Regulating Religion in Italy

Constitution Does (not) Matter

Pietro Faraguna
University of Trieste
pfaraguna@units.it

Abstract

This article focuses on state-church relations and on the peculiar implementation of the "idea of secularism" in Italy. First, it explores the formal provisions of the 1848 Constitution. Next, it investigates constitutional provisions that came into force in 1948. Finally, it examines how the actors of the living constitution (legislators, the government, judges, and the Constitutional Court in particular) tried to balance and develop the potentially conflicting principles included in the 1948 Constitution in the area of religious freedom, equality, and state-church relations. The article explores three particularly controversial examples: the teaching of religion in state schools; the display of the crucifix in classrooms; and state funding mechanisms of religious denominations. The main claim of the article is that, with regard to the regulation of religion in Italy, the transformation of the constitutional position of religion did not occur within the formal constitution, but in the "living constitution."

Keywords

religion – constitution – Italy – freedom – crucifix – balancing – secularism – laïcité

1 Introduction

Regulating religion in Italy has been a crucial issue throughout its national history. It is not necessary to have a deep knowledge of the history of the Italian state to be aware of this exceptionalism: geography is telling enough. The Italian state, a relatively weak one, which has always had to contend with a strong

religion,[1] is a rare example of a state that contains another independent ecclesiastical (or sacerdotal-monarchical) state entity in the middle of its territory. This article focuses on a specific aspect of this "constitutional" exceptionalism, namely the state-church relations, and on the peculiar implementation of the "idea of secularism"[2] in Italy. The article argues that the constitutional regulation of religion does not reveal much about the regulation of religion in the Italian constitutional experience. This is not because of a lack of constitutional provisions regulating religion and religious freedom. On the contrary, both the pre-republican constitutional charter and the republican Constitution ascribed a prominent role to the regulation of religion. Investigation of the "living constitution," however, reveals that the constitutional provisions have been implemented in diverging directions throughout the history of Italian secularism. To prove this point, the article first compares the formal constitutional provisions of the 1848 Constitution, with a brief overview of legislative and jurisdictional developments of the 19th and the first half of the 20th century. Second, it dwells on the constitutional provisions that came into force in 1948, focusing on the constitutional "compromise" that the Constituent Assembly reached on this matter. Third, the article briefly investigates how legal players of the living constitution (legislators, the government, judges, and the Constitutional Court in particular) tried to balance and develop the potentially conflicting principles included in the 1948 Constitution in the field of religious freedom, equality, and state-church relations. The article elaborates on three particularly controversial examples: the teaching of religion in state schools; the display of the crucifix in classrooms; and state funding mechanisms of religious denominations. Finally, the article argues that, with regard to the regulation of religion in Italy, in order to fully grasp the transformation of the constitutional position of religion in Italy, it is not enough to take the

1 Silvio Ferrari, "Religion in the European Public Spaces: A Legal Overview," in S. Ferrari and S. Pastorelli (eds.), *Religion in Public Spaces: A European Perspective* (2012), 139, 144. In similar terms see also Leopoldo Elia, "Introduzione ai problemi della laicità," in *Annuario 2007. Problemi pratici della laicità agli inizi del secolo XXI. Atti del 21° Convegno annuale* (*Napoli, 26–27 ottobre 2007*) (2008), 13.

2 In the field of law and religion, the transmission of terminology across different legal orders and languages may be problematic. This problem is particularly relevant with regard to the translation of the expression "*laicità* dello Stato." This article uses the expression "secularism," despite the imperfect equivalence of the terms. This ambiguity, however, does not only affect the translation into other languages, but also the understanding of the concept in Italian. Cf. Edoardo Tortarolo, "How Do You Say 'Secular' in Italian?", in R. Ghosh (ed.), *Making Sense of the Secular: Critical Perspectives from Europe to Asia.* Vol. 24. (Routledge, 2012).

formal constitution into account, but also the "living constitution" should be held in due consideration.

2 Before the 1948 Constitution: Catholicism as a State Religion

According to one classification,[3] state-church legal relations in Italy can be divided into four periods: (a) before the unitary state (before 1861); (b) after the unitary state and before the 1929 Concordat; (c) after the 1929 Concordat and before the establishment of the Republican Constitution (1948); and (d) the Republican period (after 1948). The pre-unitarian era forms a highly significant background for the analysis of the development of the Italian legal order: the *Statuto Albertino* (Constitutional Charter of the Kingdom of Sardinia-Piedmont), introduced in 1848, later became the constitutional charter of the Italian unitary state. Article 1 of the Constitutional Charter, adopted in 1848, was apparently very clear with regard to state-church relations: "Catholic, Apostolic and Roman Religion is the only religion of the State. Other existing denominations are tolerated, according to law."

This provision introduced a clear principle according to which first the Kingdom of Sardinia-Piedmont, then Italy was to be considered a Catholic state. The legislative implementation of this principle, however, followed a different path soon thereafter.[4] Immediately following the enactment of the *Statuto Albertino*, several measures were introduced aimed at a strong secularization of the legal order.[5] Law no. 735, of 1848, clearly stated that non-Catholic citizens had to be considered fully entitled to civil and political rights. Two years later, a legislative package, known as *Leggi Siccardi*, marked a significant shift of the state in a liberal direction. Privileges related to the ecclesiastic forum and the right of asylum for those who found refuge in Churches and other places of worship were abolished; sanctions for non-compliance with religious holidays were softened; and strict regulations were enacted to control properties connected with the Church.

---

3 Carlo Lavagna, Margherita Raveraira, and Carla Romanelli Grimaldi, *Istituzioni di diritto pubblico* (1985), 127.

4 The body text presents a concise overview of the implementation of religious freedom and state-church relations before the establishment of the Republic and the new Constitution, in 1946–1947. For further details, see among many others, Arturo Carlo Jemolo, *Chiesa e stato in Italia* (1974).

5 For further details, see Carlo Ghisalberti, *Storia costituzionale d'Italia 1848–1994* (8th edn., Laterza, 2002), 66 ff.

In subsequent years, the government led by Cavour was inspired by a secularizing mindset. Cavour's famous speech summarized this attitude, calling for a "free Church in a free State," a mindset that was then turned into law: in 1855, a significant item was erased from the state budget, with a remarkable reduction of the financial support that the state granted to the Church. Additionally, several religious orders were deprived of legal personality, and thus of the related right to own property. These properties were therefore expropriated by the state and transferred to the *Cassa ecclesiastica.* Only a few years earlier, in 1852, the government tried for the first time to introduce a regulation for civil weddings, which was finally rejected by Parliament. A similar bill was passed some years later, in 1866. In 1859, another important matter was addressed, namely the state regulation of schools and education, a crucial field where the Church had traditionally held a monopoly.

In 1861, the first national Parliament proclaimed the unity of the Italian Kingdom, although until 1870 Rome was not included in the territory of the new Italian state. Between 1861 and 1867, further steps were taken by the Parliament, departing from the principle of confessional state affirmed in the *Statuto Albertino* by means of two laws on the administration of the ecclesiastical estate, which determined the devolution of the ecclesiastic to the state properties and the dissolution of religious corporations. The civil code adopted in 1866 introduced civil marriage and deprived religious marriages of any civil effect. The civil-status register (collecting marital, birth, and death information) was transferred from parishes to municipalities. Art. 1 of the *Statuto Albertino*, proclaiming Italy as a Catholic state, remained formally in force, but legislation was inspired by a clearly liberal attitude, and the separation of the state and the Catholic Church became more and more evident. The above-mentioned legislative measures resulted in a substantial "emptying"[6] of the principle of state confessionalism.

