public mission and their operation is directly linked to the public interest.[154] However, supervisory regulations may not be so extensive as to deprive a school of its private status and unique character.

Private school relations with the state if they seek analogous status to public schools, in particular with regard to the recognition of school diplomas and the right to obtain subsidies. The system of contracts between public authorities and private schools is applied in some countries (e.g., France and Spain) and other countries adopt a system of granting private schools a status of public school (e.g., Germany, Austria, Switzerland, Italy, and Slovakia). Because it is only when private schools receive equal status with public schools that they will have a more lasting presence, in many countries one may speak about the claim of private schools to be granted such status. For example, in Austria, Concordat provisions provided for the granting of public school status to all schools existing within the framework of Catholic Church. This automatic application has been extended to schools run by other recognized religions.

151. *See, e.g.*, Basdevant-Gaudemet, *supra* note 14, at 314; Kucsko-Stadlmayer, *supra* note 26, at 149; Cerexhe & Boel, *supra* note 44, at 185; Hoemig & Hassemer, *supra* note 10, at 328. For Hungary it is indicated that the State "may not refuse a legal possibility of existence for schools which are based on or oriented towards religion or atheism." Adam, *supra* note 37, at 374.

152. *See, e.g.*, Kucsko-Stadlmayer, *supra* note 26, at 127.

153. For example, see Article 7, Section 4 of the German Constitution as well as the Judgment of the Italian Corte Costituzionale of 1958.

154. *See* de Mendizabal Allende et al., *supra* note 27, at 792; Cerexhe & Boel, *supra* note 44, at 187.

However, numerous obligations for private schools flow from receiving equal status with public schools, which in turn leads to the abdication of some of their autonomy. This may be manifested in a limited ability to select students,[155] the duty to respect all students' religious faiths,[156] the duty to provide free education,[157] or the obligation to accept teachers designated by public authorities.

3. The subsidization of private education

Subsidy by public authority of private education is one of the most delicate issues in education. None of the countries discussed herein have adopted the U.S. concept of a complete separation that prohibits direct state financial support for religiously-affiliated schools. Consequently, there is no constitutional ban against subsidizing private schools, regardless of their religious affiliation. In practice, many countries finance almost entirely the operation of private schools (including personnel costs and schoolbooks) where the schools have been granted the status of a public school or have entered into agreements with public authorities providing for this subsidy.

Notwithstanding this practice, it is unclear if subsidizing private schools with public funds is merely allowed under the Constitution or whether such subsidizing is constitutionally required. In Switzerland, it is accepted that there is no "claim" by private schools to public funds.[158] In several countries, however, a requirement to subsidize private schools has been interpreted as constitutionally required. The rationale suggests that the equality principle requires state subsidy so that parental choice for the education of their children in religiously-affiliated schools would not be inhibited.[159]

155. *See* Basdevant-Gaudemet, *supra* note 14, at 322; Hungerbuehler & Feraud, *supra* note 27, at 831.

156. *See* Adam, *supra* note 37, at 368; de Mendizabal Allende et al., *supra* note 27, at 799.

157. *See* Cerexhe & Boel, *supra* note 44, at 189.

158. *See* Hungerbuehler & Feraud, *supra* note 27, at 831; *see also* Wille, *supra* note 19, at 476 (discussing a 1996 decision of the State Court of Lichtenstein).

159. *See* Basdevant-Gaudemet, *supra* note 14, at 323 (discussing a 1977 decision of the Conseil Constitutionnel). See also the 1993 decision of the Hungarian Constitutional Court, as well as the 1966 decision of the Federal Administrative Court and the 1987 of the Federal Constitutional Court in Germany.

