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HOLY SEE VS. ITALY AND GENDER DISCRIMINATION. AN EXAMPLE OF DIPLOMATIC MEDDLING

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Background

On 22 June 2021, an Italian daily newspaper of national importance reported that the Holy See had sent the government a "Nota Verbale" in which a number of concerns were raised regarding the concordat legitimacy of a bill, already approved by the Chamber of Deputies and under discussion in the Senate, on "Measures to prevent and combat discrimination and violence on grounds of sex, gender, sexual orientation, gender identity and disability" (Senate Act 2005, known as "DDL Zan"). The "Nota verbale" was supposed to remain confidential, but after the scoop the text was released by the Holy See[1].

1. The Secretariat of State, Section for Relations with States, presents its compliments to the Most Excellent Embassy of Italy and has the honor to refer to Bill No. 2005, on "Measures to prevent and combat discrimination and violence on grounds of sex, gender, sexual orientation, gender identity and disability", whose text has already been approved by the Chamber of Deputies on 4 November 2020 and is currently being examined by the Senate of the Republic. / In this regard, the Secretariat of State notes that some of the contents of the legislative initiative - particularly in the part that establishes the criminalization of discriminatory conduct on grounds "based on sex, gender, sexual orientation, gender identity" - would have the effect of negatively affecting the freedoms guaranteed to the Catholic Church and its faithful by the current concordat regime. Various expressions of Sacred Scripture, ecclesial Tradition and the authentic Magisterium of the Popes and Bishops consider, to multiple effects, sexual difference, according to an anthropological perspective that the Catholic Church does not consider available because it is derived from divine Revelation itself. This perspective is in fact guaranteed by the Agreement between the Holy See and the Italian Republic on the revision of the Lateran Concordat, signed on 18 February

Before making a few considerations on the matter, it is useful to clarify that relations between State and Church in Italy are regulated by the Lateran Pacts, stipulated in Rome in 1929, therefore during the Fascist dictatorship and before the Republican Constitution came into force. The Lateran Pacts consist of three main documents: the Lateran Treaty, which regulates relations of a temporal nature and, among other things, establishes the Vatican City State, a Concordat, which regulates so-called mixed matters (e.g. the state regulation of sacramental marriage and the teaching of the Catholic religion in state schools), and a Financial Convention, which regulates financial aspects and defines compensation for the damage caused to the Catholic Church during the wars of independence that in the 19th century led to the *debellatio* of the Papal State.

The validity of the Lateran Pacts was explicitly confirmed in the Republican Constitution, so the rules established in 1929 are still in force, even though the 1929 Concordat was abrogated and replaced with a "New Agreement" stipulated in 1984. Therefore, relations between Italy and the Holy See take place within a framework of international law, although adapted to the peculiar circumstances determined by the fact that the Holy See is not exactly a State. It represents the Catholic Church in relations between States and at the supranational level 2, but the Catholic Church acts at the international level also through the Vatican City State3. The latter is a state order constituted by means of an international treaty stipulated between the Holy See and

Italy (both of which are therefore formally its parents); the position in Italy of the Catholic Church — which is the common substantive reference of both the Holy See and the Vatican City State — is conditioned by national historical events. In 1984 a new Agreement was signed and some powers of representation of the Catholic Church towards Italy were attributed to the Italian Episcopal Conference[2]. As you can see, the picture is complex. We cannot forget that until 1978 the Popes were Italian (at least

1984. Specifically, Article 2(1) states that "the Italian Republic recognizes the full freedom of the Catholic Church to carry out her pastoral, educational and charitable mission of evangelization and sanctification. In particular, the Church is guaranteed freedom of organization, public worship, exercise of the magisterium and spiritual ministry as well as jurisdiction in ecclesiastical matters'. In Article 2, paragraph 3, it is further stated that 'Catholics and their associations and organizations are guaranteed full freedom of assembly and to manifest their thoughts by word, in writing and by any other means of communication'. / The Secretariat of State therefore hopes that the Italian side will be able to take due consideration of the above arguments and find a different modulation of the legal text, continuing to guarantee respect for the Lateran Pacts, which have governed relations between State and Church for almost a century and to which the Republican Constitution itself reserves special mention. /The Secretariat of State, Section for Relations with States, uses the circumstance to renew to the Most Excellent Embassy of Italy the senses of its high consideration./From the Vatican, 17 June 2021".

2. See G. Feliciani, *The episcopal conferences*, Bologna, Il Mulino, 1974; P. Zadö, *The role of the episcopal Conferences in the relations of the Church with the modern state*, in *Revista española de derecho canonico*,1998, p.255-263; L.De Gregorio, *Episcopal Italian Conference. Normative power and pastoral role*, Tricase (Le) Libellula, 2012. (Original in Italian, my translation).

since 1522) and that they have always taken a special interest in national affairs using many instruments at their disposal, both informal - such as appeals, speeches, letters, etc. - and formal, such as the "Nota Verbale" we are now discussing.

