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NESSUN DOGMA è il progetto editoriale avviato dall'Uaar, l'associazione che rappresenta le istanze degli atei e degli agnostici italiani, si impegna per affermare il principio costituzionale di laicità dello Stato, promuove la diffusione del pensiero non religioso.
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Introduction: a lengthy controversy

Back in 1991, the Union of Atheists and Rational Agnostics (Unione degli Atei e degli Agnostici Razionalisti – thereinafter "UAAR" or simply "the Association") asked to open negotiations for the stipulation of an Agreement with the Italian State, *in accordance with* Article 8, third Paragraph, of the Italian Constitution[1]; the request was denied in 1996 with a simple "letter" from the Under Secretary to the Prime Minister[2] which the UAAR challenged with an extraordinary appeal to the Head of State. Among its various and well-structured arguments, the appeal highlighted the lack of a deliberation by the Council of Ministers as required by Article 2, *letter l)*, of Law no. 400/1988, for all deeds regarding the relationships provided

[1] See Consorti, *Diritto e religione*, II ed., Roma-Bari, 2014, p. 233, referencing the news published on the official UAAR website (*www.uaar.it/uaar/storia*). Some authors indicate 1995 as the starting date of the dispute (see Berlingò, *L'affaire dell'UAAR: da mera querelle politica ad oggetto di tutela giudiziaria*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 4/2014, p. 6) otherspoint to 1996 (see Parisi, *Associazionismo ateista e accesso all'Intesa con lo Stato. Riflessioni a margine della sentenza n. 7068 del 2014 del Tar Lazio*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 36/2014, p. 4). One thing is certain, according to official documentation: on November 13th, 1995, a request was submitted, the text of which can be found on *Quaderni di diritto e di politica ecclesiastica*, 1999, p. 570. For a more detailed reconstruction of the events that predated this ruling and for an overview of the issue's judicial configuration, see Alicino's wide-ranging and thorough work, *La legislazione sulla base di intese. I test delle religioni "altre" e degli ateismi*, Bari, 2013, especially p. 185 and following, and 218 and following, which include the necessary bibliography for a more in-depth analysis of this topic.

[2] Ruling registered by the Department of Judicial and Administrative Affairs (DAGL) undern. 1/2.5/4430/23 and notified to the UAAR by means of a letter dated February 20th, 1996.

for by Article 8, third Paragraph, of the Constitution[3].

The appeal was granted on the basis of the manifest lack of competence of the body issuing the rejection[4].

The UAAR then attempted to "ensure the start of proceedings for the desired Agreement, trying to break the persistent governmental obstruction by demanding a replacement intervention from the Administrative Courts; such an attempt, however, was deemed unacceptable"[5].

The Union then had to wait until 2003, only to receive another formal rejection: after years punctuated by an exchange of messages, injunctions and requests for access to documents, a new application for an Agreement was denied by decision of the Council of Ministers on November 27th, 2003.

Despite having already signed an Agreement with the Italian Buddhist Union in 2000[6], the Government refused to open proceedings with the UAAR based on the fact that it could not be regarded as a "religious denomination": the leadership of Executive power exclusively regarded as religious denomination, according to Article 8 of the Constitution, "a matter of faith in a divine power, shared by a group of people who manifest it to society through a peculiar institutional structure. The objective connotation defined by the Constituent in the second Paragraph of Article 8 is clearly defined by a positive religious content, so that the Council of Ministers, in accordance with the Legal Council of State, regards the regulation as not applicable by extension to any situation that does not

[3] The text of this extraordinary appeal, rich in case-law and academic references, can be found on *www.uaar.it/laicita/ateismo_e_legislazione/17b.html*.

[4] By means of a Presidential Decree on February 1st, 2001. See the Opinion of the Council of State from October 29th, 1997, no. 3048/96, based on which the appeal against the first rejection was accepted, in *Quaderni di diritto e di politica ecclesiastica*, 1998, p. 850 and following.

[5] See Berlingò, *L'affaire dell'UAAR*, quotation from p. 6.

[6] As helpfully recalled by Colaianni, *Ateismo* de combat *e intesa con lo Stato*, on *www.rivistaaic.it*, 4/2014, p. 12, note no. 75 (the essay was later published on *Diritto ecclesiastico*, 2013, p. 19 and following). Before that, as pointed out by the ruling of the Court of Cassation, Criminal Section VI (ruling no.1329/1997 concerning the *Scientology case*) the State had stipulated with the Italian Buddhist Union an agreement ratified by Presidential Decree of 3.1.1991, thus attributing even then "to the Buddhist creed the status of a religious denomination, though it certainly does not presume the existence of a Supreme Being, nor does it suggest the possibility of a direct relationship between Him and mankind".

meet this definition"[7].

The UAAR appealed this additional rejection before the administrative court, but the T.A.R. (Tribunale Amministrativo Regionale - Regional Administrative Court) of Lazio, section I, with ruling no. 12539 of 2008 declared its own *complete lack of jurisdiction* on the matter, taking into account the nature of *political deed* that should be attributed to governmental decisions regarding the drafting of Agreements provided for by Article 8, Paragraph 3, of the Constitution: "the Government (to which Law no. 400 of 1988 attributes power of review), *is free to assume the broadest power of decision* regarding its relationship with religious denominations, *barring its political responsibility* before Parliament and, ultimately, before its electorate. As a consequence, any religious denomination aspiring to stipulate an agreement *cannot claim a defined juridical position*, and therefore a «lawful» right to the agreement, but rather *a mere aspiration* ... The claimant's initiative, therefore, must be placed within the realm of a *political, rather than an administrative process*, resulting in an absence of objective, individual judicial situations that may be pursued before the courts"[8].

The controversy on the political nature of governmental decisions regarding the stipulation of agreements

The association appealed the T.A.R.'s decision to the Council of State, which, through ruling no. 6083 of 2011, section VI, overturned it with an argument aiming to restrict the Government's power of discretion on the issue and, as a consequence, to broaden the category of political deeds[9].

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[7] See the Note by the Presidency of the Council of Ministers from December 5th, 2003, available on http://www.uaar.it/laicita/ateismo_e_legislazione/17e.html. Alicino, quoted from *La legislazione sulla base di intese*, p. 219, points out how, by using this argument, the Government ended up not only denying the numerous case-law reconstructions of a very different nature and the abundance of legal academic data making this definition of religious denomination obsolete, it also forgot its own practice in this area, which had led it "to stipulate an agreement with Buddhism, a creed as removed as possible from any transcendent and divine interpretation of faith".

[8] T.A.R. Lazio, no. 12539/2008, on *Rass. Avv. Stato*, 4/2008, p. 324 and following, with a note by Palatiello, *Il concetto di atto politico «non giustiziabile»* (emphasis added).

[9] Some sharp observations on this theme can be found in Messineo, *Atti politici, Stato di diritto, strumenti di verifica della giurisdizione*, in *Diritto amministrativo*, 4/2013, p. 717 and

In the opinion of the highest administrative court, the UAAR's complaints were legitimate: after recalling its previous rulings on the matter, and how it had veered towards "an extremely rigorous and restrictive demarcation of the aforementioned category"[10], the Council of State underlined the necessary presence of both a subjective and an objective element in order to regard a deed as political[11], it then came to the conclusion that, in this particular case, it could not find "the required objectivity deriving from the deed's connection to the supreme choices in terms of constitution, safeguard and functioning of public powers". This was based on an application of Article 8, Paragraph 1, of the Constitution, since the broad margin of discretion characterizing the Government's decision on the stipulation of the Agreement and, indeed, on the acknowledgement

following, which includes the necessary bibliography for an in-depth analysis on the topic. As for the specific object of the dispute, Corvaja's *Rimedi giuridici contro il diniego di intesa con le confessioni religiose*, on *Quaderni costituzionali*, 2002, p. 227 and following, had already theorized the solution that was partly accepted by the Council of State and later confirmed by the Joined Sections of the Court of Cassation.

