JUDGMENT NO. 203 OF 1989

The Constitutional Court was called upon by the Court of Florence to answer a question as to the constitutionality of Article 9(2) of Law. No 121 of 25 March 1985, together with an Additional Protocol, ratifying and implementing an agreement signed on 18 February 1984 to amend the Lateran Concordat of 1929 between the Italian Republic and the Holy See, as well Point 5(b)(2) of the Additional Protocol in the light of Articles 2, 3 and 19 of the Constitution, alleging that they lead to discrimination against students not availing themselves of Catholic religious instruction.

The Constitutional Court is the custodian of the principle of secularism in the Italian system, as the Constitution does not explicitly proclaim the secular nature of the Republic. However, there is no doubt that Italy is a secular State, and the Court upholds a reading in this sense of the constitutional provisions of Articles 7, 8, 19 and 20.

With Judgment No. 203 of 1989, the Court for the first time explicitly outlined the principle of secularity, defining it as an "overriding principle of the State". With regard to the disputed legislation, the constitutionality of teaching the Catholic religion in public schools is examined with regard to students who decide not to make use of it, for whom the discipline imposes the compulsory attendance of alternative courses, thus creating an "alternative obligation", allegedly harmful to freedom of religion and discriminatory against those students.

In finding the question unfounded, the Court clarifies the outlines of the discipline regulating religious instruction and the principle of secularity by establishing: 1) the optional nature of the lessons on the Catholic religion, 2) the compatibility of the rules of the Rome Agreement with the principle of secularity, 3) the individual right to participate in religion classes or not, 4) the duty of the secular State to protect the self-determination of citizens and to respect the freedom of conscience and the educational responsibility of parents, guaranteed under Articles 19 and 39 of the Constitution, and 5) the evident discrimination against students who do not avail themselves of religion classes if attendance of lessons on another subject is compulsory for them. Instruction in Catholicism is optional, only becoming compulsory once a student has chosen to follow the lessons. Consequently, in the case of non-attenders, the alternative constitutes solely a situation of non-obligation.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 9, point (*recte*: number 2, of Law No. 121 of 25 March 1985 (Ratification and implementation of the Agreement, with Additional Protocol, signed in Rome on 18 February 1984, amending the Lateran Concordat of 11 February 1929, between the Italian Republic and the Holy See), and Article (*recte*: point) 5, letter b), number 2, of the Additional Protocol, initiated with a referral order issued on 30 March 1987 by the Magistrate of a district court of Florence in the civil proceedings between Anna Maria Moroni and others and the Public Education Authority, registered as No. 575 in the 1988 Register of Referral Orders and published in the *Official Journal of the Republic* No. 44, first special series, 1988;

Having regard to the entry of appearance filed by Anna Maria Moroni and others, and the statement of intervention filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Francesco Paolo Casavola at the public hearing of 7 March 1989;

after hearing Counsel Paolo Barile, Andrea Proto Pisani and Corrado Mauceri for Anna Maria Moroni and others and State Counsel [*Avvocato dello Stato*] Antonio Palatiello for the President of the Council of Ministers;

[omitted]

CONCLUSIONS ON POINTS OF LAW

1. - The Magistrate of a district court of Florence, with a referral order of 30 March 1987 (received at the Constitutional Court on 30 September 1988, R.O. No. 575/1988), raised a question as to the constitutionality, in relation to Articles 2, 3 and 19 of the Constitution, of Article 9, point (*recte*: number) 2, of Law No. 121 of 25 March 1985 (Ratification and implementation of the Agreement, with Additional Protocol, signed in Rome on 18 February 1984, amending the Lateran Concordat of 11 February 1929, between the Italian Republic and the Holy See) and Article (*recte*: point) 5(b)(2) of said Additional Protocol, alleging that they might lead to discrimination against students not availing themselves of Catholic religious instruction "if they could not legitimise the provision of religious instruction as a merely optional instruction".