In 1870, the conflict between the Italian state and the Roman Church culminated with the so-called "Porta Pia breach": the capture of Rome was one of the final landmark events of the Italian unification process, followed by the unilateral regulation of state-church relations through the *Legge delle Guarantigie* (law no. 214 of 1871). This law was divided into two parts: the first part regulated the prerogatives of the Pope and the Holy See; the second part regulated the relations of the Church with the Italian state. The first part was relatively

6 This legislative trend has been described as a process of emptying Article 1 of the "Statuto Albertino" by Marco Croce, *La libertà religiosa nell'ordinamento costituzionale italiano* (2012), 34.

generous with the Pope, leaving him complete control over the Vatican, Lateran, and Castel Gandolfo, guaranteeing immunity from Italian jurisdiction, and granting it the right to have its own army corps. The Italian state also granted the Hole See an annual provision of more than three million lira.

The second part introduced unilateral conditions that were officially rejected by the Pope. Nevertheless, the Church successively complied with its provision *de facto*. The principle of Italy as a Catholic state, clearly enshrined in the first Article of the Constitutional Charter, was not reflected in the living constitution of the pre- and post-unitarian Italian Kingdom. The Roman Catholic Church was far from being a political actor: in 1874,[7] the Pope "suggested" that Italian Catholics not take part in the political life. His "*non expedit*"[8] created a gap between believers and citizens that lasted for many decades.

During these years, the process of secularization of the Italian legal order continued at the legislative level. In 1873, the faculties of theology at state universities were suppressed, and Catholic religious education was reduced to a non-compulsory subject in public schools. In 1889, a new criminal code was adopted. Among its many innovations, the *Zanardelli* Code treated all religions and denominations equally from the criminal point of view. One year later, the so-called *Crispi* Law secularized assistance and charity institutions. At the end of the 19th century the Italian state presented a paradoxical picture: formally a fully confessional state, and yet, its process of secularization was so advanced that some authors recognized it as a "fully secular state."[9]

The first improvement in the relations between the Italian state and the Roman Catholic Church occurred in the first decades of the 20th Century. Beginning with the encyclical of 1905 on Catholic action in Italy, for the first time, the Pope authorized Italian Catholics to take part in general elections. In 1919, Pope Benedict XV officially abrogated the "*non expedit,*" and consequently, the Italian Popular Party was founded in the same year. Still, it was only after the Lateran Pacts of 1929 that state-church relations followed a completely new path. After the rise of fascism, in 1922, Mussolini's government sealed the so-called "conciliation" between the Italian Kingdom and the Holy See through the Lateran Treaty and its concordatarian implementation. The Lateran Pacts represented a breakthrough in the historical process of secularization of the

7 First steps in this direction had been taken by the Vatican starting from 1866: see Paolo Pombeni, "La rappresentanza politica," in Raffaele Romanelli, *Storia dello Stato italiano dall'Unità a oggi* (Donzelli, 2001), 82.

8 Literally meaning "it is not expedient" to take part in parliamentary elections.

9 Luciano Musselli, "Libertà religiosa e obiezione di coscienza," in *Digesto discipline pubblicistiche* (1994), 220.

Italian state. Article 1 of the Treaty included a clear identification of the Italian state as a confessional state: "Italy recognizes and reaffirms the principle established in the first Article of the Italian Constitution dated March 4, 1848, according to which the Catholic Apostolic Roman religion is the only state religion." The wording of the provision was unusual: the principle in question was not only recognized but also *reaffirmed*. The use of this unusual wording implicitly acknowledged that the principle of the confessional state, already included in the constitutional charter of 1848, had been progressively abandoned in practice.

3 The Debate of the Constituent Assembly (1946–1947): A Complex Map of Provisions

The conciliation reached with the Lateran Pacts provided the backdrop for the discussion of religious freedom, specifically the provisions regulating the relation between the Italian state and the Catholic Church in the Constituent Assembly.[10] This discussion assumed a crucial role in the process of constitution making that took place between 1946 and 1947. The number and length of the speeches and debates on the constitutional regulation of religion and on state-church relations, both in the commissions and in the plenary sessions, is impressive when compared with the amount of debate devoted to other provisions of the Constitution.[11] Then Prime Minister Alcide De Gasperi spoke

10 The legal literature that addressed the rich and complex issue of the debate concerning state-church relations has developed rather quickly in the first years after the adoption of the Constitution: among many others, see Aldo Capitini and Piero Lacaita, *Gli Atti Dell'Assemblea Costituente sull'art. 7* (Lacaita, 1959); Vittorio Falzone, Filippo Palermo, and Francesco Cosentino (eds.), *Costituzione della Repubblica Italiana illustrata con i lavori preparatori* (Colombo, 1948); Attilio Tempestini, *Laici e clericali nel sistema partitico italiano: la Costituente e l'articolo 7* (Franco Angeli, 1987); Giuseppe Casuscelli, *Concordati, intese e pluralismo confessionale* (A Giuffrè, 1974); Francesco Finocchiaro, "Articolo 7," in Giuseppe Branca (ed.), *Commentario della Costituzione* (Zanichelli, 1975); Gianni Long, *Alle origini del pluralismo confessionale: il dibattito sulla libertà religiosa nell'età della Costituente* (Società Editrice Il Mulino, 1990); Alessandro Ferrari, *La libertà religiosa in Italia: un percorso incompiuto* (Carocci, 2012); Marco Croce *supra* note 6.

11 This debate found a "prominent place" in the overall framework of the constitution making process (see Arturo Carlo Jemolo, *supra* note 4, 296.). At the same time, this fact was partly contradicted by the explicit statements of many members of the Constituent Assembly, who considered that the debate on state-church relations was not a priority for

only once as a member of the Constituent Assembly, and it was to present his views on state-church relations.[12]

The text approved in 1947 (which came into force on January 1, 1948), as all constitutions, was meaningful both in its provisions and its silences.[13] The new republican Constitution was and remains important both for what it states and for what it does not. A significant omission regards the constitutional regulation of religion. A proposal to include a mention of the Holy Trinity or some invocation of God in a preamble was rejected. The delicate issue of the religious and moral premises of the Italian state has been strategically skirted by the decision not to include any preamble to the Constitution. The republican constitutional text begins with Article 1. The difference between Article 1 of the *Statuto Albertino* and of the republican Constitution is highly relevant to the religious identification of the Italian Republic: whereas Article 1 of the *Statuto* proclaimed Catholicism to be the official religion of the state, Article 1 of the republican Constitution states that Italy is a "democratic republic founded on labor."