[10] Council of State, section VI, no. 6083/2011, on *Foro it.*, 2012, III, column 632 and following. About the ruling, see Pasquali Cerioli, *Il diritto all'avvio delle trattative per la stipulazione delle intese* ex *art. 8, 3° comma, Cost. (brevi note a Cons. Stato, sez. IV, sent. 18 novembre 2011, n. 6083)*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it) (March 26th, 2012); Bertolini, *Principio pattizio o obbligo del Governo di avviare le trattative per la stipula dell'intesa con la Confessione religiosa?*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it) (April 12th, 2012); Canonico, *La stipulazione di intese con lo Stato: diritto delle confessioni religiose o libera scelta del Governo?*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it) (April 23rd, 2012); Tozzi, *Ripartizione delle competenze e limiti costituzionali della previsione delle intese fra confessioni religiose diverse dalla cattolica e lo Stato italiano*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it) (May 21st, 2012); Fascio, *Le intese con le confessioni diverse dalla cattolica tra atti politici e discrezionalità tecnica dell'amministrazione. Il caso dell'UAAR (Unione degli Atei e degli Agnostici Razionalisti)*, on *Foro amministrativo – Consiglio di Stato*, 2012, p. 1222 and following; Alicino, *Le intese con le confessioni religiose alla prova delle organizzazioni ateistiche*, on *Diritto ecclesiastico*, 2013, p. 50 and following.

[11] "In particular, apart from cases where the aforementioned exceptional standards were considered applicable, in the current dominant opinion the two main features of a "political" deed are: a subjective one, consisting of the deed being issued by a high body of public administration, among those responsible for the direction and management of public affairs at their highest level; and an objective one, when the deed concerns the constitution, the safeguard and the functioning of public powers within their own organic structure and coordinated application".

of the requesting party as a religious denomination, may "truly generate a system based on glaring discriminations", unacceptable with a view to guaranteeing equal freedom to all, unless a judicial review was at least granted on the opening of negotiations and the preliminary assessment of whether the applicant organization may or may not be included in the category of religious denominations[12], such actions would be typically regarded as the result of evaluations connected to a balance of interests.

Mario Monti's government promptly referred the case to the Joint Sections of the Court of Cassation which, through ruling n. 16035 of 2013, upheld the verdict of the judges of Palazzo Spada, elaborating further on its grounds.

First and foremost, the Supreme Court highlighted that "religious matters, being traditional fodder for anti-humanitarian actions, are particularly sensitive to opposite tensions, which is why access to judicial protection is often allowed in order to avoid discrimination"[13].

Then, the Court recalled the case law from the European Court of Human Rights on the access of denominational subjects to privileged

[12] Point 8 of the *Law*: "Within the framework so far outlined, even the preliminary assessment on whether the applicant organization may or may not be included in the category of *«religious denominations»* cannot be regarded as unquestionable, in spite of the undeniable practical difficulties it may entail, neither in truth can it be marked by a wide margin of discretion (unless, perhaps, we are referring to technical discretion); this is because the ability to stipulate an agreement by any denomination that may require it is a direct corollary of the principle of equal freedom described in the first paragraph of Article 8, so that the assessment of whether a creed is suitable for stipulating agreements with the State cannot be regarded as an expression of unquestionable power. Consequentially, at the very least the opening of negotiations might even be regarded as mandatory, if only to judge the applicant's right to be regarded as a religious denomination. This, on the one hand, would not prejudice the State's right to refuse stipulating the agreement after negotiations have taken place, or ... to refuse translating the agreement itself into law: on the other hand it would allow, through the aforementioned technical discretion, to deny with justified reason that the subject in question displays the necessary characteristics to be included among other *«religious denominations»*".

[13] Cassazione civile Sezioni Unite, no. 16035/2013, Point 4.3.1. of *Reasons for the Ruling*. See also the text of the ruling in the appendix to Pasquali Cerioli's *Accesso alle intese e pluralism religioso: convergenze apicali di giurisprudenza sulla "uguale libertà" di avviare trattative ex art. 8 Cost., terzo comma*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 26/2013, p. 23 and following.

regulations, often through pacts or agreements[14].

Moreover, it stated that the process described in Article 8 of the Constitution aimed to "protect religious denominations from any discriminatory damage that may occur through an unmotivated and uncontrolled selection of denominational parties", so resulting in a need for judicial protection, as the necessary interest of the party requesting the Agreement – "directly based on the constitutional precedents on which the right to religious liberty is founded" – was to ascertain that the power to begin negotiations was "exercised in accordance with the relevant law on this matter, which is primarily concerned with the use of objective and verifiable standards to identify legitimate religious denominations". It therefore reached the conclusion that "The ability of a religion to stipulate agreements with the State cannot be conditioned by an absolute discretion of the executive power, which is incompatible with the guarantee to equal freedom provided for by Article 8, Paragraph 1, of the Constitution. Moreover, the State cannot allege difficulty with establishing a common definition of "religion". If the notion of religion in the ECHR generates juridical consequences, it is inevitable and proper that the delegated bodies bear the subsequent burden, unless we want the acknowledgement of rights and faculties of those belonging to this category to be forever be entrusted to their judgment"[15].

Decision on the substance of the case

The Administrative Court of Lazio was thus forced to accept the rulings of both the Council of State and the Joint Sections of the Court of Cassation, and to reach a verdict on the substance of the case.

Even taking a possible rejection into account, one might have thought

[14] In particular, the Joined Sections remind us that "the ECHR grants to every denomination a legally qualified interest to access promotional status, even by pact or agreement; it also compels national authorities to put non-discriminatory criteria into place and to adopt adequate reasons for their practice; it allows for the rationality of the set criteria and the suitability of the adopted reasons to be subjected to a judicial review, aiming to safeguard the affected subjective legal position (CEDU, July 31st, 2008, no. 40825/98; March 19th, 2009, no. 28648/03; June 30th, 2011, no. 8916/05; December 9th, 2010, no. 7798/08; November 6th, 2008, no. 58911/00)".

[15] See Point 7 of the *Reasons for the Ruling*.

that the appeal would be thoroughly examined in light of the theoretical and practical concerns emerging from the rulings of both the ordinary and the administrative Supreme Courts.

The decision no. 7068 of 2014[16] is almost more laconic and apodictic than the one through which the same judge had tried to do away with the case by acknowledging the political nature of the government's decisions. Its argumentative structure is disappointing, virtually non-existent and hardly defensible, especially in light of the governmental practice developed through agreements with the Union of Jewish Communities and the Italian Buddhist Union, not to mention the well-known Court of Cassation case-law regarding Scientology, the intervening progress in domestic and supranational law, and the results of case-law involving the Constitutional Court and the ECHR; all these elements, in my opinion, highlight the judge's poor reasoning and compliant position, a stance often adopted when ruling on governmental decisions[17].

Three key points of the ruling seem to be especially relevant to the substance of the case[18]: first of all, the T.A.R. seems to confine its ruling to the mere formal logic of the verdict's grounds rather than on the issues it examined, by stating that "the second ground of appeal seems overall unacceptable, as it demands an examination by the court seized on the

[16] The full text can be found on https://www.osservatorioaic.it/it/osservatorio/ultimi-contributi-pubblicati/luigi-barbieri/una-proposta-a-geometria-variabile-qualche-riflessione-sulla-sentenza-del-tar-lazio-n-7068-del-3-luglio-2014-e-sul-caso-u-a-a-r, with a note by Barbieri, *Una proposta a geometria variabile Qualche riflessione sulla sentenza del TAR Lazio n.7068 del 3 luglio 2014 e sul caso UAAR*. Barbieri's argument is opposed to the opinion argued by in this paper, as it views the T.A.R.'s intervention in a positive light.