The "Nota Verbale" is in fact an ordinary form of diplomatic relations between states. Originally, they were precisely the transcription of conversations by means of which diplomatic representatives informed their interlocutors in documentary form of the opinion of the represented State on a certain matter. In practice, they are "reminder" notes kept at the diplomatic headquarters (Ferraris, 1984) and, if necessary, forwarded to the respective foreign ministries and sometimes even to other states. In spite of their name, "Nota Verbale" are therefore written notes, unsigned, but drawn up on headed paper and therefore unequivocally referable to the authority transmitting them (Di Nolfo, 2012, pp. 215-216), and even drawn up according to very precise formal rules, which make them typical documents of international law[3].

"Nota Verbale" and Concordat Regime

The "Nota verbale" of 17 June 2021 is therefore a veritable "diplomatic step" by which the Holy See indicates that the possible approval of a text of a law in the form already approved by the Chamber of Deputies and currently under discussion in the Senate of the Republic (in Italy the approval of a law requires a double passage through the two chambers), would be in contrast with the rights of freedom guaranteed to the Church by the Lateran Pacts. The Note merely points out generically that a law extending the special protection that it already accords to certain violent discrimination on religious, ethnic and racial grounds to "grounds of sex, gender, sexual orientation , gender, sexual orientation, gender identity" could prevent the Church from freely expressing its Magisterium, since "Various expressions of Sacred Scripture, ecclesial Tradition and the authentic Magisterium of the Popes and Bishops consider sexual difference, to multiple effects, according to an anthropological perspective that the Catholic Church does not consider available because it is derived from divine Revelation itself"[4]. In the following paragraph I will address the merits of this statement. Now I want to conclude the technical legal argument by dividing it into two points.

3. Cf. E. Serra *The diplomatic document*, in *Review if international political studies*, 1994, pp. 261-270.
4. Original in Italian, my translation.

First, given that the Holy See represents the Catholic Church at the level of international law, it is appropriate to verify the legitimacy of the "Nota Verbale" at this level. As is well known, diplomatic relations are subject to the obligation of non-interference in the internal affairs of the accrediting State. This rule is the practical translation of the fundamental principle of non-intervention, repeatedly brought to the attention of the International Court of Justice, which tends to circumscribe diplomatic activity in areas of *self-restraint*[5]. A "diplomatic step" aimed at influencing the approval of a bill in a branch of Parliament of the accrediting State constitutes diplomatic pressure aimed at influencing the outcome of a legislative procedure otherwise entrusted to the procedures democratically established by Italian law.[6] It has been observed that "the borderline between simple diplomatic pressure upon a foreign government and a forcible interference in its internal or external affairs is entirely fluid" (Verzijl, 1968, pp. 236-7). In the case of relations between the State and the Church, identifying the borderline is even more complex, precisely because the Catholic Church is not exactly a State and its relations with States are not only articulated in diplomatic terms or in terms of international law. In fact, the Catholic Church intervenes in the political and cultural debate using various channels, from individual bishops to the Bishops' Conference, from ecclesial associations to political movements, from men of culture to the Catholic-inspired media. The Holy See is therefore only one of the subjects that speak on behalf of the Catholic Church, precisely the one that commits it at the institutional and international law level.

The point at issue is not the freedom of the Catholic Church to intervene in political and cultural debate, but the legitimacy of an institutional intervention of a diplomatic nature aimed at conditioning the outcome of a legislative process. Secondly, the concordat singularity typical of Italy must be examined. The purpose of the Concordat system signed in 1929 was to reconcile the State with the Church, guaranteeing the latter's independence, to the point of granting the Holy See a portion of Italian territory in order to establish a new State, which would live on Italian support. Without the Lateran Treaty, the Holy See would have no sovereignty under international law (art. 2), nor exclusive jurisdiction over Vatican City (art. 4) and the people residing there (art. 9). In exchange for these concessions, the Holy See undertook to remain extraneous to temporal competitions between other states (art. 24).

5. See P. Behrens, *Diplomatic Interference and the Law*, Oxford and Portland, Hart, 2016.
6. In doctrine, the hypothesis that diplomatic interventions with another State concerning its foreign policy could be considered admissible has been debated, while the illegitimacy of any intervention on domestic policy is accepted: cf. R. Sapienza, *The non-intervention principle in internal affairs. Contribution to the study of the juridical protection of the authority of government*, Milano, Giuffrè, 1990, spec. pp. 73-81.

This framework was substantially referred to in Article 7 of the Republican Constitution, which did indeed give the Lateran Pacts a constitutionally relevant role, but subject to the separation of their respective orders. That means: without mutual interference. A fundamental principle that the Italian Constitutional Court made explicit in 1989 in terms of the "secularity of the State": that is, mutual recognition of their diversity. Italian laity can be defined as "concordatarian laity", in the sense that it does not expunge the religious question in general and relations with the Catholic Church in particular outside the constitutional perimeter, but certainly requires the State to define questions of interest, including religious ones, in a logic of equal freedom and without accepting undue diplomatic pressure.

