THE INTERFACE BETWEEN END-OF-LIFE CARE AND RELIGIOUS RIGHTS: LEGISLATION OF A CHRISTIAN OR A SECULAR STATE?

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I. THE LEGAL REGULATION OF “END-OF-LIFE CARE” IN THE LIGHT OF THE PRINCIPLE OF SECULARISM

There is no doubt that legal scholars engaged in the study of what the Italian literature currently defines as “ecclesiastical law (of the State)”; or—if we prefer to have recourse to an expression which is perhaps broader and, consequently, less conditioning—of the relationship between law and religion, can find in bioethics generally and, more specifically, as in our case, in “end-of-life care” related issues, a (relatively recent but) very interesting field of investigation.

In fact, exploring the deeper meaning of the solutions being outlined with reference to those issues is equivalent, for the same researcher, to take care about the status of one of the most important principles concerning the relationship between law and religion, better known as the “principle of secularism”.¹

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¹ In the language of the Italian legal literature, this expression usually indicates the specific branch of the legal system governing the relationships between the State (or, broadly, public institutions) and the Churches or religious groups and organizations; but in a deeper, more recent, interpretation it indicates all the rules involving religious freedom. Instead, the expression “canon law” indicates the body of laws and regulations governing the Catholic Church. See Francesco Finocchiaro, Diritto ecclesiastico (Bologna, 1986) and, more recently, Maria Cristina Folliero, Diritto ecclesiastico. Elementi. Principi non scritti. Principi scritti. Regole. Quaderno 1. I principi non scritti (Torino, 2007).

² In this paper, we will have recourse to the attribution of secular (and the correspondent substantive of secularism) to translate the attribution of “laico” (and the correspondent substantive of “laicità”), used by Italian scholarship as well as Italian Courts and Tribunals, as it will result clearly afterwards. It is not easy to establish if the expression secularism and “laicità” can be really considered perfectly equivalent but we would probably muddle things up if we acted differently. However, it is worth pointing out that, according to its origin and to its literal meaning, the term “laity” seems to be more usefully used as a way to distinguish, in the ecclesiastical perspective, what is not directly regarding clerical life: see, Antonio Vitale, Corso di diritto ecclesiastico. Ordinamento civile e fenomeno religioso (Milano, 2005).
But there is still more.

Inverting that observation, we can also consider that this topic can help us understand what is the real sense of secularism as a legal principle; to understand, what it should be before considering which is the current level of respect in which it is held in our legal system.

Indeed, the question is not secondary.

Because, if we want to deal with it from a legal viewpoint, we must first take note of the fact that the current (or, if we prefer, the abstract) idea of secularism may not be entirely coincident with its legal sense. In fact, we already know that, assuming a comparative perspective, we are forced to realize that we cannot find an unanimously recognised definition of secularism and of its real meaning.3

It is probably true that a definition of secularism according to the representation that common sense would be inclined to assume should be interpreted as involving a condition of complete independence of political powers from religious (or ideological and institutional but not public) powers,4 although it must be also considered that this aspiration has to confront itself with the actual, renewed and widespread tendency of religious groups and institutions to assume an increasingly pervasive public role.5 In social and legal contexts like the Italian one, this trend appears to be more relevant and this is not surprising in the light of Italian legal history and the widespread presence of the Catholic Church in the Italian society.

On a specific legal ground, the same trend is somehow reinforced by the (more or less, depending on the specific circumstances to be considered) explicit formalization of a constitutional process of (necessary) negotiation between the Church and the State in legislation involving their reciprocal relationships (better known in the Italian literature as the

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3 «Non esiste una definizione assoluta di laicità. Una sua formula applicabile al di là e al di qua del meridiano zero»: Folliero, supra note 1, p. 135. As the Author further explains (p. 107), “Tra l’essenza della laicità e il relativo principio giuridico – l’ultimo è il modo in cui la laicità entra concretamente a fare parte degli ordinamenti costituzionali occidentali, esercitando una concreta funzione di indirizzo dell’esperienza giuridica – vi è sempre una frattura. Mantenerla aperta o tendere a riassorbirla, e i modi per farlo, sono tutte scelte che, nel nostro Paese, come negli altri d’altronde, portano l’impronta dei soggetti che vi hanno messo mano nella filiera di produzione e monitoraggio del diritto”.

4 See, for a closer examination and other bibliographical references, Folliero, supra note 1, pp. 107 ff.

5 See, W. Cole Durham Jr. and Javier Martínez Torrón (eds.), Religion and the Secular State / La Religion et l’État laïque: Interim Reports, prepared for and issued upon the occasion of The XVIIIth International Congress of Comparative Law, held on 25 July - 1 August 2010 in Washington, D.C.