

## Religion and the Secular State: The Italian Case

### I. SOCIAL FACTS

Italy is a predominantly Catholic country, though it is difficult to estimate the number of Italians practicing Catholicism because the national census does not include questions on religious affiliation. These questions are considered incompatible with the secular character of the State which follows a traditional liberal and individualistic approach with respect to religious orientation inquiries. Keeping track of the religious convictions of citizens, classified among the sensible data and protected by the legislation on matters of privacy,<sup>1</sup> is considered to be inappropriate. Moreover, the fluid nature of many religious affiliations is not accurately reflected in a rigidly conceived census, and not all declarations reported by it can be interpreted as a manifestation of faith or strict affiliation to religion.

Nevertheless, in some circumstances people are requested to publicly declare their religious affiliations (e.g., to receive religious assistance in hospitals, prisons, the army, and as a member of law enforcement; to attend religious classes at school; and to offset donations against taxes). Moreover, the census is an occasion to register and recognize the contemporary pluralization of the national religious landscape.<sup>2</sup>

Apart from the reliability of the statistical data, the available figures are often contradictory. About ninety percent of the pupils at State schools take part in Catholic religious education classes, whereas less than forty percent of taxpayers give the Catholic Church the part of income tax (*imposta sulle persone fisiche*, IRPEF) allotted to religious denominations or State social welfare institutions. About sixty percent of all religious marriages take place according to Catholic rites, but – in spite of the high percentage of citizens who have received Catholic baptism – less than twenty-five percent regularly take part in Sunday mass. In addition, the Papacy resides in Italy, which gives the Catholic Church great influence over political and social events in the country regardless of the statistical figures on the religious beliefs of Italians.

Amongst the members of other denominations – about four percent of the population – Muslims, with roughly one million followers, form the most important group because of the massive stream of immigrants from North African countries. They are followed by the Orthodox Christians and the Jehovah's Witnesses, these latter for a long time the second largest religious presence in Italy.

The presence of Jews and Valdensians, though they have a long tradition in the country, is numerically less significant (less than 50,000 followers each). The spread of

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1. Cf. the section “Tutela dati personali” in <http://www.olir.it/aretematiche/80/index.php> (accessed 26 January 2010)

2. In 2001 the introduction of a voluntary question on religious affiliation in the UK census was welcomed by Muslim organizations because it officially confirmed that Islam had become the second religion of the country: cf. T. Abbas, *United Kingdom and Northern Ireland*, in *Yearbook of Muslims in Europe*, I, ed. Jørgen S. Nielsen, Samim Akgönlü, Ahmet Alibašić, Brigitte Maréchal, Christian Moe, Brill, Leiden 2009, 363-364.

the “new religious movements” (an inappropriate expression which has, however, become common) seems to be less significant than in other Western European countries.<sup>3</sup>

## II. THEORETICAL SCHOLARLY CONTEXT

The Italian theoretical and scholarly context reflects the history of a country with a strong dominant religion and weak state institutions.<sup>4</sup> The dynamics of Italian unification have given Italy a nation-state more than a state-nation character. This means that social cohesion has been entrusted more to certain cultural-religious influences and also, in part, by considerations of mythical homogeneity, rather than to some notion of patriotism founded on the conscious participation of Italians in a common bond of citizenship based on national public institutions and civil symbols.<sup>5</sup> This also explains the relatively scarce anticlericalism among Italian scholars and, especially in recent times, the consensus for a “contractual separation” between state and religion.<sup>6</sup> This contractual separation emphasizes the possibility to openly combine separation and bilateral agreements between the state and religious denominations.

In fact, many Italian scholars who do not support a rigid separation want to guarantee equal religious freedom to all and accept a positive intervention of public authorities for responding to religious needs. From this perspective, agreements are seen as a way to create an articulated legal framework able to deal with religious differences through a “custom-made” treatment.<sup>7</sup> This approach is also highlighted by the peculiar features of Italian *laicità*, classified by the Constitutional Court among the “supreme principles of constitutional order.”<sup>8</sup> For the Court, *laicità* does not imply the state’s indifference towards religions but rather the state’s guarantee for safeguard of religious freedom in a regime of confessional and cultural pluralism.<sup>9</sup> Consequently, the principle of *laicità* is not an instrument to fight the religious presence in the public square or to foster the secularization of the Italian State and civil society.<sup>10</sup> For this reason, Italian *laicità* can be

3. Due to the lack of “official” sources it is worth consulting [http://it.wikipedia.org/wiki/Religioni\\_in\\_Italia](http://it.wikipedia.org/wiki/Religioni_in_Italia) (accessed 26 January 2010); see also US Department of State, *International Religious Freedom Report 2009* (Italy), available at <http://www.state.gov/drl/rls/irf/2009/127317.htm>; Eurispes, *Rapporto Italia 2009*, in <http://www.eurispes.it/index.php/Rapporto-Italia/rapporto-italia-2009.html>, 1104-1113, accessed 26 January 2010, and id., *Rapporto Italia 2010* (anticipation), in <http://www.eurispes.it/index.php/Comunicati-stampa/rapporto-italia-2010.html>, accessed 31 January 2010.

4. Cf. A. C. Jemolo, *Church and State in Italy*, Dufour Editions, Philadelphia 1961 or Id., *Church and State in Italy. 1850-1950*, Blackwell, Oxford 1960. More in general see C. Duggan, *The Force of Destiny. A History of Italy since 1796*, Allen Lane – Penguin Books Ltd, London 2007. Cf. also A. Ferrari, “Civil Religion in Italy: ‘A Mission Impossible’?”, in *Geo. Wash. Int’l L. Rev.*, in press.

5. Cf. P. Segatti, *Perché è debole la coscienza nazionale degli italiani*, in “il Mulino,” XLVIII, 381, 1 1999, 15-23.

6. The term “contractual separation” reflects the French experience and it has been used in the Italian context by F. Margiotta Broglio, *Vers une séparation contractuelle: le nouveau régime des cultes en Italie*, in “Revue d’éthique et de théologie morale Le Supplément,” 175, 1990, 79-93. Cf. also S. Ferrari, *Separation of Church and State in Contemporary European Society*, in *Journal of Church and State*, Autumn 1988, 533-47. The seventies represented a sort of parenthesis in the Italian recent history and were characterized by an important process of secularization. In those years Law 898/1970 and Law 194/1978 were enacted (respectively about the institution of divorce and the voluntary termination of pregnancy) and many scholars supported the abrogation of the Lateran Pacts and the end of the concordatary system: cf. *Individuo, gruppi, confessioni religiose nello Stato democratico. Atti del Convegno nazionale di Diritto ecclesiastico*, Siena 30 novembre-2 dicembre 1972, Giuffrè, Milano 1973 and *Nuove Prospettive per la legislazione ecclesiastica, Atti del II Convegno nazionale di Diritto ecclesiastico*, Siena 27-29 novembre 1980, Giuffrè, Milano 1980.

7. Cf. S. Berlingò, G. Casuscelli, S. Domianello, *Le fonti e i principi del diritto ecclesiastico*, Utet, Torino 2000.

8. Cf. the decision n. 203 of 11 April 1989 in <http://www.olir.it/documenti/?documento=370> (accessed 26 January 2010). Neither the Constitution nor the laws define the principle of *laicità*. The Constitutional Court derived it from the interpretation of the constitutional articles related to religious freedom (art. 2, 3, 7, 8, 19 and 20).

9. Id.

10. The Constitutional Court affirmed five specific State obligations: 1) the obligation to safeguard religious freedom in a regime of confessional and cultural pluralism (203/1989, supra n. 8); 2) the obligation to respect

assimilated neither to laicism (if this word is intended to be synonymous with anti-religiousness) nor to secularism (if this word is intended to be synonymous with the invisibility of religions in the public square). *Laicità* supposes the existence of a plurality of value systems – the same dignity of all personal choices in the field of religion and conscience – it entails equal protection for religious and non religious beliefs, and it requires State neutrality regarding both of them. As a result, this principle does not refer to state-church relations only, but it is a synthesis of the values and duties of the contemporary plural and democratic state in which religion plays a full role, like each other component of a civil society.

For these reasons, Italian *laicità* could be interpreted as a “habermasian” and “rawlsian” *laicità* at the same time – a positive and active *laicità*, closely connected with the contemporary obligation of the Welfare State to pursue not just “formal” but “substantial” equality.<sup>11</sup>

If the official doctrine of the Constitutional Court seems quite clear and coherent, the situation is more complex when we pass from the supreme principles to the jurisprudence of lower courts and, above all, to the legislative and political domain. At this level the mono-confessional Italian tradition significantly limits the pluralism connected with *laicità* as a juridical principle. A system based on the idea of the superiority of the Catholic Church tends, inevitably, to privilege religious over non-religious beliefs (*favor religionis*)<sup>12</sup> and cannot easily assimilate a religious-friendly *laicità* with pluralism and equal freedom for all denominations. Given the Italian historical and social context, some authors think that an “*Italia laica*” is simply impossible.<sup>13</sup> Consequently, the Italian *laicità* is a limited one or, as some have said, a “baptised *laicità*.”<sup>14</sup>

Following this interpretation, the privileged position of the Catholic Church appears perfectly compatible with the Italian Constitution once Catholicism is considered not only a specific religion but, rather, a cultural expression of the core national heritage.<sup>15</sup> This approach, which perfectly shows the nation-state character of Italy, implies also that religious and cultural needs are primarily interpreted not from the secular constitutional

confessional autonomy, with the prohibition to interfere with the internal life of religious denominations (259/1990, in <http://www.olir.it/documenti/?documento=377> accessed 26 January 2010); 3) the obligation to be equidistant and impartial towards all religious confessions, which entails the illegitimacy of systems based on a National Church or a State Church or, more generally, of forms of public “*confessionismo*” (203/1989, id.); 4) the obligation to protect the conscience of everyone, irrespective of credo or conviction (440/1995, in <http://www.olir.it/documenti/?documento=467> accessed 26 January 2010), which entails the prosecution of offenses against religious feelings, irrespective of the denomination to which an individual belongs; 5) the obligation to distinguish between civil matters and religious matters and the illegitimacy of the political use of religion and the religious use of politics (334/1996), in <http://www.olir.it/documenti/?documento=368>, accessed 26 January 2010. Cf. G. Casuscelli, *La laicità e le democrazie: la laicità della “Repubblica democratica” secondo la Costituzione italiana*, in “Quaderni di diritto e politica ecclesiastica,” 1, 2007, 169-202, S. Domianello, *Sulla laicità nella Costituzione*, Giuffrè, Milano 1999 and S. Ferrari, *Le principe de neutralité en Italie*, in “Archives des Sciences Sociales des Religions,” 101, 1998, 53-60.

11. This also includes the principle of *ragionevolezza*, which imposes to grant each person and group his or her due.

12. Cf. G. Dalla Torre, *Il fattore religioso nella Costituzione. Analisi e interpretazioni*, Giappichelli, Torino 1995, 28-29. A good example is provided by the “atheistic-bus”, an initiative promoted by the Atheists and Rationalists Union and aimed at placing on the municipal buses in Genoa atheistic advertisements which proclaimed: “The good news is that in Italy there are millions of atheists. The best news is that they believe in freedom of expression.” This sentence substituted another which was perceived as offensive: “The bad news is that God does not exist. The good news is that you do not need it.” These advertisements were contested not so much in relation to an obligation of neutrality of the municipality and its services, but because they were considered an offense to the Catholic feelings of the population. Cf. *La Repubblica*, 12 January 2009 and <http://www.guardian.co.uk/world/2009/jan/06/atheist-bus-campaign-nationwide> (accessed 26 January 2010).

