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The Principle of Secularism as Product of the Constitutional Interpretation in Italy

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Introduction

This paper deals with the discovery of the principle of secularism by the Italian Constitutional Court. It is an important example of the activism of the Court. I think we cannot celebrate the 60th anniversary of the Italian Constitution without taking into consideration the important role played by the Constitutional Court. By enforcing the constitutional provisions, often in solitude, facing the inactivity of the legislator, the Court has been an important "constitution-maker", at least when the living constitution is concerned.

In the first part I will point out in a very short way the articles of the Constitution related to the religion, with some references at the political and cultural context in which they were elaborated by the Constituent Assembly.

In the second part I will focus on the role of the Constitutional Court, by examining two main stages in its jurisprudence. In the first cases the Court justified the existing legislative discrimination between the Catholic religion and the other religions, playing a rather dismissive

role, without enforcing the new Constitution. In the second phase, beginning in the late 1970, the Court played a more active role and, facing the inactivity of the Parliament, started a long labour towards the elimination of those discrimination, mainly by using, as a tool, the new discovered, non written, principle of secularism.

Finally, I would like to point out some recent administrative cases on religious symbols. In spite of the jurisprudence of the Constitutional Court, I think these recent cases testify the long pattern that still remains to be covered in order to achieve a full secularisation, 60 years after the enactment of the new Constitution.

1. The ambiguous attitude of the Italian 1948 Constitution towards religion

As I indicated, the Italian Constitution of 1948 does not explicitly refer to the principle of secularism, differing from other Constitutions, such as the 1958 French Constitution.

This principle, moreover, has not been codified in any other article of the Italian Constitution.

Nevertheless, the Italian Constituent Assembly, whose members belonged mostly to the catholic party, the Christian-Democratic Party, faced the problem of the choice between secularism and confessionalism.

Moreover, this problem was not clearly solved in the Italian Kingdom, in the aftermath of the unification, in 1861.

On the one hand, the unification of Italy was realized against the will of the catholic Church, causing a prejudice to its secular power (the so called «Roman question»), and for many decades, because of the Pope's «non expedit» Christians did not participate in the national political life (for example, they did not use to vote): their complete reintegration was fully achieved only in the aftermath of the First World War.

On the other hand, Article 1 of the Constitution of the Kingdom of Sardinia 1848, then Constitution of Kingdom of Italy (the "Statuto Albertino"), never formally repealed, stated that «Catholic religion is the only State religion ». On the basis of this principle, the Fascist regime negotiated with the Church the Lateran Pacts, in 1929, which granted to the Church a number of privileges, in various fields, such as the education and the fiscal regime. According to Article 1 of the Treaty, « 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».

In the Constituent Assembly, in 1947, the agreement between the left-wing parties (the socialist and the communist party) and the catholic party, that constitutes the very foundation of the Republic, left some ambiguity on this point.

We can remind, among the principles defined by the Constitution as «fundamental principles», Article 3.1, on equality.

Article 3: « All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions ».

Furthermore art. 7, concerning the relations between the Church and the State, giving «constitutional covering» to the agreements signed between Mussolini and the Church, is the most clear expression of ambiguity.

Article 7: The State and the Catholic Church are independent and sovereign, each within its own sphere.

Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments.

The relations between the State and the other religious denominations are regulated by the following article.

Article 8: All religious denominations are equally free before the law.

Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law.

Their relations with the State are regulated by law, based on agreements with their respective representatives.

Finally, in the in the Part of the Constitution on rights and freedoms there are Articles 19 and 20:

Article 19: Anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality.

Article 20: No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organisation on the ground of its religious nature or its religious or confessional aims.

Furthermore, we can quote some more general norms, which can be also relevant in this matter:

Article 2: The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.

Art. 21: Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.

2. The role of the Constitutional Court. The first years: the Catholic religion as "the religion of the majority of the Italians"

Although there were some ambiguities in these articles, it was at least clear that the laws granting privileges to the Church were inconsistent with the Constitution, above all with art. 3 introducing the principle of non discrimination.

