RELIGIOUSLY AFFILIATED SCHOOLS IN AMERICA AND ITALY

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The aim of this paper is to make a comparison between the legal status of religiously affiliated schools in America and those in Italy, taking into account the difference between the two legal systems in which these institutions operate, and the different understanding of Church-State relations (separatism in the USA, Church-State Agreements in Italy). First, the study examines the different juridical legal structures offered by the two legal systems to religious organisations to manage secular works and protect their property. Secondly it examines the problem of the access of religiously affiliated schools to the public funding necessary for these institutions to continue to develop their mission: in both legal systems religiously affiliated schools are constitutionally denied direct access to public funding, but some forms of indirect access have been gradually admitted. Thirdly, the article examines new perspectives opened by recent statutes (in Italy) and decisions (in the USA) that are altering the traditional relationship between public/private and religious/secular which are going to offer a new, more equal role to religiously affiliated schools in both systems, preserving their spiritual identity and ethos.

1. PRELIMINARY REMARKS

The comparison between the legal status of religiously affiliated schools in America and in Italy takes into account the difference between the two legal systems in which these institutions operate, and the different ways the Church-State relationship is ruled (separatism in the USA, Church-State Agreements in Italy). Their juridical status can be qualified as *res mixta*, as bodies born within the Church but operating in the secular world. They are regulated by both civil and canon law.[1] In both legal systems these institutions need access to public funding in order to continue to develop their mission; if they survive only with their own limited resources they cannot operate on the same level as public or secular institutions that do the same work. Besides, the carrying out of secular work by religious institutions means integration into a complex juridical-political-social-economic ethos that can endanger the religious identity of these institutions.

The Church is aware that religiously affiliated schools are unable to operate as a 'separate body', that they need to be kept in touch with develop-

[1] G Dalla Torre, *La questione scolastica nei rapporti fra Stato e Chiesa* (Bologna: Patron Editore, 1989) p 11.

ments in the secular world and that they can be enriched by opening up to globalism and pluralism.[2] The Church also understands the importance of not devaluing the distinctive character of the religious identity of these apostolates.[3] At the same time, in both legal systems the relationship between public/private, religious/secular is being reconsidered and there is an increasing awareness of the social role of religiously affiliated institutions and also of the need to develop wider forms of school pluralism.

2. JURIDICAL STRUCTURES

The two legal systems offer different juridical structures to religious organisations to develop their mission and to protect their property. In the USA canonical juridical persons are not recognised as such, that is to say as juridical subjects with their own powers. Religious organisations have to use the tools offered by civil law. So dioceses, parishes and religious institutes need to create appropriate civil law structures (non-profit corporations) for the vesting and administration of church property and to develop charitable works. Religious groups have to pay attention to articles and bylaws in order to protect the religious identity of the civil structure and maintain control over church property.

The Italian legal system offers two juridical possibilities to protect the organisational needs of religious groups. The first is that concerning the principle of co-operation between churches and State, and gives rise to structures where the State recognises their origin inside the church. The second is connected to organisational needs that can be satisfied by civil law, within the framework of the protection of religious liberty, if the Italian legal system provides appropriate measures to protect their religious identity. Italian legislation recognises bodies constituted or approved by the ecclesiastical authority if they have certain requisites: they must be created or approved by the Church, their purpose must be religious, their headquarters must be in Italy (article 7.2 of the Agreement; article 1 of the law n. 222/85). The regulation of ecclesiastical organisations states that the purpose of religion has to be 'constitutive and essential'. In any case the ecclesiastical body, even if it has this qualification, can carry out different kinds of work that will be regulated by civil law 'respecting the structure and the purpose' of the ecclesiastical body.

3. RELIGIOUSLY AFFILIATED SCHOOLS IN A WIDE AND IN A NARROW SENSE

In both legal systems religiously affiliated schools are different from other church related organisations that manage secular work (for example hos-

[2] Congregation for Catholic Education, *La scuola cattolica alle soglie del terzo millennio* (Rome 28-12-1997).

[3] M Chopko, *Control of and administration for separately incorporated works of the diocesan Church*, in *Acts of the Colloquium, Public ecclesiastical juridic persons and their civilly incorporated apostolates in the Catholic Church in the U.S.A.: canonical–civil aspects* (Rome: Pontifical University St Thomas Aquinas, 1998) p 94.

pitals or entities of social assistance), as they are more closely connected to the mission of the church.[4] In Italy the degree of formal connection of these institutions with the ecclesiastical hierarchy seems of little importance. Whether these schools are managed by an ecclesiastical body or they are autonomous bodies, they do not receive a different juridical treatment or special privileges in school legislation.[5] On the other hand, there is an important distinction between religiously affiliated schools in a wide sense and in a narrow sense.[6] In the former case in Italy we refer to institutions devoted to spreading the faith and to the formation of persons with religious functions. These institutions on the basis of article 10 of the Agreement depend exclusively on ecclesiastical authorities.[7] In the latter, narrow sense, religiously affiliated schools are institutions devoted to education in secular subjects that operate for public benefit and are ruled by civil law when they carry out secular work and by article 9 of the Agreement.[8]

In the USA there is an increasing tendency to differentiate the juridical treatment of religious corporations and charitable corporations.[9] In any case some authors consider religiously affiliated schools as mixed purpose bodies, as it is difficult to separate the purpose of education from the moral and religious tuition of these institutions, whether they are part of

[4] Moreover, the *Codex Iuris Canonici* 1983 gives specific norms about schools (Canons 706–806).