13. Cf. O. Giacchi, *Posizione della Chiesa cattolica e sistema concordatario*, in *Individuo, gruppi, confessioni religiose nello Stato democratico*, supra n. 6 at 791.

14. For the opposition between juridical and “narrative” *laicità* cf. A. Ferrari, *De la politique à la technique: laïcité narrative et laïcité du droit. Pour une comparaison France/Italie*, in *Le droit ecclésiastique en Europe et à ses marges (XVIII-XX siècles)*, sous la direction de B. Basdevant Gaudemet et F. Jankowiak, Peeters, Leuven 2009, 333-345.

15. See *infra*, Section VIII, the section devoted to religious symbols.

point of view, but rather from the point of view of the national – religious and cultural – Catholic tradition.<sup>16</sup>

Finally, the problematic implementation of *laicità* is also visible in the lack of a general law regarding religious freedom that is capable of offering a legal framework for all faiths independently from specific agreements.<sup>17</sup> This shortcoming in the law, and the subsequent amount of excessive discretion given to public powers in signing the agreements with religious denominations, is presently considered by most to be the relevant weakness of the church-state system in Italy.

### III. CONSTITUTIONAL CONTEXT

#### A. Political History

From the beginning, Italian institutions have been strictly entangled with Catholicism. Article 1 of the Statuto Albertino – the constitution that King Charles Albert I conceded to the Kingdom of Piedmont-Sardinia on 4 March 1848 – defined Catholicism as the only state religion.<sup>18</sup> Later on, when the peninsula was unified under the lead of the Piedmont monarchy, the Statuto became the constitution of the unified Kingdom of Italy and remained in force until 1948. Nevertheless, the confessional character of this constitution does support the notion that a difference of faith constitutes an exception to the enjoyment of civil rights.<sup>19</sup> The Statuto, therefore, did not prevent the progressive reduction in influence of the Catholic Church over state institutions. The unification of Italy (1860–70) caused a serious crisis in the relations between the Catholic Church and the new state. The liberal governments started a process of secularization of the institutions and public life (e.g., introduction of compulsory civil marriage, 1865; restriction of Catholic religious education in state schools, 1877; reform of the criminal law provisions that protected religion, 1889; state control of the welfare and charitable institutions, 1890), which provoked the opposition of the Church hierarchy, further aggravated by measures aimed at weakening the economic power of the Church (especially by way of abolishing some Church entities and confiscating their property, 1866–67). The fact that the unification of Italy was attained by destroying the secular power of the Popes gave particular strength to the hostility of many Catholics towards the Kingdom of Italy, although the predominantly moderate policy of the Italian Government made the relations with the Church progressively less tense.<sup>20</sup>

However, the outbreak of World War I prevented any concrete effects of this rapprochement. Following the war, the Fascist Party, which took power in 1922, started a policy of reconciliation with the Catholic Church which culminated in the Lateran Treaties of 1929.<sup>21</sup> These treaties solved the problem of Rome by creating the Vatican

16. For example, n. 25 of the *Charter of values, of citizenship and integration* declares that “Italy respects the symbols and the signs of all religions” not because of its constitutional principles but “on the basis of its religious and cultural tradition,” cf. [http://www.interno.it/mininterno/export/sites/default/it/assets/files/14/0919\\_charter\\_of\\_values\\_of\\_citizenship\\_and\\_integration.pdf](http://www.interno.it/mininterno/export/sites/default/it/assets/files/14/0919_charter_of_values_of_citizenship_and_integration.pdf), accessed 26 January 2010.

17. Cf. *Proposta di riflessione per l’emanazione di una legge generale sulle libertà religiose*, ed. by V. Tozzi and G. Macrì, Jovene, Napoli 2010, in press.

18. For the history of the Church-State legislation of the “liberal Italy” see F. Ruffini, *Corso di diritto ecclesiastico. La libertà religiosa come diritto pubblico subiettivo*, F. Ili Bocca, Torino 1924 (re-edited as *La libertà religiosa come diritto pubblico subiettivo*, il Mulino, Bologna 1992); A.C. Jemolo, *Church and State in Italy*, cit.; *La legislazione ecclesiastica. Atti del congresso celebrativo del centenario delle leggi amministrative di unificazione*, ed. by P. A. D’Avack, Neri Pozza, Vicenza 1967 and *Chiesa e religiosità in Italia dopo l’Unità (1861-1878)*, *Atti del quarto Convegno di Storia della Chiesa*. La Mendola 31 agosto-5 settembre 1971, Vita e Pensiero, Milano 1973.

19. Law of 19 June 1848.

20. Cf. A. Ferrari, *The Italian accommodations. Liberal State and Religious freedom in the “Long Century”*, in *L’État canadien et la diversité culturelle et religieuse 1800-1914*, ed. by L. Derocher, C. Gélinas, S. Lebel-Grenier and P. C. Noël, Presses de l’Université du Québec, Québec 2009, 143-153.

21. Cf. F. Margiotta Broglio, *Italia e Santa Sede dalla grande guerra alla conciliazione*, Laterza, Bari-Roma 1966 and R. Pertici, *Chiesa e Stato in Italia. Dalla Grande Guerra al nuovo Concordato. Dibattiti storici in Parlamento*, il Mulino, Bologna 2009.

State and restored a part of the privileges – concerning marriage, economic matters, and religious education in state schools – the Church had lost during the liberal period.

### B. *Current Constitutional Provisions*

The Republican Constitution of 1948, on one hand, confirms the Lateran Treaties signed by the State with the Catholic Church, naming them explicitly them in Article 7; on the other, it creates the basis for a system of religious freedom more compatible with the principles of freedom and equality.

At the same time, the new Constitution gives a special emphasis to the “institutional” profiles of religious freedoms. Articles 7 and 8, devoted to the relationships between the State and religious denominations (*confessioni religiose*), are included among the fundamental principles, strictly connected to the “material constitution” of the State and, consequently, commonly held as unchangeable. On the contrary, Articles 19 and 20 deal with freedom of religion as an individual right (not necessarily connected with its institutional dimension). They are placed in the part of the Constitution concerning the civil relations.

The special relevance accorded in the institutional context is explained by the historical bonds between the Italian State and the Catholic Church and has a significant influence on the Italian system of religious freedom.<sup>22</sup>

#### 1. The “Individual” Side of Religious Freedom

Article Nineteen<sup>23</sup> recognizes religious freedom for “everyone,” irrespective of citizenship,<sup>24</sup> guaranteeing not only freedom *of* religion (e.g., public propaganda,<sup>25</sup> building places of worship and religious cemeteries, and ritualistic animal slaughterings) but also freedom *from* religion, with the only limit of rites contrary to public morality, identified in the sexual decency protected by the criminal code.<sup>26</sup> Consequently, Article Nineteen is considered to protect all positions in matters of conscience, including the atheistic and agnostic ones, and it is also invoked to ground laws (and claims) on matters of conscientious objection.<sup>27</sup>

22. Cf. A. Ferrari, *Laïcité et multiculturalisme à l'italienne*, in “Archives des Sciences Sociales des Religions,” 53, 141, janvier-mars 2008, 133-154.

23. Art. 19: “Anyone is entitled to freely profess his religious belief in any form, individually or with others, and to promote it and celebrate rites in public or in private, provided they are not offensive to public morality.”

24. Therefore the enjoyment of religious freedom by foreign citizens is not subordinated to the principle of reciprocity. Obviously, from a political point of view, the support by the Italian Muslim communities of the enjoyment of equal rights by non Muslim believers in “Muslim countries” would help their integration in the Italian system.

25. The Code of Criminal Law contains provisions that punish blasphemy against Deity (of whatever religion), offenses against members of religious denominations and religious objects, disturbances of religious ceremonies (arts. 724 and 403-405). Incitement to violence or discrimination for religious motives is punished by the law 654/1975 (as modified by the law 205/1993), that applied in Italy the U.N. International convention on the elimination of all forms of racial discrimination (1965).

26. In any case, religious freedom must respect some fundamental values that art. 9 of the European Convention of Human Rights identifies in public order, health or morals, the protection of the rights and freedoms of the others. The member of a religious community who violates these limits with his/her acts, writings or words, will be punished like any other individual and cannot invoke obedience to a precept of his/her religion as a cause for impunity. But these limitations of freedom only concern the manifestations of a religion and not the religious belief itself: no-one can be punished for the sole fact of belonging to a religious group.

27. The introduction of special rules allowing conscientious objection to military service (1972) and – limited to medical doctors – to participation in abortions (1978) has solved some important problems of religious freedom. Others however remain unsolved, given the fact that there is no general right of objection of conscience and a specific law is required to dispense from the observance of a legal rule. The main problems are caused by religious groups which have settled in Italy relatively recently. The refusal of medical treatments (the prevailing jurisprudence acknowledges the possibility of refusing any medical treatment which is not compulsory, insofar as such a refusal - for instance of blood transfusion - does not endanger the life of another person) and the refusal to work on religious holidays (this right is granted only to the adherents of denominations which have concluded an agreement with the Italian State) are the most frequent issues: cf. V. Turchi, *I nuovi volti di Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea*, Edizioni Scientifiche Internazionali, Napoli 2010.

Article Twenty deals with the “social side” of the Article Nineteen.<sup>28</sup> Remembering some 19<sup>th</sup>-century laws that dissolved religious organizations and confiscated their properties, Article Twenty protects all kind of religious associations from discriminatory interventions motivated by their religious character.

## 2. The “Institutional” Side of Religious Freedom

Italian law considers religious denominations as the most complete and structured form of religious associations.<sup>29</sup> These denominations are the specific object of Articles Seven and Eight of the Constitution.<sup>30</sup>

Article Seven is devoted to the relationships between the State and Catholic Church, which is considered the paradigm of religious denominations; Article Eight, the first paragraph excepted, is devoted to the relationships between the State and non-Catholic denominations.

The first section of Article Seven and the second section of Article Eight guarantee, respectively, the mutual independence and sovereignty of both the State and Catholic Church and the free organization of non-Catholic denominations.

The first section of Article Seven, taking explicitly into account the historical relevance of the Catholic legal system, affirms that the Church and the State are independent and sovereign; and, consequently, that the latter cannot interfere with internal Church laws and statutes, which are in the total disposition of the ecclesiastical authorities.<sup>31</sup> The same guarantee is granted to non-Catholic denominations by the second section of Article Eight. This gives non-Catholic denominations the possibility to have internal rules which will be respected by State authorities if they are in accord with the fundamental principles of the Italian legal system.<sup>32</sup>

28. Art. 20: “No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organization on the ground of its religious nature or its religious or confessional aims.”