Nevertheless, for a long period, the political parties, the legislator, many scholars, the courts used to act as though the Constitution did not exist. This phenomenon of non implementation of the Constitution did not concern only these Articles of the Constitution. During the Cold War, in many aspects of the constitutional life the continuity with the past prevailed.

The delay in the implementation is so far more evident and serious in this field: the revision of the Concordat dates back only to 1984; the first agreements between the State and the religious denominations date back to the Eighties; up to now, a general law on religious freedom has not been passed while the projects are still blocked at the Parliament; the jurisprudence itself started to change only at the end of the Seventies.

Concerning the Constitutional court decisions, we can quote the decisions on the oath and the criminal protection of religions, as examples of the caution of the Court during the first decades.

In general, the different treatment of catholic religion compared with the other religions has been justified by the Court by considering that the meaning of Articles 7 and 8 is not absolutely the same: equal freedom, but not parity in the relations with the State, is recognised. On the opinion of the Court, Art. 1 of the Lateran Pacts (according to which the catholic religion is the only State religion) should be considered still in force, due to a quantitative standard, that is the fact that the majority of the Italians belong to the catholic religion.

Concerning the oath, all the claims against formulas with religious elements were rejected, because «this formula reflects the conscience of the Italian people, formed mostly by religious persons. Therefore, the formula, asking to the person who is giving the oath to declare that he

believes in god, is suitable for every denominations, even not the catholic one» (58/1960 ; 15/1961 ; 85/1963). Until a 1979 decision (117/1979), the Court does not consider at all negative religious freedom, that is the freedom of the atheists. In this case, for the first time the Court states that freedom of conscience of atheists is a part of religious freedom as negative freedom. It affirms also that the majority principle can not be invoked in order to justify a discrimination, because «Articles 19 and 21 (freedom of expression) protect the religious opinion of the person, and it is not relevant if this is a minority opinion».

On the criminal protection of religions (especially with reference to the crime of blasphemy) the Court justified a different and stronger protection in favour of the catholic religion because the latter is the religion of the majority of the citizens (although it is not any more the State religion): considering the wider and stronger social consequences engendered by the offences to this religion, a different criminal protection is justified (decisions n. 125/1957, 79/1958, 39/1965, 14/1973, 188/1975).

On blasphemy, it is emblematic the case of Article 402 of the 1930 penal code – together with other norms providing a special protection for the catholic religion -, justified by the importance recognized to Catholicism as a factor granting the unity of the nation, in the political ideas of the fascist era. In this meaning, the catholic religion was considered as "the only State religion". A special protection, even in the penal sector, was given to the catholic religion, considered as a constitutive element of the State, differently from the other denominations which were only "admitted" and protected according to Art. 406 of the penal code. Following the downfall of the Fascism, the problem of the compatibility with the Constitution of a system granting a special protection to the catholic religion had to be solved. On the opinion of the Court, the special protection granted to the catholic religion in penal law was not in contrast with the constitutional dispositions, because it was consistent with the special position granted by the Constitution to the Church, by the reference, through Art. 7, to the Lateran Pacts and by the declaration, in Articles 3, 7, 8, 19 and 20 of the principle of religious freedom. This trend was confirmed in decisions n. 125/1957 and 39/1965 of the Constitutional Court: in the latter, the Court rejected the question of constitutionality of Art. 402 of the penal code with reference to Articles 3, 8, 19 and 20 of the Constitution, remarking that this penal norm does not imply any discrimination of religion, because, on one side, it refers without distinctions to all the subjects who have to respect the penal norm and, on the other, a stronger protection of the catholic religion is justified because this religion is professed by the majority of Italians.

It is even worth noting that during the whole first period, the Court refused to control the constitutionality of the agreements between the State and the Church and that, when it admitted to control them, it exercised this competence only in order to verify their conformity with the supreme principles (decision n. 30/1971). On this basis, the unconstitutionality of a norm of the Concordat was declared for the first time only in 1982 (decision 18/1982, declaring the unconstitutionality of the norm giving civil effects to certain decisions of the ecclesiastic tribunals on invalidity of

marriages, considering that the supreme principle of the right to an effective jurisdictional protection, not protected in this procedure, was infringed).

