

**CHURCH-STATE RELATIONS AND RELIGIOUS LIBERTY: COMPARATIVE PERSPECTIVES  
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Panel I: The New Calefragia Case  
“Church-State Relations”

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**The Constitutional “Topography” of the Case**

If “New Calefragia” was Italy, and the case would be brought to our Constitutional Court, our supreme judges would have four main coordinates to orientate themselves and find a solution: a) Constitutional Principles on Religion b) Constitutional Principles on Welfare and Health Protection c) Constitutional Principles on Regional State, d) Constitutional Principle of Subsidiarity.

When we face a complex constitutional case (as NCCase is) with multiple aspects and dimensions, the likely solution will always depend, first of all, on how interpreters simplify such complexity, on how they “label” the case.

In this sense, it depends on the “topography” of the constitutional conflict: every interpreter draws his own map of the constitutional issues at stake and of their intersections. The second step is to “balance” those constitutional qualifications and intersections (is it “more” a «State-Church relation» case, or “more” a «health protection case», either a «Regions-State legislative» conflict or a “Subsidiarity” question?) The different constitutional qualification (“labeling”) will produce very diverging attitudes and, therefore, solutions (it may often happen that you have correctly identified all of the relevant constitutional implications of a case, but you mistake the balancing).

In order to translate the NCCase into Italian constitutional language, we therefore have to quickly sketch out these three coordinates, obviously, concentrating more on the first one (religion) that is relevant to our discussion.

**2. Religion Constitutional Principles**

*Main constitutional references:*

*Article 2 [Human Rights]*

The Republic recognizes and guarantees the inviolable rights of man, as an individual, or in social groups where he expresses his personality, and it requires the performance of the unalterable duty to political, economic, and social solidarity.

*Article 3 [Equality]*

(1) All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions.

(2) It is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent human beings full development and the effective participation of all workers in the political, economic, and social organization of the Country.

*Article 7 [Relation between State and Catholic Church]*

(1) The State and the Catholic Church are, each within their own realm, independent and sovereign.

(2) Their relations are regulated by the Lateran Pacts. Amendments to these Pacts, which are accepted by both parties, do not require the procedure for constitutional amendments.

*Article 8 [Religious Confessions]*

(1) Religious Confessions are equally free before the law.

(2) Religious Confessions other than the Catholic one, have the right to organize themselves according to their own by-laws, provided that these by-laws are not in conflict with the Italian legal system.

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

Article 19 [Freedom of Religion]

Everyone is entitled to freely profess their religious beliefs in any form, individually or in association, to promote them, and to celebrate rites in public or in private, provided that they are not offensive to public morality.

In order to understand the “NCCase” as a “church-state relation” case, the first and fundamental question, is to consider how the Italian constitution defines *religion*. It is an individual right, a “subcategory of conscience” (see Dorsen, Rosenfeld et al. *Comparative constitutionalism*, 922), or it is an individual right but, at the same time, a *social* right – in the sense that religion creates (and derives from) a special *social* formation - what we call “religious confession” or, more roughly, “church” – therefore, if you aim to protect the religious experience of an individual, do you also need to equally protect his communitarian expression?

Obviously, the more you emphasize the *individualistic* nature of religion, the more you will differentiate the “church-state” profile from “free exercise”, and, reversely, if you consider “religion” as an “individual/social” phenomena, it will be very difficult to examine these two profiles separately.

According to the Italian constitutional tradition, freedom of religion does not coincide with (a subsector of) freedom of conscience or of opinion – as a matter of fact, we have a specific constitutional article about freedom of *opinion* (art. 21) – but implies the opportunity for a person to belong (or not to belong) to a religious social formation and to be able to actually express his religious belief (this is the exact meaning of the verb “to profess”) in all social relations, provided that it is with respect for legal order and, especially, public morality (art. 19 ITA COST).

My religious belief is not only on an act of my thought or will, but it is also the result of an educational process that assumes my belonging to specific social relations, without which religion is demoted to a “mere” opinion.