29. The problem of defining what a “denomination” is has become significant in Italy with the spread of the “new religious movements.” As there is a complete absence of statutory definitions, some commentators are of the opinion that the State is neither able nor competent to provide such a definition and affirm that the State should rely on the self-assessment of the adherents of the groups which want to be recognized as denominations: in other words, if the group members are of the opinion that they form a denomination, the State authorities would be bound to accept this assessment. On the contrary, some decisions of the Constitutional Court (and in particular Decision Nr. 467 of November 1992, in <http://www.olir.it/documenti/?documento=432>, accessed 27 January 2010) affirm that the term “denomination” must have an objective and not a subjective basis. Another group of scholars has tried to identify some characteristics which should qualify every group wanting to be classified as a denomination. Such characteristics are the belief in a transcendental reality (not necessarily in God), capable to answer fundamental questions on man’s origin and destiny, to provide a moral code, to create an existential interdependence between the faithful and this transcendental reality (manifested, amongst other things, by worship), and an organizational structure, however minimal. Besides the three religions of Abrahamic derivation, many religions of Oriental origin would fit this paradigm, while parapsychological, spiritualist and occult groups etc. would be excluded. Some of the “new religious movements” such as the Scientology Church are borderline cases (as it is shown by the contradictory decisions of the courts on this matter). In any case art. 7 and 8 are traditionally applied to religious groups with some degree of internal cohesion and not to “liquid” religious associations, which can be protected by art. 19 and 20: cf. S. Ferrari, *La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)*, in *Principio pattizio e realtà religiose minoritarie*, ed by V. Parlato and G. B. Varnier, Torino, Giappichelli 1995, 19–47 and B. Randazzo, *Diversi ed eguali. Le confessioni religiose davanti alla legge*, Giuffrè, Milano 2008, 21 ff.

30. Art. 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.”

Art. 8: “All religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organization 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.”

31. Cf., in particular, Constitutional Court, decision 334/1996, supra n. 8 and J. Pasquali Cerioli, *L’indipendenza dello stato e delle confessioni religiose: contributo allo studio del principio di distinzione degli ordini nell’ordinamento italiano*, Giuffrè, Milano 2006.

32. Consequently, if denominations decide to have (or if they decide to create some associations with) a statute, the only constitutional limit is not referred to the religious principles but just to the internal laws regarding the organization of the group that should not contradict the member’s basic constitutional rights. This

The second section of Article Seven and the third section of Article Eight ratify the “bilateralism principle,” which is a direct consequence of the principle of religious autonomy. This principle stands for the proposition that the State may only deal with the legal organization of a denomination by way of a Concordat with the Catholic Church or an agreement with non-Catholic denominations (i.e., under the condition of reaching an understanding with the denomination).<sup>33</sup> In other words, the bilateralism principle requires that the State regulate all questions strictly connected with the specific needs of a specific denomination through these agreements.<sup>34</sup> Both Concordats with Catholic Church and *intese* with non-Catholic denominations need to be ratified (the Concordat) or approved (the *intese*) by a law of the Parliament once they have been signed by the President of the Council of Ministers and the representative of the religious organization.<sup>35</sup> This law is atypical because, once approved, it can be amended only on the basis of a new agreement between the State and the denomination. No amendment based on a unilateral initiative of the State is possible.<sup>36</sup> In this way the Catholic Church and the denominations which have reached an agreement with the State have the guarantee that their legal status cannot be altered *in peius* against their will.

Under Articles Seven and Eight, one agreement between the State and the Catholic Church and six agreements with non Catholic denominations have been concluded and translated into State law. In 1984, the Catholic Church, entered into the Agreement of Villa Madama (*Accordo di Villa Madama*), which replaced the Lateran Concordat of 1929. This general agreement was followed by more specific agreements –the most important of them are concerned with the regulation of Church entities and property

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does not mean that denominations should “marry” the democratic principle. But, if they want to keep their autonomy, they must not violate fundamental human rights, such as, for example, the right to act and to defend in a judgement promoted by religious authorities and the right to freely withdraw from the group. In any case, State control regards only the rules that discipline the group’s life: therefore, no judicial control is admitted in relation to “sacred texts” at the bases of the religious credos. Consequently, the principle of autonomy exempts civil judges from the duty to investigate and to select “the true interpretation” among the many that are always possible when a religious text is invoked. At the same time, autonomy does not forbid public authorities to prosecute a concrete violation of law. In other words a Jehovah’s Witness will be punished if he refuses military service (if it is compulsory) but the Christian Congregation of Jehovah’s Witnesses cannot be dissolved because it advocates the refusal of military service; or a Muslim will be punished if he contracts a polygamous marriage but the same sanction will not be applied to the whole of the Muslim community due to the sole fact of considering such a marriage licit according to its religious precepts.

Cf., in particular, Constitutional Court decisions 259/1990, supra n. 8; 43/1988 in <http://www.olir.it/documenti/?documento=2304> and 239/1984, in <http://www.olir.it/documenti/?documento=376> all accessed 26 January 2010. A classic text in this matter is P. Floris, *Autonomia confessionale. Principi-limite fondamentali e ordine pubblico*, Napoli, Jovene 1992.

33. Atheistic organizations cannot sign agreements with the State, first of all because of their lack of a self-qualification as religious denominations.

34. In other words, “bilateral legislation” should be exceptional and unilateral State laws on religious freedom the common rule. Nevertheless, not only many matters that could have been disciplined through a general law have been regulated through specific agreements but also the agreements, as a consequence, are practically identical to each other.

35. Law 400/1988 attributes the general competence in the field of Church-State relations to the Council of Ministers, while the Legislative Decrees 300/1999 gives some specific competences to the Ministry of Interior (they range from the “guarantee of the order and public safety” to the “guarantee of the civil rights, including those of religious confessions, of citizenship, immigration and asylum”).

36. Consequently these laws, although formally are ordinary laws, have a greater force than other ordinary laws. This is an important difference with other concordatarian systems (with the Spanish one, for example) in which the State can denounce and abrogate the agreements stipulated with the Holy See without resorting to the procedure required for modify a constitutional provision. Moreover, the Constitutional Court has clarified that a law which ratifies a Concordat with the Catholic Church cannot be abrogated by referendum (decision 16/1978, in <http://www.olir.it/documenti/?documento=5030>); that only the contrast with one of the principles qualified as “supreme principles of the constitutional system of the state” by the Constitutional Court itself could justify a declaration of illegitimacy of a Concordat provision (decisions 30/1971, <http://www.olir.it/documenti/?documento=5091>; 175/1973, <http://www.olir.it/documenti/?documento=5094> and 1/1977, <http://www.olir.it/documenti/?documento=5095>, accessed 26 January 2010). Cf. S. Ferrari, *Il Concordato salvato dagli infedeli*, in *Studi per la sistemazione delle fonti in materia ecclesiastica*, ed. by V. Tozzi, Edisud, Salerno 1993, 127 ff. and the others contributions in the same volume.

(1984), Catholic religious education in State schools (eight agreements from 1985 to 2004), Church holidays (1985), protection of cultural and religious heritage (three agreements from 1996 to 2005), and pastoral care in the police force (1999).<sup>37</sup> Regarding non-Catholic denominations, the Parliament has approved agreements with the *Tavola Valdese* (Valdiansians) (1984), the Christian Churches of the Seventh-day Adventists (1986), the *Assemblee di Dio* (Assemblies of God, a Pentecostal Church) (1986), the Union of Jewish Communities (1987), the Christian Evangelical-Baptist Union (1993) and the Lutheran Church (1993).<sup>38</sup> Other agreements have been successively signed, but they have not yet been approved by the Parliament.<sup>39</sup>

There are two main problems that come from a strict application of the bilaterality principle. First, the need for representative institutions of religious denominations at the national level,<sup>40</sup> is a requirement that proved to be problematic for some religions, such as Islam, for example.<sup>41</sup> Second is the excessive amount of discretion which the public powers possess in deciding whether to accept or reject the proposal of a denomination to enter into negotiations for an agreement.

Certainly it is convenient to keep a margin of flexibility in dealing with the different scenarios, especially concerning their contents; however, the complete lack of rules governing the decision-making process according to objective criteria (e.g., number of adherents, length of their presence in Italy or other countries, type of organization) facilitates abuse.<sup>42</sup>

Another debated issue is the differentiation among denominations introduced by this system of concordats and agreements. Differentiation is not excluded by Constitution. Art. 8 sect. 1 does not refer to equality but to “equal freedom,” legitimizing in the name of the principle of reasonableness, the possibility to give different legal answers to different

37. Unlike the Concordat, these agreements are subject to the ordinary control of the Constitutional Court, which has the power to declare the illegitimacy of their provisions whenever they clash with some articles of the Constitution and not only when they clash with one of the “supreme principles of the constitutional system of the State” (Const. Court decision 1/77, supra n. 8): cf. [http://www.governo.it/Presidenza/USRI/confessioni/acordo\\_intese.html](http://www.governo.it/Presidenza/USRI/confessioni/acordo_intese.html), accessed 27 January 2010.

38. Churches represented by the “Waldensian Table” (Law 11 August 1984, n. 449); Italian Union of the Adventist Churches of the Seventh Day (Law 22 November 1988, n. 516); Assemblies of God in Italy (Law 22 November 1988, n. 517); Union of the Jewish Italian Communities (Law 8 March 1989, n. 101); Christian Evangelical Baptist Union of Italy (Law 12 April 1995, n. 116); Evangelical Lutheran Church in Italy (Law 29 November 1995, n. 520), cf. [http://www.governo.it/Presidenza/USRI/confessioni/intese\\_indice.html#2](http://www.governo.it/Presidenza/USRI/confessioni/intese_indice.html#2), accessed 27 January 2010.

39. In April 2007 six agreements have been signed with the Jehovah’s Witnesses; the Italian Buddhist Union; the Italian Hindu Union; the Apostolic Church in Italy; the Church of Jesus Christ of Latter-day Saints, and the Greek Orthodox Archdiocese of Italy and Exarchate of Southern Europe. The Jehovah’s Witnesses and the Italian Buddhist Union had already signed an agreement with the State in 2000, but these agreements were never approved by the Parliament.

40. In this sense the Italian case is – so far – different from the Spanish one, because in Spain the *Acuerdos* have been signed not with specific religious denominations but with federation of more denominations. In Italy something similar happened with the agreement between the State and Waldensians because the Waldensians Table, from 1979, also represents the Union of Methodist Church.

41. All religions that have concluded an *intesa* have had to adapt their organization to the dualistic model of Western Christianity, which involves stressing the distinction between religious or holy people and activities on the one hand and people and activities without such qualifications. The “confessional” model adopted by the Jewish communities to conclude the *intesa* is an interesting example, and it will also be very interesting to see what will be the choice of the Muslim community. In 2005 the Ministry of Interior created a consultative body, the Council for Italian Islam, whose members were selected by the Minister himself. This body has to face many problems and especially 1) the fact that its task was far from homogeneous, concerning matters connected to immigration and integration that did not regard only Muslims; and 2) the fact that this (implicit) governmental selection of the Islamic representatives was in conflict with the Constitution that forbids public authorities to select the leaders of religious organizations. In any case, since 2008 this Council stop to be convoked.

42. According to the Constitutional court the small number of members of a denomination is not, in itself, a valid reason to refuse an agreement (cf., for example, Constitutional Court, decision 925/1988, in <http://www.olir.it/documenti/?documento=446> accessed 27 January 2010). The conclusion of an agreement should only depend on the necessity to provide for specific needs of a denomination, independently from its dimension or political influence.

needs. Of course these differences cannot jeopardize legal equality of individuals<sup>43</sup>: some examples of this delicate balance may be found in the sections of this chapter devoted to financing of the denominations and religious education in State schools.

The correct relation of liberty (i.e., the possibility of a special regulation for each denomination) and equality (i.e., the necessity of a common set of rights and duties for all) is a central problem of Italian ecclesiastical law in its present stage of development and the principal test for Italian *laicità*.