[17] This refers in particular to the disputes regarding the right to teach religion and to display the crucifix in schools: see, if so you wish, the criticisms expressed by Croce in his *Giudice amministrativo e laicità dello Stato: il problematico séguito delle decisioni costituzionali sull'ora di religione*, in Bonetti - Cassatella - Cortese - Deffenu - Guazzarotti (editors), *Giudice amministrativo e diritti costituzionali*, Atti del Convegno di Trento del 24-25 giugno 2011, Torino, 2012 (e-book), p. 386 and following, as wellas in Croce's *La libertà religiosa nell'ordinamento costituzionale italiano*, Pisa, 2012, p. 249 and following.

[18] This excludes other faults in competence which may lead to the appeal being successful: we are referring in particular to the preliminary investigation's omissions regarding the applicant's eligibility to stipulate an agreement with the State, which would necessitate the opinion of the Interior Ministry's General Directorate for Religious Affairs and of the Advisory Committee on Religious Freedom established by the Council of Ministers, neither of which seems to have been requested.

assessment performed by the respondent Authority as regards the denominational nature of the applicant Association, with the aim of replacing it with a different evaluation based on a different reconstruction of relevant traits and indicators for such a qualification, as demanded by the applicant; an examination that the Court was evidently not allowed to perform without encroaching upon the role of technical discretion pertaining to the Authority"[19].

In the second point, the administrative judge fully agrees with the Government's decision by stating that "the Government's assessment on the nature of the applicant association, by recalling a concept of religious denomination featuring positive content and, as a prerequisite, «a matter of faith in the divine» – thus excluding any negative content designed to deny the existence of the transcendent and the divine – does not appear manifestly unreliable nor implausible, indeed it proves consistent with the meaning that is commonly attributed to religion, as a system of beliefs and acts of worship connecting the life of an individual or a community with what they regard as a superior and divine order"[20].

The third point states that "denying the stipulation of an agreement according to Article 8, Paragraph 3 of the Constitution, does not in any way affect the right to free association provided for by Article 18 of the Constitution, nor the guarantees referred to in Articles 19 and 21 of the Constitution, which have nothing to do with the aforementioned agreements"[21].

To conclude its apodictic interpretation, the judge dismisses as inaccurate the complaints on an abuse of power through disparity of treatment and misuse, "as it stands to reason that different guidelines are needed in situations regarded as dissimilar"[22].

Critical remarks

Each one of the aforementioned excerpts is worthy of criticism: first and foremost, the passage that attempts to restrict the Government's delib-

[19] See Point 4.1. of the *Law*.
[20] Cf. Point 4.4. of the *Law*.
[21] Point 6 of the *Law*.
[22] Point 7 of the *Law*.

eration on the concept of religious denomination to a mere assessment based on criteria established by the executive power itself sounds rather suspicious: it would be like saying that the Government is allowed to choose the benchmarks for its own judgment. On the contrary, it is apparent that such a deliberation must be based, *a fortiori*, on any criteria that the executive power may have overlooked, just like in this case, and disregarding all previous practice on the matter. This is proved by the fact that, shortly afterwards, not only did the T.A.R. defend the Government's argument as not implausible, but it went a step further by pointing to the UAAR's charter as proof that it was not a religious denomination[23]: did this mean that the relevant traits and indicators could be used to confirm the Government's decisions, but not to contrast them? A curious solution indeed.

The second excerpt is even more manifestly unacceptable: how can one not consider implausible the government's concept of religion as something necessarily based on the belief in a divine being, when our own legal system has accepted both the Italian Buddhist Union and the Church of Scientology as religious denominations?[24].

As it happens, both creeds belong to "the broad category of (not only extra-Christian but also) extra-theist or atheist movements. Buddhism, in particular, can firmly be placed among those denominations that do

[23] Cf. Point 4.4. of the *Law*, where the T.A.R. emphasizes: "and taking into account the fact that the UAAR itself (in its «Statute») self-qualifies as a «non-denominational philosophical organization», which «aims to represent the rationalist, atheist or agnostics conceptions of the world, just as denominational philosophical organizations represent the religious conceptions of the world, thus self-describing as existing outside the scope of religious denominations". Too bad the Government's rejection made no mention of this questionable (as we will see) justification.

[24] The same, however, could be said of the Italian Hinduist Union (with which the Government stipulated the agreement later included in Law no. 246/2012), given that Hinduism "is not an established religion: it owes nothing to the historical or mythical figure of a human or divine being and, contrary to the great organized religions, has no doctrinal content even just in its intentions, there is no dogma, nor is there a church that may act as its eminent guarantor or guardian. It includes an array of different positions: as soon as we think we may have found a specific unifying element, something else crops up to dismantle our illusion. To be a Hinduist it is not necessary to believe in one or more gods: one may even be an atheist Hinduist" (quote from Franci, *L'induismo*, Bologna, 2005, p. 9).

not necessarily worship any deity"[25]. Scientology, on the other hand, not only "is outside the scope of the Christian Church as we understand it, but also, to a considerable extent, outside of the very scope of belief in a divine being"[26].

[25] Quote from Colaianni, *Diritto pubblico delle religioni. Eguaglianza e differenze nello Stato costituzionale*, Bologna, 2012, p. 129 (italics added). It goes on: "Unlike Western religions, Buddhism has no doctrine to follow and, as a consequence, it has no teaching to impart, therefore «the true *bodhisattva* leaves no trace of any kind, neither by flaunting his religious faith nor by showing a lack of it» ... Buddhism is the exact opposite of exclusivism, as it tends to include, or at least to not exclude, other religious experiences, in line with many Eastern religions, especially those originating from India: according to Hinduism, a strong-spirited man will find God anywhere, especially within himself. Consequentially, Buddhism has no abstract truths to suggest nor to impose as dogma, because it is not interested in concepts – including, as we said, the concept of God – but only in direct experience, presenting a path to inner enlightenment that is necessarily free and indeed not incompatible with faith in other religions" (pp. 129-130). Moreover, "Buddhism does not entail an act of initiation or integration ... The inscription into the registers of single institutions has a mere administrative value and ceases to apply in the event of a member's resignation" (p. 131).
Cf. also Lombardi Vallauri, *Riduzionismo e oltre. Dispense di filosofia per il diritto*, Padova, 2002, p. 12, highlighting "how doubtful it is to consider Buddhism a religion, if by religion we mean a system necessitating a belief in a God or gods to which we may address prayers of adoration or imploration, devotional, sacramental and sacrificial rituals, priesthood and the idea that natural and human events are significantly influenced by personal and supernatural causes that cannot be controlled by reason: Buddhism denies the existence or importance of all of the above. It is, rather, a non-irreligious overriding of religion, a knowledge-based theory and practice with a soteriological intent. It aims to a psycho-spiritual «enlightenment» and «liberation» to be reached not through divine «grace» but by working rationally on ourselves, in accordance with the inherent laws of being. In this sense, Buddhism is a philosophy rather than a religion; a philosophy, however, that is ultimately non-speculative or anti-speculative, theorizing its own necessary transposition into ascetic practice and careful mystical propitiation. This aspect of Buddhism shows its continuity with yoga and other ascetic-philosophical orientations of Hinduism, equally directed towards the mokṣa". Finally, see also Franci, *Il buddhismo*, Bologna, 2004, p. 12.