So “religion” is not only an aspect of human *rights*, but also of human *needs*.

However, this specific way of conceiving *religion* in the Italian constitutional tradition derives from the very original relation between men and legal power (relation fixed and guaranteed in the Constitution).

We can say, in other words, that the constitutional norms on religion derive from the peculiar anthropology that constitutes the foundations of the Italian Constitution; this relation is clearly depicted in art. 2 ITA COST, which is considered the “lintel” of the entire constitutional architecture.

It states that “*the Republic recognizes and guarantees the inviolable rights of man, as an individual or in social groups where he expresses his personality*”.

The term “recognition” means that the “person” – who, as we know, means not only the individual but also his social relations– is *in fact* greater than the legal power. The Republic therefore cannot *create* rights, but may only *recognize* and *guarantee* them either as fundamental individual or social rights.

For this very basic reason, religion plays a particular role in this relational dimension of men in our constitutional system, and, therefore the relation between the State and the Catholic Church or other churches/confessions, can be considered as an expression of this very original principle according to which the individual and the collective dimensions of his freedom are structurally interrelated.

To express these constitutional values, the Italian Constitutional Court used the meaningful term “religious experience” that has two “dimensions” (...) individual and communitarian”:

“By so doing, religious belief protection has become an extension of the right to religious freedom. An extension that must clearly equally embrace the individual religious

experience of all who experience it, in its individual and communitarian dimensions, regardless the of different faith contents of each diverse confession". Const. Court n. 329/1997)<sup>1</sup>

This peculiar "public" role of religion in the current "post-metaphysical reason" age, has recently been explored, coming to very interesting conclusions, and starting from non-religious premises, by Jurgen Habermas (J.H. *Between naturalism and religion*, Polity press ed. 2008).

For these reasons, we do not find any inconsistency between freedom of religion and the official recognition of Churches through official agreements (that doesn't mean, obviously, the "establishment" of the Church in the sense of "State-religion"), their funding, their support up to the reasonable differentiation of this support, in our constitutional system. For the same reasons, the public recognition and support of "general interest" activities that are carried out by religiously motivated people (as, for example, public assistance or health care activity), or the offering of optional religious teaching within public schools are also not viewed as unconstitutional.

We have nothing similar to the "non establishment clause" of the First amendment, at least as it appears in some USSC decisions: the "establishment of religion clause means at least this: neither a State or the Federal government can set up a church. Neither can pass a law which aid one religion, aid all religions, or prefer one religion over another (...) in the words of Jefferson, the clause against establishment of religion by law was intended to erect a *wall of separation* between Church and State" *emphasis added* (USSC Reynolds v. United States, 96 U.S. 145 at 164).

Our "Church-State relation" model is not *separation*, but *coordination*. This means that there must indeed be a "relation" ruled by agreements between the State and the different Religious Confessions.

The relations with the Catholic Church is regulated by the Lateran Pacts (art. 7 ITA COST)<sup>2</sup> and the relations between the State and Non Catholic Churches or other religious denominations, are set by a parliamentary law reproducing their respective Agreements (art. 8 ITA COST) (you may see all of the already signed official Agreement at the following website

[http://www.governo.it/Presidenza/USRI/confessioni/intese\\_indice.html](http://www.governo.it/Presidenza/USRI/confessioni/intese_indice.html))

Please note this difference: the Catholic church is recognized by art. 7 as an original legal order. In its therefore not only autonomous but "sovereign"; other religious confessions, according to art. 8 are "only" autonomous, but not sovereign, so their statutes has to comply with the Italian legal order.

