CIVIL RELIGION IN ITALY: A “MISSION IMPOSSIBLE”?

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I. PREMISE: ITALY WITHIN THE GENERAL FRAMEWORK

One must identify some main assumptions before discussing the controversial notion of civil religion in Italy.

First, civil religion is a multifaceted notion to which it is very difficult to attach a final and authentic meaning or a real functioning utility. On one hand, sociological and political discourses employ civil religion in many different senses and with many subtleties; on the other, in the juridical discourse, the “guardians of the law”—legislators, judges, and experts—refuse to admit explicitly this notion into the closed gate of positive law. Thus, civil religion is an intangible word. Nevertheless, this intangibility is what makes civil religion so intriguing. After all, this intangibility seems unavoidable as a notion deeply rooted in the U.S. cultural tradition that presents many analogies with Judaism: the epic of the “chosen people” is always accompanied by the frustrating search for a god hidden in the “small voice” of Mount Oreb or concealed in the disaster of the Shoah. In other words, civil religion is necessarily intangible since it tells us about the problematic relationship between God and human power, a relationship that is never broken off but rather concealed in the rigidly dualistic Western world. Consequently, civil religion necessarily appears as a dynamic notion with a variable meaning, summarized by the attempts to conciliate the (supposedly) cold rules of the contemporary democracies with the (supposedly) warm contributions of all religions to social cohesion.

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1. I have already addressed this topic in Laicità e religione civile: qualche osservazione su un “matrimonio dispari,” 2003 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 139, 158–60.

2. 1 Kings 19:1–18.


Moreover, if one accepts “civil religion” as the notion capable of summarizing the integrative role of religion in society building, one can also accept that it is a common feature distinguishing the old and the new continent. In fact, religion traditionally occupies a very different public role in Europe as compared to the United States. Out of the ashes of absolutist and mono-denominational states, modern Europe faced the impossibility of expelling religion from the public arena. It has chosen to invest in a direct relationship between individual and state—to privatize a monopolist god and to publicize his many agents, the individual churches, with concordats and agreements. On the contrary, the United States, rooted in a pluralistic society and a liberal state, does not have the same tension between state and society. It has preferred to publicize its pluralistic god and privatize its single churches. Consequently, in Europe, a more state-centric and—sometimes dramatically—secular-oriented civil religion exists; while in the United States, a more religion-centric civil religion exists, where God has been emphatically engaged in promoting civic virtues.

Finally, the new religious activism in the public arena today seems to have grown from the “small voice” of Mount Oreb. One is confronted by a true “great wind” that sweeps away the frail barriers between sacred and profane. In this new situation, civil religion seemingly lives a second life on both sides of the Atlantic. Europe, in fact, is discovering a sort of Americanization of its civil religion by enthusiastically calling on religions to protect democracy facing the “paradoxes of pluralism” and the inadequacy of too “cold” procedures. In the United States, the trend could be toward a sort of Europeanization of the same notion if the weakening of the Establishment Clause and some paradoxes of the accommodationist approach pave the way for the public role, not only of God, but also of the single churches themselves.

What, in this picture, is the Italian position? Italy reflects the European landscape, but with a unique peculiarity closely connected with its destiny to host the center of the Catholic Church.


6. See Jean Baubérot, La morale laïque contre l’ordre moral 17 (1997); Emilio Gentile, Politics as Religion, at xiv (George Staunton trans., 2006).


and still be a nation without state. Consequently, due to this lack of state, surplus of nation, and, particularly, existence in a predominantly Catholic nation, it seems very difficult to understand Italian civil religion as a religious-oriented contribution to the good of the whole society, non-religious components included. On one hand, Italian civil religion tends to favor Catholicism. On the other hand, a civil religion—or even a sort of “vicarious” civil religion9 that is helpful for democracy—seems to have in its place a church-religion aiming to establish a “protected democracy”: a democracy subordinated to the objectives and non-negotiable values of a single church. Italian Catholicism, therefore, plays more the role of a specific “political culture” than of a universal civil religion.10

The Italian case and the impracticality of Italy producing a civil religion reflect a permanent European history11 and forewarn some optimistic supporters of the public role of religions.12 Asking them for help in supporting democracy is not always a cost-free operation: echoing a famous statement of Alfred Loisy, we are waiting for a comprehensive god, but imperfect religions are all that ever come.13

II. ITALIAN CATHOLICISM AS CIVIL RELIGION OR A NATION WITHOUT A STATE?

Italian unity had a fortuitous character, achieved in two steps by the Kingdom of Piedmont: the proclamation of the Kingdom of Italy in 1861 and the capture of Rome in 1870.14 Since nothing connected the other Italian territories to the Savoy monarchy, the monarchy viewed the new “Italian” lands with deep suspicion; in

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10. See Alessandro Ferrara, Riflessioni sul concetto di religione civile, 40 Rassegna Italiana di sociologia 209, 209–10 (1999), who also writes that the five Italian civil religions described in 1974 by Robert Bellah “have nothing to do with civil religion.” Id. at 210; see also Robert Bellah, The Five Religions of Modern Italy, in The Robert Bellah Reader (Robert N. Bellah & Steven M. Tipton eds., 2006).