The outcome of the debate in the Constituent Assembly led to the formulation of at least five articles aimed more or less directly at regulating religion. Four of these articles are perfectly in line with the postwar European pluralist constitutional tradition. Article 3 introduces the principle of equality without distinction, among others, of religion. Article 8 introduces the principle of equal freedom of religious denominations before the law.[14] Article 19

Italian citizens (see above all the intervention of the socialist leader, Pietro Nenni, who affirmed that for his group, the smallest agrarian reform was much more important than the concordatarian relations with the Church: see the plenary session held on March, 10, 1947, *La Costituzione della Repubblica nei lavori preparatori della Assemblea costituente*, vol. I (1970), 305).

12 Constituent Assembly, meeting of March 25, 1947, *La Costituzione della Repubblica nei lavori preparatori della Assemblea costituente*, *supra* note 11, 629.

13 Michael Foley, *The Silence of Constitutions: Gaps, "Abeyances" and Political Temperament in the Maintenance of Government* (1989), 61. London.

14 The second and third paragraphs of Article 8 are part of the peculiar picture of the Italian constitutional regulation of religion, providing a general regulation that is applicable to denominations other than Catholicism. These paragraphs should be considered a direct consequence of the decision to provide the Catholic Church with unprecedented special constitutional protection under Article 7 of the Constitution. Initially, the provisions of Articles 7 and 8 were intended to be incorporated into the same article. The second and third paragraphs of Article 8 provide that denominations other than Catholicism have the right to self-organization and that their relations with the state are regulated by law, based on agreements with their respective representatives. A complex system of agreements

introduces the principle of individual and collective religious freedom, declaring that all are entitled to freely profess their religious belief in any form, individually or with others, as well as to promote and celebrate rites in public or in private, provided these are not offensive to public morality. Finally, Article 20 provides that no special limitation or tax burden may be imposed on the establishment, legal capacity, or activities of any organization on the ground of its religious nature or its religious or confessional aims.

The debate on these provisions in the Constituent Assembly has been lively, but its intensity was not even comparable to the heated debate on the drafting of Article 7. This Article consists of two paragraphs: the first one affirms that the state and the Catholic Church are independent and sovereign, each within its own sphere. With regard to this paragraph, disagreements emerged on alternative wordings of the sentence rather than on the substantial underlying principles. It was about the content of the second paragraph that the temperature of the debate reached its peak. This paragraph states that the relations between the state and the Catholic Church are regulated by the Lateran Pacts, and that amendments to such Pacts that are accepted by both parties shall not require the procedure of constitutional amendments.

The incorporation of the Lateran Pacts in the Constitution appeared to be a crucial political point for the Christian Democratic Party. The political significance of this inclusion prevailed over any legal consideration. Some of the most prominent members in the Assembly expressed clear and vehement criticism of the way Article 7 was formulated, describing it as a "striking logical mistake and a legal scandal."[15] The criticism was both formal and substantive.

---

developed with many, albeit not necessarily the most numerous denominations, creating a suspect discrimination against denominations that do not benefit from any agreement. This discrimination was at the basis of a recent case brought before the Constitutional Court. In this case, the Court heard a jurisdictional dispute between the Executive and the Court of Cassation concerning a decision by the latter upholding an appeal brought by an association of atheists that had sought an order requiring the President of the Council of Ministers to start negotiations with a view to concluding an agreement with it as a religious organization under Article 8 of the Constitution. The Court accepted the application by the Executive and overturned the Court of Cassation ruling, concluding that the decision in question was a discretionary matter for the Executive, which could be held accountable for it as a political matter before Parliament, but not before the courts. See Corte Costituzionale, Judgement No. 52 of 2016.

15 These were the used by the member of the Constituent Assembly and renowned philosopher, Benedetto Croce, at the meeting of 11 March 1947, *La Costituzione della Repubblica nei lavori preparatori della Assemblea costituente*, *supra* note 11, Vol. I, 338. Similarly,

Formally, the Constituent Assembly had to swallow the incorporation of an Act that bore the signature of the fascist leader, Benito Mussolini. Substantively, many provisions of the Lateran Agreements, including the Concordat, were at odds with the new pluralistic constitutional regime. Among the many sources of embarrassment, one could mention Article 1 of the Lateran Treaty, which referred to the principle of the confessional state enshrined in the first Article of the old Constitution. In addition to this matter of principle, the Lateran Agreements and the Concordat contained other provisions that were clearly incompatible with the republican constitution in crucial fields such as marriage law, education, public employment, etc.[16] Nevertheless, the serious concerns raised following the recognition of the Lateran Pact by the Constitution should not obscure the importance of the new foundational principle of the Republic: "Italy was now framed on pluralism, freedom and equality."[17]

4 The "Religious Peace" and Its Implementation

The outcome of the debate in the Constituent Assembly was a complex map of provisions, with a high likelihood of internal contradictions. Against such a background, the resolution of potential conflicts had been implicitly delegated by the constituent power to successive settlements, to be enacted through a range of means: ordinary legislation, administrative acts, and above all, a revision of the Lateran Pacts. The necessity of such a revision had been broadly

---

Piero Calamandrei, one of the most prominent lawyers of the Assembly, expressed its firm opposition to the formulation adopted by the majority of the Assembly, both in the Commission and in the plenary session. See, in particular, his statements at the meeting of January 27, 1947, of the Commission for the Constitution (in charge of introducing a draft in the plenary session, see *La Costituzione della Repubblica nei lavori preparatori della Assemblea costituente*, *supra* note 11, vol. VI (1970), 147), and the one at the meeting of the plenary session of March 4, 1947 (see *La Costituzione della Repubblica nei lavori preparatori della Assemblea costituente*, *supra* note 11, vol. I, 154).

16 One of the clauses that was often referred to as proof of the incompatibility between the republican Constitution and the Lateran Agreement (by the interposition of the Concordat) was Article 5 of the Concordat, which prohibited apostate priests or those under ecclesiastical censure from teaching or involvement in Italian public services, and was clearly inconsistent with Articles 3, 21, and 51 of the republican Constitution.

17 Marco Ventura, "The Rise and Contradictions of Italy as a Secular State," in P. Cumper and T. Lewis (eds.), *Religion, Rights and Secular Society: European Perspectives* (Edward Elgar Publishing, 2012), 126, 131.

acknowledged during the debate in the Constituent Assembly: Christian Democrats agreed on this point as well, repeatedly affirming that the 1929 Concordat needed some immediate, although minor, revisions that the Catholic Church would have certainly welcomed. But the broad agreement on the urgent need to update the Lateran Pacts, which had clearly emerged in the Constituent Assembly, faded away soon after the enactment of the Constitution. A revision of the Lateran Pacts was introduced only in 1984. Despite the freezing of modifications to the Lateran Pacts, significant developments occurred between 1948 and 1984, a key role being played by the Constitutional Court, a novel constitutional actor within the republican framework of government.

The Constitutional Court delivered its first judgments affirming the compatibility of ordinary legislation with the new constitutional provisions regulating religion and religious freedom in the field of criminal law. In its decision n. 125 of 1957, the Court rejected the claim that the contested blasphemy laws (punishing whoever committed blasphemy against the "state religion") violated the Constitution. The referring judge argued that after the enactment of the Constitution, there was no "official state religion" anymore, therefore the criminal provision protecting a (non-existing) state religion had to be considered unconstitutional. The Constitutional Court, however, upheld the blasphemy laws. According to the Court's interpretation of Articles 7 and 8 of the Constitution, the Constitution provided "a principle of equality of religious denominations, but this principle did not imply the necessity of a common legal regulation of the relations of each denomination with the state."[18] The Court reinterpreted the content of the criminal provision, arguing that the Catholic religion had to be considered not as the official religion of the state, but as the religion of "almost the totality" of Italian citizens.