[26] *Ibidem*, p. 132. It goes on: "We must indeed take into account the fact that the object of this creed are the rights of man rather than a divinity, which is mentioned twice but on a remote horizon, lacking any power over daily reality as well as any personal relationship with individuals, who are instead engaged in perfecting themselves: at its core, like in many Eastern religions, lies personal enlightenment, the level of spiritual awareness that can be raised through pastoral counselling (auditing) and Scientology training. In this sense, as a religion, it is similar to Buddhism ... Scientology, on the other hand, differs from Buddhism – from the point of view of religious freedom – in its

Moreover, although the Government bears no responsibility in recognizing the Church of Scientology, whose previous public acknowledgment as a religion was based on decisions by the Court of Cassation, criminal section VI, ruling n. 1329/1997, and by the Milan Court of Appeal, ruling n. 4780/2000, in relation to the Italian Buddhist Union it was the Government itself who defined a collective entity not characterized by the worship of a deity, and lacking any doctrine based on transcendence, as a religious denomination.

How can the government, after all this, regard the elements of deity and transcendence as essential in the case of the UAAR, and use them to deny it its rightful status as a religious denomination, without incurring in a manifest abuse of power?

And how could the Regional Administrative Court ignore all this, how could it not detect this glaring illegitimacy which in itself should have led to an overturn of the refusal – a refusal based on a factor no longer applicable – thus eliminating any further need to appeal?

Evidently, once Buddhism, Hinduism and Scientology have been acknowledged as religious denominations, any possible concept of religion in our legal system can no longer be based on the elements of deity and transcendence. It is also curious that both the Government and the T.A.R. should ignore (or pretend to ignore) that the very same executive power had issued a Legislative Decree acknowledging the status of refugees, in which it stated that "religion" was understood as: "any theist, non-theist or atheist belief, the participation to, or the abstention from, acts of worship performed in private or in public, both individually and communally, and other religious acts or professions of faiths, as well as social or personal behaviors based on or prescribed by a religious creed"[27]. The Italian legal

administration of an actual ecclesiastical justice. This is due to the fact that Scientology is a hierarchically-structured organization" (pp. 132 and 133).

[27] We are referring to Legislative Decree no. 251 of 2007, implementing directive 2004/83/CE. See also the recent European Parliament Recommendation from June 13th, 2013, on the subject of promotion and protection of religious freedom and opinion, formulated in the same manner. As was rightly highlighted by Pasquali Cerioli, *Accesso alle intese e pluralismo religioso*, quot. p. 19, "There is no doubt – in light of the broad protection of freedom of conscience guaranteed by article 10 of the Charter of Fundamental Rights of the European Union signed in Nice in 2000, as well as by article 9 of the ECHR Convention, sources that permeate our Constitution by addressing the issue of human

system therefore includes a relevant law foreseeing the possibility that the term "religious", referring to denominations in accordance with Article 8 of the Constitution, may apply even in the absence of a deity.

However, perhaps aware that the governmental allegation that had been deemed "not implausible" was rather weak, the Regional Administrative Court strived to elaborate further, touting the UAAR charter itself as proof that the association did not constitute a religious denomination: it may be pointed out that this argument is equally baseless, since neither the charter of the Italian Hinduist Union nor that of the Italian Buddhist Union, two organization that had already stipulated agreements with the Italian Government, qualify either as a religious denomination. This did not prevent them from being regarded as such the moment they requested to sign an Agreement.

Moreover, governmental practice on this matter had long known – and accepted – instances in which organizations self-qualified as religious denominations for the sole purpose of obtaining an Agreement: the Union of Jewish Communities does not qualify nor does it self-describe as a religious denomination due to the very nature of Hebraism, and thus cannot be included in this category; this would exclude any chance of the social group it represents being regarded a religious denomination, had the Union not claimed that title for the sole purpose of obtaining an Agreement[28], which was signed back in 1987. The Italian Buddhist Union,

rights – that atheist, agnostic and indifferent religious opinions are fully included in the legal definition of «religious beliefs»". Further on, however, the author seems to exclude the possibility that this should automatically translate into an equal treatment of the collective expression of such beliefs compared to to religious denominations.

[28] Cf. Colaianni, *Confessioni religiose*, in *Enciclopedia del diritto*, Aggiornamento IV, Milano, 2000, p. 371, pointing out that from the stipulated Agreement and the law that approved it "derives a rule highlighting the right to religious self-referencing or self-qualification by a social group, preventing the State from issuing any judgment on the matter (which in this case would have been negative, stemming from Hebraism's very own non-denominational self-representation). Cf. also Ferlito, *Le religioni, il giurista e l'antropologo*, Soveria Manneli, 2005, p. 65, reminding us how "when negotiations opened for the stipulation of an agreement with the Jews, they asked to be regarded as a linguistic minority in accordance with Article 6 of the Constitution, and were forced to make do with the status of religious denomination when it was pointed out that, as a linguistic minority, they would not have the right to apply for an agreement in the first place". For more on Hebraism, cf. Stefani, *Gli ebrei*, Bologna, 2006.

the Italian Hinduist Union and the UAAR all followed the same pattern, implicitly self-describing as religious denominations when requesting an Agreement, although their respective Charters made no mention of such a definition.

The UAAR, moreover, explicitly described itself as a religious denomination in its extraordinary appeal to the President of the Republic, following the first rejection[29].

Even in this case, therefore, establishing such a principle as the T.A.R. seems to suggest to the Government, perhaps with a view to support yet another rejection, would lead to a blatant abuse of power, deviating from the practice witnessed in at least three other instances and unlawfully modifying the benchmarks for acknowledgment, and therefore for stipulating an Agreement, depending on the organization that requests it.

The last part of the ruling that is worth briefly examining, for the sake of complete information, concerns the T.A.R.'s statement that the stipulation of Agreements *as expected from* Article 8 of the Constitution does not concern nor does it affect the rights *according to* Article 19 of the Constitution: yet another astonishing pronouncement.

In order to refute it, it would suffice to recall this excerpt of Constitutional Court ruling n. 346 of 2002, often quoted by administrative judges to support the misleading idea that Articles 3 and 19 of the Constitution, as well as Articles 7 and 8 of the Constitution, are separate and self-contained regulatory systems: the aforementioned ruling clearly states that *the equal freedom of religious denominations to organize and operate represents the necessary projection on the community of the equality of individuals in enjoying an effective freedom of religion.* It is therefore unthinkable that discriminations suffered by associations would not directly affect the individual right to religious freedom.

And since Article 19 of the Constitution safeguards both believers and non-believers, as all constitutional case-law has clearly stated since ruling

[29] The last few lines of the document read as follows: "The UAAR, in its status as a religious denomination as provided by Article 8, paragraph III of the Constitution ...", whereas at the beginning of the deed it was highlighted how "The objective status of religious denomination of each militant atheist group is strengthened by the members' self-identification within their own freedom of association: and the UAAR, as we said, sees itself as a religion". To read the full text of the appeal, see the webpage in note no. 4.

no. 117/1979, it is unclear how denying the UAAR access to the same privileges[30] granted to other religious denominations which have over the years stipulated Agreements with the State – privileges not in any way connected to their peculiarities[31] – could fail to constitute a violation of Article 8, Paragraph 1, which in turn must systematically be interpreted in light of Articles 3 and 19 of the Constitution: if a denial affects the equal right to collective religious freedom, it will correspondingly affect the equal right of individuals to enjoy the same freedom, and if religious freedom is guaranteed to non-believers as well, it is apparent that all favorable standards not directly connected to the specific characteristics of

[30] The fact that many of the UAAR's requests are far from unreasonable is underlined by Floris' *Ateismo e Costituzione*, on *Quaderni di diritto e politica ecclesiastica*, 2011, p. 106: "many of the questions formulated by the UAAR concern religious freedom as described in our own system, namely «freedom of and from religion»; indeed, it could even be said that such questions are concerned with guaranteeing the effectiveness of such freedom, and outline its concrete and specific features. Secondly, this data helps us acknowledge that the legal consequences of such questions do not in any way stretch the meaning of constitutional rules, nor do they make them vulnerable to creative interpretations. They represent, if anything, a continuation of the path outlined by the Constitutional Court: a path, as recalled here, stemming from the needs of different individuals in matters of religion, moving on to explain the role of the organizations they belong to, as entities that are instrumental in satisfying the needs of their members, and finally accounting for the position of equal freedom of such organizations". The author also recalls the non-denominational moral assistance in obliging institutions, the availability of places suitable to non-religious funerals, the existence of economic and tax-related advantages. In the same issue of the magazine, see also a significant article by Fiorita-Onida, *Anche gli atei credono*, p. 15 and following.