[omitted]

3. - This Court has ruled, and constantly observed, that the overriding principles of the constitutional order have "a higher value than other provisions or laws of constitutional rank, both when it has deemed that the provisions of the Concordat, which enjoy the specific constitutional protection provided by Article 7(2) of the Constitution, do not escape verification of their compliance with the overriding principles of the constitutional order (see Judgments No. 30 of 1971, No. 12 of 1972, No. 175 of 1973, No. 1 of 1977 and No. 18 of 1982) and when it has affirmed that the law implementing the EEC Treaty may be subject to review by this Court in relation to the fundamental principles of our constitutional order and inalienable human rights (see Judgments No. 183 of 1973 and No. 170 of 1984)". (see Judgment No. 1146 of 1988).

Therefore, the Court cannot refrain from extending the assessment of constitutionality to the challenged legislation, since it is undoubtedly contrary to one of the overriding principles of the constitutional order, given the provisions invoked, namely Articles 2, 3 and 19. In particular, in relation to the subject matter in question, Articles 3 and 19 emerge as values of religious freedom imposing a dual prohibition: a) that citizens be discriminated against on religious grounds; and b) that religious pluralism limits the negative freedom not to profess any religion.

4. - These values, together with others, contribute (Articles 7, 8 and 20 of the Constitution) to give structure to the overriding principle of the secularity of the State, which is one of the aspects of the form of State outlined in the Constitution of the Republic.

The principle of secularity, as it emerges from Articles 2, 3, 7, 8, 19 and 20 of the Constitution, does not imply the indifference of the State to religions but rather a guarantee of State protection of the freedom of religion, in a regime of confessional and cultural pluralism. The Additional Protocol to Law No. 121 of 1985 ratifying and implementing the Agreement between the Italian Republic and the Holy See opens, with reference to Article 1, by laying down that "the principle, originally referred to in the Lateran Pacts, that the Catholic religion as the only religion of the Italian State, is no

longer considered to be in force", clearly alluding to Article 1 of the 1929 Treaty, which stated: "Italy recognises and reaffirms the principle enshrined in Article 1 of the Statute of the Kingdom of 4 March 1848 that the Catholic, Apostolic and Roman religion is the sole religion of the State".

The denominational choice of the Albertine Statute, reaffirmed in the Lateran Treaty of 1929, was thus also formally abandoned in the Additional Protocol to the 1985 Agreement, the qualification of the Italian Republic as a secular State being reaffirmed also in this bilateral relationship.

5. - In order to correctly understand in what capacity and in what way Catholic religious instruction in State schools other than universities is maintained within a regulatory framework that respects the overriding principle of secularism, it is worthwhile examining the propositions that make up the text of the disputed Article 9(2) of Law No 121 of 1985.

Four significant elements can be identified in the first proposition ("The Italian Republic, recognising the value of religious culture and taking into account that the principles of Catholicism are part of the historical heritage of the Italian people, will continue to ensure, within the framework of the purposes of schooling, instruction in the Catholic religion in public schools of all levels other than universities"): 1) recognition of the value of religious culture; 2) the consideration that the principles of Catholicism are part of the historical heritage of the Italian people; 3) the continuity of the commitment of the Italian State to ensuring religious instruction in schools other than universities as it did prior to the Agreement; 4) the inclusion of teaching this subject within the framework of the purposes of schooling.

The elements in 1), 2) and 4) represent an innovation that is consistent with the secular form of State of the Italian Republic.

With Article 36 of the Concordat of 1929 ("Italy considers instruction in Christian doctrine in the form received through the Catholic tradition as the foundation and culmination of public education. It therefore allows the religious instruction now given in public elementary schools to be developed further in middle schools, following programmes to be established by agreement between the Holy See and the State"), the State defined instruction in Christian doctrine, in the form of the Catholic tradition, as "the foundation and culmination of education". The expression "foundation and culmination" had appeared in Article 3 of Royal Decree No. 2185 of 1 October 1923 and was limited to elementary schools. After complex debate during the Giolittian age and the period following World War I, compulsory instruction in the Catholic religion in primary schools was reinstated on the orders of Minister of Education Giovanni Gentile, who saw religion as a preparatory phase of education, the *philosophia minor* of children's minds, to be superseded with later maturity. The expression would be reiterated, in the same context, in Article 25 of Royal Decree No. 432 of 22 January 1925 and Article 27 of Royal Decree No. 577 of 5 February 1928.