Similar arguments led the Court to reject two other cases in the following years, both concerning blasphemy laws. Again, the referring judges considered the criminal provisions unconstitutional, as their wording implied the identification of Catholicism as the state religion. In both cases, the Constitutional Court dismissed the question of constitutionality, declaring that the "Catholic religion deserves special protection by criminal law, because of the broader and deeper effect that offenses to it have on social relations."[19] The Catholic religion deserved special protection by criminal law not because of an alleged status of official state religion, but because of the factual element of being "the

18 Corte Costituzionale, Judgment no. 125 of 1957 [all translations of the judicial decisions or Italian scholarship cited in this article are the author's].

19 Corte Costituzionale, Judgment nos. 79 of 1958 and 39 of 1965.

religion professed by the vast majority of Italian citizens." The "majoritarian argument" emerged also in Court rulings in other areas. In a series of judgments, the Court upheld legislation that introduced a religious wording of the oath in both civil and criminal proceedings. The main argument was again that the formula of the oath "mirrors the conscience of the Italian people, consisting of a vast majority of believers."[20] Therefore, the religious oath implied only belief in God, and was suitable to any religious denomination.

Similarly, in its judgment no. 14 of 1973, the Court again upheld blasphemy laws that accorded special protection to Catholicism. For the first time, however, the Court issued a clear warning to the legislator. According to the Court, "the legislator should adopt a revision of the norm, extending criminal protection against any offense of the religious feeling of non-Catholics."[21]

The approach of the Constitutional Court to the Concordat was slowly changing. The Court was no longer reluctant to have its say on delicate matters: only a few years earlier, at the beginning of the 1970s, the Court pronounced some landmark rulings that introduced the category of the "supreme principles of the constitutional order." According to the Court, these principles prevailed over the Concordat, and the Court declared itself competent to strike down any Concordatarian norm that was possibly deemed to contradict these principles. This happened for the first time in 1982, when the Court struck down the norm that provided for automatic civil recognition of ecclesiastical rulings on nullifying marriages. Not only was this automatism deemed unconstitutional, it was specifically found to be incompatible with a supreme principle of the Constitution, namely the right of defense provided by Article 24 of the Italian Constitution.

The incremental emancipation of the legal order from the political deadlock of the Constituent Assembly was not limited to the jurisprudence of the Constitutional Court. Still, until the middle of the 1980s, the Parliament did not directly challenge the terms of the "religious peace" agreed upon in 1947: the modifications of the Lateran Pacts that in 1946–1947 all parties agreed were necessary remained dead letter until 1984. But an increasingly secularized society began exerting intense pressure, which had a significant effect on the legal order.[22] Divorce and abortion were legalized through a complex political

20 Corte Costituzionale, Judgment no. 57 of 1960.

21 Corte Costituzionale, Judgment no. 14 of 1973.

22 On the meaning of the referenda on divorce and abortion as landmark events in the developments described in this section, see Francesco Margiotta Broglio, "La questione del concordato dal dopoguerra al referendum," in S. Berlingò and G. Casuscelli (eds.), *Stato democratico e regime pattizio* (1977).

process that involved many actors: the legislation, the Constitutional Court, and the electoral body, which upheld the authorizing legislation on divorce and abortion, with two referendums in 1974 and 1981. The fact that liberal views prevailed over the strong opposition of the Catholic Church in the referendums on abortion and divorce showed that the influence of Catholic doctrine on Italian public opinion was slowly declining. Against this background, the internal dialectic of Christian Democratic Party was ever more influenced by its liberal wings.[23] Finally, at the beginning of the 1980s, for the first time in the history of the Republic, the Italian government was headed by non-Catholic prime ministers, namely the republican Giovanni Spadolini (1981–1982) and the socialist Bettino Craxi (1983–1987). Divorce and abortion were only the highpoints of a general trend of secularization of the legal order that did not address the Concordat directly, but affected all legislative areas. Parliament passed significant reforms with regard to the Workers' Statute of Rights, the regulation of the national public broadcasting authority, the penitentiary code, and the national healthcare system. All these reforms contained specific provisions attesting to a trend of secularization of the legal order.[24]

The general conditions, therefore, seemed to lead toward a substantial weakening of the terms of the compromise reached in 1947. The Concordat of 1929 seemed highly vulnerable when faced with a much less restrained Constitutional Court, a much more secularized public opinion, and a political weakening of the pivotal role of the Christian Democratic Party in the government.[25] A new agreement between the Vatican Secretary of State, Agostino Casaroli, and then socialist Prime Minister, Bettino Craxi, was signed in 1984. After 37 years, the promise to update the Concordat in accordance with republican constitutional principles was finally, if partially, fulfilled. The new Concordat stated that "the principle of the Catholic religion as the sole religion of the Italian state, originally referred to as the Lateran Pacts, shall be considered

23 Francesco Malgeri, *Storia della Democrazia cristiana: La DC negli anni ottanta dal delitto Moro alla segreteria Forlani* (*1978–1989*) (1989).

24 The Workers' Statute of Rights protected the religious freedom of workers at places of employment. The national public broadcast reform, the new penitentiary code and the public healthcare system reform granted easier access for non-Catholic denominations to public television and to spiritual assistance for inmates and patients. For further details, see Alessandro Ferrari, *supra* note 10, 57 ff.

25 In the view of many commentators, the new Concordat was introduced to save the state-church relations "before the Constitutional Court could destroy the [old] Concordat." Among many others, see Marco Ventura, *supra* note 17, 133–134.

to be no longer in force."[26] Although the provision may be considered legally superfluous, because the principle of state religion should have been held incompatible with the 1948 Constitution from the outset, this explicit bilateral recognition was far from irrelevant. When the Senate discussed the ratification of the new Concordat, the Prime Minister repeatedly referred to the fully-fledged secular character of the state.[27] "Minor" revisions erased the most evident inconsistencies between the 1929 Pacts and the 1948 constitutional principles.[28]

After the revision of the Lateran Pacts, the role played by the Constitutional Court became even more important. In 1988, a landmark judgment dismissed the majoritarian argument it had propounded earlier. In the view of the Court, the fact that the overwhelming majority of Italians was (and still are) Catholic should be considered legally irrelevant.[29] Although this statement had a minimal effect in the short term, its broader implications were remarkable: the majoritarian argument had been one of the pillars of the religious peace

---

26 The abolition of the state religion principle was spelled out in point 1 of the additional protocol.

27 Then Prime Minister, Craxi, using unequivocal language, mentioned "the choice of a fully-fledged secular state" and the "effective condition of secularism and independence" that the state gained through the new agreement, and the formal qualification of the state as "secular and non-confessional." See the parliamentary debate held on August 3, 1984, in the Senate, now available at http://www.senato.it/static/bgt/listaresaula/9/1984/ (references at 74, 76, and 77).