[5] S Berlingò, *Scuole confessionali*, in *Enc. Dir.* (Milan, 1989) p 925 ff.

[6] These expressions are used by S Berlingò, *Scuole confessionali*, p 923. See also S Berlingò, *Promozione culturale e pluralismo scolastico* (Milan: Giuffrè, 1983) p 1 ff.

[7] Article 10 of the Agreement 18 February 1984, enforced in Italy through law n. 121/ 1985: 'universities, seminaries, academies, colleges and other institutions for clergymen and religious figures or for education in ecclesiastical subjects depend exclusively on ecclesiastical authority'.

[8] Article 9 of the Agreement: 'The Italian Republic, in conformity with the principle of freedom of school and tuition and in the terms provided by the Constitution, guarantees to the Catholic Church the right freely to institute schools of every grade and level and educational institutions. Complete freedom is assured to schools that obtain equality, and to their students a school treatment equal to public schools and other local bodies, also about State examinations'.

[9] M Di Pietro, *Organizational overview*, in *Who do you say we are? Perspectives on Catholic Identity in Catholic Charities* (Alexandria: Catholic Charities USA, 1997) p 26 ff. The factors on which this distinction is based are the purpose, forms of funding, beneficiaries of the activity and constitutional protection. The purpose of religious corporations is to hold and administer the property of the canonical juridical person (diocese, religious institute) and promote the proper purposes of the Church; the purpose of charitable corporations is to develop a charitable purpose in the framework of the mission of the Church (e.g. education, healthcare). About funding, a religious corporation receives money only from donations of the faithful as it is strictly connected with the canonical person; the charitable corporation can receive different forms of contributions, as it is a secular structure. The only beneficiaries of the activities of a religious corporation are its members; the beneficiary of a charitable corporation is the public. Religious corporations are protected under the First Amendment, so they are not subject to some federal and State laws (e.g. involuntary bankruptcy).

a diocesan corporation or separately incorporated.[10] In the American legal system, those institutions whose only purpose is the teaching of religion, discipline and moral values will surely be considered religious corporations and regulated as such.[11]

4. PROHIBITION OF DIRECT ACCESS TO PUBLIC FUNDING IN USA

This paper intends to deal with religiously affiliated schools in a wide sense. In the two legal systems schools are denied access to public funding. The justification is different in a separatist environment from a concordatarian one. In the American legal system, for the no establishment clause of the First Amendment, every form of sponsorship, financial support and active involvement in religious activity by the State is constitutionally forbidden;[12] the same applies to taxes whose profit goes to benefit religious organisations, in order to prevent both Church and State from influencing each other. Religiously affiliated schools are often considered pervasively sectarian institutions.[13] Here religious identity and character can be seen as really pervasive regarding various factors (for example, admission only of students of a certain creed, compulsory attendance at religious services, the teaching of religion and theology and all that behaviour that could urge in some way young people to a religious involvement). The Supreme Court has considered religiously affiliated institutions that operate in other fields to be secular ones and permitted them to have access to direct public funding;[14] on the contrary, for religiously affiliated schools it decided that their religious character is so pervasive that it is impossible to separate secular activities from religious ones, or that religious mission is a substantial part of their activity.[15]

5. PROHIBITION OF DIRECT ACCESS TO PUBLIC FUNDING IN ITALY

In Italy the problem of access to public funding by religiously affiliated schools is to be placed within the framework of the possibility of creating an integrated system of public and private (also religious) schools. Article 33.2 of the Constitution states that 'bodies and private people can found schools or educational institutions without burden on the State'. In the

[10] W W Bassett, *Religious organizations and the Law* (St. Paul: West Group, 2003) p 3.24.
[11] W W Bassett, *Religious organizations and the Law*, p 3.71.
[12] *Waltz v Tax Commission*, 397 US 664 (1970).
[13] *Bowen v Kendrick*, 487 US 589 (1988). This case was about the validity of public funding for sexual counselling (Adolescent Family Life Act), also by religiously affiliated structures. Here the Supreme Court for the first time introduced the distinctions between those institutions that are pervasively sectarian and those that are not.
[14] See *Bradfield v Roberts*, 175 US 291 (1899), about public funding to religious hospitals. The Supreme Court also distinguished between religiously affiliated schools and universities; the latter can have access to public funding. See *Tilton v Richardson*, 403 US 672 (1971); *Roemer v Board of Public Works*, 426 US 736 (1976); *Hunt v McNair*, 413 US 734 (1973).
[15] *Meek v Pittenger*, 421 US 349 (1975).

constitutional framework the idea of freedom appears not to be reconciled with public funding, that assumes forms of public control or conditions and limitations on private autonomy.[16] At the beginning there was a trend to give the State a role of hegemony in the educational field and private schools only a subsidiary function. In view of this, giving public money to private institutions would mean a detraction of economical resources from those used only for primary purposes of the State;[17] besides there is also a contradiction with the principle of state secularity.[18] The Agreement has not altered this constitutionally reached balancing of interests.[19] It can be considered as a compromise solution, as the State at the same time permits the maintenance of (facultative) teaching of religion in public schools. Some authors affirm that in the Constitution there is not an absolute prohibition but only an absence of compulsion: this choice is given to the legislator.[20] On this view, the State promotion of school pluralism does not conflict with State secularity.[21] Actually, as religiously affiliated schools have an irreplaceable social function, in both legal systems this prohibition has been interpreted flexibly and some means have been found to accommodate the interests of these institutions.