3. The role of the Constitutional Court. The second phase: discovering the supreme principle of secularism

In Italy the principle of secularism, absent as I said in the text of the Constitution, is mainly the product of judicial interpretation, in particular starting from decision n. 203 of 1989 (concerning the problem of compulsory religious education in public schools). With this decision, the Constitutional Court promoted secularism to the status of supreme principle of the constitutional system. This principle is based in Articles 2, 3, 7, 8, 19 and 20 of the Constitution. In particular, this principle has been defined by the Court as «one of the aspects of the form of State outlined by the Constitution of the Republic».

In this way, the Court refused a notion of the religion as a mere element of the private life of the individuals. Therefore, with reference to religion, the perspective adopted by the Constitutional Court was not abstention/neutrality, but "positive" secularism, that is a valuation "in favour of" the religion. In this perspective, the Court admitted "positive" legislation, supporting religious activities, since it aims to fulfil a worthy interest.

According to the Court, the principle of secularism «entails not the indifference of the State for religions, but the guarantee of the State for the protection of religious freedom, in a system of a confessional and cultural pluralism»: indeed «the secular position of the State-community […] does not represent a consequence of the ideological postulates of neutrality, hostility or confessionalism of the State-person, or of its elites, as regard to a specific religion or faith, but it aims to fulfil the concrete needs of the civic and religious conscience of the citizens».

In this first decision, it has been underlined the peculiar meaning of «secularism Italian style», where secularism does not mean indifference for the religious phenomenon, but is synonymous with «confessional pluralism». It implies not «equidistance» but «equiproximity» between State and religion (or, properly, the religious denominations).

The decision underlines clearly, in the same way, the link between, on one side, secularism and prohibition of discriminations and, on the other, secularism and freedom of conscience. The latter (also as religious freedom) should be granted a particularly strong protection in the constitutional system and should be protected from direct and indirect violations.

The simultaneous presence of the *favor* with regard to the religious phenomenon and the protection of freedom of conscience is also expressed, with a particularly strong wording, in the

decision n. 13 of 1991, where it is stated that, although teaching religious education in public school is a "manifestation" of the principle of secularism (since secularism in the Italian system admits giving religious education in public schools), the position of non religious people must be absolutely protected as well, considering the choice of conscience to attend or not these classes.

In addition, in the seminal decision n. 203 of 1989, the principle of secularism has been defined by the Court as a supreme principle, that is a super-constitutional principle, which might entail the unconstitutionality of constitutional laws (the law by which the new Concordat was ratified is considered as a constitutional law) and cannot be modified by constitutional amendment. Many scholars pointed out that this is a «stratagem», which has been used by the Court to verify the constitutionality of the norms of the Concordats, that, otherwise, were excluded from the control of constitutionality (having the same force as the Constitution, according to the prevalent interpretation of Article 7).

We can discuss whether this new judicial trend, that begins with the 1989 decision, should be considered as a consequence of the social and political evolution, or as an expression of judicial activism.

I think that the first point of view is correct: we should remember that a drastic change occurred after the agreement for the amendment of the Concordat in 1984: the additional protocol to Art. 1 of the Concordat states that "the principle, originally referred to in the Lateran Pacts, of the catholic religion as the only State religion in the Italian State is not in force any more".

4. The consequences of secularism: the difficult path towards the equality of the religious denominations in the most recent Constitutional Court decisions

The outcomes of the decision of 1989 should not be overestimated: a number of scholars pointed out that this principle is not an autonomous principle, different from the principle of non discrimination.