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<sup>1</sup> This "double dimension" (individual *plus* community) of religious freedom is not only typical of Italian constitutional tradition, consider that in the same period (1948) was approved the UN Universal Declaration of Human that says: "*Article 18*: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, *either alone or in community with others and in public or private*, to manifest his religion or belief in teaching, practice, worship and observance (*emphasis added*)" and also other european constitutional systems came to similar conclusions (for Germany, e.g., see Rumpelkammer Case, 24 BVerfGE 236 (1968) when the German Court said that "The exercise of religion includes not only worship and practices such as the observance of religious customs like Sunday services (...) and ringing of the church bells, but also religious education and ceremonies of nonestablished religions and atheist as well as other expressions of religious and ideological life." or the Article 16 of Spanish Constitution: "(1) Freedom of ideology, religion, and cult of *individuals and communities* is guaranteed without any limitation in their demonstrations other than that which is necessary for the maintenance of public order protected by law. (2) No one may be obliged to make a declaration on his ideology, religion, or beliefs. (3) No religion shall have a state character. The public powers shall take into account the religious beliefs of Spanish society and maintain the appropriate relations of cooperation, with the Catholic Church and other denominations (*emphasis added*)

<sup>2</sup> The Lateran Pacts were signed originally in 1929 and amended in 1984

Two uneasy questions remain to be answered.

(A) What does “religion” mean *in the constitutional language*?

(B) Which is the relation between religion and the *equality principle*?

(A)

This question, obviously, is not as relevant to the “free exercise” sphere of the constitutional discipline, as it is to the “Church-state” facet; the individual can believe whatever he considers as “religion” – provided that there is respect for legal order - without any public power interference, on the contrary, certain constitutional consequences (freedoms and duties) derive from it being a “religious confession”. Consequently, when are we in front of a religious *confession* or simply a philosophical or cultural *association*?

In Italy (and in Germany too), we had a very hard case about some criminal procedures promoted against the organization known as Scientology - Dianetics; in that case some Courts as well the Supreme Court, had to decide if Scientology was a “religious” denomination or a simple association (you may find the English translation of the verdict in Dorsen, Rosenfeld et al. *Comparative constitutionalism*, 925 e ss).

From this highly controversial verdict, we hold, first of all, that “the *self-definition* of a group as religious is *not enough* in order to recognize it as a genuine religion” (*emphasis added*).

Secondly, that “the non existence of a legal definition for religion in Italy (and elsewhere) is not coincidental. Any definition would rapidly become obsolete and, in fact, limit religious liberty. It is much better not to limit through a definition, which is always by its very nature restrictive, the broader field of religious liberty. “Religion” is an ever-evolving concept and the courts may only interpret it within the frame of a specific historical and geographical context, taking into account the opinions of scholars.” (p. 927)

For example, the very fact that a certain religious denomination hasn't yet signed an Agreement with the State under art. 7 or 8 of Ita Const., is not sufficient for excluding its religious character (so it is unconstitutional if a regional law discriminates its subsidizing policy to religious entities on the grounds of the existence of such Agreement,)

(B)

Another crucial point is the relation between “religion” and the principle of *equality*.

Reading the Constitution we can observe that, according to art. 3 (see above) all the citizens are equal and have equal dignity, no matter their religious belonging (or not religious) and, symmetrically, art. 8 (see above) states that all religious confessions are equally free before the law: the equality of individual religious choices therefore corresponds to the pluralism of religious confessions.

But, in order to avoid misunderstandings, I think that the theme of equality requires a brief insight.

The “equality principle” is one of the basic value of western political culture and philosophy and, consequently, of western constitutional tradition; but I believe that – and not only for the legal theory – some sort of ongoing “genetic mutation” of this principle has taken place in the last decades. There is a growing consensus in regard to understanding “equality” (or “equal protection”) as “non discrimination”; not only in US constitutional jurisprudence, but also in European Supreme Courts (Strasbourg and Luxembourg) and in some more recent constitutional charters (as Nice Charter) or older (ECHR), we can perceive this tendency to translate “equality” as “non discrimination”; but the “non discrimination” principle is not exactly coextensive with “equality”, at least in its classical constitutional interpretation.

For example, in Italian constitutional tradition (but not only) "equality" means that law cannot consider "equal" different things, and "different" equal things.