6. INDIRECT ACCESS TO PUBLIC FUNDING IN USA

Since the nineteenth century in the USA a wide system of diocesan and parochial schools has been developed. These institutions were founded and managed by religious orders and financed by Church and by private donations. In 1925 the Supreme Court declared unconstitutional the Oregon Compulsory Education Act that established compulsory education in public schools for children from eight to sixteen in order to create a public school system and eradicate private schools.[22] On the basis of the Fourteenth Amendment the Supreme Court stated that this was a case of illegal State interference in private activities.[23] The State has powers of control and supervision on the professional competence of teachers and on final tests, but only parents have power to decide their children's education. The problem of access to public funding for religiously affiliated schools was still open. One way to distinguish between legal and forbidden support was the distinction between 'direct and substantial support'

[16] M C Folliero, 'Finanziamenti alla scuola privata: le scorciatoie delle regioni e la via maestra del Parlamento. La Corte dice ni all'esperimento della Regione Emilia Romagna', [1998] *Dir. Eccl.* II, p 500.
[17] Article 33.2 of the Constitution: ' The Republic issues general norms on education and institutes State schools for every order and level'. See G Cimbalo, *La scuola tra servizio pubblico e principio di sussidiarietà. Legge sulla parità scolastica e libertà delle scuole private confessionali* (Turin: Giappichelli, 1999) p 122 ff.
[18] F Rimoli, *Scuole private e pubblici finanziamenti: la Corte prende tempo*, [1998] *Giur. Cost.*, p 708.
[19] Article 9.1 Agreement.
[20] S Berlingò, *Promozione culturale*, p 60.
[21] S. Berlingò, *Libertà d'istruzione e fattore religioso* (Milan: Giuffrè, 1987) p 17 ff.
[22] *Pierce v Society of Sisters*, 268 US 510 (1925).
[23] 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws'.

and 'remote, incidental, indirect support': only the latter was considered constitutionally valid.[24]

In 1930 the Supreme Court stated the principle of 'child benefit' as a means to grant access to public funding to religiously affiliated schools on the basis of the Fourteenth Amendment.[25] In 1965 the Federal Elementary and Secondary School Act came into force. It provides public funding to school districts to benefit students of low-income families that attend public or private schools inside the district. They have to be selected on a neutral, secular, non-ideological basis.

A following decision explained the basic principles of access to public funding defining the so-called *Lemon* test: 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster an excessive entanglement with religion'.[26] A statute has a secular purpose when its aim is not to promote religious organisations; these receive a benefit within the framework of a programme of public interest that involves secular and religious institutions to the same degree.

The prohibition of religious promotion does not mean that every state programme of public funding, when in some way religiously affiliated institutions are involved, is to be considered in contradiction with the no establishment clause. According to the First Amendment, the State should not disadvantage religious organisations but be neutral.[27] The Supreme Court evaluates various factors so as to verify that there is not an advancement of religion, mainly in terms of the 'character and purposes of the benefited institutions, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority'.[28]

The third criterion requires that public funding does not imply pervasive forms of monitoring and control of religious organisations that create an excessive Church-State entanglement, in contradiction with the separatism between Church and State. These forms of supervision are necessary when there are factors which imply that the structure has a strictly religious purpose the State cannot support, otherwise there would be a risk of governmental indoctrination. On these lines, successive cases con-

[24] *Zorach v Clauson*, 343 US 306 (1952) at 393. In *Everson v Board of Education*, 330 US 1 (1947), a State programme to reimburse parents for public transport costs of students of private schools was declared valid.
[25] *Cochran v Louisiana State Board of Education*, 281 US 370 (1930).
[26] *Lemon v Kurtzman*, 403 US 602 (1971) at 612-613. For a study of the Supreme Court cases, see M E Lally-Green, *Constitutional and statutory considerations respecting challenges to the use of religious criteria by religiously-affiliated institutions in employment decision-making*, in *Acts of the Colloquium, Public ecclesiastical juridic persons and their civilly incorporated apostolates in the Catholic Church in the U.S.A.: canonical–civil aspects* (Rome: Pontifical University St Thomas Aquinas, 1998) p 270 and following.
[27] *Everson v Board of Education*, 330 US 1 (1947) at 18.
[28] *Lemon v Kurtzman*, 403 US 602 (1971) at 615.

sider constitutionally valid other forms of access to public funding for students of religiously affiliated schools. In these programmes the use of public funding was strictly specified, but the Supreme Court is sometimes not sure which forms of public aid do not contain a risk of religious indoctrination (for example, didactic materials and school assistance).[29] The *Lemon* test has been narrowly interpreted in *Aguilar* and *Ball*.[30] Both cases were about federally-funded state programmes of remedial work for disadvantaged students in religiously affiliated schools provided by public school teachers. This programme, even if it had a secular character, had been previously considered unconstitutional, as the atmosphere and the pervasively sectarian environment of school could influence tuition.[31]

