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The Relation Between the State and the Church in the Light of the Sentences of the Italian Constitutional Court

Keywords: courts, constitutional court, freedom of religion, state, concordat
Słowa kluczowe: sądy, sąd konstytucyjny, wolność religii, państwo, konkordat

Abstract

The Italian Constitutional Court spoke on numerous occasions about the provisions of the Concordat concluded between the Italian Republic and the Roman Catholic Church. Up to the 1970s, the Constitutional Court had ruled for the most part on constitutionality of solutions regarding the Catholic religion. In this period of time the Constitutional Court issued rulings that were very important for the relation between the state and the Church. The article analyzes three significant sentences issued on March 1, 1971 regarding the institution of matrimony, as well as the sentence of July 8, 1971 in which the Constitutional Court resolved the constitutionality of the law allowing church marriages to be dissolved by the Italian civil courts. These rulings are very important due to the fact that the Italian Constitutional Court has referred to them on numerous occasions in the subsequent sentences, in which it considered the issue of the contradiction between the Concordat norms and the Constitution.

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Streszczenie

Relacje państwo–kościół w świetle orzeczeń włoskiego Sądu Konstytucyjnego

Włoski Sąd konstytucyjny wypowiadał się wielokrotnie w sprawie przepisów konkordatu, zawartego między Republiką Włoską a Kościołem Rzymskokatolickim. Do lat 70. XX w. sąd konstytucyjny w przeważającej części orzekał o zgodności z konstytucją rozwiązań dotyczących w przeważające większości religii katolickiej. W tym okresie sąd konstytucyjny wydał orzeczenia, które były bardzo istotne dla relacji państwo kościół. Artykuł analizuje trzy istotne wyroki wydane w dniu 1 marca 1971 roku, dotyczące instytucji małżeństwa, a także wyrok z 8 lipca tego samego roku, w którym sąd konstytucyjny rozstrzygał konstytucyjność ustawy pozwalającej na rozwiązanie małżeństwa kościelnego przez włoski sąd cywilny. Orzeczenia te są bardzo istotne z uwagi na fakt, że włoski sąd konstytucyjny wielokrotnie się do nich odwoływał, w późniejszych orzeczeniach, w których rozważał problematykę sprzeczności norm konkordatowych z konstytucją.

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The Constitution of Italy of December 27, 1947 guarantees freedom of religion. According to the content of Article 19, anyone is entitled to freely profess their religious beliefs in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality. The protection of religious freedom, functioning with respect for the principle of equality and pluralism constitutes the element of the state sovereignty and cannot be differentiated due to individual needs[2]. It should be noted that the first paragraph of the Article 3 of the Constitution prohibits discrimination against citizens on grounds of religion.

The system of relations between the Italian State and the Church is defined by the Constitution. It is the first official instrument in which the qualifications of independency and sovereignty are applied to both the State and the Church[3].

[2] J. Pasquali Cerioli, *Legge generale sulla libertà religiosa e distinzione degli ordini, Stato, Chiese e Pluralismo confessionale*, p. 6, http://www.statoechiese.it (18.03.2019).

[3] K. Orzeszyna, *Podstawy relacji między państwem a kościołami w konstytucjach państw członkowskich i traktatach Unii Europejskiej. Studium prawno porównawcze*, Lublin 2007, p. 217.

The Article 7 of the Constitution says that the State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran Pacts. Amendments to such Pacts which are accepted by both parties do not require the procedure of constitutional amendments. This provision introduces the principle that a change in the relations between the Italian State and the church cannot take the form of a unilateral decision[4].

The principle of a secular state was not stated explicitly in the Constitution of the Italian Republic[5]. The principle of the secularism of the state was established and guaranteed by the Constitutional Court in its judicature, however, the Court did not specify any particular content and measures required to give a secular character to certain legislative instruments[6]. In its sentence of April 11, 1989, the Constitutional Court confirmed the principle of a secular state. The Court determined that secularism of the state was one of the elements of the form of the state provided for in the Italian Constitution and emphasized that it was one of the basic principles of the Italian law. In this ruling, the Court confirmed the principle of autonomy that guarantees religious freedom in the system of religious and cultural pluralism[7].

According to the Article 8 of the Constitution all religious denominations are equally free before the law. Denominations other than Catholicism have the right to organization according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives. The principle of bilateralism is a manifestation of the consequences of rejection of extremely separatist decisions, as well as the idea of a religious state[8] and is a guarantee

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[4] E. Hirsch Balin, L.F.M. Besselink, *The Italian Republic*, [in:] *Constitutional law of the EU member states*, eds. L. Besselink, P. Bovend'Eert, H. Broeksteeg, R. de Lange, W. Voermans, Wolters Kluwer 2014, p. 911.

[5] J. Pasquali Cerioli, *Legge generale sulla libertà religiosa…*, p. 3.

