Source: CHURCH AUTONOMY: A COMPARATIVE SURVEY (Gerhard Robbers, ed., Frankfurt am Main: Peter Lang, 2001).

Topic(s): Religious autonomy

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CHURCH AUTONOMY AND RELIGIOUS LIBERTY IN ITALY

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I. FOREWORD

This report strictly follows the suggested outline, merging some paragraphs and deleting the queries that do not appear interesting for the Italian situation. In order not to make the bibliography too heavy, we have tried not to mention more than one work per paragraph. With respect to the decisions of the Constitutional Court, only the respective number and year are mentioned, since they are very easy to find in Italian juridical reviews, abstracts, etc. The decisions of other Courts are instead mentioned in full.

II. FUNDAMENTAL UNDERSTANDING OF CHURCH AUTONOMY – HISTORICAL AND CULTURAL PRECONDITIONS –

In Italy, church autonomy is a value affirmed in two separate articles of the 1947 Constitution. Article 7 affirms, with respect to the Catholic Church, much more than autonomy. The first paragraph of said article affirms in fact that **State ad Catholic church are, each in its respective order, independent and sovereign.** Article 8 is made in two parts: the first, referring to all religious confessions[1], provides that **All religious**

[1] The term 'religious confessions', new in Italian law at the time of the approval of the Constitution, was studied in order to include the Catholic church, as well as other

confessions are equally free before the law. The second part provides that **Religious confessions other than the Catholic one have the right to organise themselves according to their statutes, insofar as the latter do not conflict with Italian juridical order** and provides that their relationship with the State is **regulated by law on the basis of agreements with the respective representatives.** With respect to the relations between State and Catholic Church, article 7 provides that their relationship be ruled by the *Patti Lateranensi*. The latter are a group of agreements executed in 1929, including the Treaty which, resolving the "roman issue", established the creation the State of the Vatican City, a Concordat and other minor agreements. As clearly established in the same article 7, the *Patti Lateranensi* can be reviewed upon agreement of the parties thereto. Pursuant to said provision, the Concordat has been fully amended in 1984.

Autonomy of the churches has therefore two different constitutional grounds and two different "measures": with respect to the Catholic Church, independence and sovereignty are mentioned, and the relations are consequently of international law. With respect to the other religious confessions, the autonomy is instead within national law; they can organise themselves according to their respective statutes, insofar as the latter do not conflict with Italian juridical order. Nonetheless, it is the highest degree of autonomy granted by the Constitution to any kind of social grouping, and the relations with the State are regulated by bilateral agreements, although not according to international law relations.

The historical origin of such complex structure dates back to the creation of Italian State, born in opposition to the Catholic Church and through the military occupation of the Church State between 1860 and 1870. The *Patti Lateranensi* of 1929, defined as "*Conciliazione*" [reconciliation], saw the Catholic Church acknowledge the legitimacy of the Italian State. The latter acknowledged to the Church the independence of a pretended State (a few square kilometres), the juridical existence as a separate entity of international law of the Holy Seat, and a privileged relation of a concordat nature.

The Fascism executed the *Patti Lateranensi*. Once the regime was terminated, at the time of the new constitution, the issue of the "constitutionalisation" of the former was raised, and it was strongly wanted by the Catholic party, holding the comparative majority: it was obtained

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religious organizations (previously referred to as cults), including those that cannot technically be defined as churches, such as, for instance, the Jewish ones. With reference to the matter, *G. Long*, Alle origini del pluralismo confessionale, Il dibattito sulla libertà religiosa nell'età della Costituente, Il Mulino, Bologna, 1990.

through article 7. The non-Catholic political forces consented to it, more or less *obtorto collo,* but obtained that guarantees for minorities be included in the Constitution. Article 8 has said origin, acknowledging to other confessions a different *status* respect to the one of the Catholic Church, but however superior to that of the other social groupings. Article 8 remained not implemented for many years, and only in 1984, after the amendment to the Concordat with the Catholic Church, the first agreement with other confessions was executed.

It is likely that, at the time of the approval of the 1947 Constitution, two religious groups were thought of: the Jews, the presence of which in Italy dates thousands of years, and the "Protestants", term by which at the time were mentioned mainly the Waldensians, a confession typically Italian, originated from medieval heretical movements and which became in the XVI century a reformed church. After Italian unity (1861), several other confessions appeared in Italy, mainly of an Anglo-American origin, (Methodists, Baptists, Adventists and, since the beginning of the century, Pentecostals). Only after World War II and the entering into force of the Constitution, Jehowa's Witnesses had a strong diffusion in Italy; recently, also new religious movements are diffusing. In the recent years, a strong immigration flow made Islam become the second religion present in Italy, although comparatively few of its members are Italian citizens.

From a mathematical point of view, presently the large majority of Italian citizens belong to the Catholic Church, although a spread-out secularisation implies that the practising members are much less. Estimates indicate a million Muslims (among which, as mentioned, only few tens of thousands are Italian citizens), some hundreds of thousands of Jehowa's Witnesses and Pentecostals, about a hundred thousand members of the "historical" Protestant churches (Waldensians, Methodists, Baptists, Lutherans, Adventists) and about the same number of members of other confessions including those having and oriental origin.

III. NORMATIVE FRAME[2]

In the preceding paragraph, the main constitutional provisions concerning the autonomy of religious confessions were mentioned. The Constitution, however, includes two other provisions concerning the same topic: article 19 (freedom to profess one's own religious faith in individual or associated form) and article 20. The latter is typical of Italian legal system and confirms

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[2] *R. Botta*, Codice di diritto ecclesiastico, Giappichelli, Torino, 1997.

the substantial favour for religious institutions, to which a sort of "provision of the most favourite nation" – with respect to other social groupings – is granted. The article provides in fact that **The ecclesiastical nature and the religious or cult purpose of any association or institution cannot be the cause of special legislative limitations, neither of fiscal burdens for their creation, legal capacity or any form of activity.** Also in this case, it is a historical inheritance: during the past century, Catholic religious organisation had sometimes been hit by "subversive" legislation, which included mandatory liquidation, assets' requisitions, and other restrictions. The Constitution of 1947 excludes the repetition of similar episodes with respect to *all* religious institutions: originated from a "revenge" of the Catholics, the provision has turned to be – as we shall see – a strong guarantee for new religious movements or the so called "sects" (see paragraph VI. 2.).