particular, it viewed the south as a land of ignorance and barbarism.\textsuperscript{15} Since the end of the Western Roman Empire, the peninsula remained simply a geographical expression, a target for foreign conquerors, void of any central structured political power.\textsuperscript{16} Catholicism—the religion of most of the population\textsuperscript{17}—was the only cement binding the new country together: a country without a common language and without a widespread culture capable of founding civic engagement. Italy was born from the ashes of small, conservative, patriarchal states far from both the administrative organization of absolutist states and from the civic vitality of the municipalities of the Renaissance, a place where an embryo of civil society and the “Republicanism” of Machiavelli were developed.\textsuperscript{18}

Consequently, despite the great internal variety of Italian Catholicism itself,\textsuperscript{19} the fidelity of the new country to “its” religion represented a sort of implicit rule\textsuperscript{20} that later influenced all Italian history by nourishing a strong rhetoric of continuity. Under the cloak of a generic Catholic identity, this continuity solved the problems of a deeply divided country—north/south, city/country—without a politically active middle class. In other words, the Italian unification was geographic, unaccompanied by constitutional reforms based on strong ideals—like laïcité and public service—able to nourish the process of nationalization with more secular values. The liberal governments of the nineteenth century

\begin{footnotesize}
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\item Id. at 226.
\item See Victor Hugo, A l’Italie, 26 May 1856, in \textsc{Oeuvres complètes: Politique} 509 (2002).
\item See Dagli stati preunitari d’antico regime all’unificazione 9–12 (Nicola Raponi ed., 1981).
\item Many authors have pointed out the lack of religiosity of Italians, their pagan superstitions, and the great variety of Catholicism itself in the peninsula (speaking about an Italian Catholicism would have had no meaning at these times). See, e.g., Antonio Gramsci, Prison Notebooks (1991); Arturo Carlo Jemolo, \textit{Church and State in Italy} (1961). Yet, the fact that more than 90 percent of Italians were baptized into the Catholic Church and under its canonical jurisdiction was one of the few common elements of this new political entity. In any case, it is interesting to note that this internal variety of Italian Catholicism is today individuated as one of the main reasons to explain the “soft secularization” typical of Italy, which would constitute a quite typical example of a European State at one time modern and Catholic. See generally Luca Diotallevi, \textit{Il rompicapo della secularizzazione italiana} (2001).
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were more worried about conciliating the Church with the new central power, than they were about enlarging the spaces for political participation that excluded most of the population. In an almost entirely Catholic country, before its laicisation (the secularization of society) the new state considered the optimum target to simply overcome the Church’s temporal dominion, hence, the genetic difference between the Italian situation and that of other countries.

Elsewhere, the absence of a temporal dominion of the Church intensified the struggle between secular and spiritual power on many matters, such as school or state welfare. In Italy, however, such matters were the subject of practical accommodations between the Church and public authorities since the beginning. In other words, the high level State-Church conflict in Italy was a conflict regarding the formal and institutional relations between a new and old State. On the contrary, the lower level—the social life—was a locus of accommodations between State and Church, the place where Catholicism continued playing its full role.

This unifying role of Catholicism explains the nation-state and not state-nation character of Italy. Unlike in France—the classical example of a state-nation—in Italy, social cohesion is a product of a certain natural, cultural-religious homogeneity, rather than a “patriotism” founded on a common bond of citizenship based on public institutions. This cultural-religious homogeneity resulted in the origins of the Italian “civil religion,” or, rather, the lack of an Italian civil religion.

The Italian experience in the nineteenth century provides a great example of how a liberal state could face a strong and undemocratic power—that refused to recognize the legitimization of the secular institutions—without renouncing the protection of freedoms for individual citizens or for ecclesiastical organizations themselves. Nevertheless, continuous accommodation to the Catholic Church, while impeding a dramatic societal split, contrib-


23. See id.

24. See id.


26. See generally Mario Falco, *La politica ecclesiastica della destra* (1914); *Jemolo, supra note* 19.
uted in a decisive way to giving Italy a legacy of permanent institutional weakness.27

The desperate effort of the liberal class to conciliate the papacy with the new order highlights not only the virtues, but also the original sin, of Italian political history: the failure to build a pluralist institutional system without either a true pluralistic society or the political will to encourage the development of the civil society. This sin is rooted in two core ideas that were typical both of the Italian liberal state and of the Catholic Church: strong centralism and a way of considering their own law the only juridical system.28

These orientations also explain three features still evident in Italy today: (1) the privileged position of the Catholic Church, placed at the top of the “pyramid of the cults”; (2) the way of considering relations between the Catholic Church and state an apical matter, of exclusive competence of the central governments of the state and of the Church;29 and (3) the general attitude towards a pluralism more top-down rather than bottom-up and more fragmented than integrated.30

Far from upholding the new liberal and potentially democratic institutions in exchange for definitive conciliation with the Italian State—as a civil religion would have done—the Church demanded the renunciation of full secularism or the renunciation of a procedural democracy where Catholic religion could not be the final criterion for judging the legitimacy of the state laws.31

Around 1870, the lawyer Pasquale Stanislao Mancini summarized this situation with these harsh words:

[C]onciliation can be made either by accommodating the papacy to Italy and to civilisation (and this is impossible) or, unfortunately, by accommodating Italy to the Pope. If it is not possible to make the Pope Italian and civil, the only thing will be to make every effort to make Italy clerical and papist. The institutions, therefore, will be corrupted, the laws changed, freedom wounded, and privilege and Catholic intolerance honoured. All


28. We are, in fact, at the core of the positivistic age, which also had a strong influence in the ecclesiastical legal thinking. See generally Norberto Bobbio, Thomas Hobbes and the Natural Law Tradition (1993); Carlo Fantappié, Chiesa Romana e modernità giuridica (2008).