In fact, this principle is quoted in three order of cases in the years following 1989.

a) In the cases concerning the equality of denominations other than the catholic one: with reference to the nature of public institutions of the Jewish communities (declared unconstitutional by decision 259/1990) or the different treatment between denominations which signed an agreement with the State or did not, in order to grant subventions to places of worship (195/1993).
b) In the decision on the criminal protection of religious feeling, in order to declare the unconstitutionality of every discrimination (440/1995 ; 329/1997 ; 508/2000 ; 327/2002 ;

168/2005). The Court decides not to refer any more to the quantitative standard, opting in favour of the principle of equal protection of conscience of every person. Nevertheless, the penal sanction is not suppressed, but extended to every religion: it is possible to observe here, again, the «secularism Italian style».

For example, in decision n. 508 of 2000 – adopted after the amendement of the Concordat – the Constitutional Court finally declared the unconstitutionality of Art. 402 of the penal code, on blasphemy. On the opinion of the Court, according to the constitutional principles of equality of every citizen without distinction on the basis of religion (Art. 3 Const.) and equal freedom before the law of every religious denomination (Art. 8 Const.), the behaviour of the democratic and republican State has to be equidistant and impartial with reference to every religious denomination and not only the catholic one, because "it should be guaranteed the equal protection of every person who chooses a faith without regard to the religious denomination". However, this should not prevent, according to the Court, the possibility to rule, by bilateral agreements (thus introducing differential norms) the relations between the State and the other religions through the Concordat (for the Catholic church) or the agreements (for the religions other then the catholic one).

«On the basis of the fundamental principles of equality of every citizen without distinction of religion (Art. 3 of the Constitution) and equal freedom of every religious denomination before the law (Art. 8 of the Constitution), the State behaviour with regard to them has to be equidistant and impartial; the quantitative standard of the wider or smaller adherence to a religious confession (decisions n. 925 of 1988, 440 of 1995 and 329 of 1997) and the bigger or lesser size of the social relations which may arise from the violation of the rights in one of them should not have any relevance (again decision n. 329 of 1997); on the contrary, the equal protection of the conscience of every person who believes in a faith is imposed, having not regard to the religious confession to which he belongs to (again decision n. 440 of 1995); in any case, it is possible to rule by bilateral agreements, thus introducing differential norms, the peculiar relations between the State and the Catholic church through the Concordat (Art. 7 of the Constitution) and between the State and the religious confessions other then the catholic one through the agreements (Art. 8).

This equidistant and impartial position reflects the principle of secularism, which the Court derived from the system of the constitutional norms. This principle belongs to the status of "supreme principle" (decisions n. 203 of 1989, 259 of 1990, 195 of 1993 and 329 of 1997) and characterizes our form of State as a pluralistic one, where different faiths, cultures and traditions have to coexist, respecting freedom on equal basis (decision n. 440 of 1995)». (Const. Court, decision n. 508 of 2000, *Cons. Dir.*, 3)

c) Moreover, in decision 334/1996, where the Constitutional Court declared the unconstitutionality of the "decisive oath" formula, which had to be taken "before the

divinity and the men". The Court forbade the State to make use of religious obligations in order to strengthen the effectiveness of its rules.

«The distinction between distinct "orders", which essentially characterizes the fundamental or "supreme" principle of secularism or non confessionalism of the State, as shaped in several occasions in this Court case-law (decisions n. 203 of 1989 and 195 of 1993), means that the religion and the moral duties deriving from it must not be imposed as means in order to fulfil the ends of the State».

But since the Court aims even to avoid any prejudice against the position of religious believers, it declares the unconstitutionality of the same formula with reference to the responsibility before men.

«Indeed, not only by declaring unconstitutional exclusively the references to the divinity, it might appear that a sort religion of humanity is introduced, but also, by saving the reference to a specific value, implicitly all the others are excluded, and, as a result, freedom of conscience of religious people, to whom the oath, fully legitimately, has a religious meaning, would be violated».