Constitutional provisions illustrated in the first chapter provide that the main rules on religious confessions have a bilateral character. With respect to the Catholic Church, said rules include the Concordat of 1984, formally a revision, but actually a complete substitution of the one dating 1929, and other agreed upon rules, the most important of which is the Protocol of 1984 concerning ecclesiastical entities and goods. With respect to other religious confessions, presently six Agreements are in force, some of which have been amended several times, herein listed with their respective year of execution: Churches represented by the *Tavola valdese* (1984); Italian union of Adventist Christian Churches of the seventh day, (1986); Assemblies of God in Italy (1986); Union of the Jewish Communities (1987); Baptist Evangelical Christian Union (1993); Lutheran Evangelical Church in Italy (1993)[3].

For the religious confessions without any Agreement, the law of 1929 (and the relevant implementing rules dated 1930) concerning the "admitted cults"

[3] The introduction in Italian law of such bilateral instruments follows different procedures, given their nature. The Concordat has been approved by Italian Parliament with a ratification and execution law, as it is provided for international treaties (one article only of execution, and attached the text of the relevant treaty). The Agreements with other confessions have instead been approved by the Parliament with a draft law that reproduced the relevant content, approved article by article. For the Protocol of 1984 on Catholic ecclesiastical entities, still another procedure was followed: two different laws were approved (respectively n. 206 and 222 of 1985), one of execution and one which reproduces all the articles of the Protocol. A procedure in between the one used for the Concordat (act of international law) and the one used for the Agreements (domestic law, based on a preceding bilateral agreement).

is still in force, and obviously it was issued without the previous agreement provided later by the Constitution. In the Parliament, a draft law on religious freedom that should revoke the law of 1929 and provide general rules instead, is presently under discussion.

Obviously, there are then several unilateral rules of Italian State affecting religious confessions. But the principle of autonomy of religious confessions and of the bilateral character of the latter's relations with State leads said laws – either State or Region ones – to be applicable only pursuant to implementing agreements.

IV. MAIN FIELDS OF INTEREST

1. RELIGIOUS TEACHING[4]

Religious teaching in public schools is a quite discussed matter, and has given origin, in the last fifteen year, to a series of disputes before different Courts, including the Constitutional one.

The 1929 Concordat introduced such teaching, unknown in Italy in the Nineteenth Century and in the beginning of the Twentieth. The agreement for the revision of the Concordat, dated 1984, establishes (Article 9, second paragraph) "**The Italian Republic, acknowledging the value of religious culture and considering that the principles of Catholicism are part of the historical inheritance of Italian people, shall continue to assure, within the frame of the purposes of school, teaching of Catholic religion in public schools of any order or grade, which are not at a university level.**

Respecting freedom of conscience and education responsibility of parents, everybody is granted the right to choose whether to avail himself or not of such teaching.

At the moment of enrolling, students or their parents shall exercise such right, upon request of the school authorities, without their choice giving raise to any form of discrimination."

The agreements with other religious confessions are basically all similar to each other on this topic, and do not provide teaching in public schools of religions different from the Catholic one. But they all provide the following:

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4 *A. Gianni*, L'insegnamento della religione nel diritto ecclesiastico italiano, Cedam, Padova, 1997.

a) the Italian Republic acknowledges, on behalf of freedom of conscience, the right of students not to avail themselves of religious teachings, pursuant to State laws; b) **the school order provides that religious teaching shall not occur according to schedules and modalities in any way having for the students discriminatory effects, and that forms of diffused religious teaching in the programs of other subjects are not adopted . In any event, religious practices and cult acts cannot be requested to students[5];** c) the competent bodies of the relevant religious confession can answer to requests of students or school bodies concerning the study of the religious phenomenon. Said activities are deemed to be cultural ones, but are not teaching subject, and are at the expenses of the relevant confession.

If the latter form of contact between religious confessions and public schools can be deemed a sign of the autonomy of confessions (and of schools), Catholic religious teaching is instead a real penetration between State and Catholic Church. It is a curricular course (although it is possible not to take it, and it is not calculated for the purposes of passing the student to the following grade); its teachers must **possess the qualification acknowledged by the *ordinario diocesano*** [the bishop] **not having been revoked by him** and are **appointed upon agreement with the *ordinario diocesano* by the competent school authorities[6].** This creates, for said teachers, a peculiar juridical position, which shall be examined in chapter 3.5.

With respect to students, the guarantees of "non-discrimination" included in the Concordat with the Catholic Church and in the Agreements with other religious confessions appear to be similar. But they have actually originated substantial disputes. The Catholics have deemed discriminatory that religious teaching is outside the regular school schedule, or even the fact that students not availing themselves of such teaching could have a shorter weekly schedule. On the other hand, other confessions and lay organisations have indeed deemed the inclusion of said teaching within the regular schedule to be discriminatory. The Public Instruction Ministry has initially accepted the first construction, obliging whoever did not avail himself of Catholic religious teaching to "invent" for himself a different activity and in any event to remain within the school premises. This situation lead to the mentioned disputes, solved – at least partially – by two decisions of the Constitutional Court (n. 13 of 1991, and n. 290 of 1992). Said decisions

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5 The quotation comes from the Jewish Agreement of 1987. As mentioned, all other Agreements are similar on the point.

6 Agreement between Italian school authority and Italian Conference of Bishops for the teaching of Catholic religion in public schools, executed December 14th, 1985, and implemented by Presidential Decree n. 751, dated December 16th, 1985, article 2.5.

have deemed the rules agreed upon by the Catholic Church, in particular with respect to inserting the religious teaching within the school schedule, to be legitimate. However, stressing the principle of laity of State, said decisions stated that the student who does not avail himself of said teaching is in a situation of “no obligation” (decision of 1991) and can therefore also leave the school premises (decision of 1992).

Notwithstanding the above-mentioned decisions, the issue of religious teaching remains a key one, as it is a situation of clear overlapping purposes between State and a Church: the State makes the doctrinal teaching of a confession ist own and ensures it, at its own expenses, but with the modalities established, and the teachers designated, by the Church.