In the *Ball* case the Supreme Court found a violation of the second principle (advancement of religion) as the presence of public employed people in a religiously affiliated school could imply religious indoctrination and a symbolic link between Church and State. The Supreme Court gave a strict interpretation of the child benefit theory affirming that 'any public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision making'.[32] Besides, another illicit benefit would be that religiously affiliated schools, free from their secular burdens, could use more resources for their own purposes. This type of programme was also constitutionally invalid in *Aguilar*, where the court found three potentially dangerous effects: necessity of pervasively monitoring by public authorities on religiously affiliated schools, administrative co-operation between Church and State, and political divisiveness.[33]

These decisions were strongly criticised for their negative social impact above all concerning needy students; they also resulted in burdening local administrations with new economic responsibilities, such as giving

[29] *Board of Education v Allen*, 392 US 236 (1968), where it was declared constitutionally valid to make loans to buy secular handbooks for students of parochial schools. See also *Meek v Pettinger*, 421 US 349 (1975). Direct reimbursement and tax deductions to parents for educational expenses are declared constitutionally invalid in *Committee for Public Education and Religious Liberty v Nyquist*, 413 US 756 (1973); also reimbursement for administration costs for tests are declared valid in *Levitt v Committee for Public Education and Religious Liberty*, 413 US 472 (1973), but then are declared invalid in *Committee for Public Education and Religious Liberty v Regan*, 444 US 646 (1980). Some auxiliary, diagnostic and therapeutic services are declared valid in *Wolman v Walter*, 433 US 229 (1977), previously declared invalid in *Meek v Pettinger*. In *Mueller v Allen*, 463 US 388 (1983) tax deductions for educational expenses, including educational costs in private schools, are considered valid.

[30] *Aguilar v Felton*, 473 US 402 (1985); *School District of Grand Rapids v Ball*, 473 US 373 (1985).

[31] *Meek v Pettinger* 421 US 349 (1975) at 371 was about a Pennsylvania statute that anticipated the use of public employees in auxiliary services, such as remedial courses and counselling for students of private schools, to be held in the school premises; *Wolman v Walter*, 433 US 229 (1977) at 248 was about a programme of remedial courses and counselling held by public employees to students of private schools, in facilities different from school premises.

[32] *School District of Grand Rapids v Ball*, 473 US 373 (1985) at 385.

[33] M E Lally-Green, *Constitutional and statutory considerations*, p 274.

private school students the same services in places different from religiously affiliated schools. The decisions of the following period began to erode the principle that the presence of public employed teachers in religiously affiliated schools is supposed to create religious indoctrination or a symbolic link between Church and State.[34] Some forms of public aid can be licit, even if there is a direct aid to a religious body, when the benefit to religious organisations is the effect of individual and private choices of beneficiaries.[35] There is not public funding of a religious organisation if a religious organisation is relieved of some economic costs that it would otherwise have sustained with its own resources.[36]

7. THE MOST RECENT SUPREME COURT CASES

In its most recent decisions, the Supreme Court seems to focus its attention on the real effects of programmes of public funding instead of on the potential risks of promoting religious work.[37]

The case that goes beyond *Aguilar* is *Agostini v Felton*, where the Supreme Court declared that not every form of public aid that involves religiously affiliated institutions is unconstitutional when 'the aid is allocated on the basis of neutral, secular criteria that neither favour nor disfavour religion, and is made available to both religious and secular beneficiaries on a non discriminatory basis'.[38] In *Agostini* the *Lemon* test is altered and three factors are defined that establish if a statute has the effect of promoting religion. This happens if a statute 'results in governmental indoctrination, defines its recipients by reference to religion, or creates an excessive entanglement'.[39]

A following decision, *Mitchell v Helms*, introduced interesting developments in the evolution of the jurisprudence of the Supreme Court.[40] The decision surpasses the previous cases that make a distinction between programmes of support for buying books (licit) and for buying other didactic materials (illicit), as the latter could be more easily used for religious purposes.[41] In *Mitchell* the Supreme Court declared valid a programme that gives public funding to schools to buy computers and other multimedia

[34] *Zobrest v Catalina Foothills School District*, 509 US 1 (1993) at 12-13. This case was about the presence of a public teacher for a deaf student in a religiously affiliated school.
[35] *Witters v Washington Department of Services for the Blind*, 474 US 481 (1986) at 489. This case was about constitutional validity of a scholarship for a blind student who wished to use this support to attend a catholic college and become a priest.
[36] *Zobrest v Catalina Foothills School District*, 509 US 1 (1993) at 12; *Committee for Public Education and Religious Liberty v Regan*, 444 US 646 (1980) at 658.
[37] W W Bassett, *Religious organizations and the Law*, p 9-107.
[38] *Agostini v Felton*, 521 US 203 (1997) at 231. The case was about public teachers in parochial schools to give remedial courses to disadvantaged children on the basis of the Elementary and Secondary Education Act, Title I.
[39] *Agostini v Felton* at 233-234.
[40] *Mitchell v Helms*, 530 US 793 (2000).
[41] *Meek v Pettinger*, 421 US 349 (1975); *Wolman v Walter*, 433 US 229 (1977); and also *Board of Education of Central School District No 1 v Allen*, 392 US 236.