29. See Arts. 7, 8 and 117(c) Costituzione [Cost.] (It.).


31. See generally Jemolo, *supra* note 19.
this to please the pope and to reach this great goal of conciliation.32

More than a century later, this hard sentence still offers some elements for reflection.

The process of conciliation culminated with the “Conciliation” of 1929, with the Pacts of Lateran with which Italy and the Holy See recognized their respective legitimization.33 After these pacts, Italy and the Holy See recognized that simul stabunt et simul cadent—we stand together, we fall together. More realistically, the Pacts recognize that Italy, unique among Western countries as an institutional entity, is founded on a very strong and formalized religious legitimation which inevitably still influences it strongly.

III. THE “CONSTITUENT MOMENT”: A LOST OPPORTUNITY FOR AN ITALIAN CIVIL RELIGION?

The years of 1946 and 1947 were unique in Italian history. Italy had become a Republic; universal suffrage (with the leading role of the big popular parties) and the big popular parties themselves—Catholic, communist, and socialist—elected an assembly to draft the first true constitution of the state.34 The big popular parties, unified by their common opposition to fascism, for the first time participated together both in the government and in the definition of the fundamental law of the country.35 The feeling of living an extraordinary experience was so strong that at the end of the works of the assembly, to celebrate a task destined for future generations, someone proposed that the name of God should be included in the constitution, and the old idealist philosopher Benedetto Croce invited the assembly to sing the Veni Sancte Spiritus.36

This cooperation was, however, just a moment. The Cold War and external pressures rapidly broke the alliance between communists and Christian Democrats, paving the way for forty years of continuous government by the Christian Democrats without any alternation.

32. 3 Pasquale Stanislao Mancini, Discorsi, quoted in Lorenzo Fruguele, La Sinistra e i cattolici 93 (1984).
33. See generally Jemolo, supra note 19.
34. See generally Cultura politica e partiti nell’età della Costituente (Roberto Ruffilli ed., 1979); Scelte della Costituente e cultura giuridica (Ugo De Sietro ed., 1980).
35. See generally Cultura politica e partiti nell’età della Costituente, supra note 34; Scelte della Costituente e cultura giuridica, supra note 34.
Eighty years after the unification of the country, the Constitution of 1948 was the first true Italian Constitution and is still in force. It is the only legal text approved by all the democratic political parties in an attempt to enforce into positive law the values at the basis of the national pact: in other words, it has tried to give nation a state.

These memories of unity, and the awareness of being effectively in front of quite a well drawn-up text, are at the origins of the myth of the constitution. In fact, this constitutional moment is the only moment of an epic time in Italian national history when great ideals—Catholic, liberal, socialist, and communist—were embodied in individual people who were able to accommodate private interests with the common good and who were prepared to accept the risks of canalizing their private values within the formalized procedures of democracy. This Magna Carta of the state is invoked as the center of Republican civil religion, what Habermas would define as a constitutional patriotism with all its symbols: the tricolour flag, the national anthem, the “turreted Italy”—the woman who represents the country, the star with laurel and olive—the national emblem. In recent times, the example of the former President of the Republic Carlo Azeglio Ciampi is remarkable in its attempt to reactivate this spirit of civic cohesion centered on the primacy of these Republican symbols.37

Nevertheless, this “constitutional moment” has still not succeeded in its task. There are many reasons that can explain the impossibility of implementing the state in the nation (or vice versa) and thereby the building of an Italian civil religion.

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37. Ciampi’s presidency (1999–2006) resulted in a decree (Decreto Presidente della Repubblica 7 aprile 2000, n. 121) that approved rules about exhibition of the national flag in public originally set out in a February 1998 law (Legge 5 febraio 1998, n. 22), which was promulgated without the consent of the Northern League. President Ciampi also insisted that the “Celebration of the Republic” on June 2 again be designated a national holiday. Legge 20 novembre 2000, n. 336. In his last speech to Italians on the final day of 2005, President Ciampi stated that having been called to represent Italy and be the guarantor of the constitution was, first of all, a “mission.” Carlo Azeglio Ciampi, Messaggio di Fine Anno del Presidente della Repubblica (Dec. 31, 2005), available at http://www.quirinale.it/qrnw/statico/ex-presidenti/Ciampi/dinamico/discorso.asp?id=28351. For this reason, he insisted on recalling the most significant symbols of “[Italy’s] identity as a nation: from the tricolor flag to the Mameli’s anthem, the anthem of the reawakening of the Italian people that recalls the ideal link which binds the Risorgimento to the Resistance, to the Republic, to the values proclaimed by the Constitution.” Id. The menace of demission from the Presidency of the Committee of Guarantors charged with supervising the celebrations for the 150th Anniversary of National Unity in 2011 also demonstrates the difficulty of this task due to the total inertia and indifference of the government in preparing this event. See Marzio Breda, Ciampi e la festa per l’Unità d’Italia, CORRIERE DELLA SERA, July 22, 2009, at 14.
The first reason is a sort of general incredulity or moral laziness: in the years following the approval of the Republican Constitution, it seemed impossible or inconceivable to many Italians—the “silent majority”—that a conformist country could produce such a progressive constitution. The Cassation Court quickly explained that the articles of the constitution were not immediately enforceable but simply programs for a better future. At the same time, the state apparatus remained the same as in the former fascist regime. The password was pacification, and public administration became the place of clientele and nepotism with the Christian Democrats committed to occupying the central administration and the left wing the available peripheral places. Advancing the new principles with strong enthusiasm would have been very strange for many of these people. On the symbolic level, the emblem of the Republic was created in such a great hurry as to be “without character or heraldic style”; the national anthem was temporarily chosen and is still today the provisional anthem of the Republic. The commemorative stamps of October 1946 made no reference to the state: they represented an ancient, glorious past—the seafaring Repubblicas and the Florentine Republic. There was nothing about the contemporary era or the “Resistance,” the civil war against Nazi-fascists, whose courage is at the basis of the constitution.