Obviously, each confession can carry on its teaching in its own schools (see paragraph IV.6.), in the worship premises and in private houses. It is, however, a quite recent achievement: the 1929-1930 rules provided that **public meetings in order to do religious ceremonies or other worship acts** were permitted only if a minister “approved” by the governmental authority was present. Pursuant to said rules, declared constitutionally illegitimate by the Constitutional Court (decision n. 59 of 1958), worship meetings or having the purpose of religious teaching held by communities which were independent, or did not have an “approved” minister, in particular Pentecostal ones, were for a long time forbidden and prosecuted.

2. INTERNAL ORGANISATION[7]

The particular constitutional acknowledgement of the Catholic Church’s independence, as well as the autonomy of the other confessions, has already been discussed. The nature of the Vatican State has lead to the paradox – during World War II – that the embassies to the Vatican (but located in Rome) of countries which were enemies of Italy remained regularly open, according to the Treaty [*Trattato del Laterano*], that grants the Vatican full freedom of communication with foreign States even in case of war.

In this respect, it should be noted that the Catholic Church presents, from a juridical viewpoint, different aspects. At least three are its nature from an international law perspective: State of the Vatican City – Holy Seat – Catholic Church. Obviously this applies to the relations of all States, but mainly those of Italy, within the territory of which all three entities are located. And it should be noted that the acknowledgement of independence

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[7] *P. Floris*, Autonomia confessionale. Principi – limite fondamentali e ordine pubblico, Jovene, Napoli, 1992.

and sovereignty (article 7 of Italian Constitution) is addressed to the Catholic Church.

The Concordat revision of 1984 has lead to the emerging of still another entity, namely the Italian Bishops' Conference, *i.e.*, the national organisation of the Catholic Church. Also with respect to said entity, just as with respect to other confessions (at least those with an Agreement), there is a large acknowledgement of the internal organisation's characters. A whole series of rules of the agreement on Catholic ecclesiastical entities of 1984 and of the Agreements with other confessions provide simplified procedures – with respect to those applicable to normal entities – in order to obtain the juridical capacity of ecclesiastical entities, namely the confessions' internal structures, pursuant to Italian law.

In such respect, a significant case recently occurred. In 1995 the Holy Seat, availing itself of a possibility granted by the agreement dated 1984, asked to create a joint committee for the purpose of interpreting some provisions of the agreement. In particular, in addition to a specific question concerning worship buildings, the Holy Seat complained that Italian administration exercised a series of undue controls in coincidence with the granting of the "Italian" legal personality to ecclesiastical entities. The committee ended its works in February 1997, basically agreeing with the Holy Seat on the matter. In particular, the committee affirmed that **The provisions of the Italian Civil Code concerning creation, structure, management and termination of private legal entities cannot be applied to ecclesiastical entities.** The Italian administration cannot, in particular, **make subject to its approval the statutes of the organisation, in coincidence with the granting of the legal personality**[8]. The grounds of the decision are rather interesting: the fundamental rule established in the agreement is that the ecclesiastical entity is received in the Italian juridical order with its original characteristics, while the practice condemned would lead to "re-founding" it within the Italian legal system. In such decision appears clear the full respect of the Catholic Church's autonomy when creating its own entities, which must not be adapted to Italian law.

A large acknowledgement of the confession's autonomy is provided also by the Agreements. The types of entities are quite different: an Agreement provides for a *numerus clausus, i.e.*, the granting of the legal personality only to the entities mentioned in the relevant Agreement (Assemblies of God). All the others provide for the granting of the legal personality to additional entities: some provide that all local communities have legal

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[8] Joint committee Italy – Holy Seat. Conclusive document, February 24th, 1997, in: Quaderni di diritto e politica ecclesiastica, 1997, p. 577.

personality (Jewish, Lutherans, Baptists), others do not. It is particularly worth mentioning the great transformation made by the Agreement with the Union of Jewish communities. In the past, many Jewish entities (schools, assistance institutions, etc.) had autonomously obtained the legal personality. Subsequent to the Agreement, many of said entities are abolished, and their assets and activities are linked to the territorial competent communities, also considering the demographic changes due to the racial prosecutions. But also the other Agreements try to reflect in the entities' juridical structure the view that the relevant confession has of itself.

Nothing similar occurs for the confessions not having an Agreement. Some of them have a head-entity acknowledged pursuant to the law of 1929 and shaped on the strict provisions of said regulation. Others, utilise the juridical forms offered by Italian law (associations, *non-profit*, foreign entities), adapting to them and thus without being permitted to protect their own confessional characteristics.

3. OWN JURISDICTION[9]

The various Agreements executed by the State guarantee a vast space to the internal activities of each confession (please, refer to the following paragraph), also with respect to disciplinary and spiritual acts. The simple mentioning of discipline implies an acknowledgement of internal jurisdictional functions, just as the autonomy granted to confessions with respect to appointment (and therefore, also revocation) of ministers does.

More specific affirmations are however provided in the Agreements with certain confessions. The 1984 revision of the Concordat openly acknowledges to the Catholic Church **the jurisdiction in ecclesiastical matters**. Other provisions of the Concordat specify said acknowledgement with respect to conjugal matters. In this respect, it should be remembered that before 1929 religious wedding (whether Catholic or of any other confession) had no value for the State, which acknowledged the civil wedding only, celebrated before its own organs. It was therefore quite common to have a double ceremony, a civil one and a religious one, which originated two different ties, one completely independent from the other. With the Concordat of 1929, the civil effects of a canon wedding were acknowledged[10], thus giving full validity within the Italian State to all

9 *A. Licastro*, Contributo allo studio della giustizia interna alle confessioni religiose, Giuffrè, Milano, 1995.