28 Among the most significant provisions of the Concordat of 1929 that were abrogated in 1984 are the following: the ban against employment by the state of apostate priests; the duty imposed on the clergy to address pray for the prosperity of the King of Italy and of the Italian state during mass; the bishops' oath before the head of the Italian state; the dispensation in the case of non-consummated marriages; the teaching of the Catholic doctrine as fundamental to public education; and the ban against priests joining political parties.

29 The Court affirmed that "any discrimination based on the fact that a majority or minority of people belong to a given denomination is unacceptable," Corte Costituzionale, Judgment no. 925 of 1988. This approach welcomed a scholarly orientation that dismissed the majoritarian argument as incompatible with the core principles of constitutionalism: "There is no majority, no matter how large it may be, which with its strength could validate arguments that are invalid from the point of view of democracy." Cf. Gustavo Zagrebelsky, "One Among Many? The Catholic Church between Universalism and Pluralism," in S. Mancini and M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press, 2014), 247, 262.

signed in the Constituent Assembly,[30] and the Constitutional Court, in the exercise of its counter-majoritarian duties, finally rejected it.

One year later, in 1989, the Constitutional Court pronounced one of its most important rulings to date, further developing the notion of the supreme principles of the constitutional order that the Court had started to frame since the early 1970s. For the first time in its case law, the Court not only judicially recognized Italy as a secular state, but also established the principle of the secular state as a supreme one, deciding a case concerning the teaching of Catholic religion in public schools. This principle of state secularism resulted from the combination of several constitutional principles[31] and differed significantly from the French conception of *laïcité*. "Italian *laïcité*" did not imply "indifference toward the experience of religion," but represented "the state guarantee that religious freedom will be safeguarded, in a framework of denominational and cultural pluralism."[32] An active benevolent attitude toward religious freedom seemed to underpin the Court's conception of the principle of *laïcité*. Other remarkable ruling were pronounced in subsequent years: the Court's earlier rulings on blasphemy laws were overruled,[33] and the supreme principle of Italy as a secular state was reaffirmed and further specified. The non-indifference was interpreted as a constitutional blessing for the state to exercise legitimate promotion of religion as a phenomenon, although lately this benevolent "active" attitude toward freedom of religion became more hesitant in some recent rulings of the Court. In 2000, the Court took some steps toward what appeared to be abandoning that conception of the constitutional understanding of freedom of religion defining the principle of secularism simply as "equidistance

30 During the debate, then Prime Minister, De Gasperi, affirmed in his only intervention as a Member of that Assembly, that according to the latest official data, of 45,526,770 inhabitants, 45,348,221 declared themselves to be Catholics.

31 The supreme principle in question resulted from a combination of seven constitutional principles: the recognition of the inviolable rights of the person (Article 2); the principle of equality without distinction of religion (Article 3); the principle according to which the state and the Catholic Church are independent and sovereign, each within its sphere (Article 7); the principle of equal freedom of religious denominations before the law (Article 8); the freedom of religion (Article 19) and the ban against any special limitation on any organization on the ground of its religious nature or its religious or confessional aims (Article 20).

32 Corte Costituzionale, Judgment no. 203 of 1989.

33 See Corte Costituzionale, Judgments Nos. 440 of 1995, 329 of 1997, 508 of 2000, 327 of 2002, and 168 of 2005.

and impartiality"[34] of the state towards any denomination. This approach had been recently confirmed by a decision of the Constitutional Court, in which it was reaffirmed that the principle of *laïcité* envisaged "impartiality and equidistance with regard to each religious faith."[35]

The modification of the Lateran Pacts and the new trend of the Constitutional Court appeared to open a new era in the constitutional experience of the Italian Republic. Did this mean that Italy turned into a new variety of secular state, a *stato laico* in a rigid sense, implying a strict separation between state and religion, where the state is a neutral player (if not a "non-player") in religious matters? This would probably be a hasty conclusion. Successive developments showed that the Court's neutral understanding of the constitutional principle of secularism did not (and still does not) find perfect reflection in the "living constitution."

5 Between Constitutional Norms and Legislative/Administrative Implementation: Three Difficult Cases

Below, the article addresses three ongoing critical problems in state-church relations that show how Italian secularism[36] still has its own peculiar characteristics. The article seeks to explain how the equidistance of the state from all denominations has been interpreted as a sort of "equi-closeness," which finally still admits preferential treatment of the majority denomination.

Regulating religion is not a matter of mere abstract balancing. There are innumerable practical issues related to secularism, which can cause disagreements regarding their solutions. The disagreements may result in conflicts, and conflicts must be settled within the legal order. In the Italian republican

34 Corte Costituzionale, Judgment No. 508 of 2000.

35 Corte Costituzionale, Judgment No. 52 of 2016.

36 The article does not seek to identify an ideal model of the principle of secularism, or a common core of different variations of that principle. All countries where secularism has been proclaimed and observed as a constitutional principle have their own characteristics, and there is no ideal or pure model of secularism to which all its variants adhere. The aim of this article is to consider some of the peculiarities of the Italian experience of secularism, and to investigate the role played by constitutional principles in the process of transformation of this principle. Only in this limited sense does the article refer to "Italian secularism," avoiding any contrasting with other experiences of secularism and constitutionalism. The author is grateful to the anonymous reviewer for remarks concerning possible misunderstandings of the aim and scope of the article.

experience, there are countless conflicts stemming from the interpretation of the right balancing of constitutional principles, and mapping these would far exceed the scope of this article. Some of these conflicts, however, have significantly affected the legal order and involved broad academic debates. This article focuses on three case studies touching upon three topics: religion in state schools; the crucifix in the classrooms; and the funding of organized religions.

5.1 *Religion in the Curriculum of Public Schools*

In 1984, the new Concordat introduced far-reaching modifications with regard to the role of the Catholic Church in public schools. Traditionally, the Catholic Church had played a central role in education in Italy. The 1929 Concordat explicitly acknowledged such a role, recognizing "the teaching of the Christian doctrine in the form received by the Catholic tradition as the capstone and cornerstone of public education" and a compulsory subject in both primary and high schools. The mandatory teaching of the Catholic doctrine persisted in the curricula of state schools until 1984, when the modification to the Concordat introduced an opt-out clause. According to Article 9, paragraph 2, of the Agreements of 1984, "the Italian Republic will continue to grant that the Catholic doctrine will be taught in state schools." The change was that "in respect of the freedom of conscience and of the educational responsibility of parents, the right to choose whether or not to take advantage of this educational option shall be guaranteed to everybody." The terms of this new Pact between the state and the Catholic Church remained somewhat vague with regard to the fate of students who chose to opt-out. Will they be given the option to attend an alternative subject? Could this alternative teaching be a "parallel" mandatory subject? The new Concordat did not address these and other "practical" questions directly. At the time, the matter was regulated through legislation that was challenged before the Constitutional Court. After a few interlocutory decisions of inadmissibility, the Court delivered its landmark ruling, where the principle of the secular state was "discovered" as a supreme principle of the constitutional order. The Court decided that the teaching of the Catholic doctrine in public schools could not be considered unconstitutional *per se*. On the contrary, the opt-out clause guaranteed the compatibility of the new regulation with the principle of the secular state, as long as the opt-out mechanism was organized in a non-discriminatory manner. The Court specified that this condition was fulfilled only if the opt-out led to a situation of mere non-obligation: "the provision of an alternative compulsory subject would bias the questioning of the conscience, which, on the contrary, should be preserved whole and

focused on its object: the exercise of the constitutional freedom of religion."[37] Nevertheless, the innovations introduced after 1984 did not dissipate all doubts regarding the compatibility of this system with the principles of the Constitution. Three main objections are commonly raised. First, the state is charged with the financial burden of Catholic religious education only.[38] Second, the Conference of Bishops and Diocesan Bishops maintain a strong hold over the selection of teachers and the approval of school books and curricula. Third, the opt-out system may be reasonably considered capable of nudging students in the direction of the majoritarian choice.[39]