When facing a social or personal difference (for example, man and woman), not every discrimination is therefore illegal, but only "unreasonable" ones. Let's consider, for example, a pregnant woman. It is a "reasonable" discrimination, and therefore constitutional, to provide for a different legal treatment in order to especially protect the condition of the woman. If, on the contrary, labor laws considered men and pregnant women in the same manner, this would be unconstitutional precisely based on an "equality principle".

This is why we find a lot of "discrimination" when reading the Italian Constitution (long and social). It often provides for the protection of certain social groups in a "different" way (e.g. Catholic Church compared to other non catholic confessions, family as a "natural society based on marriage" compared to other social unions, sons born out of marriage compared to legitimate families, "numerous families" compared to non numerous, "ill people without financial capacity", "cooperative enterprises" compared to normal companies, etc..)

This different way of conceiving *equality* and *non discrimination* is very often the grounds for highly controversial debates (as, recently, with same sex marriage in Italy: moving from the fact that heterosexual couples are different from homosexual, you may refer to the *equal protection clause* either to claim their identical legal treatment or to claim reasonably differentiated legal discipline).

### 3. Health Protection Constitutional Principles

*Main constitutional reference:*

*Article 32*

(1) The Republic safeguards health as a fundamental right and a public interest; it guarantees free medical care to the poor.

(2) No one may be forcefully submitted to undergo a medical treatment except as regulated by law. The law may in no case violate the limits imposed by the respect for the human being.

We have to consider other aspects involved in the narrative in order to put the "NCCase" in the Italian constitutional framework.

The circumstance that gave rise to the "NCCase" is constituted by the enactment of a new "governmental program aimed at subsidizing expanded medical program to the private sector".

We are therefore in the area of State's intervention (what constitutional lawyers use to call "welfare" area) and this is a significant point for many reasons.

On one hand, we left the field of classic liberal "negative freedom" and we entered the area of "positive freedom". This means that we have to take into account not only the constitutional discipline of the classical "regulatory" function of the State, carried out by threatening "sanctions", but we also have to consider the constitutional principles – if any – in the area of the "supporting" function of the State performed by "inducing" behaviors through "incentives".

On the other hand, we are also in a highly "money-sensitive" area, in the sense that the currently growing global financial crisis of the western States is imposing – generally - state expenditure cuts and "forcing" cooperation with the private sector. This leads to new hard questions about balancing "social rights" (e.g. the health of people that can be cured by private hospital) and "civil rights" (the associations of physicians or of other religious sects that may consider their civil liberty wounded by the support to a religious oriented hospital).

Very briefly on this (very big) issue: the Italian Constitution belongs to (it can probably be considered “the original model” of) a typical post-World War II “social” constitution- This means that a fundamental part of its (long) text is precisely devoted to imposing duties and objectives to the Republic in order to guarantee “positive freedoms”.

The very root of this “active” part of the Constitution is the same Art. 3, second comma (see *above*). Here we read that “it’s the duty of the Republic to remove all of the economic and social obstacles” that, by limiting the freedom and equality of citizens, prevent their full development and the participation of all workers in the political, economic, and social organization of the Country.

From this original point stems the “social” dimension of the Italian constitutional rights: education, social assistance, social security and employment.

One of the most relevant specifications of this major principle, is the right to *health safeguarding*.

After the “classical” negative liberty statement (“*the Republic safeguards health as a fundamental right and a public interest*”), Art. 32 ITA COST (see *above*) contains a “new” positive liberty assertion which states that the Republic “*provides free medical care*” to those who cannot afford it.

We therefore have a clear constitutional obligation on the part of the *Republic* (that means either the *state* or the *regions* – either the Federation or the States in the US constitutional language -) to guarantee a system that allows everyone to have medical aid in case of serious illness - regardless his or her capability to paying for it - in order to make the “right to health” not conditioned by economic or social status.