10 The law of 1929 acknowledged the validity of weddings celebrated before the "approved" ministers of other cults. The ministers would act per delegation of the

subsequent decisions of ecclesiastical bodies on such weddings. In practice, the State waived, in favour of the Catholic Church, any competence over canon weddings having civil effect (called "concordat weddings"). The situation dramatically changed in 1970, further to the approval of the law permitting divorce: the State took back the capacity of terminating civil weddings, and of declaring the termination of the civil effects of the "concordat" ones. There were protests for the wound (*vulnus*) brought to the Concordat, but the Constitutional Court declared that the law on divorce was legitimate[11]. Even more important was a decision of 1982. The Court, although confirming the overall system of receiving ecclesiastical decisions concerning marriages, declared illegitimate two important points of its features: it established, in fact, the constitutionally illegitimacy of the civil validity of the exemption from wedding celebrated, but not consumed [*rato et non consumato*], and, with respect to decisions concerning the nullity of any marriage, established that the Italian Judge must ascertain **that in the procedure before the ecclesiastical court it had been ensured that the parties have the right to bring the action and to defend their respective rights, and that the decision itself does not contain provisions contrary to Italian public order[12]**. The revision agreement of 1984 has outlined a system matching the one defined in the mentioned key decision. It can be said that from a system of mechanical transfer in Italy of any decision concerning conjugal matters, Italy moved to a system in which decisions of ecclesiastical courts are treated just like the decisions of foreign courts, on the basis of the rules of private international law.

Nothing of the kind is instead provided by the Agreements with other religious confessions. The State grants civil effects to the weddings celebrated pursuant to the rules of said confessions, but does not foresee any jurisdiction of religious organs over the same. Besides, nothing like that was ever requested by the protestant or evangelical churches being a party to five

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civil officer, and therefore such weddings were actually civil ones, the jurisdiction on which lied with the State.

[11] Decision n. 176, dated 6th-11th December, 1973, which declared constitutionally legitimate law n. 898, dated December 1st, 1970, "Discipline concerning marriage termination".

[12] Decision n. 18, dated January 22nd – February 2nd, 1982, which declared constitutionally partially illegitimate law n. 810, dated May 27th, 1929, implementing the *Patti Lateranensi*. It is worth noting that – besides the important news concerning the latter – said decision solved a long debated issue, namely, whether article 7 of the Constitution could prevent the *Patti Lateranensi* from a judgment on their constitutionality. The Court deemed itself competent, and its competence, with the subsequent agreements of 1984, was basically acknowledged from the Holy Seat also.

of the six Agreements having been executed to present. A considerable discussion on the matter took place, instead, in the negotiations which lead to the Agreement with the Jewish Communities. Since 1929 the Jewish communities asked the same treatment as the Catholic Church on the matter, thus obtaining the full acknowledgement of the decisions of the Rabbinical Courts. The State did not accept the request, stressing that also the acknowledgement of the Catholic jurisdiction had been strongly reduced between 1929 and 1984. The Agreement with the Jewish communities of 1987 provides therefore a discipline in matrimonial matters similar to the one of other Agreements, although there is a rule which is specific for this Agreement. It provides, in fact, that **there remains the possibility of celebrating and terminating religious marriages, without any civil effect or relevance, pursuant to the Jewish law and tradition.** Said provision does not create any new rule, but acknowledges the legitimacy of Jewish jurisdiction, without any relevance of the same for the State.

A part from marriage jurisdiction, another provision concerning jurisdiction is important. It is an affirmation having a "separatism" value, included in the first Agreement, the one executed in 1984 with the Churches represented by the *Tavola valdese*[13]. Said Agreement was drafted before the Concordat's revision, although it was actually executed a few days later, and therefore presents some considerable differences with respect to all of the following Agreements. In article 2 of said Agreement, the Italian Republic acknowledges that **the *Tavola valdese*, the bodies and the institutions that it represents shall continue not to apply, for the implementation of the measures taken by it in disciplinary or spiritual matters, to State organs.** It is the refusal of the "lay arm", the traditional institution according to which the States would implement the measures taken by the Catholic ecclesiastical jurisdiction. A long time ago the issue was to send heretics, among which were the Waldensians, to stake. But when the Agreement with the *Tavola valdese* was drafted, article 5 of the 1929 Concordat was still in force, and under said article the Italian State undertook not to hire for any job implying contacts with the public former Catholic priests, either apostates or however subject to ecclesiastical measures.

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[13] These are mainly Waldensian and Methodist Churches, and few other local communities having a different origin. Further to the *Patto di integrazione* [integration covenant], all of them are represented by the *Tavola valdese* in their relation with the State although they all maintain their original characteristics.

4. DEFINITION OF “OWN” ACTIVITIES OR MATTERS OF THE CHURCH[14]

A definition of the characteristic activities of the religious confessions can be found in the various agreements executed by Italian State in recent years. In particular, article 2 of the 1984 agreement for the revision of the Concordat **acknowledges to the Catholic Church full freedom to carry on its pastoral, educational and charitable mission, as well as the evangelisation and sanctification ones. In particular freedom of organisation, of publicly exercising the worship, of teaching and of exercising spiritual ministry, as well as jurisdiction in ecclesiastical matters are assured to the Church.** Rules of the kind are also included in the Agreements with other confessions, with some differences. Usually, the Italian Republic calls to mind freedom rights granted by its Constitution and occasionally even the main international conventions, specifying certain warranties. In the most recent Agreement with the Evangelical Lutheran Church in Italy (CELI, 1993), the Republic **acknowledges that the appointment of ministers, worship celebration, community organisation and other acts in disciplinary and spiritual matters,** within CELI and its Communities, shall occur without State interference[15].

The agreements with the Catholic Church and other religious confessions also include a definition “in negative” of matters that should not be deemed pertaining to religion or cult. On the matter, please refer to paragraph V.1.

5. LABOUR LAW[16]

The vast area of relations between autonomy of religious confessions and labour law can be synthetically divided into three points.

Firstly, the attribution (and the revocation) of the position of minister [of cult] lays only with the confession, which provides the person with the relevant certification. This is established in all bilateral agreements of

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[14] *P. Bellini*, Realtà sociale religiosa e ordine proprio dello Stato, in: *Parlato-Varnier* (ed.), Normativa e organizzazione delle minoranze confessionali in Italia, Giappichelli, Torino, 1992, p. 290.

[15] Article 3, paragraph 2, of the Agreement with the evangelical Lutheran Church in Italy, 1993. The following paragraph 3 assures also free communication and cooperation of CELI with the World Council of Churches (WCC), with federations and with national and international entities.