#### IV. THE LEGAL CONTEXT

##### C. Difficult Implementation of Constitutional Provisions

The implementation of the constitutional provisions has revealed two main interconnected problems: a) the tendency to use the bilaterality principle not as an instrument for reaching “equal freedom” among individuals and denominations but as a political tool for a selective public recognition of these latter; b) the substantial similarity of all the agreements that have been signed.

Agreements are used by the State to concede a set of rights to “recognized denominations.” In this way, many matters that could be included in a general law on religious freedom (because they express needs common to all denominations) become matter of specific agreements signed by public powers that have great discretion. Consequently, these “photocopy” agreements are seen by the religious groups more as an instrument of political legitimation than as an opportunity for expressing their identity.

This state of affairs is full of negative repercussions. On the one hand, the benefits deriving from agreements have given rise to a rush to get them. On the other hand, the absence of any procedural limit to the discretionary powers of the government<sup>44</sup> can easily result in discrimination against denominations excluded from the agreements. Denominations without agreement with the State are ruled by the old law on “admitted cults” of 1929<sup>45</sup>: they are not only excluded from the more favorable provisions contained in the agreements but also barred from benefits reserved to the “agreed religions by the State and the regional legislator. The Constitutional Court has (in vain) affirmed that this last situation to be illegitimate.<sup>46</sup> On the other hand it rejected the request to condemn the failure to extend promotional interventions which, though agreed in the *intese*, do not answer a specific need of the contracting denomination.<sup>47</sup> In this way a “general law of the *intese*” has been created, which can be enjoyed only on the basis of substantially uncontrolled government powers of discretion. If the treatment of religious confessions by public authorities is unreasonable, it may lead to genuine inequality and to a different measure of freedom not only among them but also among their believers, in contrast with the limit fixed by the first section of Article 8 of the Constitution.<sup>48</sup>

43.Cf. S. Ferrari, *Libertà religiosa individuale ed uguaglianza delle comunità religiose nella giurisprudenza della Corte costituzionale*, in “Giurisprudenza Costituzionale,” 1997, 3085 ff.

44. The government is free to refuse or slow down negotiations for an agreement and to obstruct parliamentary approval when it gets cold feet and wants to retrace its steps.

45. Law 24 June 1929 n. 1159 and Royal Decree 28 February 1930 n. 289.

46. Cf. Constitutional Court 195/1993 and 346/2002, in <http://www.olir.it/documenti/?documento=378> and <http://www.olir.it/documenti/?documento=891> accessed on 27 January 2010 (two regional laws had reserved the public funding for the building of places of worship only to the religions with agreement although a general law of the State extended it to all denominations). Despite this decision, the regional lawmakers continued to provide privileged treatment for the religions with an agreement (for example, in the legislation on non-profit-making organizations (Legislative Decree 4 December 1997, n. 460), in that on privacy (Legislative Decree 11 May 1999, n. 135) and in the general policy law for the realisation of the integrated system of interventions and social services (Law 8 November 2000, n. 328).

47.Cf. Constitutional Court, decision 178/1996 and 235/1997, in <http://www.olir.it/documenti/?documento=433> and <http://www.olir.it/documenti/?documento=435> accessed 27 January 2010.

48. In this case, not only the first paragraph of art. 8 and art. 19 is violated, but also the first paragraph of art. 3 of the Constitution: “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.”

#### D. A Four-Tier System

The different social status of religions is reflected in their legal status. Any group with religious aims may be founded without the necessity of any authorization or prior registration and may operate within the Italian legal system. The only limits are set by considerations of public order and common decency.

Nevertheless, the denominations (or, more precisely, their legal entities) may choose between various types of legal capacity.

First of all, they may constitute themselves as non-recognized associations (*associazione non riconosciuta*, Article 36-38 of the Civil Code): it is the simplest model which is also used by political parties and trade unions. In this way, the denomination attains legal capacity (including independence in property matters and the ability to receive donations, take legal actions, etc.) in complete liberty, without their constitutive act or statute being submitted to any form of State control. More precise and binding rules apply to recognized associations (*associazioni riconosciute*) according to Articles 14-35 of the Civil Code and to Dpr. 10 February 2000, n. 361. They obtain legal personality through registration at the Prefecture, provided they fulfil a socially useful purpose and have sufficient economic means.

Civil law legal capacity may also be obtained according to Article 16 of the *Disposizioni sulla legge in generale* (Provisions on law in general), which grants foreign legal entities the rights of Italian legal entities on terms of reciprocity, and furthermore according to Art. 2 of the Treaty of Friendship, Commerce and Shipping with the United States, concluded in 1948. About forty denominations (or denominational legal entities) have obtained legal capacity in this way. Following some changes in the law interpretation which resulted in the loss of the tax advantages established in the Treaty, they enjoy now a legal status similar to that of recognized associations.

Up to now only, the possibilities of obtaining legal capacity in the same forms provided by general law for all groups, independently of their religious or other aims, have been discussed. For the religious groups however there is a further possibility of which the most important minority denominations have made use: that is, obtaining legal capacity on the basis of a law conceived exclusively for groups with religious aims (Law Nr. 1159 of 1929).<sup>49</sup> This law, by establishing the equal treatment of organizations with religious aims with those of welfare and education, grants important tax privileges (and so extends the advantages accorded to the associations of this latter type). On the other hand, this law subjects groups with religious aims to the control of the government and gives the State authorities the right to annul the decisions of their administrative bodies and to replace them with a State commissioner.<sup>50</sup> Apart from all the advantages and disadvantages linked with these provisions, the acknowledgement of legal capacity

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49. Forty different religious entities have been recognized on the base of this law: among them there are Orthodox entities, including the Orthodox Christians Association in Italy; the Russian Orthodox Church in Rome and in San Remo; one Islamic entity, the Islamic Cultural Centre of Italy; different Evangelical entities and the "Mormon Church"; the Soka Gakkai; the Italian Hindu Union; the Italian Buddhist Union; the Foundation for the Preservation of the Mahayana tradition; the "Christian Science"; the Pentecostals Christian Congregations and the Salvation Army: cf. [http://www.interno.it/mininterno/export/sites/default/it/assets/files/14/0853\\_enti\\_di\\_culto\\_riconosciuti\\_D.P.R.pdf](http://www.interno.it/mininterno/export/sites/default/it/assets/files/14/0853_enti_di_culto_riconosciuti_D.P.R.pdf), accessed 27 January 2010. The competence for this recognition is attributed to the Minister of Interior. The recognition can concern the church itself (e. g., the Evangelical Lutheran Church in Italy); a national representative institution (e. g., the Christian Congregation of Jehovah's Witnesses); a central "patrimonial" body (e. g., the Baptist Evangelical Christian Union of Italy); a cultural centre (e. g., the Islamic cultural centre of Italy) or even single entities that are connected with the central ones. The discretionary power of the Minister of the Interior is greater in reference to the entities of the religions without concordat or agreement. According to Law 1159/1929, the Minister of Interior will take into consideration the assets of the entity that claims recognition (these must be sufficient for the activities foreseen in its statute); the number of members and how widespread they are in the country; the compatibility between the statute and the main principles of the Italian legal system and the aim of the entity, which has to be "prevalently" of religion and cult.

50. All these powers raise serious questions of legitimacy, concerning the respect of the constitutional principle of religious autonomy.

according to Law Nr. 1159 of 1929 has great significance, because it confirms the religious nature of the recognized group. It forms the basic precondition (in fact, if not in law) for an application for an agreement with the Italian State.

The six denominations which have come to an agreement with the Italian State are no longer subject to Law Nr. 1159 of 1929, which has been replaced in their case by the (far more favorable) provisions contained in the separate agreements. However, the legal capacity obtained on the basis of this law is maintained by the six denominations. The Jewish communities and their Union, on the other hand, were never subjected to the law 1159/1929; they obtained legal personality by a law (Nr. 1731 of 1930) especially created for them, which regulated their activity in detail. The law was abrogated when the agreements were concluded, but the communities and their Union have maintained the legal capacity granted them on the basis of this law. Parallel provisions apply to the *Tavola Valdese* and the consistories of the churches in the Vaudois Valleys, which have – even after the conclusion of the agreements – kept the legal capacity which they had obtained not on the basis of legal provisions, but because of “*antico possesso di stato*” (long-standing possession of status, which means they had legal capacity even before the Italian State was founded).<sup>51</sup>

A final remark concerns the Catholic Church which has public law legal capacity, even if it is in no way comparable to the bodies which form part of the State organization. It can, if at all, be compared to foreign States which are public law subjects in Italian law.

Consequently, it is possible to say that Italian ecclesiastical law forms a four-tier system. The most prominent position is held by the Catholic Church, which, because of the number of its adherents and its special significance in Italian history enjoys a preferential position secured by the Agreement of Villa Madama and numerous other regulations in various ordinary laws.

An intermediate position is held by those denominations which have come to an agreement with the State. The groups concerned here are those which have existed in Italy for a long time (i.e., the Valdensians and Jews) or more recent groups which however have no characteristics incompatible with Italian law. They are guaranteed a position equivalent, although not equal, to that of the Catholic Church, participating in the 0.8% system and enjoying tax-deduction from donations; tax reductions for religious activities; facilities for a presence in state schools, the army, prisons and hospitals; regional facilities for public financing of places of worship; facilities in being financed as non-profit-making organizations.

In a lower tier are the denominations regulated by the Law Nr. 1159 of 1929 that allows tax reductions for religious activities; the possibility, under some conditions, of a presence in state schools, the army, prisons and hospitals and that make easier regional facilities for the financing of the places of worship.

Finally, in the lowest tier are the denominations – some of them with a significant number of adherents (e.g., the Muslims) – which have only relatively recently settled in Italy and which are sometimes characterised by doctrines and practices which are, according to the predominant interpretation, in more or less open conflict with public order (it is the case of some controversial “new religious movements,” e.g., the Scientology Church): these groups are regulated by the general laws on associations and are excluded from some important privileges (for instance with respect to financing, religious education and pastoral care). These denominations can simply enjoy the benefits guaranteed by the general law to all private groups. Consequently, they do not enjoy the benefits specifically laid down for religious groups although they should have the right, for example, to receive public money for building places of worship and to enjoy the tax

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51. This is also the case for the Holy See, the oldest Catholic parishes, seminars or cathedrals, and the Orthodox groups living in the old Habsburg possessions of Venice and Trieste. In other cases legal personality can be recognized through a specific law: this is the case of the National Conference of Catholic Bishops (recognized by the new concordatarian legislation); of the Jewish Communities and their central Union, recognized by the *intesa* which confirmed their previous legal status and of the entities of the Adventist Church and of the Assemblies of God, equally recognized by their respective *intese*.

reduction for their specific religious activities. Nevertheless, this seldom happens because of the resistance, in the first case, of the regional authorities, which have a preference for more traditional and institutionalized religions, and in the second of the tax authorities which apply tax reductions only to the groups that are recognized in the forms laid down by Law Nr. 1159/1929.

Roughly speaking, this four-tier system is based on Italian history and culture; however, this does not mean it is above criticism.

The first remark concerns the extent of the system of treaties and agreements, which was expanded to include matters which could have been dealt with by State law - with more satisfactory results with respect to the principle of equality. For instance in the field of the financing of the denominations the present system excludes Muslims and Jehovah's Witnesses (which, considering the number of adherents, form the second and third largest religious communities in Italy): without an agreement with the Italian State, they neither participate in the distribution of the 0.8 percent *IRPEF* nor can deduct from their taxable income sums donated to their religious community.