materials. Incidentally the Supreme Court also affirmed that the distinction between direct and indirect aid is a formalism and this categorisation implies an 'arbitrary choice that does not further the constitutional analysis'.[42] The court adds that this requirement is not demanded by the First Amendment.[43]

The last decision of the Supreme Court about religiously affiliated schools concerns the problem of the constitutional validity of vouchers,[44] which has been extensively discussed by State jurisprudence.[45] The validity of vouchers is generally in doubt as they constitute a support in cash, instead of in kind, as in previous cases concerning forms of support to cover specific costs afforded by students (books, meals, transport). It was also in doubt if participation of faith-based initiatives to this kind of programme involved a giving up or anyway a dilution of their religious identity.[46]

The *Zelman* case declares constitutionally valid Ohio's Pilot Project Scholarship Program, which grants scholarships to students of low-income families, offering the parents the possibility to choose the school (public or private). The programme is considered secular, as the only criterion for choosing the beneficiaries is the family's low income, and it is religiously neutral, as it maximises the freedom of the individual and genuine personal choice; only through this free choice can religiously affiliated schools obtain a benefit. There are two important innovations in this decision: the numerical predominance of religiously affiliated schools over secular schools in a specific geographical area is irrelevant for the constitutional validity of the programme (82 per cent of Cleveland schools are religiously affiliated) and also the fact that most of the beneficiaries choose a religiously affiliated school is unimportant. Ohio does not force students to attend a religiously affiliated school: this is only one option within a pluralistic formative offer. Besides, previously, the use of public funds by beneficiaries was strictly defined, in order to prevent diversion of public money to religious activities; in this case the use of scholarships has no limits. So religiously affiliated schools seem to be on an equal level with secular ones: they need to have accreditations and licences, they have to respond to the standards of quality required, they have to open admissions without operating or promoting discrimination on the basis of race,

[42] *Mitchell v Helms*, 530 US 793 (2000) at 795.
[43] *Mitchell v Helms* at 816.
[44] *Zelman v Simmons-Harris*, 122 SC 2460 (2002).
[45] W W Bassett, *Religious Organizations and the Law*, p 2-44.2, notes that in this decision the disputed word 'voucher' is never used and it is replaced by the word 'scholarship'. At State level we can remember, in Wisconsin, *Jackson v Benson*, 578 NW 2d 602 (1998), where the vouchers provided by the Milwaukee Parental Choice Program are considered constitutionally valid. On the other hand the Supreme Court of Maine considered exclusion of religiously affiliated schools from a State programme that foresaw public funding for scholarships constitutionally valid in *Bagley v Raymond School Department*, 728 A 2d 127 (Me 1999).
[46] I C Lupu, '*Government messages and government money: Santa Fe, Mitchell v. Helms, and the arc of the Establishment Clause*', (March 2001) *William and Mary L. Rev.*819.

ethnicity and religion but their religious dimension cannot be challenged when they seek to participate in this 'form of public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian, or public-non-public nature of the institution benefited'.[47]

8. INDIRECT ACCESS TO PUBLIC FUNDING IN ITALY

In Italy too there is a distinction really similar to the one referring to direct and indirect aid to religiously affiliated schools. In the framework of the right to study, some authors have distinguished a structural element that pertains to the founding phase of the institution (premises, hiring the staff); this is part of the autonomy of the sponsoring body and the State cannot intervene with public funding because of the prohibition based on Article 33.3 of the Constitution. There is also an assistance element that concerns all the forms of support to promote the effective right to study (transport, meals, scholarships).[48]

This distinction is accepted by the Constitutional Court through the decision n. 454 of 30 December 1994, which states that students are the beneficiaries on the basis of Article 34 of the Constitution and they cannot be discriminated against on the basis of which school they attend.[49] The Italian situation is influenced by the division of authority between the State and the Regions. Article 117 of the Constitution gave authority about school assistance to the Regions. Then Presidential Decree 616/1977 gave to the Regions a series of functions and to the local governments administrative scope about school assistance.[50] During the eighties a large number of regional statutes about school assistance were brought into force that foresaw various forms of public aid to students of both private and public schools.[51] Regional legislation has begun to go beyond the principle of indirect benefit by providing forms of financing of school managing costs; moreover some regional statutes provide the possibility for local governments to negotiate agreements with private schools operating in their area, even though there was no national framework statute about private education.