[16] The most recent synthesis is provided by *R. Botta*, Manuale di diritto ecclesiastico. Valori religiosi e società civile, Giappichelli, Torino, 1998**²**, p. 172.

whatever kind between State and confessions. Also in this respect, the position of the confessions without any Agreement is different. According to the law of 1929, their ministers, in order to exercise functions having external effects, must be "approved" by State authorities. It is however permitted to exercise cult activities even in the absence of an "approved" minister, unlike what happened until the mentioned decision of the Constitutional Court n. 59 of 1958.

The position of [cult] minister implies some particular conditions: a specific professional secrecy, forms of exemption from military service, and/or civil service (although not all confessions have deemed to deal with the matter in their respective Agreement), some restrictions on the eligibility to public office. It is mainly remainders of a *status* which was in the past much more anomalous, in particular for Catholic priests. The Concordat's revision has in fact deleted many of the differences with respect to common citizens: for instance, ministers can presently be elected to political posts and restrictions remain only with respect to their eligibility to local posts in the place where they carry on their ministry.

From a labour law viewpoint, ministers exercise a particular profession, and the State does not interfere with their relation with the relevant confession. The Agreements usually only specify that the money received by ministers corresponds, for fiscal purposes only, to employment wages.

More delicate is the issue concerning "ordinary" work, carried on by religious: nuns working as nurses in hospitals, priest who are teachers in schools. On the matter, case law is still fluctuating. As a general principle it can be said that, if the job is carried on for the religious congregation to which the relevant person belongs (for example, a Catholic nun teaching in a school of its order), the relation is deemed similar to that of the minister, and therefore the State does not interfere. If, instead, the activity is carried out on a third party's behalf (for instance, the priest teaching in a public school), the priest-employee is granted all usual benefits, primarily the one concerning wages.

A third issue concerns the "lay" employees of religious organisations. With respect to such circumstance, case law affirmed that the employee's rights must be compared with the identity of the "trend organisations" (either religious or political, trade unions, etc.). Under such circumstances, the general provisions in favour of the employees – such as the one that forbids dismissal for religious, political or ideological reasons – are weakened. In brief, it is necessary to assess, on a case-by-case basis, whether the right of the organisation to its own identity prevails over the employee's right to have his own opinions.

A particular category of employees is made of teachers of Catholic religion in public school: as mentioned, they are hired and paid by the State, but on the grounds of the authorisation granted by the bishop (after having assessed their qualification). Withdrawal of the qualification determines automatically termination of employment. As a consequence, a paradox occurs: case-law has sometimes declared illegitimate the dismissal of Catholic schools' teachers for ethical private matters (such as civil wedding, divorce, birth of a child without a previous marriage), while the State relentlessly dismisses Catholic religion teachers to whom, for similar reasons, the bishop's authorisation to teach has been revoked.

6. SCHOOLS[17]

All the agreements with religious confessions grant to the latter freedom to open their own schools. On one side, they are academies, of a university kind, which prepare ministers. The State does not interfere with such schools, although usually acknowledges – on the basis of the agreement with the relevant confession – the theology degree issued by them. It should be noted, instead, that since over a century theology is no longer taught in State universities.

Much more delicate is the issue of schools managed by religious confessions for the generality of student and with programs corresponding to those of public schools. This is traditionally a *punctum dolens* of Italian politics. The 1947 Constitution provides (article 36) that **Entities and private persons are entitled to create schools and educational institutions, without burdens for the State. The law, in establishing rights and duties of non-public schools requesting equivalence, must assure full freedom to them, and a school treatment equivalent to the one of public schools pupils, to their students.**

Freedom to open schools is therefore granted to all, irrespective of bilateral agreements with religious confessions. The issue concerns the possible State funding of private schools, which in Italy are for the great majority Catholic. During all the time (1948-1994) in which Italian Cabinets were based on coalitions made by the Catholic party holding the comparative majority (Christian democracy) and other "lay" parties (over the time: liberal party, republican party, social-democrat party, socialist party), two trends clashed: the Catholics considered the **equivalent school treatment**, provided for by the

[17] *N. Colaianni*, Autonomia e parità della scuola, in: Quaderni di diritto e politica ecclesiastica, 1997, p. 61.

Constitution, as funding equivalent to the one allotted to public schools; the others had the **without burdens for the State** aspect prevail, considering the equivalence as legal validity of school degrees issued by a private school. The debate has always been strong, and some Cabinets have been defeated exactly on such issue. The second opinion has however always prevailed, and private schools – whether Catholic or not – have never been funded by the State.

The present left-wing Cabinet (since 1998, on the basis of initiatives already started by the preceding one), which is supported by Catholic forces also, has revived the proposal to fund private schools. It is a very strong request of the Catholic Church, often mentioned by the Pope and the Italian Conference of Bishops. Opposition is not missing, however, based on the wording of the Constitution, which appears insuperable. The debate is presently going on. It should be noted that there is a minority position within the religious confessions (and even within the same Catholicism) which opposes the funding insofar as the same standardises religious schools over public ones, (*i.e.*, same programmes, same modalities of choosing teachers) as it would make confessions lose their autonomy in organising their own schools according to their own *criteria*.

7. CHARITABLE ACTIVITIES

Historically, welfare services started in Italy – as well as in most parts of Europe – as an initiative of religious institutions. Hospitals, hospices, orphanages were Catholic structures; in Jewish *ghettos* and in the territories where the Waldensians were tolerated, similar institutions were created for people belonging to those specific religions.

The highly lay politic of the end of the last century brought to a series on "nationalisations" of religious assistance structures. Many of them became public, but some of them remained religious – that is, dependent from churches – and other continued to be created having the same features.

In more recent times, after the public health reformation of the Seventies, the hospital system received a new impulse, through the insertion of (private and) religious structures in the plans of both the State and the new-born regions.

On the other hand, as we shall see in the following paragraph V.1., assistance purposes do not coincide, in principle, with those of worship. Hospital and assistance structures should not, as a general principle, be ecclesiastical entities and thus fall within confessional autonomy. But several are the exceptions to such principle: there exist entities

acknowledged long ago which carry on essentially charitable activities (the Agreements, mainly Jewish and Waldensian, list a considerable number of them); ecclesiastical entities can own (private) hospitals; public hospitals can maintain in their statutes tracks of their original confessional nature.