A State law extending these channels of funding to all denominations (which are recognized as such by Italian law) would show more respect for the "equal freedom" guaranteed by Article 8 Const. A similar criticism applies to other areas of Italian law. There is no law common to all religious communities concerning problems which could be solved uniformly (besides financing, this applies to pastoral care in public institutions, access to schools, etc.).

Such law would leave to the treaties and agreements only the regulation of problems which are of special interest to specific denominations (for example refusal of blood transfusions for Jehovah's Witnesses, ritual slaughter of animals for Jews, Sabbath rest for Jews and Adventists.<sup>52</sup>

#### V. STATE FINANCIAL SUPPORT FOR RELIGION

The Agreement of Villa Madama of 1984, which also makes use of the new possibilities created by the *Codex Iuris Canonici*, has fundamentally changed the system of State funding of the Catholic Church.

As a consequence of the Law Nr. 222 of 20 May 1985, which gave effect to the provisions of the agreement on Church entities and property reached between the Italian State and the Catholic Church in the preceding year, two systems of financing have been established: they apply both to the Catholic Church and to the other denominations which have signed an agreement, benefit. The first type concerns a quota of 0.8 percent of the revenue from *IRPEF* (*imposta sul reddito delle persone fisiche*, income tax, which is paid annually by all Italians liable to taxation who earn more than a minimum income). In the tax declaration the taxpayer, by ticking the respective box, can determine to devolve the money to one of the following:

- a) The Italian State for extraordinary measures against famine in the world, natural disasters, aid to refugees, the conservation of cultural monuments;
- b) The Catholic Church, for the religious needs of the population, the support of the clergy, welfare measures benefiting the national community or third world countries;
- c) One of the denominations which have signed an agreement with the Italian State.

The quota of 0.8 percent is distributed on the basis of the declarations of the taxpayer. If a person does not declare any preference, his quota is distributed among the different recipients in proportion to the choice made by the rest of the taxpayers.<sup>53</sup>

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52. The problems connected with this four-tier system are widely examined by Randazzo, *Diversi ed eguali* ..., supra n. 29 at 181 ff.

53. There are certain peculiarities which must be mentioned. The Christian Evangelical-Baptist Union, which has an agreement with the State, originally declined to take part in the distribution of the 0.8% of *IRPEF* but in 2008 changed opinion, and it is now trying to reach a new agreement with the State. The Pentecostals have decided to give up their right to the part of the 0.8% *IRPEF* corresponding to the persons who did not express any choice. Moreover, together with the Adventists and Waldensians, they decided to use the 0.8%

The second type of financing concerns the possibility of off-setting from taxable income donations up to Euro 1,032.91 to the Catholic Central Institute for the Support of the Clergy (or similar institutions of other denominations).

Scattered amongst various other legal provisions are additional forms of direct or indirect funding of the denominations. For instance many regional laws destine lots and parcels of land for the erection of places of worship and Law Nr. 390 of 1986 facilitates the loan or hire of State real property to Church bodies. In both cases it is uncertain whether these provisions apply only to the Catholic Church and the denominations with an agreement or to all denominations.

There is no doubt that the present system of financing, which follows the Spanish model,<sup>54</sup> is a step forward compared to the situation existing in Italy before 1984 and is in certain respects preferable to the systems that are in force in other European countries, characterised by inflexible mechanisms which may sometimes come into conflict with religious freedom. However, apart from certain details (i.e., the distribution of the quota of IRPEF pertaining to persons who have not declared their preference), there are some fundamental features of the present system which may be problematic. As already said, the access to the two main channels of finance (0.8% IRPEF and donation deductible from taxable income) is dependent on the conclusion of a concordat or an agreement with the Italian State: this pre-condition excludes from any form of financial support the denominations which cannot or do not want to conclude such an agreement or whose application for an agreement is rejected by the State.

In the area of taxation the denominations and their entities enjoy numerous privileges. Italian tax law is particularly fragmentary and only its basic principles can be mentioned here. The starting point is the equal treatment of the organizations with religious aims and those with welfare and education aims. This provision applies both to the Catholic Church entities (Art. 7 Nr. 3 of the Agreement of Villa Madama) and to the other denominations (Art. 12 of the Royal Decree of 28 February 1930, which implements the Law Nr. 1159 of 1929). The extension of the legal regime of welfare/education organizations to religious organizations gives these latter numerous advantages, for instance a rebate of 50% on corporation tax (*imposta sul reddito delle persone giuridiche*, IRES), the exemptions from inheritance and donation tax, value added tax (*imposta sul valore aggiunto*, IVA), and local land transfer tax (*imposta comunale sull'incremento di valore dei beni immobili*).

Finally it must be noted that the real property of the Holy See located on Italian territory (Articles 13 and 14 of the Lateran Treaty) as well as the other real properties named in Articles 13 and 14 of that Treaty are exempt from any kind of tax or duty toward the State or other public entities.

## VI. LEGAL EFFECTS OF RELIGIOUS ACTS

The religious rules that govern the internal activities of religious groups can have civil effect in the Italian legal systems provided they are not in contrast with its fundamental principles. When a religious entity of denomination with agreement has a

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revenues for social and humanitarian purposes only, because they are of the opinion that the financing of the Church and the maintenance of the clergy should be exclusively based on donations by the Church members. The available data show the following distribution: in 2004 about 40% of the taxpayers made a choice, and 87 % of these (which roughly equals 35% of all taxpayers) opted in favor of the Catholic Church, whereas 10% preferred the Italian State and the remaining 3% are divided among the Seventh-Day-Adventists, the Assemblies of God (Pentecostals), the Valdensians, the Lutherans and the Union of Jewish Communities. Of the sums thus attributed to the Italian Conference of Bishops, 35% was used for the maintenance of the clergy, about 20% for welfare measures and the remaining part (about 45%) for purposes of worship to the benefit of the population: cf. [http://it.wikipedia.org/wiki/Otto\\_per\\_mille](http://it.wikipedia.org/wiki/Otto_per_mille), accessed 28 January 2010.

A disputed question is the choice of the State to use its part of 0.8% to finance the restoration of ... Catholic buildings: cf. I. Pistolesi, *La quota dell'otto per mille di competenza statale: un'ulteriore forma di finanziamento (diretto) per la Chiesa cattolica ?*, in "Quaderni di diritto e politica ecclesiastica", 2006/I, 163-182

54. Cf. C. Cianitto, *Il finanziamento delle confessioni religiose in Italia e Spagna: scelte a confronto*, id. 197-201.

legal status internal rules can also have full effects in matter of property and exchanges between religious organizations and thirds if they are published, and consequently cognizable, in registers of legal persons of Prefectures.

Where religious acts have a more evident civil relevance is in the field of marriage. Article 34 of the Concordat of 1929 restored the civil law validity of Catholic marriages after that the Civil Code of 1865 had recognized the civil marriage as the only form with legal effects. The Concordat of 1929 stated that Church marriages could be registered in the registers of births, marriages and deaths kept in every Italian municipality: once registered, they obtain full validity in State law. Additionally it was ruled that the Church courts (not the State courts) were competent to deal with annulments and dissolution of the registered Church marriages (the so-called “concordat-marriages,” *matrimoni concordatari*) and that the decisions of these courts, which were pronounced on the basis of Canon Law, obtained civil law validity through a (highly summary) recognition procedure (*giudizio di delibazione*) by the Italian courts of appeal. It was of course still possible to celebrate a civil law marriage (which was completely regulated by State law and subject to the jurisdiction of the State courts) and, for the members of non-Catholic denominations, Law Nr. 1159 of 1929 introduced the possibility of being married by a minister of their own denomination: but, differently from the “concordat-marriages,” the regulation of these marriages and the power to declare their nullity were matters for the legislation and the courts of the State.<sup>55</sup>

Article 34 of the Concordat and Law Nr. 847 of 1929, which was passed for its implementation, have caused numerous problems which the Agreement of Villa Madama has tried to solve, without changing the fundamental principles of the system laid down in 1929.

Article 8 of this new Agreement recognizes civil law effects of the marriages concluded according to Canon Law, provided that the certificate issued by the minister conducting the marriage is registered in the state register of births, marriages and deaths. The marriage starts having civil law effects since the moment of its celebration, even if it is registered at a later date. It is not possible to register and so give civil law effects to Church marriages of persons who have not reached the age of consent for civil law marriage (18, or, with a court authorization, 16 years of age) or when there is an impediment to the marriage which is regarded as insurmountable by civil law (n. 4 of the Additional Protocol to the Agreement of Villa Madama regards as such the impediments for reasons of insanity, previous marriage, crime and direct blood relations). In order to ascertain the existence of impediments, the parties are required to publish the banns at the town hall, according to the rules that apply to civil marriages too.

In this way religious marriages are prevented from obtaining civil law validity through registration when they could not have been concluded under the provisions of the Civil Code, so that equality of citizens in matters of marriage is granted regardless of the denomination to which they belong. The same article also provides that the court of appeal may, on application of the parties, declare the civil validity of the annulments of marriage declared by the Church courts. Before giving civil effects to these ecclesiastical courts decisions, the court of appeal must however establish that (a) the Church court had jurisdiction to acknowledge the grounds of annulment; (b) during the annulment procedure in front of the Church courts, the fundamental principles of Italian law concerning the rights of the parties had been respected<sup>56</sup>; and (c) the preconditions for the recognition of

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55. Cf. A. C. Jemolo, *Il matrimonio*, in *Trattato di diritto civile*, ed. by F. Vassalli, Utet, Torino 1957, III, I, I, 246 ff. and F. Finocchiaro, *Del matrimonio*, art. 79-83 cod. civ., in *Commentario del codice civile*, ed. by A. Scialoja and G. Branca, Zanichelli - Società Editrice del Foro Italiano, Bologna-Roma 1971, 196 ff.

56. Recently Italy has been condemned by the European Court of Human Rights (*Pellegrini v. Italy*, n. 30882/96, July 20, 2001) because the Court of Appeal of Florence had given civil effects to a Church court decision that had annulled a “concordat-marriage”: according to the European Court, the Church judgment had not respected the principles of fair judgment granted by art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in <http://www.olir.it/documenti/?documento=1154>, accessed on 28 January 2010.

foreign judgements in Italy were met, which means that the decision of the Church court cannot contain provisions that are in conflict with Italian law. Consequently it is argued that Church decisions annulling the marriage for typically denominational reasons (for instance *disparitas cultus*, ordination and vow of chastity) may not be declared valid in Italian law, because this would conflict with the principle of religious freedom. The Constitutional Court has also emphasised the existence of a similar conflict regarding the Church decisions which annul a marriage on the grounds of a deception by one of the parties only: in this case it is possible to declare these decisions valid in Italian law only with the consent (or at least without the dissent) of the party who was in good faith or after proof that the deception was known (or at least recognisable) to the latter at the time of marriage.<sup>57</sup> On the subject of the jurisdiction of the Church courts, Article 8 of the Agreement of Villa Madama is worded ambiguously (perhaps purposely because of the difficulty of overcoming the differences of opinion between the parties during the negotiations). This Article does not repeat the clear wording of Article 34 of the Lateran Concordat, which stated that the cases concerning the annulment of marriages (and the dissolution of marriages which had been concluded but not consummated) were reserved to the competence of the Church courts: it declares that the Church decisions of annulment are valid under the conditions listed in the Article, without any reference to the exclusive character of the Church court jurisdiction.

Because of the lack of any reference to the exclusivity of Church jurisdiction, some commentators argued that the State courts are competent alongside the Church courts to declare the nullity of concordat marriages. This opinion was adopted by the Court of Cassation in a decision of February 1993 and it has been followed by the majority of the Italian courts.