6. - Amid the events of the Risorgimento State, the Casati law of 1859 established compulsory instruction in the Catholic religion in grammar and senior schools (Article 193), in institutes of technical education (Article 278), in primary schools (Article 315, 325), up to the detailed provisions of Articles 66, 67, 68 and 183 of Royal Decree No. 4151 of 24 June 1860 (Regulations regarding normal and higher schools for aspiring teachers of both sexes). Of significance was the hendiadys "Religion and Morality" that gave its name to the first of the nine subjects listed for teaching in normal government schools under Article 1 of Royal Decree No. 315 of 9 November 1861 (Regulations

regarding normal and higher schools and for the certification of primary school teachers of both sexes), as was the inclusion of "Catechism and Sacred History" among the compulsory subjects for both written and oral examinations, under Article 22 of the same Regulations.

Law No. 3918 of 23 June 1877 (Law modifying the system of high schools, gymnasiums and technical schools) abolished the figure of spiritual director in these schools (Article 1); Law No. 3961 of 15 July 1877 (Law on the obligation of elementary education) introduced a course, "First notions of the duties of man and the citizen" in lower elementary school, a subject extended ten years later to the two levels of elementary education by Article 1 of Royal Decree No. 5292 of 16 February 1888 (Single Regulations for Elementary Education), whose Article 2 establishes, in symptomatic correlation with the provisions of Article 1, that religious instruction, which until then had been obligatory, would be given only "to those pupils whose parents ask for it". This system, that included religious instruction upon parental request, would be confirmed in the two general regulations on elementary education of 1895 (Article 3 of Royal Decree No. 623 of 9 October 1895) and 1908 (Article 3 of Royal Decree No. 150 of 6 February 1908). The latter provision, in the second paragraph, even provided for religious instruction "by the heads of households who requested it" if the majority of town councillors did not see fit to order that the Municipality provide it.

7. - With the close of the historical cycle, first, of the instrumental use of religion as a support for common morals, and then of the positivist opposition between religion and science, and thus of the ethical values of the totalitarian State, having removed the last vestige of the dispute between the Monarchy and the Papacy during the Risorgimento, the Republic can, precisely due to the secular form of the State, have instruction in the Catholic religion provided on the basis of two criteria: a) the educational value of religious culture, which is no longer a matter of one religion but of the religious pluralism of civil society; and b) the acquisition of the principles of Catholicism within the "historical heritage of the Italian people".

The genus ("value of religious culture") and the species ("principles of Catholicism in the historical heritage of the Italian people") contribute to describing the secular attitude of the State-community, which does not answer to ideological and abstract postulates of the extraneousness, hostility or confession of the State-person or its governing groups with regard to religion or a particular belief system but is at the service of the concrete demands arising from the civil and religious conscience of the citizens.

Article 9 states that instruction in the Catholic religion will be provided "within the framework of the purposes of schooling", namely in a manner compatible with other school subjects.

8. - The second proposition of Article 9(2) of Law No. 121 of 1985 ("While respecting the freedom of conscience and the educational responsibility of parents, all are guaranteed the right to choose whether or not to avail themselves of this instruction") is by far the most significant, from the constitutional perspective.

It refers, on the subject of Catholic instruction, to respect for the freedom of conscience and the educational responsibility of parents, which are protected in the Constitution of the Republic in Articles 19 and 30, respectively.

However, faced with the teaching of a specific religion "in conformity with the doctrine of the Church", according to the provisions of point 5(a) of the Additional Protocol, the secular State has the duty to ensure that the freedom laid down by Article

19 of the Constitution and the educational responsibility of parents under Article 30 are not restricted.

The instrumental logic proper to the State-community that welcomes and guarantees the self-determination of citizens through the recognition of an individual right to choose whether or not to make use of the predisposed teaching of the Catholic religion reoccurs here.

This right is held by parents and, in the case of upper secondary schools, directly by students under Article 1, point 1, of Law No. 281 of 18 June 1986 (The ability to make choices regarding school and enrolment in upper secondary schools).

There is no precedent regarding such a subjective law figure.

Article 222 of the Casati law of 1859 provided, with regard to grammar and high schools, for the dispensation of non-Catholic students, or of those "whose father or legal guardian has declared that he will provide for their religious instruction privately", "from attending religious instruction and from taking part in the exercises associated with it".