If the existence of a symbol depends on its effective force and, therefore, on extra-juridical factors, and if symbols can play their integrative function only if sustained by a widespread custom in society, we can understand that these Republican symbols have simply fallen from the top of the state on a refractory nation.

An implicit rule nourished rhetoric of continuity of an Italy under the perennial benevolent umbrella of the Catholic Church. This rhetoric recalled that Italy owed its existence solely to its classi-
cal and Christian heritage and that only Catholicism had saved the country from the disaster of the war years, when all civil institutions had collapsed, and it had again saved Italy from the danger of communism.45 Nothing, and least of all a simple assembly of utopian people, could break off a millenary history.

Once again, like at the time of liberal governments, Italy faced a confrontation between a “legal” and a “real” country: the idea of common institutions equally open to all new and old Italians was a matter for a minority elite.46

Actually, the implicit Italian rule had embedded an important flag in the Italian Constitution itself: the second paragraph of Article 7, which guarantees the Pacts of Lateran and the prominent position of the Catholic Church.47 In fact, this article, for which the Catholic hierarchy strongly lobbied (once again working more for this private guarantee than for general laws equally good for everyone),48 is considered the “mother of all constitutional antinomies.”49 Indeed, even as the Italian Constitution speaks about the freedom of religion for the individual and for groups with no distinction between foreigners and citizens50—even if the same constitution proclaims the distinction between the state and the Catholic Church, and guarantees equal freedom for all religions,51 contemporary Italian history shows us a different picture with the Catholic Church still clearly at the top of the pyramid.

This situation is closely connected with the ambiguities of Italian laicità and with an interesting process of the emersion of the implicit rule that characterizes contemporary times.

45. See Alessandro Ferrari, De la politique à la technique: laïcité narrative et laïcité du droit: Pour une comparaison France/Italie, in LE DROIT ECCLESIASTIQUE EN EUROPE ET Á SES MARGES (XVIIIe-XXe siècles) 333–45 (Brigitte Basdevant-Gaudemet & François Jankowiak eds., 2009).


47. The second paragraph of Article 7 states: “Their relationship is regulated by the Lateran pacts. Amendments to these pacts which are accepted by both parties do not require the procedure of constitutional amendments.” Art. 7 Costituzione [Cost.] (It.).

48. See, for instance, Giovanni Sale, IL VATICANO E LA COSTITUZIONE (2008), where the coldness of the Vatican to the attempts to introduce a generic mention of God in the Italian Constitution seems very clear and motivated by the fear of jeopardizing the approval of other articles in matters of religion and, in particular, the present Article 7.

49. See, e.g., Michele Anis, CHIESA PADRONA: UN FALSO GIURIDICO DAI PATTI LATERANENSI Á OGGI 56 (2009).


51. Arts. 7–8 Cost.
IV. ITALIAN LAICITÀ AS AN IMPLICIT RULE DETECTOR

Like many other Western Constitutions, the Italian Constitution declares the separation between church and state, and like other countries with a history of Catholic monopoly, the Constitutional Court uses the word laicità to indicate the independence of civil power from religions (and vice-versa). At the same time, Italian laicità naturally reflects a peculiar history, in particular, the rhetoric of continuity of the Catholic Nation and the new legal discourse of the State: again, the Nation and the State.

First, let us consider the legal discourse. Neither the Italian Constitution nor the laws define the principle of laicità. Instead, the Constitutional Court has defined it. For the court, this principle implies, above all, “not the state’s indifference towards religions, but the state’s guarantee to safeguard religious freedom in a regime of denominational and cultural pluralism.”

Therefore, Italian laicità does not intend to fight religious presence in the public arena. Laicità is not a policy of secularization by the Italian state and civil society, nor is laicità either a form of laicism (if this word is intended to be synonymous with anti-religious) or secularism (if this word is intended to be synonymous with the invisibility of religions in the public arena). In the discourse of the Constitutional Court, Italian laicità, implies a “regime of [denominational] and cultural pluralism,” and supposes the existence of a plurality of value systems with dignity for all personal choices in the field of freedom of religion and conscience. It entails identical protection for specific religious freedom and for

52. The first paragraph of Article 7 and the second paragraph of Article 8 declare that the state and Catholic Church are “within their own reign, independent and sovereign.” Id. These articles also guarantee religious autonomy by affirming that “denominations other than Catholicism have the right to organize themselves according to their own by-laws.” Id.


55. See supra note 54.

the more generic freedom of convictions. Consequently, laicità imposes, at the same time, state neutrality on these freedoms and a state commitment to promote and guarantee this pluralism. As a result, this principle does not just refer to state-church relations, but instead, to a “supreme principle of constitutional order.”

This principle is a summary of the values and duties of the contemporary pluralistic and democratic state in which religion plays a full role, like each other element of civil society.