Questions related to religious marriages have been of great relevance in the past, but today they (while remaining of great theoretical interest) have only a small practical importance: since the introduction of divorce in 1970, the number of applications to give validity to decisions of annulment of the Church courts has dropped to a few hundred per year. As has been mentioned, citizens who do not wish to marry “*in facie Ecclesiae*” may conclude a civil marriage or, if they are members of a denomination other than the Catholic one, may be married by a clergyman of their own denomination according to the provisions of law Nr.1159 of 1929. This law is no longer applied to those denominations which have concluded an agreement with the Italian State but the provisions on marriage contained in the agreements – although introducing significant changes (for instance the abolition of the preliminary State authorization for the clergyman who celebrates the marriage) - do not change the structure of the institution, which remains a marriage concluded in religious form but ruled completely by civil law.

## VII. RELIGIOUS EDUCATION

In Italy since 1873 there are no theological faculties in the State universities. There are no particular problems regarding the right of the denominations to establish schools and other educational institutions of every level and type: this possibility is in fact granted to all private law persons by Article 33 Cost., and the provisions of the Agreement of Villa Madama and some of the agreements with other denominations merely repeat and apply this rule. The question of the legitimacy to publicly fund private (including religious) schools has been discussed for a long time. In any case, in 2000 a new law established that families which send their children to private schools recognized by the State (*scuole paritarie*) are entitled to a partial refund of the fees.<sup>58</sup>

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57. Cf. R. Botta, *Matrimonio concordatario*, in *Il diritto di famiglia*, I *Famiglia e il matrimonio*, ed. by G. Bonilini, C. Cattaneo, Utet, Torino 1997, 213 ff.; S. Domianello, *I matrimoni davanti a ministri di culto*, in *Trattato di diritto di famiglia*, ed. by P. Zatti, vol. I, *Famiglia e matrimonio*, ed. by G. Ferrando, M. Fortino, F. Ruscello, t. 1: *Relazioni familiari, matrimonio, famiglia di fatto*, Giuffrè, Milano 2002, 202-492 and N. Marchei, *La giurisdizione dello Stato sul matrimonio “concordatario” tra legge e giudice*, Giappichelli, Torino 2008.

58. Cf. A. Ferrari, *Libertà scolastiche e laicità dello Stato in Italia e Francia*, Giappichelli, Torino 2002.

In the field of education, discussion focused on the topic of religious education in State schools. Neither the Italian Constitution nor ordinary laws contain any provision specifically devoted to religious education.<sup>59</sup> Rules on this matter can only be found in the law on “admitted religions” (n. 1159 of 1929), in its executive decree (n. 289 of 1930) and in the agreements concluded by the State with some denominations. In line with the attention paid to the institutional profiles of religion, the Italian legal system considers religious education in schools from a strictly denominational point of view, in relation to the needs of the pupils and families belonging to a specific religion. In Italian schools the cultural teaching of religious phenomenon (“education about religion”) is still barely developed.

Concerning religious education in State schools there is a clear difference between the provisions applying to the Catholic Church on one hand and to the other denominations on the other. The Agreement of Villa Madama stipulates that two classes of religious education will be taught in play schools and primary schools and one class at senior schools per week; no religious education is provided at university level. The State bears the total financial burden of Catholic religious education. Every year the pupils – or, up to the end of intermediate school, which is usually completed at the age of 13, their parents – must declare whether they intend to attend the Catholic religious education classes or not.<sup>60</sup> If they decline, the pupils may concentrate on other subjects during this period or may leave the school premises (this right was granted the pupils by the decision Nr. 13 of the Constitutional Court in 1991).<sup>61</sup>

The teachers of Catholic religious education are chosen by the diocesan bishop from a list of people who have been trained in theology and Church disciplines and (since 2003) have won a regional competition (which is proof of their knowledge of school system). The recognition by the Church authority takes the form of a written confirmation (*nihil obstat*) which certifies that they are suitable to teach religious education. If this recognition is withdrawn<sup>62</sup> or if there are not students enough, the teacher must leave the teaching of Catholic religion and will be assigned to the teaching of a different subject (if he/she is qualified to do so) or will be given a different job in the public sector.<sup>63</sup> The curricula for Catholic religious education in each type of school are determined through an agreement between the Minister of Public Education and the Chairman of the Italian Conference of Bishops: the curricula must consider the teaching of religion “in the framework of the goals of the school,” avoiding all forms of (strong) proselytism or discrimination. The school books must have the *nihil obstat* of the Conference of bishops and of the bishop of the diocese in which the school where the books will be used is located. The concrete experience generally shows that the teaching of Catholic religion is pluralistically oriented and open to the study of other religious traditions, revealing the role played by the Catholic Church in adapting Italian society to the growing pluralism.

The six denominations which have reached an agreement with the Italian State may send their own teachers to the State schools where pupils, their parents or the school teachers require the teaching of a certain religion (e.g., Judaism) or the study of “the phenomenon of religion and its implications” in general (as it is said in Article 10 of the agreement with the *Tavola Valdese*). The provision of this teaching is agreed by the competent school authority and the representatives of the denomination, while the

59. For a minor exception see art. 1 of the Legislative Decree n. 59 of 19 February 2004.

60. When students are less than 18 years old, their choice needs to be confirmed by their parents.

61. It is for this reason that this teaching is said to be voluntary and not optional. The teaching of the Catholic religion was followed in 2008-2009 by 91% of students: more in the South (98.2%) than in the North (85.1%); more in primary schools (94.2%) than in high schools (85.3%); less in big cities: cf. [http://www.chiesacattolica.it/pls/cci\\_new\\_v3/V3\\_S2EW\\_CONSULTAZIONE.mostra\\_pagina?target=0&id\\_pagina=328](http://www.chiesacattolica.it/pls/cci_new_v3/V3_S2EW_CONSULTAZIONE.mostra_pagina?target=0&id_pagina=328), accessed 27 January 2010. Cf. A. Gianni, *L'insegnamento della religione nel diritto ecclesiastico italiano*, Cedam, Padova 1997.

62. For some examples of behavior in conflict with Catholic doctrine (e. g., re-marriage after divorce; pregnancy without marriage) cf. V. Pacillo, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, Giuffrè, Milano 2003, 334-363.

63. Cf. law n. 186 of 18 July 2003.

financial burden is borne by the denomination.<sup>64</sup>

Finally, according to the Law of 1929, denominations without agreement may use the classrooms of State schools for religious education when the students belonging to a denomination are in a considerable number in a school and there are no places of worship of their religion available in the proximity of the school. All the costs are paid by the denomination and an agreement between the religious group and the Director of the Regional School Office is necessary. It is interesting to note that this possibility has never been used by the Muslim communities and that it has never been mentioned in the public debate about the possibility of an Islamic religious education in State school.<sup>65</sup>

The regulation of religious education contained in the Agreement of Villa Madama and in the agreements with minority religions has been the object of numerous conflicts. However, since the intervention of the Constitutional Court, the system seems to have attained a point of equilibrium. Some doubts remain concerning the obligation of the pupils to declare whether they want to attend Catholic religion classes (with reference to the protection of privacy), the fact that the State is charged with the financial burden of Catholic religious education (but not that of the other denominations; in some cases the State financial support has been rejected by the denominations themselves) and the limitation of religious education classes only to pupils of the denominations which have concluded an agreement. These problems are however general problems which depend on the fundamental choices which are at the basis of the whole reform of Italian Church-State relations law and which reappear in all parts of the system, although in other forms.

Finally, it must be noted that special provisions in the Agreement of Villa Madama (Article 10, which reappears in the agreements with some other denominations) state that seminaries and educational institutions in Church disciplines are free from any kind of State interference and are solely under the authority of the Church. The same article stipulates that the appointment of the professors at the Catholic University of the Sacred Heart (*Università Cattolica del Sacro Cuore*) is subject to the consent of the Church authorities as far as religion is concerned.<sup>66</sup>

### VIII. RELIGIOUS SYMBOLS IN PUBLIC PLACES

The Italian Catholic tradition and the Italian interpretation of the principle of *laicità* facilitate wearing religious symbols in public places, included schools, hospitals and public offices, allowing a relevant degree of freedom to public servants also.<sup>67</sup> Sections 25 and 26 of the Charter of Values, Citizenship and Integration published in 2007 under the auspices of the Ministry of Interior declare that “on the basis of its religious and cultural tradition, Italy respects the symbols and the signs of all religions. No one can say to be offended by the signs and symbols of a religion different from his/her own. As established

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64. The agreements between some minority denominations and the Italian State also contain provisions excluding forms of “widespread” religious education (i.e. which takes place under cover of other subjects) and prohibiting pupils being forced to participate in religious acts or acts of worship. This has raised the problem of some practices traditionally wide-spread in State schools, for instance the blessing of the class-rooms (which is done once a year by a member of the Catholic clergy), the participation of the pupils in religious ceremonies during school hours (usually a mass celebrated according to the Catholic rites), and the meetings of the pupils with the diocesan bishop on the occasion of his pastoral visits. A decree of the Ministry of Public Education (1992) granted the collegial bodies of the schools the right to decide on such activities, provided the participation of the pupils is voluntary, but some courts have affirmed that these activities are illegal.

65. Cf. A. Ferrari, *La scuola italiana di fronte al paradigma musulmano*, in *Islam in Europa/Islam in Italia tra diritto e società*, ed. by Id., Il Mulino, Bologna 2008, 171-198.

66. Cf., on this matter, the decision of the ECHR of 20 October 2009, n. 39128/05 which condemned Italy for recognizing the dismissal of a professor of the Catholic University of Milan without verifying the concrete respect of the fair process rules by the University authorities: <http://www.olir.it/documenti/index.php?documento=5133>, accessed 27 January 2010.

67. This right is particularly disputed in relation to courtrooms, where judges can forbid the attendance of persons with covered head. art. 6 of the agreement with the Jewish communities explicitly allows to take an oath with covered head. Cf., in general, V. Pacillo, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, cit., 312 ff.

by international Charters, it is convenient to educate the youth to respect the other's religious beliefs, without finding in them elements of division. In Italy there are no restrictions on people's attire, as long as it is chosen freely and it is not detrimental to human dignity.<sup>68</sup> The only limit would be in relation to symbols which impose to « cover the face because this [would impede] the person's recognition and [would hinder] establishing relations with others »<sup>68</sup>. Consequently, it is possible to wear headscarves in State school and when photos for identity cards are taken, if the face is well visible,<sup>69</sup> but there is some tolerance toward some other disputed symbols as the *kirpan*.<sup>70</sup> Nevertheless, in recent times, the fear of Muslim immigration and a lively debate around the preservation of Italian identity has made the situation more complicated focusing the question around two paradigmatic symbols, the crucifix and the burqa.