5.2 *The Crucifix in the Classroom*

One of the most debated practical problems of secularism in Italy concerns the display of the crucifix in public buildings. This issue emerged in several cases, with different peculiarities in every case. First, we should distinguish instances of displaying the crucifix in public buildings where an official state function is being carried out (schools, hospitals, tribunals, polling stations, etc.) from those in which the crucifix (or any other religious symbol) is displayed in a public space. The freedom to wear religious symbols in public places is protected by the Constitution, but the constitutionality of the exposure of a certain religious symbol in schools, tribunals, polling stations, etc. has been widely debated and challenged in the Italian courts. The outcomes of these challenges revealed many contradictions and disagreements between various

37 Corte Costituzionale, judgment no. 203 of 1988.

38 Denominations that signed an agreement with the state may conduct religious education in schools in which students, their parents, or the teachers demand the teaching of a different religion or the study of religion as a "cultural phenomenon." In these cases, the financial burden is borne fully by the denomination.

39 Figures clearly suggest the presence of such a nudging effect. At present, the ratio of students opting out of religion class is approximately 10%. It is almost impossible to determine how many Italians are Catholics, but it is significant that the 10% figure is much smaller than other reported figures concerning religious preferences in Italy. Civil marriages or marriages celebrated following non-Catholic rites amount to more than 40%. Taxpayers who do not indicate their preference of the Catholic Church in the allocation of the 0.8% of the total sum of income tax collected by the state (see below) amount to less than 40%. Although these cases are different and not entirely comparable (cases are reported of Catholic parents opting out of religion class, Muslim families opting in, Catholic spouses celebrating a civil wedding, and non-believers spouses being married in a Catholic church), the significant disproportion in the figures seems to attest to empirical evidence of a nudging effect.

jurisdictions. Space limitations do not allow this article to address all these cases. This article discusses only the best known and most debated case of the crucifix in the classroom, which also bears witness to the contradictions and disagreements between various courts.

In 2002, Mrs. Lautsi asked that the crucifix be removed from the classrooms attended by her children. The governing body of the school rejected her request. Mrs. Lautsi appealed the rejection before an administrative judge. The first section of the competent Administrative Tribunal submitted a constitutional reference to the Constitutional Court, asking for a review of the duty to display the crucifix under the principle of secularism.[40] The Constitutional Court dismissed the case as inadmissible, as the duty to display the crucifix was not grounded in a "first-order" legislative provision, but in "second-order" regulatory provisions.[41] After the ruling of inadmissibility by the Constitutional Court, the case was referred back, not to the section that submitted the constitutional reference, but to another one.[42] The third section of the Administrative Tribunal, ruling on the merits of the case, rejected the applicant's appeals. According to the Administrative judges, the crucifix should be considered "not only as a symbol of a historical and cultural evolution, and thus as a

40 Constitutional laws regulating the jurisdiction of the Constitutional Court establish that a law cannot be directly challenged before the Court by any party, and that questions of its constitutionality can be raised only by judges in the course of applying that law.

41 The legal source of the duty to display the crucifix is as old as it is uncertain. Allegedly, the obligation dates back to a royal decree of 1860 of the Kingdom of Piedmont-Sardinia, predecessor of the unitary Italian state. This decree provided that "each school must … be equipped … with a crucifix." This obligation has survived subsequent regimes and has been confirmed by a series of "second-order" regulations in the 1920s. According to Art. 134 of the Italian Constitution, the Constitutional Court has jurisdiction "over controversies concerning the constitutional legitimacy of laws and enactments having force of law issued by the state and regions." Second-order regulatory measures are not subject to the jurisdiction of the Constitutional Court because a constitutional review is enacted by the disapplication of unconstitutional acts by judges. In the case at hand, this disapplication was problematic if not impossible. On these issues see, among many others, Valerio Onida, "Sulla 'disapplicazione' dei regolamenti incostituzionali (a proposito della libertà religiosa dei detenuti)," *Giurisprudenza Costituzionale* Vol. 13. (1968), 1032; Andrea Pugiotto, "Sul crocifisso la Corte Costituzionale pronuncia un'ordinanza pilatesca" (2004). Retrieved 17 February 2017, http://www.forumcostituzionale.it/wordpress/wp-content/uploads/pre_2006/590.pdf.

42 This detail seems to be relevant because the attitude of the section that submitted the Constitutional reference to the Court seemed to be quite different on the merits.

symbol of the identity of our people, but furthermore as a symbol of a system of values inspiring our Constitutional Charter, including freedom, equality, human dignity, toleration, and secularism."[43] This ruling clearly spelled out an argument that would become a recurrent one in the *Lautsi* saga: the symbolic transformation of the crucifix from a religious artefact into a cultural fact. The saga was not over yet, and the most important jurisdictional milestones were yet to come. Having exhausted domestic judicial remedies,[44] in 2006 Mrs. Lautsi decided to apply to the European Court of Human Rights. The applicant alleged a violation of the right to education guaranteed by Article 2 of the first Protocol and of the rights to freedom of thought, conscience, and religion, guaranteed by Article 9 of the Convention. The applicant also argued that the display of the crucifix represented a discriminatory treatment of non-Catholic parents and children, in comparison with Catholic ones, and thus violated Article 14 of the Convention, which prohibits discrimination based on religion. In its ruling of 2009, the Second Section of the European Court of Human Rights unanimously ruled that displaying a crucifix "restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not to believe."[45] The argument of the cultural transformation of the meaning of the crucifix, introduced by the Italian government in the proceedings, was rejected: in the view of the Court, the crucifix may have a variety of meanings, but the religious one predominates.[46] The Court also stated that the display of the crucifix in the classroom infringes the rights protected by the Convention "because the restrictions are incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education."[47]

The decision of the Second Section raised a heated debate, with divergent reactions, both in the national political community[48] and in the international

43 TAR Veneto, No. 1110/2005, in *Foro it.*, 2005, III, p. 329 ss., para. 11.9.

44 The second decision of the Administrative Tribunal had been appealed to the Council of State, the highest administrative jurisdiction. The latter upheld the decision of the Tribunal in its ruling No. 556/20006.

45 *Lautsi*, 2009 Eur. Ct. H.R., Para. 57.

46 *Ivi*, Para. 51.