The scope of the obligation to subsidize is also not uniform. For example, the German Constitutional Court has stated

> that the obligation to finance the replacement schools (*Ersatzschulen*) in need is only permitted if the financial standing of such schools would be endangered without intervention of the state or if the departure from the equality of public and private schools would make it impossible to enjoy the freedom of education. Within such frameworks, the legislature is granted a vast discretion to determine the manner of meeting such obligations.[160]

In Belgium, granting subsidies is limited,

> on the one hand, through the ability of the Community to tie the subsidies to requirements of general interest, among others that of quality education and of the standards of the school population and, on the other hand, because of the need to distribute the available financial means among the many missions of the Community.[161]

The issue of subsidization also relates to the principle of equality, both pertaining to the relationship between private and public schools as well as to the relationship among private schools of various types. In Belgium, differentiation of churches and religious organizations is admitted under Article 24, Section 4 of the Constitution which requires "the consideration of objective differences."[162] Thus, as long as the criteria of proportionality and justification are met, there will be no constitutional violation.[163] According to German case law, the state may not treat replacement schools in a worse manner than public schools simply because of their differences in curriculum or methodology.[164] In Italy, financing the transportation of public school students has been upheld even where there is no provision for the transportation of private school students. But no reservations have surfaced in Italy as to the financing of schoolbooks in both types of schools.[165]

160. 75 *Entscheidungen des Bundesverfassungsgerichts*, at 67.

161. Cerexhe & Boel, *supra* note 44, at 188 (discussing a 1998 decision).

162. 2 CONSTITUTIONS, *supra* note 12, at *Belgium* 4.

163. Cerexhe & Boel, *supra* note 44, at 189 (citing a 1992 decision).

164. *See* Hoemig & Hassemer, *supra* note 10, at 338.

165. *See Italy*, *supra* note 51, at 448.

Questions of constitutionality may also arise if a private school acquires a privileged position in regard to public schools.[166] In Austria, the differentiation of the status of religiously-affiliated schools and other private schools with public school status does not infringe the principle of equality.[167]

4. The employment of teachers in religiously-affiliated private schools

Religiously-affiliated private schools may impose specific requirements with respect to its teachers. In principle, a private school is free to create the criterion for selecting its teachers. However, if a private school is granted public school status or enters into contracts with public authorities, then the selection of teachers, to a large extent, is taken over by the state.

Generally speaking, employment at a private school does not deprive a teacher of constitutional rights, including the freedom of belief.[168] Nevertheless, it is assumed that teachers have a duty to respect the religious character of schools where they are employed. For example, the Constitutional Court of Spain indicated that a teacher's duty of respect does not force him to act as a defender of school-supported ideology, to transform his lessons into indoctrination, or to subordinate scientific systems or truth to the school-supported ideology. Nevertheless, teaching which is hostile or contradictory to the ideology of a school may constitute grounds for dismissal. Dismissal may not be based solely on a teacher's faith but must be related to specific actions.[169] In Austria, a school may request to transfer a teacher[170] if further employment of the teacher is not possible for religious reasons.[171] In Liechtenstein, teachers may be required to

166. See the 1994 decision of the French Conseil Constitutionnel, declaring unconstitutionality of legislation abolishing subvention limits in regard to private schools and subsequent decisions of the Conseil d'État following the same direction. *See* Basdevant-Gaudemet, *supra* note 14, at 324.

167. *See* Kucsko-Stadlmayer, *supra* note 26 at 146. This is similar for Hungary. *See* Adam, *supra* note 37, at 376.

168. See the 1977 and 1985 decisions of the Conseil Constitutionnel. *See* Basdevant-Gaudemet, *supra* note 14, at 324.

169. See de Mendizabal Allende et al., *supra* note 27, at 802, and the decision referred to therein.

170. In schools of public status, such decisions are made by public authorities.

171. *See* Kucsko-Stadlmayer, *supra* note 26, at 150. This is similar to the Italian decision of 1972 regarding the effects of withdrawal of the church authority approval for a professor of Catholic university.

meet "ethical qualifications."[172] Finally, in Italy, evaluations of a teacher's disposition towards religion may be made, but the 1984 Amendment to the Concordat abolished the criterion of moral evaluation.[173]

B. Public School

1. The teaching of religion in public schools

The teaching of religion in public schools should be viewed with the background and nature of the state in mind. State-religion neutrality exists in most of the countries discussed in this article. Thus, public schools in such countries tend to be neutral rather than religious schools. However, just as state neutrality does not imply indifference[174] or disregard for religion but rather guarantees "freedom of religion in pluralistic system[s] of religions and cultures,"[175] the notion of a neutral public school does not obligate a school to be purely secular or require complete separation of religious teaching from a school's curriculum.