The Region Emilia Romagna with a statute dated 24 April 1995, n. 52, chose to anticipate the decision of the central government and foresaw an integrated system of public and private schools, with financial support to local governments that make conventions devoted to qualifying and promoting schools managed by no-profit organisations. This statute, much studied by commentators,[52] was contested by three religious groups

[47] *Zelman v Simmons-Harris*, 122 SC 2460 (2002). See also W W Bassett, *Religious Organizations and the Law*, pp 9–114–7 ff.
[48] S Berlingò, *Promozione culturale*, p 38.
[49] Constitutional Court, 30 December 1994, decision n. 454, [1996] *Dir Fam*, p 445.
[50] Article 42 of the Presidential Decree 24 July 1977, n. 616.
[51] For a study of regional legislation, see G Cimbalo, *Il finanziamento alla scuola privata tra leggi statali e regionali*, [1998] *Quad Dir e Pol Eccl*, 1, 145.
[52] P Cavana, *Contributi alle scuole non statali e nuovi poteri delle Regioni (D lgs n. 112/1998)*, [1998] *Dir Fam e Pers* 1340. This author thinks that nursery schools are a service of school assistance, and that their direct funding is constitutionally valid.

(Evangelist Methodist Church of Bologna, Christian Adventist of Seventh Day Church of Bologna, Jewish Congregation of Bologna) and by the Bologna School and Constitution Committee before the Regional Administrative Court (TAR).[53] The TAR referred the decision to the Constitutional Court and this declared the problem of constitutional validity clearly not admissible.[54] In 1998, while the problem was directed to the attention of the court again,[55] in the ambit of a wider project of administrative federalism Legislative Decree n. 112 was approved. It delegated to the Regions the 'planning of integrated school offer between professional education and training' and 'subventions to private schools' and local authorities for decisions about the ways of distribution of school service, enlarging their province.[56]

9. THE INTEGRATED SYSTEM

After various legislative projects, a statute dated 10 March 2000 n. 62 came into force. With this the State intends to create an integrated system between public and equal private schools and schools of local bodies (article 1.1).[57] Religiously affiliated schools are part of this system: the statute assures to the schools 'full freedom about cultural trends and didactical-pedagogic lines' and respects their 'educational plan' in the framework of constitutionally granted liberties. A school, even if it is religiously affiliated, has to be inspired by a pluralistic model and cannot be pervasively sectarian (as they would say in the USA): that means that schools can neither operate discrimination in admitting students nor can they provide compulsory religious activities. The qualification of 'equal school' should have a double effect for private schools: it gives the schools the ability to confer legally recognised qualifications and also lets them participate in the public funding system provided by the same statute.

The schools have to conform to general norms about education and be coherent with the formative requests of families; in order to have this qualification, besides, they must have the additional requirements provided by this statute (article 1.2). Among these requirements, while some simply impose uniformity to religiously neutral statutory standards (educational plan consistent with the Constitution, conformity with statutes about student disabilities, complete courses, the hiring of staff with the professional qualities required by law and a public budget), others are intrusive of the autonomy of religiously affiliated institutions (for exam-

[53] TAR Emilia Romagna, sez II, ordinance 28 July 1997, n. 574, [1997] *Quad Dir e Pol Eccl*, 3, 710.
[54] Constitutional Court, ordinance 17 March 1998, n. 67, [1998] *Quad Dir e Pol Eccl*, 3, 759.
[55] TAR Emilia Romagna, sez II, with ordinance 21 April 2000, n. 491, [2000] *Quad Dir e Pol Eccl*,3, 782, proposed again the question of constitutional validity of l. n. 52/1995. The question has been declared not admissible by Constitutional Court, ordinance 5-6 November 2001, n. 346, [2001] *Quad Dir e Pol Eccl*, 3, 721.
[56] Article 138 Legislative Decree n. 112 del 31 March 1998 published in Gazzetta Ufficiale (Official Bulletin) (hereafter referred to as G U), 21 April 1998 n. 77/L, ordinary supplement G U of 21 April 1998, general series, n. 92.
[57] Law 10 March 2000, n. 62, in G U 21 March 2000, n. 67.

ple, the obligation of the democratic nature of the composition of collegial organs is in contradiction with the organisational freedom allowed to religious entities; the prohibition to employ no-profit workers beyond one quarter of total workers is in contradiction with the tradition of religiously affiliated schools,[58] that largely employ religious men and women; the obligation to conform the plan of the educational offer to statutes does not consider very much the principle of didactic autonomy (article 1.4-5).[59] In addition, this statute imposes further costs on private schools for structural changes, without giving them appropriate financial support. There are also forms of centralised control to verify respect of the original requirements (article1.6) and subsequent controls to verify conformity to statutory standards (article 1.5).

A statute that requires conformity to it by all private schools within three years can be criticised. After this date, all previous norms about private education will be eliminated and private schools that are not coherent with the model of an equal school will not be able to confer legally recognised qualifications; perhaps they will have more autonomy but they will not become legally recognised institutions.[60] The model of public financing is the indirect one, by giving funds to the Regions that have to use them to give scholarships to needy students and to offer support to families for educational costs.[61] The State statutory model is different from the regional one. In any case there are some forms of accommodation to give direct aid when the law provides 'funding to maintain officially recognised primary schools' and for expenses to participate in the creation of an integrated school system or to support schools that admit students with disabilities (article 1.13-14). However the Regions maintain their authority over the right to study (article 1.11).