As a general principle, it can be said that charities are either public or private entities; those belonging to churches are private ones, although they may be inserted in the public health – welfare system through conventions with the relevant public entity (usually the Region). The ecclesiastical character of certain structures, however, is not irrelevant with respect to the legislative power. For instance, the Agreement with the *Tavola valdese* lists five evangelical hospitals which, in virtue of their nature, are not obliged to arrange the service of religious (Catholic) assistance provided by the law for all the other hospitals.

It is also worth noticing the rule, which shall be further analysed under paragraph VI.2., pursuant to which the non-profit organisations – which include several charities – of a religious nature are not obliged to have a democratic association structure: rather, they depend upon the respective confessional bodies. The reason for such a provision is the respect for the confessional structure.

V. LIMITS TO CHURCH AUTONOMY

1. NORMATIVE FRAME[18]

The agreements between State and Catholic Church and the Agreements with other religious confessions include a precise definition of what “religion” is or is not. Pursuant to article 16 of law n. 222 of 1985 (implementing the Protocol with the Catholic Church) **For the purposes of the civil law are however considered:**

a) activities of religion and cult, the ones aiming at exercising worship and soul caring, at forming clergy and religious, at missions, at teaching catechism, at Christian education;

[18] *C. Cardia*, Manuale di diritto ecclesiastico, Il Mulino, Bologna, 1996, in particular p. 344 La finalità di religione o di culto e il carattere ecclesiastico dell’ente [the purpose of religion and worship and the ecclesiastical character of the entity].

b) activities other than those of religion and cult, the ones concerning assistance and charity, instruction, education and culture and, in any event, the commercial ones or those for profit.

The Agreements with other confessions contain, obviously, some variant to the terminology under a) above, *i.e.*, the peculiarities of the confession. But the
description under b) above, *i.e.*, what, pursuant to State laws, is not religion, is similar for all[19]. It was not always a simple statement, nor was it shared by all the confessions. For instance, the concept that Jewish people have of their communities provides that worship activities, welfare services and cultural activities be joint. The Jewish Agreement (article 26) specifies that **The Italian Republic acknowledges that, according to Jewish tradition, religious needs include those of worship, welfare service and culture.**

For the purposes of civil laws, however:

a) are deemed to be of religion and cult the activities aiming at carrying on rabbinical teaching, at practising worship, at performing ritual services, at training rabbis, at studying Jewish religion and at Jewish education.

b) concerning activities other than those of religion and cult, the agreement corresponds to the one of other confessions.

2. PRACTICAL ISSUES[20]

It should be noted that the distinction outlined in the preceding paragraph does not have significant fiscal implications. Traditionally, and this is confirmed in the bilateral agreements, religion and cult purposes have the same *status* as those of instruction and welfare service. With respect to tax

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[19] The only Agreement that does not include the list referred to is the one with the Tavola valdese that, for the already mentioned reasons, presents considerable differences with respect to the other ones. Rather, it includes a statement partially contradictory, when it affirms (article 12) that ecclesiastical entities of said confession always have jointly the purposes of worship, instruction and charity. Furthermore, the same article specifies that **the activities of instruction and charity carried on by the above-mentioned ecclesiastical entities, although respecting the autonomy and the purposes of the entities which carry them out, are subject to State laws concerning the same activities, carried out by non-ecclesiastical entities.**

[20] *C. Redaelli*, Enti non profit: la rivoluzione comincia dal fisco, in: Quaderni di diritto e politica ecclesiastica, 1998, p. 689.

implications, therefore, the only actual difference is between commercial activities – for profit – and the others. To such end, recent legislative innovations concerning non-profit entities[21] have given quite a contribution to the matter. It was in fact established that all ecclesiastical entities are non-profit entities, although all commercial activities managed by them are subject to the applicable specific tax treatment.

The practical distinction between activities of religion and cult and other activities does not pertain, therefore, to tax treatment: it rather has the flavour of a cultural distinction. It is precisely under Italian system, which grants religious confessions a constitutional importance and a special consideration with respect to any other social organisation, that it is important to set the limits of confessions' autonomy. On the other hand, not considering such matters as religious ones – and therefore matters concerning confessional autonomy – permits to ensure State control over them. Confessions are free to have their own schools or hospitals (and also hotels, commercial activities, etc.), but within the general legislative framework arranged by the State for said matters. What is excluded, instead, is State competence over religious or worship matters.

3. FUNDAMENTAL RIGHTS OF OTHERS[22]

Italian Constitution includes, as already mentioned under chapters n. II and III, protection of individual religious freedom (article 19) and a complex system of relationship with religious institutions (articles 7, 8 and 20). From a quantitative viewpoint, the second aspect seems to prevail. From a comparative law viewpoint, the issue can be summarised as follows: individual religious freedom is protected according to the average standards of modern Constitutions, while the system concerning protection of religious confessions' autonomy is much more structured.

The issue that arises is thus the one concerning protection of individuals from religious confessions' intrusiveness, and therefore the guarantee of a full freedom of adhering to a confession and of withdrawing from it. The issue is present in ordinary legislation. For instance, it is established that the choice on whether to choose Catholic religion teaching or not in secondary schools (normally from fourteen years old up) belongs autonomously to students. It is a derogation to the general principle according to which

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[21] Legislative Decree n. 460, dated December 4th, 1997.

[22] *S. Ferrari*, Libertà religiosa individuale ed uguaglianza delle comunità religiose nella giurisprudenza della Corte costituzionale, in: Giurisprudenza Costituzionale, 1997, p. 3085.

choices for the children, until their majority (18 years old), are made by parents. It is considered, therefore, that with respect to religion a higher degree of autonomy must be left to individual choices. The draft law on religious freedom, presently under discussion in the Parliament, provides in fact that all choices concerning religion be made by the relevant person since the age of fourteen.