[31] The Agreement, as reminded by constitutional case-law, should aim to meet the needs of special denominational cases. In practice, however, the resulting system became a tool for the government to arbitrarily choose the religious denominations it deemed worthy of more freedom, by granting them special privileges and leaving all others under the control of the *Law on tolerated cults*, or even of a common law that often proved unequal to their necessities. This resulted in a clear violation of the principle of equal freedom provided for by the first paragraph of the very same Article 8 of the Constitution, not to mention a violation of Articles 3 and 19 of the Constitution. From this point of view, see also the commendable reconstructions of the egregious situation found in Italian ecclesiastical law, as described by Alicino in *La legislazione sulla base di intese*, quot., especially p. 35 and following, p. 65 and following, as well as by Ferrari in *La libertà religiosa in Italia. Un percorso incompiuto*, Milano, 2012, part. p. 75 and following. Cf. also the sharp observations of Guazzarotti in *Nuove intese con le minoranze religiose e abuso della normazione simbolica*, on *Quaderni costituzionali*, 2007, p. 845 and following.

requiring parties are constitutionally illegitimate, unless they are extended to include organizations representing the interests of non-believers[32].

Constitutional Court ruling no. 52 of 2016

Still pending the UAAR's appeal to the Council of State against the decision of the Lazio T.A.R., ruling no. 52 of 2016 deliberated on the conflict of attribution raised by the Government against the ruling by the Joined Sections of the Court of Cassation, which had established a possible scope for judicial review in this controversy[33].

The judge of disputes ruled to set aside the verdict of the Joined Sections, thus dismissing the common view of both the ordinary and administrative courts on the disputability of deeds performed by the Government in the proceedings leading to agreements with religious denominations other than Catholicism[34].

This led to the creation of a sort of "grey area", unaffected by the applica-

[32] This would open up yet another issue, about the right to an Agreement and the right to a law on the basis of the Agreement itself, as well as about its possible implementation. As it would not be appropriate to carry out an in-depth analysis of the matter in this essay, we may refer to the interesting proposal for the possible nomination of an acting commissioner for the stipulation of Agreements containing parts identical to those already signed with other parties, as described by Colaianni in *Ateismo* de combat, quot., pp. 9-10.

[33] The decision has been widely commented and criticized; apart from those quoted in the following footnotes, see Licastro, *La Corte costituzionale torna protagonista dei processi di transizione della politica ecclesiastica italiana?*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 26/2016; Floris, *Le intese fra conferme e ritocchi e prospettive per il futuro*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 28/2016; Colaianni, *La decadenza del "metodo della bilateralità" per mano (involontaria) degli infedeli*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 28/2016. These contributions have been the published, together with others by Varnier, Parisi, Pasquali Cerioli, Toscano, Patruno on *Diritto ecclesiastico*, 2015, p. 73 and following. Cf. finally Alicino, *La bilateralità pattizia Stato-confessioni dopo la sentenza n. 52/2016 della Corte costituzionale*, in www.osservatoriosullefonti.it., 2/2016, and the papers contained in Parisi (editor), *Bilateralità pattizia e diritto comune dei culti. A proposito della sentenza n. 52/2016*, Napoli, 2017.

[34] For an up-to-date reconstruction of the issue in light of the changed social context, as well as an overview of the current legal approach, see Alicino, *La legislazione sulla base di intese, quot.*

tion of the supreme principle described in Article 24 of the Constitution[35], in the particularly sensitive sphere of religious freedom[36].

It is important to stress how the grounds for the Court's ruling sound rather apodictic and even contradictory, hinting at a probable split behind closed doors. So much so that Judge-Rapporteur MrLattanzi, who had presumably supported a dismissal of the appeal as unacceptable or unfounded, refused to draw up the verdict.

The first, fragile cornerstone on which the decision rests is the Commission's interpretation of Article 8 of the Constitution: faced with the unanimous acknowledgement of the (supreme?) principle of equal freedom of religious denominations described in Article 8, Paragraph 1, of our Constitution, and included in the rulings of both the ordinary and administrative Supreme Courts, it is truly surprising that the constitutional judge should display such a glaring lack of sensitivity on this issue, leading him to state that Article 8, Paragraph 3, is not a «merely functional» provision with respect to the first two Paragraphs, but in itself allows for an extension of the bilateral method to relationships with non-Catholic religious denominations[37].

Even if we discountall legal literature rightly pointing out how the original intention of Constituents was to make Paragraph 3 functional to the previous two, as a means to put into practice the equal freedom provided for by Paragaph 1[38], clearly it is one thing to state that one

[35] Ruggeri, in *Confessioni religiose e intese tra* iurisdictio *e* gubernaculum, *ovverosia l'abnorme dilatazione dell'area delle decisioni politiche non giustiziabili (a prima lettura di Corte cost. n. 52 del 2016)*, on www.federalismi.it, 7/2016, highlights with rightful indignation how the same Court which in other instances strenuously fought to eliminate any "grey areas", has in this case contributed to violate the principle of effective protection, by unduly broadening the area of political discretion.

[36] Lariccia, *Un passo indietro sul fronte dei diritti di libertà e di eguaglianza in materia religiosa [?]*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 20/2016, p. 11, talking about a "heavy-duty reorganization" and "severe reduction" in the protection of the rights of freedom and equality guaranteed by the Constitution to any association wishing to make use of agreements.

[37] Point 5.1. of the *Considered in Law*.

[38] Cf. Poggi, *Una sentenza "preventiva" sulle prossime richieste di Intese da parte di confessioni religiose? (in margine alla sentenza n. 52 della Corte costituzionale)*, on www.federalismi.it, 6/2016, p. 6 and following. The article includes a quote from Hon. Ruini, stating that the State has a duty to proceed, when required, with the negotiations for agreements. Vita's *Della non*

provision is not functional to another, but it is a very different matter to say they are as impermeable to each other as monads[39], yet another thing is to state that one provision allows us to violate the other: the Court's ruling ends up corroborating the latter interpretation, falling prey to an excess of abstraction when it states that the lack of a stipulated agreement is not, «in and of itself», incompatible with guaranteeing equality among religious denominations[40]. This system would not automatically lead to discrimination, if agreements were only used to guarantee such exceptions from common law as are necessary to one denomination's specific demands: however, there is no common law on this matter, or rather, it is only represented by the law on tolerated cults. Laws based on agreements, on the other hand, are used to curb the effect of that particular law on the religious groups who stipulate them, and who automatically have access to a higher degree of freedom (the so-called "common law of agreements"), while those who don't are forced to submit to a regulatory framework that does not provide the same tools for freedom, and that, in many ways, can in fact be regarded as unconstitutional[41].

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obbligatorietà dell'avvio delle trattative finalizzate alla conclusione di un'intesa, quot., p. 6, note 32, even includes a statement by Hon. Pajetta suggesting that «the law will come if it is required».

Porena, *Atti politici e prerogative del Governo in materia di confessioni religiose: note a prima lettura sulla sentenza della Corte costituzionale n. 52/2016*, on *www.federalismi.it*, 7/2016, p. 8, highlights on the other hand how the literal wording of Paragraph 3 appears to exclude any choice by stating, in the indicative mode, that relationships «are» regulated by law, which would at least make a preliminary refusal of negotiations unacceptable.