10. LEGISLATIVE INNOVATIONS

The problem is still open. A recent change in the Constitution has operated a redistribution of functions between the State, the Regions and local governments. Constitutional law n. 3 states that the State preserves the power to establish general norms about education and essential levels of services; the Regions have concurrent legislative power, legislative initiative and ruling power.[62] Other forms of autonomy can be given to the Regions by law in some matters (and among these, education), on request of the Region involved. Administrative responsibility is given to local government. More important additional changes for the Regions which are being examined by Parliament are discussed below. Besides, a delegating

[58] G Dalla Torre, '*Il disegno di legge governativo sulla parità scolastica nel quadro dei principi costituzionali*', [1998] *Dir Fam e Per*, 182.
[59] S. Berlingò, '*Il pendolo dell'istruzione*', [1995]*Quad Dir e Pol Eccl*, 3, 804.
[60] F Freni, '*La legge sulla parità scolastica e la "piena" libertà delle scuole confessionali*', [2000] *Quad Dir e Pol Eccl*, 2, 467.
[61] See also in this direction Law 27 December 2002, n. 289, 'Norms to form annual and pluriennal budget' (financial law 2003), in G U 31 December 2002, n. 305, ordinary supplement, n. 240.
[62] Constitutional Law 18 October 2001, n. 3, 'Changes to Title V of second part of the Constitution' , in G U n. 248, 24 October 2001.

statute dated 12 March 2003 for the reform of the school system already seems to lay the foundations, together with the already enforced public-private integrated system of education, for a consolidation of the right to study with the wider right-duty to education and training, enlarged over a period of twelve years.

11. ACCESS TO PUBLIC FUNDING AND NEW PERSPECTIVES IN THE USA

The United States experience shows clearly that direct access to the public funding of religiously affiliated institutions doing secular work implies the duty to conform to strict statutory and ruling standards. The religious dimension of these institutions is intrusively investigated as pervasively sectarian institutions (strictly religious) have to be excluded from public funding. This has led to a gradual secularisation of many of these institutions (hospitals, universities) and a partial or total abdication of their identity.[63] As regards schools, access to forms of indirect funding maximises the protection of individual choices of beneficiaries (students, families); the ideological inspiration of the institution and its formal or substantial relationship with the Church is not disputed. In the light of the most recent Supreme Court decisions,[64] some authors think that the indirect benefit system is more respectful of the principle of neutrality, as the secularity of a state programme is verified only for the use of public money, while the direct benefit system imposes an exclusion of pervasively sectarian institutions.[65]

There is a limit to this way of thinking. In the USA religiously affiliated institutions are often incorporated as no-profit organisations and have a social role, carrying out this work instead of the State. All these institutions, both secular and religious, offer a large range of services to the public (education, healthcare, social services). Nowadays public funding is necessary to let religiously affiliated institutions be competitive on an equal level with secular institutions that offer similar services. It cannot be considered promotion of religion, in violation of the establishment clause, to give to these institutions the same resources granted to secular institutions that operate in the same ambit; this means only giving them the possibility to operate on an equal level. It also seems that the strict controls made in the past by the Supreme Court on cases of public funding to religious institutions are now limited only to cases where there seems to be the diffusion of a religious message in public institutions.[66]

[63] J T Burtchaell, *The dying of the light, the disengagement of colleges and universities from their Christian Churches* (Grand Rapids: Eerdmans, 1998).
[64] *Agostini v Felton*, 521 US 203 (1997); *Mitchell v Helms*, 530 US 793 (2000); *Zelman v Simmons-Harris* 122 SC 2460 (2002).
[65] S V Monsma, '*The "pervasively sectarian" standard in theory and practice*', [1999] *Notre Dame Journal of Law, Ethics and Public Policy*, 321.
[66] I C Lupu, '*Government messages and government money*', 817. The author quotes *Santa Fe Independent School District v Doe*, 120 S Ct 2266 (2000), where the tradition of a prayer before football matches in a public school was declared constitutionally invalid.

Recent Supreme Court decisions develop an idea of separatism seen as religious neutrality, not as hostility toward religion, granting religious groups the same opportunities and facilities offered to secular organisations to exercise constitutional liberties.[67] Nowadays neutrality ought to mean offering the same benefit to a large range of people, without taking into account their creed. So it should be less relevant that public aid goes directly or indirectly to religious institutions. Neutrality would be exalted if the same benefits are offered to beneficiaries that have different ideologies and opinions.

12. ACCESS TO PUBLIC FUNDING AND NEW PERSPECTIVES IN ITALY

In Italy too, it is still under discussion whether private schools (and among them religiously affiliated schools) can have access to direct or only to indirect public funding, within the framework of the new laws. A statute was approved on 12 March 2003 to delegate the power to define general norms about education and essential levels of services in education and professional training to the Government. This statute does not address the problem of public funding of private schools.[68] It would be better to define what the term 'equal school' means and what its role is within the school system, and also the role of the State in this system, as it is no longer going to manage social services, but only to regulate and guarantee them. It needs also to be understood if public funding to private schools is one of the basic principles that the State has to define to guarantee the unity of the system. Statute n. 62 defines a national system in which public and private schools participate. In this framework private/religiously affiliated schools are defined as pluralistic bodies, that no longer operate only for students of the same creed nor are an environment in which proselitisation is mainly done. In the Italian system, as in the American, integration with secular activities and the acquisition of an equal role implies new forms of public control over the activity and coherence with technical-qualitative standards.