Although the official discourse of the Constitutional Court about laicità is clear and coherent, the situation gets more complex when we pass from the principles expressed by this Supreme Court to the jurisprudence of lower courts or to legislative, administrative, or political levels. It is at these levels that the implicit rule—the rhetoric of continuity of the Catholic Nation—often works, using the reference to the Catholic tradition as an instrument to limit or master social pluralism. When the official discourse of the Constitutional Court clashes with this implicit rule, the result is a kind of hybrid. This apparent victory for the rhetoric of continuity reveals its weakness: the need for the implicit rule to emerge to survive, and, then, its need to accept being more exposed to the influence of the formal constitution.

This laicità was born when the judges had to discuss an article of the Concordat between the state and the Catholic Church. Even

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59. The Constitutional Court has pointed out five main obligations for the state: (1) the obligation to safeguard religious freedom in a regime of denominational and cultural pluralism, Corte Cost., 11 aprile 1989, n. 203; (2) the obligation to respect denominational autonomy and the prohibition on intervention in the internal life of the religious denominations, Corte Cost., 23 maggio 1990, n. 259, Giur cost. 1990, I, 1542; this “denominational otherness” explains both the separation/distinction between state and churches and the bilateral agreements between them; (3) the obligation to be equidistant and impartial towards all religious denominations, with the possibility of concluding concordats or agreements with them when their specific identities allow a reasonable, different treatment, Corte Cost., 13 novembre 2000, n. 508, available at http://www.olir.it/documenti/index.php?documento=469; (4) the obligation to protect the conscience of everyone, irrespective of his or her specific credo or conviction, Corte Cost., 18 ottobre 1995, n. 440; and (5) the obligation to distinguish between civil matters and religious matters and prohibit the political use of religion and the religious use of politics, Corte Cost., 30 settembre 1996, n. 334.

though it was about the new Concordat of 1984, the supreme judges considered it still protected by Article 7 of the Italian Constitution, which only speaks about Lateran Pacts. Consequently, had they wanted to decide about its unconstitutionality, they would have had to find a super-rule, higher than an ordinary constitutional rule: laicità as a supreme constitutional principle. These complicated proceedings immediately reveal a genetic weakness of the Italian laicità. This principle, in fact, appeared more for formal reasons than for substantive or political ideals—to find a rule formally superior to the Concordat, which would be “included” in the constitution. Therefore, in its concrete contents, it risks perpetuating the implicit rule, taking on a Catholic meaning and becoming a “baptised laicità” or, as popes say, a “sane laicità.” This Catholic meaning surfaced in the first decision in which laicità appeared. There, the supreme judges legitimized teaching the Catholic religion in state schools by imagining teaching inspired by pluralistic values and consequently not opposed to the principle of laicità as non-establishment: as though the teaching of the Catholic religion would effectively represent the teaching of all religions, the teaching of a civil religion. In so doing, the judges totally ignored the reality of this teaching, which is, according to the law itself, strictly Catholic. Nevertheless, this timid laicità, seriously subjected to the rhetoric of continuity that sustains Catholic teaching in state schools, causes difficult contortions of the implicit rule and progressively undermines the strict denominational character of the religious teaching.

When it appears in the juridical scenario, the implicit rule can directly use laicità to give laicità a strong Catholic interpretation. This is the case of the draft laws, which try to recognize formally the Christian (or Judaic-Christian) character of the country by declaring its compatibility with laicità. The result is to display the

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62. This is the traditional interpretation from Corte Cost., 1 marzo 1971, n. 30, available at http://www.olir.it/documenti/?documento=5091.
sectarian nature of these initiatives (only presented by the Right and never approved by Parliament) and to display once again the impossibility for Catholicism to play the role of civil religion. This result also fully reveals the distance between a European country and the United States: in Italy, in fact, nobody would believe, as Joseph Weiler would,\textsuperscript{67} that recognizing the Christian character of the country would be the same as declaring Italy as an open and inclusive society, where all religious and cultural traditions are equally considered. In fact, formally recognizing an apparently generic Christian heritage, a Christian \textit{Leitkultur}, would clearly confirm the supremacy of the traditional Italian religion. After all, it is significant that this recognition also appears in Article 7 of the Italian Constitution, which speaks only about the Catholic Church.\textsuperscript{68}

V. A CRUCIFIED STATE?

The existence of the crucifix in the state school classrooms is the most interesting hybrid between the principle of \textit{laicità} and the implicit rule, and is also the most significant example of what an Italian civil religion would be. How can judges declare the crucifix compatible with the principle of \textit{laicità} when the Constitutional Court defines the latter as a guarantee of religious and cultural pluralism and neutrality of public authorities?

The judges used strong rationale strictly connected with the rhetoric of continuity of the Catholic Nation and the implicit rule of the Italian juridical system. In fact, considering that the crucifix was also in Italian state schools at the time of the liberal regime—which struggled against the pope and his Church to achieve the unity of the country—judges conclude that the presence of the crucifix is not connected with the denominational fascist regime, but rather with a sort of implicit rule, a true constitutional custom, which they call “a condition of use” of Italian \textit{laicità}.\textsuperscript{69} In other words, judges do not interpret the principle of \textit{laicità} as referring only to the articles of the Italian Constitution, but rather as referring to extra-juridical elements such as the cultural tradition and


\textsuperscript{68} See Proposta di legge costituzionale, 15 luglio 2008, n. 1483.

customs that would have been translated into the constitution itself and, in particular, into Article 7 about Lateran Pacts. As evidenced in the “Charter of Values of Citizenship and Integration,” published in 2006 under the auspices of the Home Minister, this explanation perfectly shows the nation-state character of Italy. Italy will take into account the needs of other religions and cultures not from the point of view of its constitution, but from the point of view of its religious and cultural tradition. The logical consequence of this rationale is an interpretation of Italian religious freedom based on the idea of a privileged treatment of religious convictions over non-religious ones (favor religionis) and based on a clear superiority of the Catholic Church. In the crucifix controversies, the judges completely ignore the first paragraph of Article 8, which foresees equal freedom for all cults.