In this long judicial evolution, by this time, some points are clear and can be underlined:

a) the complete guarantee of the negative dimension of religious freedom: as a consequence of the interpretation of Articles 3 and 19 of the Constitution it can be asserted that the citizens must not be discriminated on the basis of their religion and that religious pluralism does not limit the negative freedom not to profess any religion; in case, the only religious feeling worth protecting by penal law is the individual one, including the "negative" religious feeling;
b) the numeric standard is not proper in the evaluation of the reasonableness of the differentiations between citizens belonging to different religions and atheists, because the principle of equality is based on the protection of minorities against the abuses of the majorities.
c) Nevertheless, defining the principle of secularism is still problematic.

The scholars provide two different interpretation of the constitutional jurisprudence.

On one hand, they speak about a "relative secularism", that is a "favor religionis", in underlining the case-law denying the indifference of the State in front of religions and the need to preserve (even by positive actions) the freedom of religion.

On the other, they state that this principle does not entail a "confessional pluralism", but a pluralism where the different cultural options and traditions from one hand, and the atheist from the other hand, have to be considered on equal basis.

5. The paradox of the "confessionalisation" of the principle of secularism in the administrative Courts decisions on religious symbols

This unclear definition of the principle of secularism is evident in the decision of the ordinary and administrative courts, in particular with reference to the core argument of the Italian public debate in the last years, that is the exposition of religious symbols (the Crucifix) in public places.

The Court of Cassation (Cass., IV penal section, 439/2000), by enforcing the principle of secularism nullified a punishment against a member of a polling station who refused to act because in the polling station there was a Crucifix. The Court stated that public places must be neutral, as a consequence of the principles of secularism and pluralism affirmed by the Constitutional Court.

On the contrary, the administrative judges (TAR Veneto 1110/2005; Council of State, 556/2006), affirmed a notion of «relative secularism».

One Regional Administrative Court declared that the principle of secularism is not violated by the exposition of the Crucifix in schools: the Crucifix, as a symbol of the Christian religion, based on the tolerance, is *per se* a symbol of secularism (!). In the appeal decision, the Council of State confirmed that the principle of secularism is not infringed by the exposition of the Crucifix because this symbol expresses the civic values of national identity. In the Italian cultural context, according to the Council of State, the Crucifix is the symbol representing in the best way the fundamental values, including the principle of secularism. «The values of tolerance, mutual respect, worth of the human being, human rights, freedom, autonomy of conscience before the authorities, solidarity, refusal of every discrimination which characterizes the Italian civilization» are expressed in Italy in the Crucifix, because they take their roots in the Christian tradition. The symbol, interpreted in such a way, does not infringe the principle of religious freedom. In a way that has been considered by many commentators as "a provocation", the Council of State stated that «this symbol, raising values of tolerance and solidarity, is particularly important in Italian public schools in this historical period, when more and more non-EU students are attending school, because it can help in transmitting the values of openness to diversity and refusal of every

fundamentalism». Moreover, «in this moment of turbulent meeting with different cultures, … it is essential to reaffirm our identity also by a symbol ».

We are witnessing, as the scholars pointed out, at the trend to «'confessionalize' the principle of secularism».

In the administrative case-law, most of the indications of the constitutional court disappear, in particular the «equidistance and impartiality with reference to every religious denomination", the irrelevance of the quantitative standard or of the social reactions following the violation of their rights, the «equal protection of the conscience of every individual» (508/2000), the «equal protection of religious feeling» (168/2005) and the freedom of conscience.

Also the Constitutional Court has been touched by the problem of the Crucifix. It dismissed the challenge against the dispositions providing the exposition of the Crucifix in public schools, considering that the act ruling the exposition of the Crucifix in classrooms was a bylaw, a source of law excluded from its jurisdiction (389/2004).

The decision of the Court cannot be considered, as it often happens, as a mere attempt to avoid a hard case. Considering the above quoted judicial trends, the decision on the notion of secularism seems to be a responsibility of the politics, not of the Courts.

This decision affects more and more the definition of national identity itself and, since an explicit indication is lacking in the Constitutional text, it is still open. The democratic principle demands that the people's representative make a decision on such fundamental matter. In the meantime, face to the silence of the legislator, the role of the Courts is uncomfortable and require an extra-wisdom to avoid conflict of values or of civilization.