However, this statute proposes a model (the State school) to which different realities have to conform, without an effective financial equality. Another limit is that the statute does not give proper relevance to no-profit organisations. These have the same tax exemptions as all no-profit bodies, but there is not a special treatment in consideration of their social

[67] *Good News Club v. Milford Central School*, 533 US 98, 121 S Ct 2093 (2001), concerning access to school premises by a religious group to do extra school activities. See previously *Rosenberger v Rector of University of Virginia*, 515 US 819 (1995), where refusal of a school to offer to a religious magazine of students the same support given to secular ones is declared in contradiction with freedom of speech.

[68] The Government will enforce legislative decrees to define educational system so as to promote 'moral and spiritual education' (art 2.1 b). About nursery schools, the law ensures that a nursery school, for a three-year term, must provide for the education and the effective, psychophysical, moral, religious and social growth of children (art 2.1 e). This law was approved but is not published yet and can be found at the website www.senato.it

function, as happens in the USA. Some think that direct public funding implies a conception where there is a State monopoly in education and a take-over of private schools, while indirect funding promotes freedom of individual choice about the school most appropriate to a person's own needs.[69] As happens in the USA, this model assumes that all the institutions operate on an equal level, in a competitive environment where there are mechanisms to reduce inefficiency and avoid the doubling of services (for example, merger of structures or services),[70] there is an exchange of teachers,[71] and where the public role is only to verify that participating organisations have the basic qualities required (accreditation, licence, planning permission) but the State neither intervenes in the content of the distinctive religious education offered.

This perspective is in contrast with the fact that in the USA there is a long tradition of the co-operation of no-profit organisations in social service; while in Italy only recently has there been a separation, a shift from the State monopoly of public services and from a negative attitude towards intermediary organisations. Effective equality means that private schools no longer have a subsidiary role, but are seen as deserving complete equality, and also the possibility of access to the same public resources.

This should be similarly true for no-profit organisations,[72] or institutions that operate in the provision of public services or in some way respond to a public need that a State service cannot satisfy (for example, in poor areas). This would also be in harmony with administrative reforms that give didactic autonomy, autonomous management and autonomous juridical personality to schools.

In Italy we have already noted that this normative frame is in a transitional phase. At present there are proposals to modify Article 33 of the Constitution in order to eliminate the clause 'without burden for the State' that is considered no longer adequate to the changed social-juridical-political environment. It is in doubt if we can still consider the public funding prohibition as a guarantee of freedom, taking into account also recent school needs of autonomy and pluralism.[73] The substantial equality affirmed in the Constitution cannot be carried out fully unless obstacles (including economic ones) that limit school freedom are removed. The

[69] '*Buono scuola e diritto allo studio: Stato e Regioni*, in *Libero insegnamento*', 9-10 November-December 2002, p. 76.
[70] Article 7.2 of the Presidential Decree n. 275/1999, provides the possibility of forms of co-operation between schools, through agreements concerning didactic, research, experimentation, development education update, administration, accountancy, purchase of goods and services, organisation and other activities coherent with institutional activities, and even "temporary exchange of teachers"(art 7.3).
[71] S Berlingò, *Pluralismo scolastico*, p 91, where the author proposed staff exchange between public and private/religious schools.
[72] For example, Law n. 52 del 1995 that foresaw an integrated system with some no-profit organisations (Ipab).
[73] F Donati, '*Pubblico e privato nel sistema di istruzione scolastica*', [1999] *Le Regioni*, 3, 556.

division of authority between the State and the Regions seems still not definitively established.[74] Moreover the extension of regional scope, operated by Legislative Decree n. 112/1998 and also by the new constitutional law, gives the possibility of opening new routes to public funding for schools, on the basis of autonomous regional decisions, creating a differentiated system in various geographical areas on the basis of local programming needs, and up to Regional budgets.[75] This devolution promotes a greater integration of non-State bodies, in order to supply the needs of a specific community.

13. CONCLUSIONS

In both legal systems (United States and Italian) we have to take into account an economic aspect: proper public financing is necessary, otherwise every legislative intent will remain merely theoretical. In Italy it is difficult to propose public funding to private institutions at a time of rationalisation of public resources for social services, and when autonomous management has been assigned to schools, implying autonomous management of economic resources, a decrease of State contributions, and autonomous search for funds. Nevertheless, United States cases show that in the balancing of interests, social benefit factors should prevail over separatist attitudes of segregation for organisations that promote religious models or values. In Italy, the participation of private schools could be promoted by agreement between civil and ecclesiastical authorities at a local level in order to avoid the burden that limits the preservation of the religious identity of these institutions. Finally, in both legal systems the State and all church bodies should make joint efforts (through the different juridical tools offered by the two legal systems) to maintain the religious identity of these institutions without the State expecting or the Churches passively accepting uniformity to a simply secular/public model, and to ensure for all parties a real freedom of educational choice between the various options available.

[74] See drafts of law n. 377 e n. 2546 at the website www.senato.it See also draft of law n. 3461-A, in discussion, that would give Regions exclusive authority on 'school organisation and management, maintaining autonomy of schools'.
[75] For example, vouchers have been already introduced in Veneto by a regional statute.