"Nota verbale" and gender discrimination

In terms of merit, the "Nota verbale" expresses ecclesiastical concern over the possible approval of a law potentially contrary to the concordat commitments undertaken by Italy towards the Catholic Church, insofar as the "criminalization of discriminatory conduct for reasons "based on sex, gender, sexual orientation, gender identity"" could also concern the Catholic Magisterium on parts unavailable to change "because they derive from divine Revelation itself". The "Nota verbale" does not explain which "expressions of Sacred Scripture, ecclesial Tradition and the authentic Magisterium of the Popes and Bishops" could constitute the offences introduced by the possible new law. It confines itself to criticizing the "anthropological perspective" which—in its opinion—underpins the proposed law, considering it contrary to divine law.

Although it is implicit in the statements made to the national press, it emerges that the Catholic Church is concerned that its anthropological idea, based on the substantial difference between male and female and on the necessary functionalization of the sexual act for procreation, could integrate the hypothesis of crime envisaged by the new law. The new law aims to protect against discriminatory violence, without preventing people from expressing opinions on gender difference or sexual orientation.

From this point of view, there is a perennial temptation on the part of the Catholic Church to bend state legal systems to its own worldview, without admitting the democratic pluralism that—together with the tripartition of powers—characterizes a principle of contemporary legal civilization, at least in the West. The events that took place in Italy in 1970 on the occasion of the introduction of divorce can help to un-

derstand the meaning of this statement. Ecclesiastical opposition was extremely strong and even led to the holding—for the first time in the history of the Republic—of a referendum to repeal the law, which confirmed the institution of divorce (Saresella, 2017, pp. 401-418).

Fifty years later, it is a given that Catholics can continue to consider marriage an indissoluble sacrament, and are not obliged to divorce. At the same time, anyone who wants to, even Catholics may divorce. This is possible because the State ensures the pluralism of "anthropological perspectives" and does not allow one to prevail over the others.

Although it does not emerge from the "Nota Verbale", the Holy See's criticism is based on three main points. Firstly, as already mentioned, it challenges the presumed cultural reference of the possible future law to "gender theories", which are incompatible with Catholic doctrine and therefore—the second criticism—such as to expose Catholics to the "new hate crime" that the law introduces. Lastly, it opposes the planned establishment of a national day against homophobia, lesbophobia, biphobia and transphobia, which would oblige Catholic schools to celebrate these issues, violating their educational autonomy.

The first criticism is based on the fact that the definitions presented in art. 1 of the bill regarding the words "sex", "gender", "sexual orientation" and "gender identity", would be tributary to "gender theories", which the Church disapproves of. Actually, these definitions are valid "for the purposes of this law", and therefore do not engage the anthropological profile.

The second criticism—which concerns the central part of the possible new law—does not hit the mark, since it does not create a "new hypothesis of crime", but adds to the cases already provided for in Articles 604 bis and ter of the Penal Code the grounds "based on sex, gender, sexual orientation, gender identity or disability".

The third criticism calls for absolute autonomy for Catholic schools, which, on the contrary, is already conditional—at least for those that want to be part of the national education system—on compliance with certain indefectible principles:

> an educational project that conforms to the values expressed by the Constitution: they cannot discriminate or prevent enrolment of anyone who requests it; they must ensure the inclusion of differently abled or disadvantaged students and comply with common regulations on the subjects taught, the conduct of programmes, the qualification profile of teachers, the suitability of premises, etc. (Consorti, 2014, p.163)

There is no reason why they should not be committed to ensuring equal opportunities, education for gender equality and the prevention of gender-based violence and all forms of discrimination.

References

Behrens, P. (2016). *Diplomatic Interference and the Law*. Oxford and Portland: Hart.

Clementi, F. (2019). *City of Vaticane*. Bologna: il Mulino.

Consorti, P. (2014). *Law and religion*. Roma-Bari: Laterza.

De Gregorio, L. (2012). *Italian episcopal conference. Normative power and pastoral role.* Tricase: Libellula.

Di Nolfo, E. (2012). *Lexicon of international contemporary policy*. Roma-Bari: Laterza.

Feliciani, G. (1974). *The episcopal conferences*. Bologna: il Mulino.

Ferlito, S. (1988). *The international activity of the Holy See*. Milano: Giuffrè.

Ferraris, L.V. (1984). *The diplomatic relationship as intrument of foreign policy*. *The intenational community*, 537-550.

Saresella, D. (2017). The Battle for Divorce in Italy and Opposition from the Catholic World. (1861–1974). *Journal of family law*, 401-418.

Serra, E. (1994). The diplomatic document. *Review of international political studies.* 261-270.

Verzijl, J. H. W. (1968). *International Law in Historical Perspective*. Leiden: Sijthoff.

Zadö, P. (1998). The role of episcopal Conferences in the relations of Church and Modern State. *Revista española de derecho canónico*, 255-263.