

BYU Symposium 2016. Elena Ervas presentation.

Agreements between State and Religious Denominations: The Italian perspective.

- In this presentation I would like to share with you some reflections concerning the results of a recent decision of the Italian Constitutional Court which addressed the issue of Church-State relations and raised questions about non-discrimination against majority and minority religions; in particular, as we will see, the focus of the decision is the right of a religious denomination to stipulate an agreement with the State in order to regulate issues of common interests. Paradoxically, but interestingly, this case was brought before the Court by an Atheistic organization.
- I will concentrate on the following points:
- First of all, I would like to give you an introductory perspective on the Italian legal framework about Church and State relations and then I will focus on the recent case law. The Italian Constitution, guided by the canons of religious pluralism and autonomy, recognizes and guarantees the mutual independence and sovereignty of both the State and the Catholic Church and the free organization of non-Catholic denominations. This provides religious groups the possibility to self-organize with their own internal rules, which will be respected by the State provided that they are not in contrast with the fundamental principles of the Italian legal system. In pursuance of the principle of religious autonomy, the Constitution provides that every form of interaction between the temporal and the spiritual's spheres should be governed by agreements between the state and the religious institution.

- Accordingly, the Constitution provides two methods to regulate the relations between the State and a religious denomination. The first one is reserved to the Catholic Church, which has historically enjoyed a significant role in the Italian peninsula. According to the Constitution, the relationship between the State and the Catholic Church is ruled on the basis of a Concordat. The Constitution explicitly refers to the Lateran Pacts that were signed in 1929 and later modified by the Pacts of Villa Madama in 1984 in order to make them compatible with the principles of the democratic system.
- Regarding other non-Catholic denominations, the Constitution provides for a special instrument, called *Intesa*, which is an agreement reached by the religious Representative and the Government. The content of this agreement, once implemented by a law of the Italian parliament, will be the source of regulation of relations between the State and the religious denomination.
- The main idea is not only to recognize the autonomy of religious denominations from the State but also to allow each religious denomination to assert their specificities and needs through a separate and individual negotiation with the State. Saying and doing are two different things and the agreements that have been reached tend to have a “standardized” content; for example: the recognition of civil effects on religious marriages celebrated by the respective Minister of Worship, the recognition of religious festivities, the possibility to establish religious schools and the recognition of the granting diplomas, the taxation system and the participation in states’ funding.
- Here, it is important to emphasize that religious denominations can, but don’t need to, sign an agreement with the State in order to enjoy religious freedom;

in fact, they may decide not to enjoy a special status. In the absence of a general law on religious freedom, which admittedly the constitution does not mention, the religious denominations that have not reached an agreement with the State, continue to be ruled by the *law on admitted cults* of 1929. This piece of legislation dates back to the fascist period. It's true that this law was gradually adapted by the Constitutional Court to guarantee equality and liberty of the republican Charter, but it still gives the Government strong powers of control over the group's activity. It is sufficient to say that an appointment of minister of worship must obtain the government approval and without this approval any acts could have effects on the civil society. So, a religious denomination has usually a strong interest to enter into an agreement with the State to obtain a more favorable status.

- So, to sum up: in the Italian system of Church-State relations we have:
 1. The catholic Church with the Concordat;
 2. Non - Catholic denominations that have reached an Intesa with the Government (and until now we have 12 religious denominations that have obtained the agreement);
 3. Non- Catholic denominations that do not want to reach an agreement with the State and accept to be governed by general laws.
 4. But finally, we might also have denominations that want to stipulate this agreement with the State but face opposition from the Government, which refuses to accommodate the request of the religious side. It is precisely on this point that the Italian Constitutional Court has recently intervened, in

a way that is not so protective for the religious groups seeking an agreement.

The case was brought before the Court by the Union of Atheist and Agnostics after the Government's refusal to launch negotiations to reach an agreement with the Union. Notwithstanding the particular nature of the applicant, which certainly could not be said a religious denomination, the ruling of the Court hits all religious groups, in particular the minority ones.

- As a matter of fact, the Constitutional Court argued that a religious group cannot invoke a right to stipulate the agreement. This is more plain, since an agreement in itself assumes the presence of *consensus* on both sides. But the Court also ruled that a religious denomination cannot invoke a right to start negotiations to reach an agreement either. According to the Court, this is a context strictly related to the *political discretion* of the Government in which a court cannot interfere. This means that currently the State is free:
 - to decide whether to begin a negotiation process
 - then, whether to conclude an agreement with the religious denomination
 - And finally when (and whether) to give the impetus to render effective that agreement through a parliament law.
- And a religious denomination that faces the opposition from the government to accommodate its request has no choice but to be subject to the Government's decision without the possibility to invoke protection in courts.

- I'm wondering if this system could be said sufficiently protective of the religious freedom and equality of religious groups. An excessive amount of discretion which the public powers possess in deciding whether to accept the request of a denomination or not to start negotiations for an agreement may be problematic from a non-discrimination point of view. Through the agreements, the religious organizations receive protection of their independence, of their right to self-organization, the right to be equal in front of the law, and last but not least, the right to be different from one another. For this reason, a system completely left to the absolute discretion of the State entails, in my opinion, a risk of prejudice for the equal protection of all religious faiths. On the one hand, the religious denominations that are left without an *Intesa* cannot avoid the application of the illiberal law of 1929; on the other hand, the State is entitled to treat different religious denominations in different ways without the necessity of providing a justification for such different treatments.
- The applicant in the present case decided to bring the case before the ECtHR; It would be interesting to see how the Strasbourg's court will deal with this issue. In light of the ECtHR case law, "the conclusion of agreements between the State and a particular religious community establishing a special regime in favor of the latter, does not, in principle, contravene the requirements of Articles 9 and 14 of the Convention", provided that the principle of non-discrimination is respected. This means that "there must be an objective and reasonable justification for the difference in treatment and similar agreements

may be entered into by other religious communities wishing to do so”¹. In the words of Judge Tulkens: “public authorities are under no obligation to provide an identical legal status to each community; nevertheless, the Court will control with severity the conformity with the Convention of advantages granted exclusively to one religious community. Any advantage conferred to a religious community to the exclusion to the others must rest on a legitimate justification and remain proportionate”².

- To conclude, it would be interesting to know if the Italian mechanism, in which the possibility to enter into an agreement with the State seems to be totally referred to the Government, would pass the Court's assessment of compatibility with the European Convention's principles.

¹Case Alujer Fernández and Caballero García v. Spain (dec.), no. 53072/99, ECHR 2001-VI

² TULKENS F., The European Convention on Human Rights and Church-State relations: Pluralism v. Pluralism, in Cardozo Law Review, 2009, v. 30:06, p. 11