#### 4. Regional State Constitutional Principles

*Main constitutional reference*

*Article 117 [State and Regional Legislative Power]*

(1) Legislative power belongs to the State and the regions in accordance with the constitution and within the limits set by European Union law and international obligations.

(2) The State has exclusive legislative power in the following matters:

a) foreign policy and international relations of the State; relations of the State with the European Union; right of asylum and legal status of the citizens of states not belonging to the European union;

(...)

c) relations between the Republic and religious confessions;

(...)

m) determination of the fundamental standards of welfare related to the civil and social rights that must be guaranteed in the entire national territory

(...)

(3) The following matters are subject to concurrent legislation of both the state and regions: (...) health protection; (...) In matters of concurrent legislation, the regions have legislative power except for fundamental principles which are reserved to state law.

(4) The regions have exclusive legislative power with respect to any matters not expressly reserved to state law.

The last constitutional dimension inevitably involved in “NCCase” is called forth the starting phrase: “New Calefragia is a Federal State”. Italy is not Federal but “*Regional*” State.

The Italian *Regional* State varies from *Federal* models (as US) mainly for historical reasons (we didn’t start from the Covenant among founders member states, but from the “subdivision” of a unitary State) and consequently the constitutional features of Center-Periphery powers of distribution are pretty dissimilar from federal systems. For example, in Italy, judicial power is only central, so we don’t have any judiciary “regional level”. In 2001 we had a major constitutional amendment aiming to emphasize the role of regional powers in respect to the central state, so some scholars started to think that we are moving toward a “federalization” of our constitutional system. In the newspapers the regional presidents are often referred to as “governors” - as in the US system - but it is only a journalistic oversimplification.

Hypothesizing a new program for health assistance, the “NCCase” postulates a certain distribution of legislative and administrative competences between the state and provinces of New Calefragia.

In the Italian regional framework, we have “State exclusive competences” (art. 117, comma 2), “Concurring State-Regions competences” (art. 117, comma 3) and “Region exclusive competences” and this distribution is not neutral for the case.

For example: the central state has exclusive competence in religious issues (freedom of exercise and Church-State agreements) and for the setting of what the Constitution calls “the basic standards of welfare related to civil and social rights that must be guaranteed in the entire national territory” – this means that only the State can uniformly set the minimum standard level of medical assistance for all of the Italian territory and the regions may differentiate their facilities and health care systems, but only in “addition” to that minimum level.

On the other hand, health protection is a matter of State-Regions concurring competence – this means that the regions have legislative power except for fundamental principles which are reserved to State law.

In the end, any matter not reserved to the State is of legislative competence of regions.

## 5. Constitutional Principle of Subsidiary

*Main constitutional reference*

*Article 118 [Administrative Functions]*

(1) Administrative functions belong to the municipalities except when they are conferred to provinces, metropolitan cities, regions, or the state in order to guarantee uniform practice; the assignment is based on the principles of subsidiary, differentiation and adequacy (...)

(4) State, regions, metropolitan cities, provinces and municipalities support autonomous initiatives promoted by citizens, individually or in associations, in order to carry out activities of general interest; this is based on the principle of subsidiary.

Finally, we have to consider another basic constitutional principle concerning the republican administration. I mean the “subsidiary” principle.

This principle entered the Italian Constitution with the 2001 Amendment and has a very long and relevant history that we can’t go back on in these few pages.

Only to sketch out its relevance for the “NCCase”, we have to consider that in the Italian Constitution we have two different meanings of the “subsidiary” principle.

In his “vertical” dimension (see art. 118, comma 1 ITA COST) the principle calls for the attribution of administrative functions (the execution of laws) firstly to Municipalities (the lower level of administrative bodies, the closest to citizens), “jumping” then to upper administrations (provinces, metropolitan cities, regions, or the State) if the previous lower level is not adequate to perform that function.

Our case, indeed, evokes the “horizontal” dimension of the subsidiary principle (see. art. 118, comma 4 ITA COST).