70. The decisions and the advices of the Regional Administrative Courts (Administrative Tribunals and the Council of State) are a good representation of Italian history as a “Catholic history,” and they do not hesitate in quoting the documents of the Second Vatican Council (Vatican II) as relevant rationales for the interpretation of this constitutional principle. See, e.g., id.; TAR Veneto, 17 marzo 2005, n. 1110, available at http://www.olir.it/documenti/?documento=2075.

71. See generally Segatti, supra note 25.

72. For example, in relation to the question of religious symbols, the charter declares that “Italy respects the symbols and the signs of all religions” not on the footing of its constitutional principles, but “[o]n the basis of its religious and cultural tradition.” See SCIENTIFIC COUNCIL, MINISTERO DELL’ INTERNO, CHARTER OF VALUES OF CITIZENSHIP AND INTEGRATION 4 (2007), available at http://www.interno.it/mininterno/export/sites/default/it/assets/files/14/0919_charter_of_values_of_citizenship_and_integration.pdf.

73. A paradigmatic example of this are the rumors caused by the “atheistic-bus,” an initiative promoted by the Atheists and Rationalists Union, to cover municipal buses in Genoa (similar to those in Washington and Barcelona) with an atheistic advertisement that proclaimed: “The good news is that in Italy there are millions of atheists. The best news is that they believe in the freedom of expression.” This advertisement was substituted for another that was perceived as more offensive: “The bad news is that God does not exist. The good news is that you do not need it.” These advertisements were disputed not in relation to an obligation of neutrality of the municipalities and its services but because the writings were perceived as an offense to the Catholic sentiment that was widely viewed as a sort of “common sense.” See Rita Celi, Spot sull’ateismo, anche a Genova i bus che promuovono l’inesistenza di dio, LA REPUBBLICA, Jan. 12, 2009, http://www.repubblica.it/2009/01/sezioni/cronaca/atei-autobus/atei-autobus/atei-autobus.html; Riazat Butt, Atheist Bus Campaign Spreads the Word of No God Nationwide, THE GUARDIAN, 6 Jan. 2009, http://www.guardian.co.uk/world/2009/jan/06/atheist-bus-campaign-nationwide.

74. Theoretically, the reference to this Article, specifically devoted to the equal freedom among religious denominations, would not be necessary; Articles 2, 3, and 19 of the Italian Constitution, in fact, should already ensure equal freedom among individuals. Nevertheless, the first paragraph of Article 8 is considered a cornerstone of the Italian system of religious freedom and is used when the state’s unequal treatment of religions provokes a non-rational difference among individuals. For example, it has been used in criminal law to avoid a preference for Catholicism, diminishing the treatment of non-Catholics. In the case of the crucifix, the connection of this symbol with a specific church (the Protestant churches, in fact, are traditionally opposed to this) could mean a violation of Article 8.
In this discourse, the dangers of the celebrated passage from an “emancipating” laicità to a gentler guaranteeing laicità are evident. Without an emancipator will, that is, a will to effectively promote the constitutional targets, laicità risks simply reflecting reality, reproducing a sort of “authentic sociology” and renouncing the quest for substantial rights—one of the most important features of the constitutionalism of the post–World War II period. In this context, it is very easy to exploit the discourse of the famous historian and lawyer Francesco Ruffini. In 1924, he wrote that the desire to achieve perfect equality of legal treatment among different religions would have ended up signifying “not a work of practical justice, but simply of abstract justice.” Most juridical doctrine has traditionally interpreted this sentence as an expression of the principle of ragionevolezza (reasonableness) and therefore in favor of the possibility of different legal treatment among religions on the grounds of their different practices (for example, Jewish Sabbath on Saturday). Today this sentence is politically used to justify the difficulty of extending the benefits provided for traditional religious groups to “new” religions.

The other motivations used by courts to justify the compulsory exposition of the crucifix stem from the emphasis put on the Catholic character of the nation. First, secularization itself is said to sustain this “constitutional custom,” which would weaken denominational approaches and allow all children, and especially extra-communitarian ones, to perceive the universal values of tolerance and respect transmitted by the crucifix. Therefore, these are the same values included in the constitution and summarized by the principle of laicità that would consequently receive a true transcendent foundation. This passage from the Christian crucifix to natural law and, finally, to the positive constitution, is certified by the assumption of the same judges that the crucifix represents a sign of national identification and that it would be difficult or impossible to find another symbol able to perform this task. Judges never consider the constitutional symbols, including the national flag. In any case, judges have not considered this possibility, thereby implicitly excluding it. See generally Giuseppe Casuscelli, Concordati, intese e pluralismo confessionale (1974).