In Belgium, the 1994 Decree sets forth principles of neutrality.[176] In Spain, the principle of neutral schools and the respect of religious and moral ideas are considered fundamental. It means, in particular, banning a school from imposing a specific faith or religion "with an apologetic content or with the goal of indoctrination and not purely for informational purposes."[177] In Portugal, the 1976 Constitution, Article 43, Section 3 provides that "public education may not be of religious character." However, against the background of the state not being agnostic, atheistic, or secular, this constitutional provision does not prohibit cooperation between church and state.[178]

172. Wille, *supra* note 19, at 476.

173. *See* A. Pizzorusso, *Italie*, *in* L'ÉCOLE ET LA RELIGION, *supra* note 141, at 269 (1996).

174. *See* Adam, *supra* note 37, at 377 (discussing a 1996 decision of the Constitutional Court).

175. *Id.* at 272.

176. *See* Cerexhe & Boel, *supra* note 44, at 189.

177. de Mendizabal Allende et al., *supra* note 27, at 804 (citing a 1991 decision of the Constitutional Court) ("avec un contenu apologétique ou dans un but d'endoctrinement et non purement informative.").

178. *See* de Sousa e Brito, *supra* note 11, at 589.

Interpretations of state neutrality or *laicité* are not uniform in all countries. In France, emphasis is placed on separation of public school and religion; while "no religion is privileged, all are respected."[179] In Hungary, the Constitutional Court requires that "neutral public school cannot be committed to any religion or worldview; it must make free and well founded choices possible."[180]

In many countries of Western Europe, neutrality does not necessarily exclude a direct link to the Christian tradition and value system. While the German Constitution has guaranteed the existence of non-religious public schools, in the German Federal Republic, the operation of public schools with Christian character is not prohibited by *Lander*, even if a minority group does not want such religious influence. However, there are limits to the teaching of religion in public schools. While the teaching of religion in churches focuses on specific religious precepts, public schools aim to pass on more general Christian values. Such schools are different from mission schools. They must limit compulsory elements, be open to other religious and philosophical ideas and values, and the upbringing aim of school cannot be Christian and religion oriented, a significance should be attached to the principle of tolerance.[181]

In Spain, according to the agreement between the state and Holy See, the educational process in public schools must respect Christian values and ethics.[182] The Portuguese Concordat[183] and the 1984 Amendment to the Italian Concordat include similar provisions.[184] In Austria, the Act on Organization of Education states that the objective of public schools is to help in the upbringing of youth "in the spirit of customary, religious and social values as well as in Truth, Good and Beauty."[185] In Liechtenstein, under the *Landeskirche* model, the Constitution provides that one of the main

179. Basdevant-Gaudemet, *supra* note 14, at 316.

180. Decision 4/1993. *See* G. BRUNNER & L. SOLYOM, VERFASSUNGSGERICHTS BARKEIT IN UNGARN, BADEN-BADEN 421 (1995).

181. *See* Hoemig & Hassemer, *supra* note 10, at 336 (discussing a 1975 decision of the Federal Constitutional Court).

182. *See* de Mendizabal Allende et al., *supra* note 27, at 806.

183. A challenge to its constitutionality has been rejected by the Constitutional Court. *See* L. Nunes de Almeida & R. Mendes, *Portugal*, *in* L'ÉCOLE ET LA RELIGION, *supra* note 141, at 308–13 [hereinafter Nunes de Almeida & Mendes].