47 *Ibid.*

48 Reactions in the domestic political debate have been in part extreme, with what may be interpreted as a call to resist the decision of the European Court. On these reactions, which included mayoral ordinances imposing the duty to display the crucifix, see Marco Croce, *supra* note 6, 267.

legal[49] and political[50] ones. The Italian government requested to refer the case to the Grand Chamber, which in 2011 reversed the ruling of the Second Section with a decision adopted by 15 votes to two. The main argument of the Grand Chamber relied on the margin of appreciation: in the view of the Court, "the decision whether crucifixes should be present in state-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent state." The Grand Chamber accorded the states a wide margin of appreciation, treating the ban on indoctrination as the ultimate limit of state discretion. This approach was also supported by the acknowledgment that there was no European consensus on the question of the presence of religious symbols in state schools.[51]

Although the Court chose to frame the question in the narrowest possible terms,[52] relying on the margin of appreciation as a strategic way out from any abstract considerations on the compatibility of the display of the crucifix in the classroom with the principle of secularism, its reasoning led to some substantial disagreement with the Second Section. Above all, the Grand Chamber found that there was no evidence that the presence of the crucifix had any influence on students, and identified the crucifix as a "passive symbol." In other

---

49 Numerous non-governmental organizations, including many lawyers and intellectuals, submitted briefs as *amici curiae* to the Court.

50 Ten members of the Council of Europe intervened in the *Lautsi* case as *amici curiae*, submitting briefs to the Grand Chamber, and eleven others publicly questioned the ruling of the Court.

51 The Court reported that in the great majority of member states of the Council of Europe, "the question of the presence of religious symbols in State schools is not governed by any specific regulations." In a few states, the display is expressly forbidden (the former Yugoslav Republic of Macedonia, Georgia, and France, except in Alsace and the *Département* of Moselle). In some other states, in addition to Italy, the display is expressly prescribed (Austria, Poland, in some German *Länder,* and some regions of Switzerland). A third category consist of states where the issue is not expressly regulated, but the crucifix is *de facto* displayed (Spain, Greece, Ireland, Malta, San Marino, and Romania). See paras. 26–28.

52 Regarding this strategy, see the critical remarks of Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (2012), 149. The ruling of the Grand Chamber raised harsh criticism on the one hand and satisfaction on the other hand. The range of responses was as wide as the one that followed the ruling delivered by the Second Section in 2009. According to one commentator, the wide variation in the responses confirmed the view of the Court that there was no European consensus on the issues, therefore, granting the state a broad margin of appreciation was a wise solution: Cf. Malcom D Evans, "Neutrality in and after Lautsi v. Italy," in J. Temperman (ed.), *The Lautsi papers: multidisciplinary reflections on religious symbols in the public school classroom* Vol. 11. (Martinus Nijhoff Publishers, 2012), 329.

words, the applicant had not proved any injury: her subjective perception was considered insufficient to prove that any harm has occurred.

5.3 *The Problem of State Funding*

One of the most critical aspects of compatibility of state-church relations with the constitutional principles is the one that concerns the public funding of Churches, especially the selective funding of some Churches and religious denominations only. Before 1984, the system of funding was based on a regulation first introduced by Law 878/1855, modified in the 1920s, and finally by the Agreements signed in 1929. The Italian state agreed to link the so called "ecclesiastical benefices" (an amount of property connected to the office exercised by each clergyman) established by the Catholic Church to a certain system of funding. Each clergyman could administer the returns on his own *beneficium* directly. But if these returns were below a certain amount, the state supplemented it with a sum of money, the so-called "stipend-cheque" or "supplementary of adequacy." In short, the state provided financial support by means of the general budget for the clergy of the Catholic Church only.

Since 1984, this system has been reshaped, with the introduction of a more innovative system. Benefices were abolished, and new institutions were charged with the support of the clergy that was transformed into a stipendiary order. The contribution from the general budget to the clergy was abolished with the abrogation of the stipend-cheque, and in its place, two main sources of funding were introduced.[53] One was based mainly on a private flow of money, the other one on a public source of funding. The former consists of voluntary grants bestowed by tax payers in favor of designated ecclesiastic bodies of certain religious denominations. Although the funding flows from the private sector, the public budget is indirectly affected, because these grants can be deducted from the taxpayer's income in the annual income tax return up to a certain amount (€1,032.91).

The system of public funding is regulated through a relatively complex set of provisions. According to this system, taxpayers can choose to allocate a quota of 0.8% of their tax liability on their personal income in favor of the Catholic Church or any other denomination that signed an agreement with the state and has agreed to participate in the system.[54] Taxpayers are free to

53 The legal framework of indirect financing and taxation privileges is too broad and fragmentary to be addressed in this article.

54 The agreement between the state and a religious denomination does not necessarily require inclusion in the 0.8% funding system. To date, the Mormons are the only ones who signed an agreement but decided not to participate in the system.

decide whether to allocate this share to the state or to express no preference as to its destination.[55] The amounts accruing from unexpressed choices of taxpayers are distributed between the various recipients, in proportion to the choice made by the rest of the population that did express a preference. This legal arrangement has significant concrete consequences, as the percentage of taxpayers who express a choice is continually decreasing. According to the latest data available,[56] fewer than 45% of taxpayers express a choice; the other 54% do not check any box. This means that the sums associated with the unexpressed choice, which are distributed according to the preferences of the taxpayers who did check a box, are higher than those collected with an explicit destination. In other words, taxpayers do not merely determine the destination of their own 0.8%, but also contribute to the decision on how the total sum collected by the state will be divided. It is not surprising that the Catholic Church benefits most from this redistribution system. Indeed, 80% of the preferences are in favor of the Catholic Church, so that roughly four fifths of the money are allocated to the Church.

The unequal concrete effect of the redistribution system has been vehemently criticized by a majority of legal scholars.[57] The system has been considered inconsistent with the Constitution in many respects. It has been argued that the principle of equality without distinction of religion would be infringed by any state budget allocation in favor of a certain denomination. Moreover, the individual dimension of the religious freedom would be violated, as not all religions and denominations are included in the list of that can be financed

---

55 The sums received by the state in this manner are intended to be used in support of extraordinary measures against famine worldwide, natural disasters, aid to refugees, and conservation of cultural monuments. The share accorded to the Catholic Church is intended to be used for the worship needs of the population, the support of the clergy, and welfare measures benefiting the national community or third world countries. Nevertheless, there is uncertainty concerning the effective use of these sums, as attested to by a highly critical report of the Italian Court of Auditors, published on November 19, 2014, and available at http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_centrale_controllo_amm_stato/2014/delibera_16_2014_g.pdf.

56 Data are derived from the above-mentioned report of the Court of Auditors, *supra* note 55, 15.

57 Among many others, see Silvio Ferrari, "La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)," in G.B. Varnier, V. Parlato, *Principio pattizio e realtà religiose minoritarie* (1995), 43; P. Consorti, *Diritto e Religione* (2014), 138. Additionally, a report of the Court of Auditors (*supra* note 54) touched on this and other critical points of the legislation concerning religious funding in Italy.

through the 0.8%. Therefore, the collective dimension of the principle of equal freedom among religious denominations would also be violated, as the condition for accessing both channels of direct funding is the establishment of a concordat or an agreement. As a result, many denominations are excluded, either because they cannot or do not want to conclude such an agreement, or because their application has been rejected by the state, which enjoys large discretionary power in making these decisions.