[39] This part of the reasons is omitted by Vita in *Della non obbligatorietà dell'avvio delle trattative finalizzate alla conclusione di un'intesa*, quot., p. 7, where the author highlights how any interpretation of bilateralism failing to recall the principle of equal freedom threatens to become a source of odious privilege.

[40] Point 5.1. of the *Considered in Law*.

[41] The fact that agreements «have become a field of conquest for privileged categories» (Poggi, *Una sentenza "preventiva"*, quot., p. 10) and that the lack of an agreement therefore means «a discrimination based on religious faith, harming those belonging to a creed that holds none» (Porena, *Atti politici e prerogative del Governo*, quot., p. 8, expressing this concept as a rhetorical question) constitutes empirical evidence that brings us very close to doctrinal unanimity. Ruggeri, *Confessioni religiose e intese tra* iurisdictio *e* gubernaculum, quot., p. 8, highlights instead how the very method of necessary bilateralism would make no sense «if we did not believe that, through an agreement (and, more in general, through any kind of pact), the aforementioned basic principles may be better safeguarded than

In the absence of a general law constitutionally veered towards religious freedom, aiming to broaden the prevalent content of agreements to all denominational subjects, the act of granting an (identical, or almost identical) agreement to some entities and not to others irretrievably jeopardizes equal freedom, generating inequality: the way Paragraph 3 has so far been applied clearly contradicts Paragraph 1. And the Court, far from condemning this practice, endorses it by failing to admonish legislators, that they may take action to implement a general and universally binding transposition of Article 19, and neglecting to limit the scope of what is instead permissible through an agreement; on the contrary, it even states that the need for a wider legal framework «is not at all enforced by the Constitution»[42].

The Court then provides two additional reasons in support of its proposed solution: one is logical, the other relates to an interpretation of the power bestowed on the Government by the Constitution in matters of "ecclesiastical policies"[43].

According to the constitutional judge, «an autonomous right to demand the opening of negotiations before the law cannot be envisaged, as it is impossible to foresee a subjective legal claim to a positive conclusion»[44]: the argument could be convincing in theory, were it not for the fact that the alleged impossibility to envisage a right to law based on an agreement, regardless of conflicts in doctrine on whether this is an automatic consequence or not, in accordance with Article 8, Paragraph 3, of the Constitution[45], should be subject to proof, which is not given here, rather than be used apodictically to constitute the grounds of the argu-

through the single sovereign ruling of State law».

[42] Point 5.1. of the *Considered in Law.*

[43] According to Leone, *Negoziare un'intesa non è una pretesa giustiziabile*, on *Quaderni costituzionali*, 2/2016, p. 362, the Court referred to appraisals «focusing on the pursuit of a common interest by taking into account different circumstances, rather than [on] any kind of political direction (which may well be interpreted as an "orientation") on religious matters». If this was the case, however, the necessary consequence would have been a duty to examine and justify it, which can in no way be inferred by the ruling.

[44] Point 5.1. of the *Considered in Law.*

[45] As conveniently summarized by Vita in *Della non obbligatorietà dell'avvio delle trattative finalizzate alla conclusione di un'intesa*, quot., p. 8, part. note 45. See also Colaianni, *Ateismo* de combat, *quot.*, p. 8.

ment[46]; the opposite, indeed, could also be argued based of the principle of non-discrimination, that is to say that both the Government and the Legislator are lawfully bound to grant what has already been granted to others[47]. And, consequently, that claimants have a right to demand the opening of negotiations.

The second argument refers to the power attributed to the Government by the Constitution on the issue of agreements: Articles 8 and 95 of the Constitution suggest that the identification of potential negotiating parties, and the subsequent opening of the negotiations themselves, are «important decisions, involving political discretion and the resulting responsibility in a parliamentary government»[48]. Upon reading the two Articles, however, it is unclear how the Court could reach this conclusion, since Article 8 never mentions the Government and Article 95 makes no reference to agreements. The Council of Ministers' prerogatives on the issue are based on practice as well as on Law no. 400 of 1988. A law that, as argued by the UAAR's defense, supported the unacceptability and indeed the absence of any objective conflict, based on a constitutional provision (Article 111 of the Constitution) which squarely ascribes to the Court of Cassation the power to solve jurisdictional disputes. Alternatively, a balance between the different positions could have been struck so that

[46] On the otherhand, this argument is regarded as very convincing by Nicotra, *Le intese con le confessioni religiose: in attesa di una legge che razionalizzi la discrezionalità del Governo*, on www.federalismi.it, 8/2016, p. 7.

[47] This does not solve the legal question of how to address the inaction of the two constitutional bodies, which is a separate issue from the right's acknowledgement: it is worth noticing, however, that the employment of an acting commissioner for the stipulation of an agreement, namely for those parts referring to the "common law on agreements" was indicated as a possible solution for the Government (Colaianni, *Ateismo* de combat, quot., p. 11), while the conflict of attribution was the suggested remedy available to religious denominations (Guazzarotti, *Il conflitto di attribuzioni tra poteri dello Stato quale strumento di garanzia per le confessioni religiose non ammesse alle intese*, on *Giurisprudenza costituzionale*, 1996, p. 3920). The legislative inaction could perhaps be overcome by adding a "common law for agreements" to the current law on tolerated cults "within the prescribed verses of the Statute" (even though the procedure to reach this outcome seems rife with insurmountable difficulties). The pressure deriving from damage compensation for failing to enact a law based on an agreement, granted if the denomination in question required an agreement identical to all others and if there were no legally sustainable reasons for not allowing it, might constitute an alternative solution.

[48] Point 5.2. of the *Considered in Law*.

this part of our legal system would no longer be lacking in legal remedies, allowing the Constitutional Court to ascertain on a case-by-case basis whether there was any damage to the scope of influence that the Constitution bestows on the various powers in this sphere[49].

The Court instead regards political responsibility as sufficient, even telling us that a lack of jurisdictional responsibility on whether or not to open negotiations «enables» the Parliament's monitoring function[50]: one might counter that the practice of political responsibility does not in any way depend on whether the Government and its members hold responsibilities of a different kind, which are completely separate and non-fungible with the political[51]. Besides this rather obvious consideration, it is apparent that making the protection of minority rights subject to the political leanings of the majority is completely unacceptable, and contradicts the very role of constitutional jurisdiction[52]: political control and legitimacy control satisfy very different needs, and «the former may be added to, but by no means replace the latter»[53], or else «it would be tantamount to admitting that an unquestionable political decision is entitled to replace the authentic interpretation of a constitutional

[49] The Court, for example, might have ruled the dispute unfounded, by acknowledging the jurisdiction's power to re-examine the procedural documents in pursuance of Article 8, Paragraph 3, of the Constitution. Its examination would have stopped, as any legal review must, if any aspect of the Government's actions was judged to be related to political choice (for example, if the agreement had proposed to allow for a never-before-granted exemption from ordinary law).

[50] Point 5.2. of the *Considered in Law*.

[51] And that, in a State ruled by a rigid Constitution, «the Government's political responsibility before Parliament is always and without exception related to actions taken within the limits of constitutional rule» (Porena, *Atti politici e prerogative del Governo*, quot., p. 11).

[52] In this case as well, a basic knowledge of law practice (as reported by Lariccia, *Un passo indietro*, quot., 21 and following, about the practice of the Parlament's role in relation to agreements), allows us to argue that the Constitutional Court has essentially endowed to the political majority in power with the ability to curtail the fundamental constitutional rights of anyone who is not in its good graces. On the otherhand, Dickman, *La delibera del Consiglio dei ministri di avviare o meno le trattative finalizzate ad una intesa di cui all'art. 8, terzo comma, Cost. è un atto politico insindacabile in sede giurisdizionale*, on www.forumcostituzionale.it, 3/2016, p. 6, seems to be completely unconcerned with suchtrifles, fully agreeing with the ruling and its reasons.