184. See decision 203/1997 of the Corte Costituzionale.

185. Kucsko-Stadlmayer, *supra* note 26, at 107.

tasks of upbringing and education is religious and ethical formation.[186]

2. Neutrality allows for the teaching of religion in public schools

The principle of neutrality in many European countries is not viewed as the obligation to separate public schools from Christian values and traditions. Rather, it allows for the teaching of religion as part of the comprehensive operation of public schools.

European countries have not followed the American model of imposing constitutional bans on the teaching of religion in public schools. Even in France, where secularism in school means that "religious instruction is not part of scholastic programs," this prohibition refers to primary schools only, whereas in secondary schools, it is possible to organize chaplaincies.[187] Also, in Eastern European states, where the principle of secular schools is emphasized, public school buildings may be used for the teaching of religion outside the regular school schedule as a supplement to the school curriculum.[188]

In many countries, the Constitution neither prohibits nor requires the organization of the teaching of religion in public schools. In these countries, this area of lawmaking is left to the legislature.[189] Constitutional courts have recognized that the introduction of religion in public schools does not infringe constitutional rights per se but have also recognized that various requirements and specific guarantees must be met.[190] Although the teaching of religion in public schools does not violate constitutional provisions per se, parents and students do not necessarily have the right to require such teaching.[191]

In other countries, the constitution requires the organization of the teaching of religion in public schools. Article 7, Section 3 of the

186. *See* Wille, *supra* note 19, at 468.

187. Basdevant-Gaudemet, *supra* note 14, at 314 ("instruction religieuse ne fait pas partie de programmes scholaires").

188. *See Russia*, *supra* note 27, at 657; *Macedonia*, *supra* note 28, at 508; *Slovenia*, *supra* note 38, at 714.

189. *See* Kucsko-Stadlmayer, *supra* note 26, at 139.

190. See the 1981 decision of the Spanish Constitutional Court, de Mendizabal Allende et al., *supra* note 27, at 806; the decisions of the Portuguese Constitutional Commission and Constitutional Court of 1982, 1987 and 1993, Nunes de Almeida & Mendes, *supra* note 183, at 308–13; the 1991 decision of the Polish Constitutional Court, Leszek Lech Garlicki, *Pologne*, *in* L'ÉCOLE ET LA RELIGION, *supra* note 141, at 287; and the 1997 decision of the Romanian Constitutional Court, *Romania*, *supra* note 56, at 636.

191. *See* Hungerbuehler & Feraud, *supra* note 27, at 829.

German Constitution allows for the teaching of religion in all public schools that are not specifically designated as non-religious schools. In Belgium, Article 24, Section 1 of the constitution guarantees public school students the choice between studying a recognized religion or non-religious ethics. In the Czech Republic, the teaching of religion in state schools is provided for by Article 16, Section 3 of the Charter of Fundamental Rights and Freedoms.[192] In Poland, the teaching of religion in public schools must be introduced at the request of parents.[193] Countries such as Spain, Italy, Portugal, and Poland that may have a duty under Concordat provisions to introduce the teaching of religion in public schools, may also have a duty, under principles of equality, to do so for all religions. The organization of religious teaching in such countries is a constitutional task of the state and other public authorities.[194]

In order to prevent public schools from becoming religious schools, the teaching of religion in public schools may not be limited to one religion. However, identical treatment and recognition of all existing religions is not required.[195] The teaching of religion in public schools may be limited to the teaching of recognized churches. Another possibility may be to base the right to teach religious doctrine in public schools on the stage of development and degree of the public approval of such doctrine.[196]

3. The teaching of religion as an integral part of the school curriculum

The teaching of religion may take place on school premises without a direct link to school curriculum, or it may constitute an inte-

192. Article 16, Section 3 states, "The law establishes the conditions of religious instruction at state schools." 5 CONSTITUTIONS, *supra* note 12, at *Czech Republic* 157.