Article 374 of the same law exonerated any elementary public-school pupils "whose relatives declare that they will take care of their religious instruction themselves".

In 1865, Article 61 of Royal Decree No. 2498 of 1 September (Regulations for the middle and secondary Schools of the Kingdom) states: "Pupils must attend religious services if they have not obtained official dispensation from the Headmaster or Director, upon written request of the pupil's father or legal guardian".

As of 1888, by Royal Decree No. 5292 of 16 February (Consolidated regulations on elementary education), religious instruction was no longer obligatory, but could be provided by municipalities only at the request of parents. In restoring religious instruction in primary schools in 1923, Article 3 of Royal Decree No. 2185 of 1 October once more included an exemption for children "whose parents declare that they wish to provide for them in person".

Article 112 of Royal Decree No. 1297 of 26 April 1928 (Approval of the general regulations on primary education services) added, on parents requesting such a dispensation, the further burden of indicating how they would provide private religious education.

The dispensation procedure subsequently abandoned the burden of justification, extending the regime put in place for recognised religions to all students. Article 6 of Law No. 1159 of 24 June 1929 (Provisions on the practice of religions recognised within the State and on marriages celebrated before the ministers of such religions) stated: "Parents or those acting in their stead may request that their children be exempt from attending religious instruction courses in public schools" (see also Article 23 of Royal Decree No. 289 of 28 February 1930 (Provisions for the implementation of Law No. 1159 of 24 June 1929 on religions recognised within the State and its coordination with the other laws of the State)).

Article 2 of Law No. 824 of 5 June 1930 (Religious teaching in classical, scientific, teacher training, technical and artistic institutions) stated: "Pupils whose parents or guardians apply in writing to the head of the institution at the beginning of the school year are exempt from the obligation to attend religious instruction".

The transition from the reasoning of the liberal age (that religion is a private affair and religious instruction at parental discretion) to that of the ethical State (that religion is a connotation of national identity to be nurtured in State schools) is evident.

It was only with the Agreement of 18 February 1984 that a particular aspect of the teaching of a specific religion emerged: the potential to create problems, in the light of

proposals for substantial adherence to a doctrine, of personal conscience and family upbringing, which the secular State avoids by requesting an act of free choice by the interested parties.

With the third proposition of Article 9(2) of the Agreement ("At the time of enrolment, students or their parents shall exercise that right, at the request of the educational authority, without their choice giving rise to any form of discrimination"), the principle of secularity is respected in all its implications by virtue of the concerted assurance that the choice does not give rise to any form of discrimination.

Point 5(2) of the Additional Protocol contains no immediate provision relevant to the question to hand, and therefore the source of the objection cannot be found in the disputed legislation.

9. - The imposition of another compulsory subject on those who do not avail themselves of it would clearly discriminate against them because it is proposed in the place of instruction in Catholicism, almost as though there were a logic of alternative obligation between them, when, in the face of instruction in Catholicism, one is called to exercise a irreducible right of constitutional freedom, with all its seriousness and requirement of awareness, in choosing between equivalent school subjects.

The State is obliged, by virtue of the Agreement with the Holy See, to guarantee instruction in the Catholic religion. For students and their families this is optional: only the exercise of the right to use it creates a scholastic obligation to attend.

For those who decide not to use it, the alternative is a state of non-obligation. In fact, the provision of some other compulsory subject would constitute a conditioning of that question of conscience, which must remain focused on its sole object: the exercise of the constitutional freedom of religion.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

Declares that, in relation to Articles 2, 3 and 19 of the Constitution, the question as to the constitutionality of Article 9 point (*recte*: number) 2 of Law No. 121 of 25 March 1985 (Ratification and implementation of the Agreement, with Additional Protocol, signed in Rome on 18 February 1984, amending the Lateran Concordat of 11 February 1929, between the Italian Republic and the Holy See), and of Article (*recte*: point) 5, letter b) number 2 of the Additional Protocol, raised by the Magistrate of a district court of Florence with the referral order in the headnote, is unfounded within the meaning in the reasoning section.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, 11 April 1989.

President: SAJA
Author of the Judgment: CASAVOLA