78. See id.
the absence of symbols of a “demos,” a political/state community able to integrate through its laws, the crucifix plays the role of a symbol of a potentially exclusive national “ethnos” founded on its religion. Thus, religion plays the role of a “guardian of multiculturalism,” affecting the openness of the system to the acceptance of the Catholic character of the country by newcomers.79

In this picture, little space exists for individuals. Judges apodictically declare that no one can consider himself negatively provoked by the presence of the crucifix, and that this feeling cannot constitute the subject of a legal trial but only a political debate.80 Moreover, in the end, the right of Muslim children to wear headscarves is protected more by the presence of the crucifix in the classroom than by the religious freedom formally granted by the Italian Constitution.81 This is typical of the Nation-State, and not State-Nation, attitude. This fact reveals the very careful judicial interpretation through which to read the cross: it is clearly a secularization read in the light of the Second Vatican Council and not in the light of certain political secularization that uses the symbol of Christianity to expel immigrants.

Finally, what do these decisions reveal about the Italian system of the sources of law? The crucifix affairs required the emergence of the implicit rule and its formal declaration as a super-constitutional law, identified with the principle of laicità itself. Administrative judges have nearly constitutionalized the presence of the crucifix in state schools at the same moment when this presence lacks any positive legal source. In fact, many still seriously question the fascist decrees.82 Many suggest that they should have already been

79. See Morelli, supra note 44, at 188.

80. See Cons. Stato, 13 gennaio 2006, n. 556. The widespread apodictic conviction that the crucifix absolutely cannot bother pupils’ consciences has been confirmed by the unanimous negative reactions of the principal political parties and media toward the November 3, 2009, decision of the European Court of Human Rights. See Lautsi v. Italy, Application No. 30814/06 (Eur. Ct. H.R. Nov. 3, 2009), available at http://www.olir.it/documenti/index.php?documento=5146. This decision, in fact, considered the presence of the crucifix in state school a violation of Article 9 of the Strasbourg Convention because of its menace to the freedom of individual consciences. Id.

81. One should remember that in state school, the teaching of citizenship or of “civic education” has always been very weak and, of course, influenced more by Catholicism than by the constitution. See Andrea Pugiotto, La Costituzione tra i banchi di scuola, Associazione Italiana dei Costituzionalisti (Nov. 24, 2008), http://www.associazionedecostituzionalisti.it/materiali/dossier/pugiotto.html.

tacitly abrogated or that they are in conflict with the constitution and, in particular, with the principle of laicità.\textsuperscript{83} At the same time, the supreme guardian of the constitution, the Constitutional Court, declared itself incompetent in the matter, in terms of the simple administrative and not legal nature of the decrees.\textsuperscript{84} Paradoxically, the case concerns a symbol declared the sign of national identification and, thereby, a constitutional matter.\textsuperscript{85} Moreover, it is for fear of intervention by the Constitutional Court that supporters of the crucifix have not presented a law to clarify and reinforce its presence in classrooms, as the court could declare such a law unconstitutional. Consequently, the symbol of the nation owes its existence to an implicit rule that overrules all other sources of law.

\section*{VI. SOME CONCLUSIONS}

One can argue that Italy has never been a true Westphalian State and that it has been prevalently a nation without a state. Consequently, it is not strange that presidents of the Constitutional Court and presidents of the Republic have often stigmatized the weak sense of the constitution.\textsuperscript{86} Nevertheless, Catholicism and the constitution, nation and state, have a strong connection when remembering how many Catholic people participated with strategic roles in the drawing up of this text. Do the relations between the Catholic hierarchy and the constitution create the state, though? A weak political class frequently requires the intervention of the Church to improve the civic feeling of the people. For example, the political

\textsuperscript{83} Moreover, for some authors, the same should have happened to Article 7 of the Italian Constitution after the enforcement of the new Concordat, which has been substituted for the old Lateran pact; in this case the same “macro-rule” that establishes the predominant role of the Catholic Church would have lost any meaning. This was the position of one of the leading Italian scholars of law and religion. \textit{See}, e.g., Francesco Finocchiaro, \textit{Diritto ecclesiastico} 124 (9th ed. 2003).


\textsuperscript{85} The constitutional character concerns both the symbols of the state, \textit{see} Art. 12 Costituzione [Cost.] (It.), and the individual freedoms (freedom of conscience and religious freedom) involved in the affair.

\textsuperscript{86} In his January 28, 2009, speech, the President of the Constitutional Court denounced “a widespread lack of interest if not a true ignorance about what the Constitution of the Republic represents ‘today’ and about what it means within the rules system.” Giovanni Maria Flick, Considerazioni finali del Presidente Giovanni Mari Flick sulla giurisprudenza costituzionale del 2008 (Jan. 28, 2009). During his state visit to Finland, on September 10, 2008, the President of the Republic, Giorgio Napolitano, expressed his opinion that there were still open questions in Italy concerning the principles and values of the Republican Constitution and Italian society. Giorgio Napolitano, Conferenza stampa del Presidente della Repubblica (Sept. 10, 2009), \textit{available at} http://www.quirinale.it/elementi/Continua.aspx?tipo=Discorso&key=710.
class has turned to the Church to encourage the payment of taxes, to sustain peace in the world, to support the struggling welfare state through its charities, to stop the secessionist tendencies of the Northern League, and to fight terrorism in the 1970s and the Mafia and Camorra today.87 At the same time, the intervention of the Catholic hierarchy aims to enforce both a specific moral perfectionism, presented as a natural, universally valid law, and an idea of a Catholic Italy perceived both as the last bastion in a secularized Europe and a model for a possible Catholic modernity.