In relation to the first, it is disputed validity and the constitutional legitimacy of the decrees (which date back to the fascist regime) that allow the exposition of the crucifix in the classrooms of State school and in courtrooms. Some people think that these rules are not more in force and that the exposition of crucifix is contradictory with the constitutional principle of *laicità*, which prescribes cultural and religious pluralism. But the legal scholars and the Courts that share this idea<sup>71</sup> are a minority in Italian society. The presence of the crucifix in State schools is supported by the majority as an expression of Italian *laicità*<sup>72</sup> giving constitutional relevance to the Catholic cultural tradition of the country.<sup>73</sup> According to the Administrative courts, the crucifix represents a sign of national identity and cannot be considered a threat to freedom of conscience: on the contrary, it allows all children, and especially the extra-communitarian ones, to perceive the universal values of tolerance written in the Constitution.<sup>74</sup> Finally, in relation to courtrooms, the Consiglio Superiore della Magistratura (the self-governing body of the Italian judges) has expelled from the judiciary roll a judge who refused to have hearings in a courtroom where a crucifix was displayed.<sup>75</sup> What the history of the crucifix issue seems to say is that a particular interpretation of national identity prevails on both neutrality of institutions and individual rights. These latter would also be violated by some draft laws which propose to ban the burqa from the public spaces, considering it as a symbol of Islamic fundamentalism directed against both women and national security.<sup>76</sup>

68. Cf. nn. 25 and 26 of the Charter, *supra* n. 16.

69. Cf. art. 289 of the royal decree 635/1940 and the circulars of the Ministry of the Interior n. 4/1995 and 14/07/2000.

70. Cf. Criminal Courts of Vicenza (28 January 2009, in <http://www.olir.it/documenti/index.php?documento=4950>) and Cremona (19th February 2009, in <http://www.olir.it/documenti/index.php?documento=4939>), which confirm the status of "accepted minority" enjoyed by the Sikh community, which is well integrated in North Italy where Sikh work as specialised farmers.

71. Cf., for example, the ordinance of the Cassation Court 15614/2006, in <http://www.olir.it/documenti/?documento=3751>, accessed 27 January 2010.

72. Cf. Council of State, sentence n. 556 of 13 February 2006, in [http://www.olir.it/ricerca/index.php?Form\\_Document=3517](http://www.olir.it/ricerca/index.php?Form_Document=3517), accessed the 27<sup>th</sup> January 2010.

73. Beside the decisions quoted in the note above, see the opinions of the Council of State of 15 February 2006 (in [http://www.olir.it/ricerca/index.php?Form\\_Document=3638](http://www.olir.it/ricerca/index.php?Form_Document=3638)) and 27 April 1988, n. 63 ([http://www.olir.it/ricerca/index.php?Form\\_Document=730](http://www.olir.it/ricerca/index.php?Form_Document=730)), accessed on 27 January 2010. Cf. also J. Pasquali Cerioli, *La laicità nella giurisprudenza amministrativa*, in [http://www.statoeChiese.it/index.php?option=com\\_content&task=view&id=244&Itemid=40](http://www.statoeChiese.it/index.php?option=com_content&task=view&id=244&Itemid=40) and N. Marchei, *Il simbolo religioso e il suo regime giuridico nell'ordinamento italiano*, in *Symbolon/Diabolon. Simboli, religioni, diritti nell'Europa multiculturale*, ed. by E. Dieni, A. Ferrari & V. Pacillo, il Mulino, Bologna 2005, 261-301.

74. Cf. Council of State, opinion of 15 February 2006, *cit.* Recently the ECHR condemned Italy, considering the display of the crucifix a violation of individual religious freedom and freedom of conscience: decision of 3 November 2009 n. 30814/06, in <http://www.olir.it/documenti/index.php?documento=5146>, accessed on 27 January 2010.

75. Decision of 22 January 2010, <http://www.csm.it/comunicati%20stampa/CommStampa.php?icomuni=161>, accessed on 27 January 2010.

76. Differing from France, the Italian draft laws ban the burqa in all public spaces: cf., for example, the proposal n. 2422 of 6 May 2009, in [http://www.camera.it/\\_dati/leg16/lavori/schedela/trovaschedacamera\\_wai.asp?Pdl=2422](http://www.camera.it/_dati/leg16/lavori/schedela/trovaschedacamera_wai.asp?Pdl=2422) and the proposal n. 2769 of 2 October 2009, in [http://www.camera.it/\\_dati/leg16/lavori/schedela/trovaschedacamera\\_wai.asp?Pdl=2769](http://www.camera.it/_dati/leg16/lavori/schedela/trovaschedacamera_wai.asp?Pdl=2769), both accessed on 27 January 2010.

## Religion and the Secular State in Japan<sup>1</sup>

### IX. SOCIAL CONTEXT

The contemporary society of Japan appears to be comprised of *both* secular and religious influences. The reality is that the Japanese society reflects an ambivalent feeling towards religion shared by the majority of the Japanese people and is the key to understanding the social, political and legal context in the theme of “Religion and the Secular State.”

In this section of the report, both the current breakdown of religious affiliations in Japan and a brief historical explanation of the major religious traditions in Japan are given. According to the latest reliable statistics available concerning the religious affiliation of the Japanese, 51.2 percent are Shintoists (Shinto is traditional polytheistic religion of Japan), 43.3 percent are Buddhists, 1.0 percent are Christians, and 4.4 percent are other religions. The total number of Shintoists and Buddhists combined make up approximately two hundred million, which is almost twice as many as the total population of the country. How could that be explained?

First, as the statistics are based on a questionnaire answered by religious communities, each community may have declared a number slightly more than actual membership. Another explanation could be the possibility that each community counted the number of people who had simply participated in some religious events of the community or worshipped in some way or other, even though there is no such clear-cut sign of one’s religious affiliation in Shinto and Buddhism as baptism is in Christianity. Many Japanese tend to participate in religious events of different religions, such as the New Year’s celebrations at Shinto shrines or Buddhist temples, Saint Valentine’s Day and Christmas Eve, romantic wedding ceremonies at Christian churches, and funeral ceremonies done in a Shintoist or Buddhist style.

According to a variety of public-opinion polls, however, approximately 30 percent or less of the Japanese believe in a religion. This gap between their willingness to participate in various religious events and their self-understanding regarding religious affiliation is due to the dual meaning of the word “religion.” If the word “religion” implies something related to the ultimate solution of human problems, most Japanese would answer that they are not committed to a particular religion. However, most Japanese become involved in religion in some way or other by taking part in a variety of religious events, because it cannot be denied that a religious dimension still exists in those mores. Actually, few Japanese consider themselves to be atheistic or strictly non-religious. In this “secular” society, there are as many as 182,310 religious corporations, thus showing the religious ambivalence of the Japanese.

The following major religious traditions in Japan are worth mentioning: Shintoism, Buddhism, Confucianism, and Christianity.

Shintoism is the indigenous polytheistic religion of Japan. In particular, Shrine Shinto (Jinja Shinto) enjoyed a special status until the end of the Second World War as a “state religion” of pre-war Japan. After the Meiji Restoration, an event in 1867 which put an end to Tokugawa shogunate, it was called State Shinto (Kokka Shinto), which incorporated traditional local Shinto rites, nationalized certain rituals and holidays, and built on them to promote worship of the emperor and Yasukuni Shrine’s cult of war dead. State Shinto (or Shrine Shinto) was officially regarded as non-religion by the government and it spiritually

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1. This is an interim version of the article, prepared for the 18th International Congress of Comparative Law; relevant footnotes will be included in the final version.

supported ultra-nationalism and militarism of pre-war Japan.

Buddhism found its way into Japan in the sixth century and proliferated in each era in some way or other with governmental support. The traditional authority enjoyed by Buddhism in Japan was lost in the sixteenth century when some feudal rulers burned down the Buddhist temples. But a mixture or synthesis of Shinto and Buddhism based on the identification of Buddhist figures as Shinto deities has been a prominent feature of Japanese religiosity throughout time in spite of Meiji government's Edict for Separation of Shinto and Buddhism just after the Restoration.

Confucianism, a political moral philosophy founded by Confucius in ancient China, is not regarded as an authentic religion. It did, however become highly influential, particularly in Tokugawa period, when it provided the shogunate with ideological support. It has since been highly influential among commoners since the Meiji era.

Christianity was introduced to Japan by a Jesuit Francisco Xavier in 1549. After harsh persecution during Tokugawa era and the Western major powers' arrival at the end of the shogunate, Japan was finally exposed to the West and religious dissemination came to be tolerated. Today, most major Christian churches or sects are found in the country. The total number of Christian followers, however, has never surpassed 1 percent of total population of Japan. The Roman Catholic Church has the largest number, but it still has about 450,000 people, less than 0.5 percent of the total population. Japan even has members who are Jehovah's Witnesses. Although superficially celebrated, Christian ceremonies and rituals include Christmas, Saint Valentine's Day, and Halloween. There are very few Muslims, Judaists, Hindus and Sikhs in Japan.

#### X. THEORETICAL AND SCHOLARLY CONTEXT

The present Constitution, promulgated on 3 November 1946 took effect on 3 May 1947 and replaced the first Constitution (Meiji Constitution), which was enacted in 1889. Critical reflection of the state Shinto system, accompanied by oppression of other religions under the Meiji Constitution, led to the guarantee of human rights embodied in an extensive list of fundamental rights and freedoms of the present Constitution. The list includes a provision regarding religion (Article 20), which is bolstered by Article 89 concerning prohibition of financial support for religion. The two articles provide for religious freedom and the principle of church-state separation in detail.

There are competing views among politicians, academics and activists as to how religion and the state should relate to each other, similar to the significant controversies regarding the Religion Clauses of the First Amendment to the U.S. Constitution. Two major views exist in Japan.

The conservative view, held by right-wing organizations, conservative politicians in the Liberal Democratic Party (now out of power), the Self Defense Force leadership, the Associations of War-Bereaved Families, and the Association of Shinto Shrines, have argued against strict separation, insisting on state support for Yasukuni Shrine and official visits to the shrine by public figures. The other more liberal view held by Christians, communists, socialists, and a majority of constitutional scholars argue that a strict separation of the state from religion is mandated by the two articles and that this is essential as a barrier against the revival of pre-war militarism.

The latter view can be said to be shared more widely, but academics differ on how a line of separation should be drawn in each of the concrete problem areas.

#### XI. CONSTITUTIONAL CONTEXT

One of the important aims of the Meiji Restoration was to separate Shinto from Buddhism. The two religions had been mixed for a long time in Japanese history. The Edict for Separation of Shinto and Buddhism in 1868 by the new Meiji government officially put an end to this co-mingling. This separation of Shinto from Buddhism made it possible for the government to treat the former in a special way, both politically and constitutionally: Shrine Shinto, or State Shinto, was to be treated as a state religion by

way of the tricky logic of considering Shinto shrines and State Shinto to be “non-religious.” Accordingly, Shinto priests were considered state officials, and Shinto shrines came to be supported financially by the government.

The Meiji Constitution Article 28 guaranteed religious freedom as “the subjects shall have freedom of religion to the extent that it does not interfere with the public welfare and their liability as a subject is not breached,” but the wording invited an interpretation that the freedom could be restricted by a mere order. Also, the freedom of religion was only guaranteed to the extent that it could coexist with the special status of Shrine Shinto or State Shinto as a state religion. Therefore, other religions were treated coldly or even oppressed (e.g., Christianity and Ohmoto). In sum, the full realization of religious freedom was fundamentally obstructed under this regime. With the rise of ultranationalism, the “state religion” status and dogma of Shrine Shinto became a spiritual support for the nationalism and militarism of prewar Japan.

After the Second World War, in December 1945, the Shinto Directive (the Directive on the Abolition of Governmental Sponsorship, Support, Perpetuation, Control and Dissemination of State Shinto) issued by SCAP (Supreme Commander for the Allied Powers in Japan) clearly repudiated special character and constitutional status enjoyed by State Shinto. Together with the renunciation of divinity made by the late Shouwa Emperor Hirohito on New Year’s Day in 1946, it brought about a total demise of the pre-war regime and demanded a new regime guaranteeing religious freedom and state separation from religion. This historical development was a backdrop of the detailed provisions concerning religion in the present Constitution. The present Constitution has two provisions concerning religion as mentioned before, namely Articles 20 and 89:

Article 20:

Sec.1 Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.