On this matter there is a fundamental decision of the Constitutional Court – n. 239 of 1984 – concerning Jewish communities. Pursuant to the 1930 law, **all Jews** residing within a given territory **belonged by virtue of law** to the local community and were subject to payment of a mandatory contribution levied by municipalities on behalf of the community itself. There was an individual possibility of withdrawing from the community and therefore from the contribution. The Court deemed the rule incompatible with the constitutional principle of equality: certain citizens, in fact, in virtue of their religious and ethnic characteristics, were subject – within State legislation – to particular obligations, and were therefore discriminated with respect to all other citizens. The authority to withdraw was only, according to the Court, a late remedy to a situation that was unconstitutional in its very origin. The issue concerning membership of the Jewish communities has been subsequently defined in a different way in their Agreement with the State. However, the Court's decision remains of great importance for the relations between all confessions and State.

4. RULE OF LAW

The distinction between rights (and obligations) of confessions and rights (and obligations) of individuals is not always clear. This is particularly so whenever the doctrine of any confession includes ethical principles clashing with State laws. It is the case of conscience objection in its many forms, which Italian legislation acknowledges in various fields. It is possible to make a distinction between right to conscience objection acknowledged by ordinary law for all citizens (although usually on the basis of attitudes having a religious origin), and specific rights deriving from bilateral legislation. Conscience objection to military service (ruled by several laws, starting in 1972) and to abortion made by personnel working in health services (since the introduction of legal abortion in 1972) belong to the first category. Objection to abortion is a particularly significant conscience objection, because it is not made by minorities, but by the Catholic majority. Although they are not qualified as conscience objection, some amendments to State legislation appear due to the respect of religious opinions. This is so for giving oath in court procedures: at a first stage reference to the name of

God became elective; in the most recent laws the reference to oath (or swearing to God) itself is disappearing.

Other situations similar to conscience objection are provided by the Agreements: namely, the modalities for giving oath, ritual slaughtering, compliance with Sabbath in the Jewish Agreement. Sabbath is provided also in the Adventist Agreement, which also has a specific provision concerning objection to military service. The latter, when the Agreement was executed, was regulated as follows: the young man called to serve in the army could ask to render a substitute civil service, proving before a specific committee the moral or religious reasons of his opposition to the use of weapons. The Adventist Agreement provided that said evidence was deemed automatically given by those who declared themselves Adventists. It was a peculiar case of general law integrated by an Agreement. The issue is presently superseded by the new rules concerning conscience objection, which provide destination to civil service simply upon request.

Rules concerning conscience objection are not the only case of clash between the ethics of a confession and general rules. It may also happen that conscience objection be not deemed sufficient by a confession. This is the case with the Jehowa's Witnesses, who used to refuse the possibility of objecting to military service, provided by the pre-existing rules, insofar as discriminatory for the conscience objectors (to the contrary, according to said confession, the law presently in force considers equivalent army and civil service). A clear distinction between duties of any confession and duties of individuals has been set by the *Consiglio di Stato* [Administrative High Court]. The latter[23] was requested to resolve upon granting the legal personality to the Christian Congregation of the Jehowa's Witnesses, and affirmed that article 8 of the Constitution simply requires that the statutes of any confession comply with Italian juridical order. Breach of criminal law by members of any confession (with respect to the Jehowa's Witnesses, refusal to serve in the army and of certain medical treatments) does not imply that the confession itself be illegal. On the other hand, the acknowledgement of any confession does not justify breach of criminal law by its members, who remain fully subject to the sanctions established by the applicable laws.

The principle has been reaffirmed by the *Consiglio di Stato* in a subsequent opinion, concerning Mormons (Church of Jesus Christ of the Saints of the last days)[24]. In said case, the (assumed) polygamy practices of the

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[23] Consiglio di Stato, Sez. I, Opinion dated July 30th, 1986, n. 1390, in: Quaderni di diritto e politica ecclesiastica, 1986, p. 509.

[24] Consiglio di Stato, Sez. I, Opinion dated October 7th, 1992, n. 2330, in: Quaderni di

confessions were discussed. The *Consiglio* stated that the issue was not an obstacle to granting the legal personality to the confession, although the validity of marriages and the possible criminal sanctions remained regulated by State laws.

VI. INSTITUTIONAL RANGE

1. WHICH INSTITUTIONS ARE REGARDED AS BEING "CHURCH"?

The important juridical role assigned by the Constitutional Court to "religious confessions" makes it fundamental to come to a definition of "confession". On the matter, the Constitutions does not say anything[25], nor do the laws presently in force. The discussion presently going on in Parliament concerning the new draft law concerns the attempt to define the term "confession" as well. However, it is a very difficult task, considering that the Italian juridical order has until now "survived without knowing any definition of confession"[26].

In this respect, it should be noted that during the years immediately following the adoption of the Constitution very strict interpretations were given, namely that a religious confession could be so only if traditionally established in Italy. This interpretation, which applies only to Catholicism (or, at the maximum, Waldensians and Jews), is presently abandoned. But some tracks remain in certain courts' decisions. The Court of Appeals of Milan has excluded the character of "religious confession" with respect to Scientology, as it lacks a faith in a transcendent God and in soul salvation. But the decision has been cancelled by the Supreme Court[27], which noted that also Buddhism has similar characteristics. And the State has

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diritto e politica ecclesiastica,1993, p. 942

[25] On the grounds of the text, it can only be said that the Catholic Church is a religious confession (article 8 mentions "religious confessions other than the Catholic one") and that confessions other than the Catholic one exist. Said principle has often been mentioned by case-law both in Italy and in Spain, where the constitutional position of confessions is very similar to that of the Italian ones. However, a conclusive definition has not come out.

[26] *S. Ferrari*, La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla), in: *Parlato-Varnier* (ed.), Principio pattizio e realtà religiose minoritarie, Torino, 1995, p. 19.

[27] Cassazione penale, VI, October 22nd, 1997, in Diritto penale e processo, 4/1998, p. 479. The Decision of the Court of Appeals of Milan, IV, February 14th, 1997 is published in Quaderni di diritto e politica ecclesiastica, 1997, p. 1019.

acknowledged the Italian Buddhist Union as ecclesiastical entity, and carries on negotiations with it, in view of an Agreement.