When abortion, marriage, and bioethics issues are involved, the hierarchy, like any other social group, does not hesitate to use its lobbying force to exploit all the fragilities of democracy. For example, it incites people not to vote in case of referendum,88 and attacks parties and individual members of Parliament who do not defend its position. It tries to block any law that could threaten its central position or its “non-negotiable values,” such as the law on religious freedom—the law about the so-called de facto couples and the law about the “biological testament.”89 This attitude causes a vicious circle with all the weaknesses of the system on display. The opposition toward legislation on de facto couples provokes paradoxical legal evasions, taking into account that, in Italy, Catholic mar-

87. See, e.g., Enzo Pace, La questione nazionale fra Lega e Chiesa cattolica, 46 II. MULINO 857, 857–64 (1997).

88. This was the case with the referendum of June 12–13, 2005, about in vitro fertilization: only 25.9 percent of voters went to the polls. Ian Fisher & Elisabetta Povoledo, In Political Step, Pope Joins Fray on Fertility Law, N.Y. TIMES, May 31, 2005, at A1.

89. The opposition toward a general law on religious freedom that could compromise the privileged position of the Catholic Church was clearly expressed on July 16, 2007, in front of the members of the Commissions for Constitutional Affairs of the Chamber of Deputies, by the General Secretary of the Italian Episcopal Conference, who was particularly shocked by the reference to the constitutional principle of laicità made by the draft law. Giuseppe Betori, Address to the Chamber of Deputies (July 16, 2007), available at http://www.chiesacattolica.it/pls/cci_new/bd_home_cci-vis?id_n=1607. Regarding the draft law on the matter of “de facto couples,” which was one of the sources of tension between the second Prodi government and the Catholic Church, and which probably facilitated the end of Prodi’s tenure as prime minister, it is interesting to read the article Non possimus (with a clear reminder of the nineteenth century) of the (un-)official newspaper of the National Conference of Bishops, AVVENIRE, of February 6, 2007. The article stresses the need to defend the family as a natural union founded on marriage. Id. On July 22, 2009, Rino Fisichella, the Rector of the University of the Lateran and Chaplain of the Chamber of Deputies, referring to a draft law recently approved by the Senate, explicitly mentioned political strategy, explaining that if the Deputies changed the text, they would realize an “auto-goal” for the majority. Testamento biologico: Mons. Fisichella, sarebbe autogol stravolgere DDL, ASCA.COM, July 22, 2009, http://www.asca.it/news-TESTAMENTO_BIOLIGICO_MONS_FISICHELLA_SAREBBE_AUTOGOL_STRAVOLGERE_DDL-847976-ORA-.html.
riages have civil effects. For example, a soldier wounded in Afghanistan was married during a special canonical marriage service (marriage in danger of life) to a woman with whom he had three children when he was lying unconscious on his deathbed, dying soon after. The religious marriage itself, and the consequent civil effects, were invalid as it was performed without his consent, but the Church was in favor of allowing the woman to have a state pension. But what about a non-Catholic soldier who could not have any civilly recognized religious marriage? In relation to the lack of a law on “biological testament,” we observe that this situation causes individual, highly publicized cases (like the Englaro case, which was quite similar to the Schiavo case). The current monopolistic Italian television system that favors the Catholic position often exploits such cases, which could reach the level of a true constitutional crisis.

Contemporary Italy, in resolving the “Vatican question” in its territorial character, has become a normal country where conflicts between state and church directly concern society. Paradoxically, this conciliation has broken the implicit rule that would like Italy as a nation to be unanimous in its Catholic feeling. Perhaps this unanimity was necessary at the time of liberal governments, when the Italian State was not accepted, but today the possible and even ordinary division of the nation—of a pluralistic society—needs a strong political system, a strong state, able to overcome this Oedipus complex.

This delicate moment is obviously causing a reaction in the form of the implicit rule that surfaces when it is losing its indisputable power. This emergence could have two different endings, one negative and one positive. The negative ending: the desire absolutely to affirm the Catholic implicit rule could result in a continued

90. Italy does not yet have any legislation on the legal effects of heterosexual or homosexual relationships outside of marriage. The former can have civil effect if they are celebrated in front of a state official or in front of a recognized religious minister. The state also recognizes the civil effects of Catholic tribunals’ sentences of nullity on marriages.


93. Tocqueville would probably have had a lot to say about the connection of these two monopolies.
weakening of the state and its main principle of _laicité_. The implicit rule and principle of _laicité_ would act as instruments of the old, monopolistic Westphalian state, forgetting that constitutional _laicité_, with its pluralistic feature, should end this form of state and represent explicit state openness to pluralistic social forces. In this case, Catholicism could not act as a civil religion but rather as a political culture, as a sectarian lobby, which could risk encountering serious disappointments. The positive end: that the strategic choice for freedom of conscience and democracy by the Church of the Second Vatican Council leaves space for more direct political involvement on the part of lay people and the awareness that the creation of paradise will only be finished in another world, where there will not be any democracy. In this case, Catholicism, like Anglicanism in England, could play the role of a sort of civil religion if it can play its music with its more comprehensive notes.

In any case, the Catholic Church, like other religions, seems today much more interested in the earth than in heaven. This could signify—at least for Western countries—a big change in religions as a sociological subject and their re-interpretation in this secular age as true political forces: and that could be the end, or a new history, for civil religion.

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94. _See_ Sidney Hook, _The Philosophical Presuppositions of Democracy_, 52 _Ethics_ 275, 281 (1942).

95. Paradoxically, these are not in the natural law, but in the positive divine law, which imposes the “golden rule.”