In this perspective the principle requires “State, regions, metropolitan cities, provinces and municipalities (to) support autonomous initiatives promoted by citizens, individually or in associations, in order to carry out activities of general interest”.

According to this principle, always provided the respect of legal order, all of the public authorities have to “support” (i.e. recognize and aid) private initiatives aimed at the “general interest”.

In Italy we have two different readings of “horizontal” subsidiary.

Following a “hard” interpretation, this prevents public authority from acting every time private associations or individuals efficiently and completely cover areas of general interest and consequently imposes public authority to support instead of acting.

Following a “soft” interpretation, this principle, at least, binds public authorities, prior to intervention, to examine private activities in general interest areas, to support them – if any - and to show a reasonable justification if, despite private initiative, they anyhow decide to perform public actions in the same area.

## **6. The Constitutional “Dilemmas” in the New Calefragia Case**

Having recalled some of the major constitutional dimensions involved in the “NCCase”, we now may conclude by trying to briefly address the crucial questions an hypothetical Italian Constitutional Judge in charge of the case would likely face.

I think that the main constitutional questions can be summarized as follows:

*a) Is a federal legislation that funds religious affiliated healthcare institutions constitutional?*

As I tried to highlight in par. 2, in the Italian constitutional system there is no prohibition as matter of principle to fund religious oriented association or institutions.

In many cases, the financial relations between the State and some more relevant religious affiliated health-care facilities (or universities, schools, assistance institutions etc...), are directly ruled within the “Agreements” between the “State” and the “churches” we described above<sup>3</sup>.

This principle was many times reaffirmed by the Italian constitutional court either as regard to the “Federal” (State) legislation, or as regards to the “Province” (region) legislation; the only clarification in Italian constitutional jurisprudence is that this type of supporting legislation may not introduce unreasonable discrimination among religious denominations. For example, the Court annulled some regional laws that gave funds to support the building of “religious temples or worship places” because those law excluded from eligibility religious confessions that hadn’t signed an official agreement with the State (Const. Court no. 195/1993, 346/2002, see above par. 2).

In addition, please consider that we have a specific directive from art. 32 (se above par. 3) that requires the Republic to guarantee the effectiveness of the constitutional right to health, providing for free medical aid to poor people.

So, transplanted in Italy, the “calefragian” new health program would probably not be only “constitutionally” sound, but also “appropriate” or “necessary” and the circumstance we know from the narrative, that the Catholic Divine Mercy Hospital is the “Province’s sole full service hospital”, gives a strong reasonable justification to legislation that – in order to guarantee a higher and wider level of health right protection – relies on private autonomous initiatives, no matter if religiously oriented.

Another constitutional principle elicited by the case is the “subsidiary principle”.

A federal legislation that subsidizes health care institutions run by religious affiliated people is to be supported by public authorities, given the fact that it is an autonomous “social answer” to a general interest need.

Obviously the “subsidiary principle”, in this case, is a general principle that orientates legislation, but this doesn’t mean the automatic “constitutionality” of each program supporting private activities.

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<sup>3</sup> For example on February 15, 1995 was signed a specific Agreement between the “Holy See” and the Italian Government to rule the relations amid the Catholic Church owned Child Hospital «Bambin Gesù» and the National Health Service

*b) Is the legislation of a province that allows “religious objection to acts of sterilization or abortion constitutional”?*

Another key point in the narrative is that some Provinces, in order to allow Catholic health care facilities to comply with the licensing requirements for a “full-service” hospital, changed their previous legislation (according to which every hospital and clinic in the province must include sterilization and abortion services) consenting an exemption to it on behalf of any group that has “a sincere religious objection to acts of sterilization or abortion”.

Leaving aside for a while the different problem of sterilization, the possibility of exerting a conscientious objection for religious motivations to abortion can surely be considered constitutional in Italy. As a matter of fact, we approved in 1978 (L. 194) a state law on the interruption of pregnancy that considers legal the abortion within the first ninety days of pregnancy if the continuation of this status would cause serious danger to woman’s health; in the same law (art. 9) it is disciplined the right for doctors and nurses to deny the participation in such interventions.