193. Article 53, Section 4 of the 1997 Constitution provides, "The religion of a church or other legally recognized religious organization may be taught in schools, but others peoples' freedom of religion and conscience shall both be infringed thereby." 15 CONSTITUTIONS, *supra* note 12, at *Poland* 12.

Already in the beginning of 1990s, case law has determined that the elimination of religion from public schools would be contradictory to the principle of individual freedom of religion, *see* Maczynski, *supra* note 53, at 538–39; a similar position was adopted by the Portuguese Court in a 1987 decision, *see* Nunes de Almeida & Mendes, *supra* note 183, at 308–13.

194. *See* Hoemig & Hassemer, *supra* note 10, at 338; Wille, *supra* note 19, at 469; *Romania*, *supra* note 56, at 635.

195. *See* Hoemig & Hassemer, *supra* note 10, at 338.

196. *See* Adam, *supra* note 37, at 276 (discussing decision 6/1993 of the Constitutional Court).

gral part of the school process of teaching and upbringing. While the former system exists in countries that emphasize the principle of secular schools like Russia and Macedonia, the latter system exists in the majority of countries discussed in this article.

In such countries, religion classes are treated as ordinary subjects.[197] They are taught on equivalent terms as other classes,[198] are totally integrated in the school's curriculum and schedule, and are graded like other subjects. Religion teachers are members of the educational staff, and public authorities bear the costs of their salaries and social security. However, in each country, details regarding these matters differ slightly.

States have set their own standards with regard to the curriculum of religious classes. In Germany,[199] religious lessons do not consist of a neutral comparison of religious doctrines. Rather, the lessons must teach specific beliefs of a given religious community. The given church's ideas on teaching are binding on the school. In Austria, the teaching of religion in schools is considered an internal operation of recognized churches and religious groups.[200] A 1991 Polish Constitutional Court decision indicated that due to the principle of state neutrality, the content of religious teaching should be determined by church authority and not by the state.[201]

Just as various forms of cooperation and supervision between churches and public authorities exist,[202] various views on grades for religion classes and their significance exist in different countries. In some countries, grades for religion classes are not listed on school report cards.[203] In other countries, grades are listed but do not affect graduation or further education,[204] and in other countries, religion grades are treated the same as grades for other subjects.[205]

197. *See* Hoemig & Hassemer, *supra* note 10, at 337.

198. *See* de Mendizabal Allende et al., *supra* note 27, at 806; *Italy*, *supra* note 51, at 453.

199. *See* Hoemig & Hassemer, *supra* note 10, at 327, 450 (discussing the case of Land of Brandenburg).

200. *See* Kucsko-Stadlmayer, *supra* note 26, at 140.

201. *See* G. BRUNNER & LESZEK LECH GARLICKI, VERFASSUNGSGERICHTSBARKEIT IN POLEN, BADEN-BADEN 119 (1999).

202. *See* de Mendizabal Allende et al., *supra* note 27, at 806; Wille, *supra* note 19, at 469.

203. *See* Adam, *supra* note 37, at 376; *Slovak Republic*, *supra* note 45 at 673.

204. *See* de Mendizabal Allende et al., *supra* note 27, at 807; de Sousa e Brito, *supra* note 11, at 585.

205. *See* Kucsko-Stadlmayer, *supra* note 26, at 142; *Romania*, *supra* note 56, at 636.

The position and status of religion teachers may vary from country to country. For example, in Spain, religion teachers may not be school headmasters because religion teachers are only employed on one-year contracts. Generally, there are no objections to a clerical person teaching in public schools.[206] However, it is essential for appropriate church authorities to approve a teacher (*missio canonica* in the Catholic Church).