6 Conclusion: Regulating Religion in Italy: Constitution Does (Not) Matter

The three examples above show how the peculiar path of Italian secularism still admits of preferential treatment in favor of the majoritarian denomination. There is still a long way to go before reaching the full settlement of the original constitutional disagreement reflecting conflicting constitutional principles, which at the same time provide for the equality of all religious denominations and introduce a differentiated constitutional *status* by distinguishing the legal position of the Catholic Church from that of other denominations.[58] The display of religious symbols, the teaching of the Catholic doctrine in public schools, and the privileged system of funding are examples of an overall differentiated status. The revision of the Lateran Pacts, which occurred in 1984, contributed to blurring the picture of contradictions that remain present. The differentiated treatment has been described as a four-tier differentiation:[59] at the first tier, denominations and religious groups may constitute themselves as non-recognized associations, following the general regulation provided by the civil code for any kind of association. At the second tier, denominations and religious groups may obtain legal capacity based on a general law regulating only groups with religious aims.[60] At the third tier, there are denominations that have concluded an agreement with the Italian state and benefit from more

58 Other denominations "have to adapt themselves to 'living in a diaspora,' that is, in a social, political, and legal environment of others, not including them; where their arguments of a common good life do not have public relevance; where they must be satisfied with being 'tolerated,' or, alternatively, must adapt to being 'assimilated.'" See Gustavo Zagrebelsky, *supra* note 29, 259.

59 Alessandro Ferrari and Silvio Ferrari, "Religion and the Secular State: The Italian Case," in Javier Martinez-Torrón and W. Cole Durham, *Religion and the Secular State: National Reports* (2010), 431, 440.

60 Legge 24 giugno 1929, n. 1159.

favorable provisions, if compared with the ones regulating the other denominations that have no agreement. Finally, at the fourth tier, the Catholic Church is benefiting from a differentiated and unique constitutional status.

A first conclusion that may be drawn is that the developments in religious regulation in Italy convey a constitutional paradox. On one hand, the *Statuto Albertino,* in its first Article, envisaged a confessional state, but an investigation of the living constitution reveals a different picture. A clear secular attitude has characterized the actions of the legislation from the outset of the Italian national history until the conclusion of the Lateran Pacts, in 1929. It was only in 1929 that the living constitution in ecclesiastical matters was brought in line with the formal constitution. The principle established in the first Article of the *Statuto Albertino*, according to which the Catholic Apostolic Roman religion is the only state religion, was *reaffirmed* in 1929 and adopted in practice only in the following years.

On the other hand, the republican Constitution was inspired by liberal and pluralistic views concerning ecclesiastical matters, with the limited exemption of the second paragraph of Article 7. On ecclesiastical matters, however, the living constitution, introduced with the Lateran Pacts in 1929, remained practically untouched for many years after the new Constitution came into force. It took more than 30 years for the actors of the living constitution to introduce some modifications, with a pivotal role played by the Constitutional Court. The 1980s represented a turning point in the redesign of the living constitution. At the same time, the living constitution of the *Statuto Albertino*, formally declaring a confessional state, was characterized by a secular legislative trend more so than was the republican constitutional regime, which was formally inspired by denominational pluralism. Preferential treatments are still in force in many respects, some based on legislative silences.[61] Under the extremely wide umbrella of the Constitutional compromise in matters of regulation of religious freedom and of state-church relations, the legislative body has decided in recent years not to play any role.[62] The issue of the display of the crucifix provides an apt example, where the uncertain regulatory framework

61 According to a different interpretation of the same facts, one could speak of legislative omissions instead of silence. See Alessandro Ferrari, *La libertà religiosa in Italia*, *supra* note 10, 95 ff.

62 The inaction of the legislation in this is far from new in the Italian experience. According to a prominent author, an ecclesiastic policy has been missing in many crucial moments of Italian republican history: see Arturo Carlo Jemolo, "Politica Ecclesiastica," *Società civile e società religiosa* (1959), 461.

dates back to the 1920s.[63] On one hand, this legislative silence makes it possible to maintain the religious peace that the Constituent Assembly was aiming for; on the other, the persistent legislative silence has frequently placed the courts, both national and supranational, in the embarrassing situation of dealing with specific cases within an uncertain regulatory framework. With the exception of the ruling of the Second Section of the ECtHR, domestic and supranational courts have so far decided to be sympathetic to this silent approach.

A second conclusion may be drawn: new challenges are emerging that test the adequacy of the old approach in handling them. Two developments seem to be particularly relevant:[64] (a) a growing number of residents are not members of any religion, and therefore demand improvements in the negative religious neutrality of the state; (b) increasingly, residents follow not only numerically marginal religions but also religions that are not considered traditional in the history of the country. In other words, Italian society seems to be facing post-secular challenges, which may contain an explosive mixture in a polity that has never reached fully-fledged secularism. Most recent political developments show a tendency toward prohibitionist religious regulations. Local regulations and administrative acts have been adopted to protect the religious peace against new threats.[65]

Against this background, there is sufficient reason for doubting that the silent approach will continue to be a workable compromise for the future. About twenty years ago, most scholars noticed that it was probably wise to avoid abrupt interventions through decrees and judicial decisions, rather letting time decide what would be the destiny of religious symbols in the European public space.[66] Admittedly, on such delicate matters it may be wise to avoid clear-cut decisions, but a great deal of time has elapsed already, and it seems

63 Many other examples could be brought. Some are less known, but just as problematic as the display of the crucifix in the classrooms of state schools: for example, a general legislative framework for all religions and denominations is still missing. The only legislative measure still in force is the one on "admitted cults," dating back to 1929.

64 See Silvio Ferrari, "Religion in the European Public Spaces," *supra* note 1, 140.

65 See Silvio Ferrari, "Conclusion" in R. Cristofori and S. Ferrari (eds.), *Law and Religion in the 21st Century: Relations between States and Religious Communities* (2013). The author elaborates on an episode that took place in Milan in 2009. At the end of a demonstration against an Israeli military intervention in Gaza, a few thousand demonstrators, mostly Arabs, met up in the largest square in Milan, in front of the Duomo, where they knelt down, facing Mecca, and prayed. After a few days, the Home Affairs Minister issued a directive aimed at preventing a repeat of such events.

66 Silvio Ferrari and Ivan C Iban, *Diritto E Religione in Europa Occidentale* (Bologna, 1997), 36.

appropriate for the legislation to make clear political choices.[67] These choices may be selected from a range of options: from "permissive laws in the true sense,"[68] to solutions that show preference for a sort of religious subsidiarity, where decisions on the presence of religious symbols and other crucial issues are taken at the lowest possible level.[69] The only limits are the ones stipulated by the Constitution of 1948. In other words, it is finally time for the Constitution to truly matter in regulating religion.

---

67 Giuditta Brunelli, "Simboli collettivi e segni individuali di appartenenza religiosa," in *I problemi pratici della laicità* (2008), 275, 299.

68 The true sense is "the sense of the jurist Modestino, according to the formula specified in the Digest: '*Legis virtus est imperare, vetare, perimttere, punier.*'" Cf. Leopoldo Elia, *supra* note 1, 13.

69 Cesare Pinelli, "Esposizione del crocefisso nelle aule scolastiche e libertà di religione," 56 Giurisprudenza Costituzionale (2011), 947.