Following this same direction, I think that abortion could be assimilated with other surgical interventions aiming to permanent damage (or alter) ones physical integrity. I guess therefore that a law that allowed religious objection also to sterilization could be considered equally constitutional.

*c) Is the legislation if a province that allows religious objection to “standard medical practice constitutional”?*

You might probably consider this case equal to the case b) and so predict the same result. Actually, moving from Italian constitutional jurisprudence, you may also grasp a slight difference.

In the case of the religious objection to abortion, the objector does not have different ideas or options with respect to the “standard medical practice”, that is, to the surgical or clinical techniques or protocols elaborated by medical professional organizations. His conscience considers the fetus a human, being so, he considers anyway and by any means impermissible the result of this act (and in order to avoid such a critical and dramatic inner conflict, the legal system allows the objector to exceptionally suspend his duty of obedience to the laws).

But this is not the present case: here the objector’s conscience dictates a different opinion or choice about “medical practices” to be followed or about the usefulness of certain methods, procedures or therapies.

(Remember, that the hypothetical narrative says that “Siddha Hospices,” will hold themselves out as “houses of prayer” and will employ medicinal and homeopathic remedies as alternatives to the prescription of standard medical practice”).

As for the abortion within Catholic hospitals, in the case, in order to grant Hindu Hospices the compliance with licensing requirements, some Provinces consented religious objection to “standard medical practice”.

I think that in Italy - moving from the difference between question b) and question c) - we may conjecture, in front of a legislation consenting a general religious objection to “standard medical practice”, a different constitutional solution.

We may refer to some similar precedents examined by the Italian Constitutional Court. Some Italian regions enacted laws prohibiting all health care institutions the adoption of particular “medical practices” (electroshock and lobotomy), being under dispute – also for religious motivations - their utility or technical obsolescence. The Italian Supreme Court declared such laws unconstitutional because “unless other constitutional rights and duties come into play, the Legislator is usually not able to directly and specifically establish the

allowed therapeutic practices, nor their limits and conditions. Since the art of medicine is based on constantly evolving scientific and experimental acquisitions, the fundamental rule in this matter is based upon the physician's autonomy and responsibility. The physician will carry out the professional options based on the available knowledge and with the patient's consent a all times" (ruling no. 282/2002; ruling no. 338/2003).

As far as the exercise of the medical profession is concerned, the legislator may not substitute the scientific and technical judgment with political choices.

Obviously, the premise of this reasoning is that we are speaking about "medical" treatments or "health-care" practices; all of the institutions performing these activities have to follow the "medical standard practice" in order to be recognized as "medical institutions".

On the contrary, following the narration, the "Sidda Hospices consider themselves as "houses of prayer" and will not follow the prescription of standard medical practice. So, a radical question could be raised: are these institutions fitting with the general aim of the program, that is to subsidize "medical" programs in the private sector or innovative "medical" services to the public? Or, perhaps, are we out of the *medical* service activity and are we in the "worship" and "religious" service activity?

*d) Is a federal funding program requiring applicant institutions to provide (directly or indirectly) abortion and sterilization services constitutional?*

This is a very delicate question.

I think synthetically that, according to the Italian constitutional and legal system, a law (directly or indirectly) compelling private full-service hospitals to have abortion services would be unconstitutional.

This depends firstly on the peculiar consideration we have of abortion services.

The interruption of pregnancy cannot be considered strictly a *right* or a public service. It is – at least in the "letters" of the law, practical enforcement is another matter – a very dramatic choice taken after a counseling procedure carried out by special counseling offices; a "last resort" choice in case of balance between the life of the fetus and the health of the mother.

This explains why in the Italian abortion law there is no general obligation to practice abortions for private health care institutions. On the contrary, private hospitals that want to carry out such services, have to ask the State for authorization and pass through public controls in order not to create distorted "abortion private industries".