[53] Porena, *Atti politici e prerogative del Governo*, quot., p. 11.

provision»[54].

Another excerpt sounds equally unconvincing, as the Court states that the proceedings may reach a different conclusion «even on the issue raised by the dispute in question, should the legislator decide, at their discretion, to introduce a complete set of rules for the stipulation of agreements, featuring objective parameters aiming to guide the Government in its choice of negotiating parties»[55]; however, given that the Constitution itself indicates the political nature of the Government's action in this sphere, so that it may freely «evaluate the many reasons and events often resulting from the changeable and unpredictable reality of political and international relationships», how could a law attempt to restrain it without being unconstitutional?[56]. And, vice versa, if we believe that it is possible to bind the Government's actions, the decision should be based on a constitutional principle such as secularism, which according to the Court itself dictates "equidistance and impartiality" towards all; in this case, then, the consequence established by the Supreme courts would at the very least be applicable, in that the jurisdiction of such deeds could be disputed in order to avoid a disparity of treatment, in light of the very constitutional principle legitimizing a legislative action to limit the Government's scope for discretion[57].

Finally, it is slightly surprising to witness how the Constitutional Court cheerfully ignores the ECHR case law that the Joint Sessions had recalled

[54] Ruggeri, *Confessioni religiose e intese tra* iurisdictio *e* gubernaculum, quot., p. 4.

[55] Point 5.1. of the *Considered in Law.*

[56] Point 5.2. of the *Considered in Law.* As rightfully observed by PIN in *L'inevitabile caratura politica dei negoziati tra il Governo e le confessioni e le implicazioni per la libertà religiosa: brevi osservazioni a proposito della sentenza n. 52 del 2016*, on *www.federalismi.it*, 7/2016, p. 8, given the Court's reasons for its ruling «it would seem difficult, if not downright inappropriate and even unreasonable, for Parliament to force the Government to comply with objective parameters». However, contrary to the author of this paper, Pin sees all other aspects of the ruling in a positive light.

[57] In the opinion of Tomba, *Il principio di laicità: mero strumento rafforzativo del principio di eguaglianza "senza distinzione di religione" ovvero obbligo positive nei confronti dei pubblici poteri? Riflessioni a prima lettura delle sentenze n. 63 e n. 52 del 2016*, on www.osservatorioaic.it, 2/2016, p. 9, from the principle of secularism derives an obligation to «justify any refusal to open negotiations as described in the third Paragraph of Article 8 of the Constitution and, consequently, the power to verify before judicial courts that the reasons for this refusal do not constitute discrimination».

in support of their decision, stating that «it is illegitimate to reject an agreement comparable to those already stipulated with other denominations, unless the rejection can adequately argue the existence of "objective and reasonable grounds", only valid in the presence of a "legitimate aim" and of a "reasonable relationship of proportionality"[58]. It is hard to fathom why, in light of the ECHR's clear ruling, the Italian State was not condemned in the prosecution of this case, with the predictable consequences in terms of the relationship among the Courts[59]. We must also consider that, as well as a clear undermining of the principle of religious discrimination provided for by Articles 9 and 14 of the ECHR, this would highlight a macroscopic violation of Article 6 of the Convention, determined by a lack of legal remedies[60].

Unless we decide to claim, as it has been done before, that the Constitutional Court's decision did not mean to create a "gray area" within our legal system, but instead aimed to take responsibility for ruling on the rejection, as the religious denomination may have required based on the conflict of attribution, «at least if the reason for rejection is based on a

[58] Colaianni, *Ateismo* de combat, quot., p. 11. See in particular: *Religionsgemeinshaft der Zeugen Jehovas c. Austria*, July 31st, 2008; *Lang c. Austria*, March 19th, 2009; *Savez crkava "Riječ života" c. Austria, December 9th, 2010; Association Le Témoins de Jéhovah c. Francia*, June 30th, 2011. The case involving *Union des Athées c. France*, from July 6th, 1994, also appears especially relevant. In that instance, when examining the admissibility of the appeal, the ECHR states that the different philosophical content of an atheist association in comparison to a religious one does not constitute sufficient grounds to justify a discrimination in judicial treatment when asking to be granted the same privileges.

[59] If such is the case, will the Constitutional Court admit to have caused a conviction in Strasbourg, or will it react by declaring the case law of the European Constitution on Human Rights on the matter to be unconstitutional? According to Ruggeri, *Confessioni religiose e intese tra* iurisdictio *e* gubernaculum, quot., p. 9, this would determine a potential conflict between conventional case law and the sole Paragraph of Article 137 of the Constitution, from which «would stem an opposition to the "counter-limitations" to the domestic acceptance of rules and decisions by the European Courts, even when they are incompatible with Constitutional Court rulings». The author, however, solves the issue by stating, on the one hand, that Article 137 does not represent a supreme principle, while on the other it should be harmonized and balanced with the basic principles of openness to international and supranational law established by Articles 10 and 11 of the Constitution.

[60] In light of this parameter, case-law does not seem to leave much scope to the margin of discretion.

lack of subjective or objective requirements on the plaintiff's side»[61]. The latter interpretation seems hard to read between the lines of the ruling: on the one handitsfinal part, allowing for other public subjects to be recognized as religious denominations for different purposes, proves the Court's clear intention to make the Government's decision unquestionable; on the other, it would be rather curious if, by denying a private collective subject the chance to appeal to the T.A.R., the ruling was potentially elevating it to the same level as a State power in a situation of conflict, through a rather unpredictable interpretation.

It seems instead that the Court has completely embraced the Government's political preoccupations, namely viewing religious liberty as a public safety issue, a position often displayed by our Ministry of the Interior[62]: religious denominations are required to legitimize themselves in the eyes of the Government by attending special training courses[63], in order to gain its political favor and be regarded as trustworthy. Only then, and whenever the government "feels like it", it will decide whether and when to grant them the same freedom it has already bestowed on others.

This argument, in practice, results in a disparity of treatment that has been, is and always will be manifested through an exercise of unquestionable power by the Government and its political majority: the inevitable arbitrary power to grant something to one applicant but not to another, even when the request is the same, with no need to elaborate on the reasons nor on their respective differences: how this result can be compatible with our country's secular principles, postulating "equidistance and impartiality" towards all, is truly difficult to understand[64].

[61] Ferrara, *Corte cost. n. 52 del 2016, ovvero dello svuotamento delle intese Stato-Confessioni religiose e dell'upgrading del giudizio concernente il diniego all'avvio delle trattative*, in www.federalismi.it, 8/2016, p. 5.

[62] On the same issue, cf. Consorti, *La libertà religiosa nel terzo millennio: tra crisi di sicurezza e paura*, in Dal Canto - Consorti - Panizza (editors), *Libertà di espressione e libertà religiosa in tempi di crisi economica e di rischi per la sicurezza*, Pisa 2016, p. 143, as well as the other essays included in the book.

[63] About these courses cf. Consorti (editor), *Religione, immigrazione e integrazione. Il modello italiano per la formazione civica dei ministri di culto stranieri*, Pisa, 2018.

[64] According to the valid opinion of Vita, *Della non obbligatorietà dell'avvio delle trattative finalizzate alla conclusione di un'intesa*, quot., p. 10, «considering the Government's refusal to open negotiations as an unquestionable political decision exposes religious denominations to the risk of receiving unequal treatment, *not based on the content of the agreement they*

Conclusions

The UAAR's request for an agreement has exposed the whole scope of unresolved issues regarding the safeguard of religious freedom in our Constitution.