Sec.2 No person shall be compelled to take part in any religious act, celebration, rite or practice.

Sec.3 The State and its organs shall refrain from religious education or any other religious activity.

Article 89:

No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.

Thus, religious freedom is explicitly protected and separation of religion and state is distinctly mentioned. This scheme is modeled after the American constitutional principle found in the First Amendment, namely, strict separation of the state and religion.

The principle of state separation from religion provided for by Articles 20 and 89 is a principle of state neutrality toward religion. This understanding, commonly shared by constitutional academics, was professed by the Supreme Court of Japan as well in *Tsu City Ground-Purification Ceremony Case* in 1977. What actually matters is how both “non-involvement” and “impartiality,” two competing elements of “(religious) neutrality” could and should be respected as it would determine the outcome of each concrete case determining which of the two elements is given more serious consideration.

Whatever the position on this question may be, it is certain that there can be no preferred or privileged religion, or group of religions, under the current Constitution. There are also specific provisions concerning the principle of equality when dealing with the individual’s religion, namely, Article 14 Section 1, which provides that “all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin,” and Article 44, which provides that “the qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.”

## XII. LEGAL CONTEXT

The Religious Corporation Law is a piece of legislation that deals with religion. The Religious Corporation Law, enacted in 1951 and significantly revised in 1995, aims to confer juristic personality on a religious organization in order to facilitate its ownership and maintenance of properties such as a place of worship, and its operation and business for achieving its goal (Article 1 Section 1). Section 2 of the Article provides that religious freedom guaranteed by the Constitution should be respected in all the administrative settings and that any provision in the Religious Corporation Law should not be interpreted in such a way that the constitutionally guaranteed religious freedom of an individual, group or organization may be restricted.

The revision in 1995 was controversial in that the administrative control of religious corporations by the Ministry of Education (and prefectural governors) was tightened through the requirement of an annual submission of administrative/financial documents and through the requirement to report (on a religious corporation's business) and answer (to the public authority's inquiry when requesting a dissolution order by a court seems necessary) (Article 81). This scheme of dissolving a delinquent religious corporation, provided for by Article 81 of Religious Corporation Law, was upheld under Article 20, Section 1 of the Constitution guaranteeing freedom of religion by the Supreme Court in the Oumu Shinrikyou Dissolution Case in 1996.

There are also specific provisions on religion in several laws. Section 1 of Article 897 of the Civil Code concerning Succession provides that "notwithstanding the provisions of the preceding Article, the ownership of genealogical records, of utensils of religious rites, and of tombs and burial grounds passes to the person who, according to custom, is to preside over the rites for the ancestors. If, however, the *de cuius* has designated a person to preside over the rites for the ancestors, such person shall succeed to that ownership." Corporate Tax Law, Local Tax Law and Income Tax Law provides for tax exemption of religious corporations. The Fundamental Law of Education enacted in 2006 provides that benevolence towards religion, religious cultivation and social importance of religion is to be respected in education and that no religious activities including denominational religious education shall be permitted at public schools (Article 15). It also prohibits discrimination based on creed in education (Article 4 Section 1).

Similar provisions concerning the principle of equality when dealing with the individual's religion or creed are found in National Public Service Act Article 27 ("In the application of this Act, all citizens shall be accorded equal treatment and shall not be discriminated against by reason of race, religious faith, sex, social status, family origin, or political opinions or affiliation except as provided for in item 5 of Article 38."), Labor Standards Act Article 3 ("An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker."), and Labor Union Act Article 5 Section 2 Item 4 ("No one shall be disqualified from union membership in any case on the basis of race, religion, gender, family origin or status."). The Criminal Law makes it a crime to disrespect a place of worship and to disturb a religious ritual (Article 188).

As to specific case law on religion, there is a substantial body of case law concerning constitutional guarantees of religious freedom and state separation from religion because the system of constitutional review in the United States has been introduced (Article 81 of the present Constitution). In principle, constitutionally guaranteed freedoms and rights cannot be restricted by legislation.

The specific body in the State structure that deals with religious affairs and religious communities is the Ministry of Education, Culture, Sports, Science and Technology (the Ministry of Education until 2001), and especially its extra-ministerial bureau, the Agency for Cultural Affairs. These two bodies are responsible for religious administration. The Ministry includes the Religious Corporations Council, an independent expert advisory council, whose establishment is provided for by Article 71 of the Religious Corporation Law. The function and power of the Council is confined to enforcement of relevant provisions such as dealing with petitions for redress of a grievance. Religious Corporation

Law (Article 71 Section 4) prohibits the Council from intervening in internal religious affairs of a religious corporation. This requirement naturally follows from the constitutional principle of state separation from religion, since the Council is a part of the State government.

### XIII. THE STATE AND RELIGIOUS AUTONOMY

The public authorities may not restrict the autonomy of religious communities, because Article 20 Section 1 of the Constitution guarantees freedom of religion, which includes freedom of religious association. (Freedom of association in general is specifically guaranteed by Article 21 Section 1 as well). The autonomy of religious communities follows from freedom of religious association.

Thus, the public authorities are prohibited from intervening in internal affairs of religious communities (e.g., in structuring, administering and financing the religious community, in determining religious doctrine, in selection of religious personnel, in disciplining members of the community). The Religious Corporation Law Article 85 specifically provides that any provision of the law shall not be interpreted to empower the public authorities (including courts) to intervene in the internal affairs of religious communities, such as determination of religious doctrine, discipline or custom and selection of religious personnel. Article 84 of the law also requires the public authorities to avoid violating religious freedom of such corporations when they enact or amend a law affecting such corporations' finance (e.g., tax law), or when they lawfully inspect such corporations.

There is a substantial body of case law concerning secular judicial intervention in internal disputes of religious communities. It has been established judicially that a suit to obtain a declaratory judgment regarding a purely religious status within a religious community is to be dismissed without prejudice, and that an ostensibly legal dispute, the resolution of which is virtually dependent on a determination of underlying religious doctrinal matter, is not a legal controversy and dismissed without prejudice.

As for the secular law protecting or restricting the autonomy of religious communities to govern themselves and act freely in the secular sphere, see Part IV, above.

### XIV. RELIGION AND THE AUTONOMY OF THE STATE

Article 20, Section 1, in its latter part, provides that no religious organization may receive any privileges from the state, nor exercise any political authority. A good example of the proscribed privilege is the special status and preferential treatment enjoyed by State Shinto (or Shrine Shinto) until the end of the World War II. Under the present Constitution, however, no particular religion can be supported by the government nor be given any power to control other religious communities, as any preferential treatment of a particular religion of those kinds is considered a form of the proscribed privilege.

“Political authority” has been commonly understood to mean “sovereign power” currently monopolized by the state or local public entities (i.e., legislative power, taxing power, judicial power, power to appoint and to dismiss public officials). Political activity itself is not considered “political authority.”

In this context, the Soka Gakkai, a religious group of the followers of certain Buddhist sect, is worth mentioning. The Soka Gakkai became an influential religious group after the war, getting many members and engaging in political activity with the intention of converting the Japanese to their particular Buddhist faith. The Soka Gakkai organized a political party named Komei-to (Clean Government Party) in 1964. The party had smoothly developed in the political arena so much so that it transformed itself from the opposition to the government together with the Jimin-to (Liberal Democratic Party) in the 2000s.

The Soka Gakkai has been a genuine “new religion” since 1991, when it was excommunicated by the authority of the Buddhist sect. The Soka Gakkai International, an international arm of the Soka Gakkai, has been internationally developing as well.

### XV. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

As to the state law regulating religion specifically, see Part IV above. The religious almanac, edited by the Agency for Cultural Affairs, contains information about religious affiliation of individuals. This is, however, a result of voluntary replies submitted by religious communities. Religious freedom guaranteed by Article 20, Section 1 prohibits the state from forcing people to confess their religious affiliation.

Regarding the exemption from generally applicable laws or requirements based on religious conscientious objection, there are some lower court decisions worth noticing: the Bokkai Katsudou Case, concerning a clash between criminal law and the religious activity of a priest, Tokyo School Attendance Case, and Kobe Technical College Case, both concerning a generally applicable burden on religious activity of believers.

The new issue of whether religious exemption from public duty to serve as a lay adjudicator (named “Saiban-in”) should be given is also noteworthy. This system of guaranteeing lay people’s participation as lay adjudicators in certain serious criminal cases came into operation in May 2009. Catholic Bishop’s Conference of Japan announced its official opinion the following month that the clergy should decline to serve as Saiban-in while the laity should be free to decide whether or not they would assume the responsibility as Saiban-in. As Japan still maintains capital punishment, some sects of Buddhism which are critical of death penalty are also concerned about the possibility of their followers serving as Saiban-in in a case where a sentence of capital punishment would be likely.

### XVI. STATE FINANCIAL SUPPORT FOR RELIGION

State separation from religion is provided in detail in the present Constitution in Article 20, Section 1 (“No religious organization shall receive any privilege from the State.”) and Article 89 proscribing public financial support of religious institutions or associations. The latter proscription is a part of the prohibition of granting a “privilege” provided in the former. In all the cases regarding the separation principle, the “purpose-effect test,” a Japanese version of the *Lemon* test in the U.S., has been applied. The following is a list of important concrete issues in this field:

Public payment to a religious organization (e.g., Ehime Shrine Donation Case).

Public benefit to accommodate an individual's religious activity (e.g., Mino War Memorial Case, and Sorachibuto Shrine Case).

Indirect public aid to religion through tax exemption.

Public subsidies for maintenance of religious structures which have historical or cultural value.

Public aid to private religious schools.

The Sorachibuto Shrine Case is important in that the purpose-effect test was not articulately applied there.

### XVII. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

So long as there is no violation of secular law, religious acts are respected as they are. With regard to secular judicial intervention in internal religious dispute, see Part V.

### XVIII. RELIGIOUS EDUCATION OF THE YOUTH

Religious communities are free to create private schools with curricula and diplomas recognized by secular law. Actually, some of the most competitive prestigious schools in Japan are both private and religious. Due to the essential requirement of the separation principle articulated in the Constitution Article 20, Section 3 (“The State and its organs shall refrain from religious education or any other religious activity.”) and by the Fundamental Law of Education Article 15, Section 2 (forbidding religious education for a particular religion), the public school’s curricula cannot include any denominational religious instruction on a specific subject. They can, however, include non-

denominational education about religions or beliefs as provided for by Article 15, Section 1 of the Law.

Private schools are free to give religious instruction even in a denominational way, as they are not the state or its organs.

#### XIX. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Heated controversies concerning religious symbols in public places (e.g., the headscarf issue in France) have not yet occurred in Japan. In the context of education, however, a pupil or student of a school which officially prescribes a school uniform and a teacher wearing distinctly religious symbols may cause legal controversies. Most constitutional academics seem to agree that accommodating their religious need to wear religious symbols at school would not be held unconstitutional under the presumably established purpose-effect test concerning the separation principle articulated by Article 20 of the Constitution.

#### XX. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

There is no particular protection of religion in the public arena against offensive expressions such as the criminalization of a blasphemous libel. There is, however, a related provision in the Criminal Law Article 188 concerning the crime of disrespecting a place of worship or of disturbing a religious activity (see Part IV).