In case-law and in administrative practice of the recent years, a broader concept of "religious confession" appears to be prevailing, even more than in other European countries. Therefore, Buddhists, Jehowa's Witnesses (both said confessions are presently negotiating an Agreement) and Mormons have obtained legal acknowledgement. The Constitutional Court has strongly contributed to such a trend. By decision n. 195 of 1993, a regional law that for the purposes of granting benefits discriminated confessions "without an Agreement" was declared unconstitutional. Equality of all confessions – with respect to benefits granted by State in a general way – derives from equality of all citizens. The Court has also stated that even confessions without any organisation cannot be excluded, and that in order to identify a "confession" the following criteria must be used: existence of an Agreement or other public acknowledgement; common consideration; elements that can be derived from the statutes of the confession itself.

2. DO YOU DISTINGUISH BETWEEN THEOLOGICAL CORE INSTITUTIONS AND OTHERS, NON-DIRECTLY RELATED INSTITUTIONS; DO THEY ALSO ENJOY CHURCH AUTONOMY?[28]

The mentioned constitutional rules appear to outline two kinds of religious organisations: religious confessions (article 8) and associations or foundations having religion or cult purposes (article 20). To the former, a particular *status* is granted; to the latter only non-discrimination with respect to similar non religious organisations is granted. In practice, agreements with confessions, and in particular those with the Catholic Church, grant a very broad autonomy, within State order, to all the institutions having even indirectly a religious character, provided they are directly linked to the confession itself. The procedure leading to the granting of the legal personality always provide for an "introduction" by the Catholic hierarchy or the head entity of other confessions. As a result, a broad autonomy within State order corresponds to very little autonomy of such entities with respect to the parent confession, which can amend or terminate them at any time.

A confirmation of such orientation is provided by the mentioned legislation concerning non profit entities (non commercial entities – ONLUS[29]). The

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[28] *G. Feliciani*, Organizzazioni "non profit" ed enti confessionali, in: Quaderni di diritto e politica ecclesiastica, 1997, p. 13.

[29] Organizzazione non lucrativa di utilità sociale [non-profit organisation having social

latter, through a general provision states that the association structure of said non profit entities must be democratic. But the same requisite is not set forth with respect to ecclesiastical entities, which are by virtue of law deemed to be non profit entities. This is so because dependence from confessional structure is regarded as a typical feature of ecclesiastical entities.

The position of organisations not headed by Catholic Church or by one of the confessions having executed an Agreement is different. As mentioned before, especially if they do not even have the legal personality pursuant to the 1929 law, they have a very limited autonomy. It should however be noted that article 20 of the Constitution has a considerable impact on said organisations, that widely coincide with "new religious movements". Namely, said organisations cannot be subject to particular limits due to their religious nature. Therefore, in Italy it is not possible to oblige religious associations to register, as foreign countries have done within the purpose of contrasting sects.

VII. CONCLUSION (CONTEXTS IN PUBLIC OPINIONS AND CONTEMPORARY POLITICS)

It should appear from this report that the autonomy granted to religious confessions in Italy is quite broad. Certainly, differences exist: the maximum autonomy is granted to the majority Church, the Catholic one; a strong autonomy is granted to confessions having an Agreement with the State; little autonomy pertains to confessions having legal personality only; extremely little autonomy is granted to the others.

With respect to the Catholic Church, the issue often raised over the past fifty years is the opposite one, namely: respect of State autonomy by Catholic Church. To the normal relation between State and religious confessions provided by the Constitution, for the Catholic Church a diplomatic relation with the Vatican should be added. Furthermore, the presence in Italy of political forces openly Catholic and more or less strictly linked to ecclesiastical institutions must be considered. A Catholic party, Christian Democracy, held the comparative majority and Cabinet without interruption from 1946 to 1994. Since the latter date, further to the adoption of a bipolar political system, there are Catholic parties both in the right-wing and in the left-wing coalition, having determinant influence.

The last decades have seen clashes having historical importance, particularly with respect to Catholic opposition to the law permitting divorce (1970). Lay

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relevance].

trends have prevailed, through the mentioned decisions of the Constitutional Court and in particular through the victory of the national *referendum* of 1974, which confirmed the said law of 1970. But there is a constant tension between the right of the Catholic Church to exercise its moral teaching ministry in all matters, and the fear that said Church want to impose its opinions to the State, and therefore to all citizens. Said risk does not exist for the other religious confessions, given the limited number of their members, but certainly the ethical issue concerning definition of the respective fields of activity exists.

From a juridical viewpoint, the bilateral agreements presently in force have in practice reduced, if compared to the 1929 Concordat, the superimposition between civil and church authority. However, the broad limits of the confessions' autonomy continues to raise issues. The actual risk is that the confessions, and mainly – as it is obvious – the majority one, can take away State autonomy on the ground of claiming their own one. The comments made on Catholic religious teaching in public schools, and in particular on the relevant teachers, should be clarifying. In the name of the – legitimate – autonomy of the Catholic Church to establish *what* to teach as Catholic religion, said Church has been granted the absolute monopoly in choosing *who* should teach said subject.

Furthermore, in order to comply with said obligation, Italian State makes a particular category of its employees – namely, Catholic religion teaches – subject to a treatment (*ad nutum* dismissal) not applied to anyone else. Actually, State does not even permit any other employer to apply such treatment to its employees. The "humanitarian" solution often suggested (namely, have the Catholic religion teacher, who no longer qualifies for the bishop, teach a different subject) also constitutes a breach of State autonomy. In fact, State should bear the burden of a teacher whose qualifications have never been assessed by it, because he had been chosen autonomously by the bishop. In addition, State should also breach the rights of other teachers, who – unlike the teacher of religion – have passed a specific exam in order to be permitted to teach in State schools.

The Constitutional mechanism grants to the laws deriving from religious confessions a special position within the Italian legal system. Said laws prevail, as a general rule, over ordinary laws. The construction suggested by the Constitutional Court appears to be the proper one: even said laws, including Concordat, are subject to constitutional control, and within the Constitution there are some fundamental principles that supersede other constitutional rules, including the one concerning procedure.

In light of said principles, certain institutions originated from autonomy of religious confessions have been declared illegitimate, as also mentioned in

this report. In the name of the right to “a due process of law”, the exclusive jurisdiction of ecclesiastical courts over “concordat” marriages has been limited; on the grounds of the equality principle, mandatory membership in Jewish communities has been banned (although, actually, the law dated 1930 was not a bilateral one); affirming the fundamental principle of laity of State, the more shocking consequences of Concordat rules on religious teaching in public schools have been cancelled.