But, I also think, that if a program like the "Calefragian" was adopted in Italy, it probably could be easily challenged on the basis of its "reasonableness".

We have to remember that also in New Calefragia – as in Italy - we have legislation allowing religious based conscientious objection to abortion. So, how can you impose the practice of abortion and, at the same time, allow religious objection to abortion? What will happen if all the doctors or nurses of a hospital, whose managers decided to apply for the program, are objectors? This program causes an - indirect - limitation of their (constitutional) right to conscientious objection.

Why, if the aim of the program is to "improve medical care among the broad base of the country's population" and according to it "the designated medical institution will receive payment by the federal government according to a Medicaid-like schedule of fees per individual patient treated", the Federal government doesn't simply quantify the financial support with regard to the services really carried out, therefore, religious oriented hospital, that don't have abortion services, simply don't receive the correlative payment.

All these questions are examples of that particular constitutional scrutiny of legislation that our Constitutional Court call "reasonableness" judgment of a law.

If a law produces an effect that is inconsistent with his own aim, this law lacks of rationality and, therefore, is unconstitutional.

e) *Is a federal legislation that requires applicant institutions to respect “equal protection principle” (as it is specified in the narrative as regards to race, gender and religion) constitutional?*

Very briefly on this last question.

It is obvious that a federal law that requires respecting a constitutional principle is constitutional!

But, in the narrative, the equal protection principle is specified in three directions: no discrimination can be made on *race*, *gender* and *religion* grounds.

I believe that the first and the second meaning of “equal protection” could easily be subscribed also in Italy.

The way a “religious affiliated” hospital must respect the non-discrimination principle as far as religious beliefs are concerned is slightly more problematic.

On this point, I refer to par. 2 lett. (B) and to the great misunderstandings about the equality principle we often register.

The narrative specifies, “with respect to religion, the law provides an exemption only for positions devoted specifically to clerical or liturgical functions”.

So, under such conditions, the hospital cannot require religious affiliation, for example, for recruiting the medical staff or the respect of religious norms cannot be considered a constitutive element of the employment contract between the Hospital and the professional.

I would only raise some doubts about this application of equal protection, remembering a very famous decision of the Italian Constitutional Court - the “Cordero case” -.

In that very famous sentence professor Franco Cordero, an agnostic, challenged the constitutionality of a law that required whoever applied for a professor position in the Catholic University of Sacred Heart in Milan – University funded by the State – to obtain the declaration from a Catholic bishop of the religious “soundness” of the applicant.

The main issue at stake was, again, the respect of the equal protection principle on religion grounds and the free exercise right.

The Court upheld the constitutionality of that law saying that “it is absolutely clear that, by denying a free and ideologically qualified university’s power to select its professors on the basis of their personality’s evaluation and by denying the same university’s power to terminate an agreement when a professor’s religious and ideological beliefs have become in contrast with those characterizing the institution, the latter’s freedom, inconceivable without the detention of such powers, would be mortified and disclaimed. It is useful to add that such powers definitely constitute some sort of indirect limitation to the professor’s freedom, but they do not violate such freedom since the professor is free to accept the specific goals of the institution by accepting the appointment; the professor is free to select whether to terminate or not his agreement with the university should he no longer share such goals (ruling no. 195/1972)”.

So in that situation, similar to a certain extent to the “NCCase”, the Italian court interpreted the equality principle not as the directive to treat religious affiliated institutions equal to non religious ones, but to treat the religious affiliated institutions in a reasonably differentiated manner, respectful of its diversity, as an expression of an equally constitutional right. Therefore, it could be argued from this precedent that, if the peculiarity of a religious hospital relies - also - on the religious inspiration of the people working in it and in their particular way of conceiving care and assistance deriving from those religious beliefs, to “restrict” – in the name of equality – only to “clerical or liturgical personnel” the relevance of religion, could be fairly unreasonable.