Both the Government and the Administrative judges seem to want to protect a system dominated by a political power of discretion, setting in stone the 1929 system of concordats and of "tolerated cults", which to this day much of legal doctrine struggles to give up[65].

> The Italian Constitutional Court, with the decision no. 52/2016 has accepted this model, at least for what concerns the procedure for concluding the agreements. According to this decision, the subject has to be considered as a political and not a judicial issue[66].
>
> From the point of view of the scientific debate, it is necessary to stress that inequalities in treatment of religious and philosophical association do exist, and that it is therefore necessary a liberating (and libertarian) effort to createan ecclesiastical law based on equal freedom for all subjects who have a right to it, starting with individuals – whatever they choose to believe in or not. In order to ensure a proper safeguard of religious freedom, this equality should be extended to the communities such individuals belong to, and that self-identify as religious denominations[67].
>
> The case brought to our attention by the UAAR's initiative proves how far we still are from our goal, which after all is not even so lofty: as we have

might propose, but on the mere premise of belonging to a specific religion, and thus, ultimately, on the basis of what might be seen as an ideological prejudice incompatible with the principle of secularism» (emphasis added).

[65] For a different opinion to that outlined in this paper, see Rossi, *Le "confessioni religiose" possono essere atee? Alcune considerazioni su un tema antico alla luce di vicende nuove*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 27/2014.

[66] It will be interesting to see whether the European Court of human rights will share this view.

[67] Self-identification is argued as the basis of religious freedom by Croce, *La libertà religiosa*, quot.; along the same opinion cf. Colaianni, *Confessioni religiose*, quot., p. 372, and Consorti, *Diritto e religione*, quot., p. 91. For an array of different opinions and further readings on the topic, see Ferrari, *La nozione di confessione religiosa (come sopravvivere senza conoscerla)* in Parlato-Varnier, *Principio pattizio e realtà religiose minoritarie*, Torino, 1995, p. 19 and following.; Di Cosimo, *Coscienza e libertà*, Milano, 2000, especially p. 110; Barbieri, *Per una definizione giuridica del concetto di confessione religiosa*, Soveria Mannelli, 2000; Randazzo, *Diversi ed eguali. Le confessioni religiose davanti alla legge*, Milano, 2008, especially. p. 33 and following.

> seen, extending the definition of "religious denomination" to include associations of non-believers, in order to offer them the same legal protection – and privileges – granted to organized religions, is possible by means of governmental practice, as well as being hinted at, if not demanded, by EU law: in terms of their relationship with European institutions, Article 17 of the TFEU treaty confers equal status to religious denominations as well as non-denominational and philosophical associations[68].

The ECHR system, with its precedent set by the Commission's report on the case involving the Atheist Union vs. France, seems to be pushing in the same direction[69]: when ruling on the legitimacy of the appeal, it highlighted a breach of Articles 11 and 14 of the Convention, stating

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[68] On this rule, see the observations made by Margiotta Broglio, *Un'"intesa per gli atei"?*, on *Diritto ecclesiastico*, 2013, p. 17, who judges it as "A provision that, combined with the UE's Charter of Fundamental Rights and with the European Convention of Human Rights... grants to atheists and agnostics a degree of dignity and *status* by treating the individual and collective rights of believers and non-believers as equal, and safeguarding them against any kind of discrimination, even as regards potential «privilege schemes»"; Colaianni, *Diritto pubblico delle religioni*, quot., p. 56 and following; Bilotti, *L'Unione degli Atei e degli Agnostici Razionalisti (UAAR), membro associato della* International Humanist and Ethical Union, *come soggetto stipulante un'Intesa con lo Stato, ex art. 8, III Cost.*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), (July 2011); Durisotto, *Unione europea, chiese e organizzazioni filosofiche non confessional (art. 17 TFUE)*, in *Stato, chiese e pluralismo confessionale*, Rivista telematica (www.statoechiese.it), 23/2016; also, for a more in-depth analysis, cf. Alicino, *Costituzionalismo e diritto europeo delle religioni*, Padova, 2011, especially p. 138.

[69] *Commissione europea dei diritti dell'uomo, Unione degli atei c. Francia, 6 luglio 1994*: "78. La Commission note qu'en droit français, le choix de doter les associations cultuelles d'un statut juridique plus favorable s'explique par des considérations historiques, (voir par.36 ci-dessus). A part le risque de captation d'héritage, le Gouvernement n'a pas fourni de justification à la différence de traitement opérée par la legislation française en matière de libéralités entre les associations cultuelle d'une part et les autres associations d'autre part. La Commission n'aperçoit, quant à elle, aucune justification objective et raisonnable de maintenir un système qui défavorise à un tel degré les associations non cultuelles.
79. La Commission note en effet que la requérante a pour objectif le regroupement de tous ceux qui considèrent Dieu comme un mythe. Elle admet que pareille attitude ne semble pas, de prime abord, de nature à la qualifier comme une associaton cultuelle. La requérante ne fait pourtant qu'exprimer une certaine conception métaphysique de l'homme, qui conditionne sa perception du monde et justifie son action. Ainsi, *pour la Commission, la teneur philosophique, certes fondamentalement différente dans l'un et l'autre cas, ne semble pas un argument suffisant pour distinguer l'athéisme d'un culte religieux au sens classique et servir de fondement à un statut juridique aussi différent*" (emphasis added).

that the different philosophical content of an atheist association compared to a religious one does not constitute sufficient grounds to justify a discrimination in judicial treatment.

Finally, comparative law shows no shortage of examples highlighting the different interpretations on this issue, and how it is in fact of a merely political and cultural nature: in the Belgian system, atheist associations mainly exist to offer moral support to citizens who choose not to turn to a church for help in matters of family, school or personal issues, among many others. This has allowed for the creation of a scheme in favor of all organizations, denominational or not, that perform a socially relevant function by offering help to the people; so much so, that the representatives of non-denominational associations providing moral support enjoy the same State-given salary and pensions as religious ministers. Atheist associations have even joined together in a *Conseil central laïque*, and their acknowledgment as a *culte reconnu* has led to a full equivalence of their representatives, who can now exercise the same legal power as religious ministers.

The status of non-denominational associations in Germany is solidly based on the Grundgesetz'sconnections to the Weimar Constitution, stating that associations created for the promotion of a philosophical ideology must enjoy the same status as religious communities: the *Weltanschauungsgemeinschaft*, a term which includes humanist and atheist associations, are allowed the same status as other public bodies, and thus enjoy the same rights as churches, including the power to tax their members and to be represented in the national school system. Following the principle of equality between religious denominations and philosophical associations, the Land of Lower Saxony has even stipulated a kind of agreement with the local atheist federation[70].

It is frankly not understandable why the same solution cannot, as it should, be adopted in our legal system in order to guarantee equal protection and freedom to those who require it.

As one of the most illustrious jurists of the 20th century stated shortly before he died, the issues "we have encountered in defining freedom of

[70] Cf. Coglievina, *Il trattamento giuridico dell'ateismo nell'Unione europea*, in *Quaderni di diritto e politica ecclesiastica*, 2011, p. 51 and following. See also the observations on the aspects ultimately recalled by Margiotta Broglio, *Un"intesa per gli atei'?*, quot., p. 17.

religion stem from an attempt to preserve this right as special, while at the same time disconnecting religion from the idea of a God. We should instead consider the possibility of abandoning the idea of a special right to religious freedom, together with its strictly binding principles of safeguard, and as a result also its pressing need for rigorous limitations and a precise definition"[71]. This includes the definition of religious denomination, which can only be entrusted to social groups that want to and have an interest in self-identifying as such, unless one is available to leave the definition of the individual attribution to the whims of public powers, as the case at hand seems to do.

[71] Dworkin, *Religion without God*, Harvard, 2013. The quote is from the Italian translation, *Religione senza Dio*, Bologna, 2014, p. 107.