Although the teaching of religion in public schools is obligatory, attendance is optional and depends on the decision of parents and students. The right to choose whether or not to participate in religious classes is an essential element of the principle of religious freedom.[207] Here a question arises, among others, about the appropriate form of declarations submitted: in Portugal and in Poland the Constitutional Courts have indicated that the Constitution guarantee the "right to silence" as regards religious beliefs. Thus only "positive" declarations are permissible, where the request to participate in religion classes is declared.[208]

The teaching of religion must take into account the principle of religious pluralism. Thus, if public schools organize the teaching of one religion, they must ensure comparable conditions for the teaching of other religions. However, as mentioned above, such guarantees of equality are usually limited to recognized or registered religions. Countries differ in the implementation of this principle, especially in countries where one religion is dominant.[209]

The principle of religious pluralism also requires the protection of non-believers or those who, for other reasons, do not fit the school's religious curriculum. The majority of countries provide alternative classes in ethics or moral formation for such students. In Belgium, such lessons cannot defend any specific philosophical system or be inspired by militant secularism.[210] However, in some countries, mandatory attendance at alternative classes is unconstitu-

206. *See, e.g.*, Cerexhe & Boel, *supra* note 44, at 193; Kucsko-Stadlmayer, *supra* note 26, at 141; *Czech Republic*, *supra* note 104, at 277.

207. *See* Hoemig & Hassemer, *supra* note 10, at 336; de Mendizabal Allende et al., *supra* note 27, at 796; Kucsko-Stadlmayer, *supra* note 26, at 139; *Italy*, *supra* note 51, at 451; de Sousa e Brito, *supra* note 11, at 585; *Romania*, *supra* note 56, at 636; *Czech Republic*, *supra* note 104, at 276.

208. *See* Garlicki, *supra* note 190, at 288; de Sousa e Brito, *supra* note 11, at 586.

209. *See* de Sousa e Brito, *supra* note 11, at 584.

210. *See* Cerexhe & Boel, *supra* note 44, at 193.

tional.[211] In Belgium, students do not have to attend religion or ethics classes; in Switzerland, a release from Bible history classes may be requested.[212]

VI. PROBLEMS ARISING FROM THE TEACHING OF RELIGION IN PUBLIC SCHOOLS

Various problems may arise from the presence of religion in public schools. One such problem involves the placement of religious symbols, like crosses and crucifixes, in classrooms or on school premises. In some countries this is not allowed.[213] For example, in Germany and Switzerland, the constitutional courts banned the placement of crosses and crucifixes in public schools. The Swiss decision of 1990 stated that the placement of religious symbols in public schools violated the neutrality of religious teaching, which is constitutionally protected. The decision also referred to the state's obligation to ensure religious peace.[214] The German Court, in its 1995 decision, indicated that since the meaning of a cross could not be reduced to a general symbol of Western culture, placing one in the classroom or school would transgress the admissible religious and world-view nature of schools. The Court further stated that since students who did not believe in the crucifix would not be able to avoid the presence of a cross placed in the classroom, such placement would infringe upon their freedom of religion.[215] However, in other countries, no objections arise as to the placement of crosses in classrooms.[216] In Austria, under the provisions of the Concordat, a cross must be placed in the classroom if the majority of students are Catholic.[217]

211. *See* Pizzorusso, *supra* note 173, at 272 (discussing Italian decision no. 203/1989).

212. *See* Hungerbuehler & Feraud, *supra* note 27, at 829; *see also* Kucsko-Stadlmayer, *supra* note 26, at 139.

213. *See, e.g.*, Basdevant-Gaudemet, *supra* note 14, at 318; Adam, *supra* note 37, at 376; *Slovenia*, *supra* note 38, at 714; *Czech Republic*, *supra* note 104, at 277; de Sousa e Brito, *supra* note 11, at 562 (noting that a similar situation exists in Spain).

214. *See* Hungerbuehler & Feraud, *supra* note 27, at 817.

215. *See* Hoemig & Hassemer, *supra* note 10, at 337.

216. Wille, *supra* note 19, at 473; Maczynski, *supra* note 53, at 547; *Romania*, *supra* note 56, at 636.

217. *See* Kucsko-Stadlmayer, *supra* note 26, at 174.

School prayer may also pose problems.[218] In some countries, school prayer is not expressly allowed or prohibited.[219] In other countries, school prayer is allowed as long as participation is voluntary.[220] According to the 1993 decision of the Polish Constitutional Court, states would violate the prohibition on their right to interfere in religious practices by denying students the opportunity to pray.[221]

Religious outfits of students and various religious symbols worn by them have also caused problems. In particular, the Council of State in France has dealt several times with the issue of Islamic girls wearing head scarves. In 1989, the Council decided that although wearing religious symbols is, as a principle, protected by the freedom of religion, this freedom does not protect the ostentatious display of religious symbols that would constitute acts of pressure, provocation, proselytism, or propaganda and that could violate the dignity or freedom of other students, endanger their health or safety, or obstruct an educational process or school order. This decision has been applied in subsequent cases.[222] In Belgium, as indicated by F. Delperee, the wearing of head scarves is protected by the Constitution, but it may be banned if it is objectively justified (for instance, with respect to physical education lessons or sports). Furthermore, a broader limitation may apply to non-religious teachers since they have a general duty to "exercise reserve" and not to impose, in any way, their religious ideas or approach onto their students.[223] Thus, a teacher may be banned from wearing a head scarf[224] or a Buddhist monk outfit and neck chain.[225]

Finally, the question of whether students have a right to be excused from certain lessons or school attendance based on their reli-

218. The Supreme Court of the United States has expressed its view on this matter multiple times.

219. *See, e.g.*, Basdevant-Gaudemet, *supra* note 14, at 320; Adam, *supra* note 37, at 376; *Slovenia*, *supra* note 38, at 714; *Czech Republic*, *supra* note 104, at 277.

220. *See, e.g.*, Hoemig & Hassemer, *supra* note 10, at 336; Kucsko-Stadlmayer, *supra* note 26, at 13; *Romania*, *supra* note 56, at 636; Hungerbuehler & Feraud, *supra* note 27, at 829; Wille, *supra* note 19, at 473.

221. *See* BRUNNER & GARLICKI, *supra* note 201, at 191–92.

222. *See* Basdevant-Gaudemet, *supra* note 14, at 319.

223. Isensee/Kirchhof: Handbuch des Staatsrechts der BRD, Bd. 6, Heidelberg 1989, at 360.

224. *See* Hungerbuehler & Feraud, *supra* note 27, at 830 (discussing a 1997 decision of the Swiss Bundesgericht).

225. *See* O. Jouanjan, *Allemagne*, *in* L'ÉCOLE ET LA RELIGION, *supra* note 141, at 164 (discussing a 1988 decision of the German Federal Administrative Court).

gious beliefs has been raised. Islamic girls have been excused from swimming lessons with boys without serious question.[226] However, more doubts have been raised with regard to permanent school absence on Saturdays or Fridays. In France, although the duty to attend school is considered fundamental and general excuses would infringe the appropriate operation of schools, individual excuses due to religious holidays have been allowed.[227] Similarly, the 1993 decision of the Swiss *Bundesgericht* stated that while freedom of religion does not exempt people from respecting civic duties, the principle of proportionality allows students to be excused from classes as long as the organization and efficiency of teaching is not affected and the religious beliefs of other students are not infringed.[228] In other countries, permanent absence from school on Saturdays due to religious beliefs has been allowed.[229]

226. *See* Hungerbuehler & Feraud, *supra* note 27, at 830; *see also* Jouanjan, *supra* note 225, at 163 (discussing a 1993 decision of the German Federal Administrative Court).

227. *See* Basdevant-Gaudemet, *supra* note 14, at 319.

228. *See* B. Knapp, *Suisse*, *in* L'ÉCOLE ET LA RELIGION, *supra* note 141, at 319–20.

229. *See* Jouanjan, *supra* note 225, at 163 (discussing a decision of the German Federal Administrative Court concerning the Seventh-Day Adventists). For Austria, see O. Pfersmann, *Autriche in* L'ÉCOLE ET LA RELIGION, *supra* note 141, at 174–75.