[6] P. Lewandowski, *Zasada świeckości państwa w Konstytucji i orzecznictwie Trybunału Konstytucyjnego Republiki Włoskiej*, "Przegląd Prawa Konstytucyjnego" 2016, No. 4, p. 64.

[7] K. Orzeszyna, *Podstawy relacji między państwem a kościołami…*, p. 218.

[8] P. Stanisz, *Proces normowania stosunków pomiędzy państwem a niekatolickimi związkami wyznaniowymi w trybie art. 8 ust. 3 Konstytucji Republiki Włoskiej z 1947 r.,* "Studia z Prawa Wyznaniowego" 2006, vol. 9, p. 28.

of religious freedom[9]. The provision of the Article 8 of the Constitution applies to all denominations, including Catholicism, imposing on the State the obligation to treat them all equally[10].

The purpose of this article is to present the relation between the Italian State and the Church in the light of judicature of the Italian Constitutional Court. It is worth noting that up to the 1970s the Constitutional Court had ruled for the most part on the constitutionality of solutions regarding the Catholic religion[11] in the vast majority. This tendency was in line with general activity of the Constitutional Court during the first phase, when the Court through its judicature, contributed to implementation of the principles arising from the Italian Constitution[12]. In the 1970s, the Constitutional Court issued rulings that were very important for the relation between the State and the Church. In particular, this article analyzes three significant sentences issued on March 1, 1971 regarding the institution of matrimony, as well as the sentence of July 8, 1971 in which the Constitutional Court resolved the constitutionality of the law allowing church marriages to be dissolved by the Italian civil courts. These rulings are very important due to the fact that the Italian Constitutional Court has referred to them on numerous occasions in the subsequent sentences, in which it considered the issue of the contradiction between the Concordat norms and the Constitution.

On February 11, 1929, the Italian State and the Catholic Church signed the Concordat on the basis of constitutional regulations. The Concordat is an international agreement that governs the situation of the Catholic Church and its followers who are the citizens of that state[13]. It defines the legal status of the Church by giving the Church independence to guarantee the ful-

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[9] M.A. Kulikowska, *Kształtowanie stosunków pomiędzy państwem a niekatolickimi związkami wyznaniowymi w drodze umów zawieranych na podstawie art. 25 ust. 5 Konstytucji Rzeczypospolitej Polskiej i art. 8 zd. 3 Konstytucji Republiki Włoskiej*, "Studia Iuridica Toruniensia" 2014, vol. 14, p. 161.

[10] Ibidem, p. 162.

[11] G. Leziroli, *La tutela penale della religione fra la Carta e la Corte*, p. 13, htpp://www.statoechiese.it (5.03.2019).

[12] M. Urbaniak, *Sąd konstytucyjny w Republice Włoskiej*, Toruń 2019, p. 250.

[13] J. Krukowski, *Konkordaty z państwami Europy Środkowej i Wschodniej zawarte na przełomie XX i XXI wieku*, "Teka Komisji Prawniczej" PAN 2010, vol. III, p. 102.

fillment of the mission of the Church that was restricted during the period of fascism[14]. Under Lateran Treaty, Catholicism was recognized as the ruling religion in Italy[15]. On February 18, 1984[16] the Concordat was revised. Under the so-called New Concordat (Accordo di Villa Madama) part of the Lateran Treaty of 1929 remained in force[17], but the provisions on recognition of the Catholicism as the main religion in Italy were revoked. The church tax was introduced instead of financing the Vatican City State by Italy (the so-called eight per thousand law – *otto per mille*). In its judgment of April 11, 1989[18], the Constitutional Court stated that the supreme principle is the principle of the secularity of the state, which is one of the forms of the state referred to in the Constitution. This rule, arising from the content of the Articles 2, 3, 7, 8 19 and 20 of the Constitution, does not imply the indifference of the state toward religion, but guarantees the protection of religious freedom in the conditions of multiple denominations and cultures. The provisions of the constitutional law of December 9, 1978[19] that regulate the relations between the Italian State and the Holy See are of crucial importance. The Article 12 (6) of the Act stated that the Grand Fascist Council (Gran Consiglio del Fascismo) should express opinions on all constitutional issues, including relations between the state and the Holy See.

The interpretation of constitutional provisions as regards the relations between the state and the Catholic Church, in particular in matters concerning matrimony and family, was the subject of consideration of both Italian doctrine and judicature of the Constitutional Court. The sentences of the Con-

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[14] G. Gänswein, *I rapporti tra stato e chiesa in Italia. La "Libertas Ecclesiae" nel concordato del 1929 e nell'accordo del 1984,* "Ius Ecclesiae. Rivista Internazionale di Diritto Canonico" 2011, vol. 23, No. 1, p. 137.

[15] M. A. Kulikowska, *Kształtowanie stosunków pomiędzy państwem…*, p. 150.

[16] Legge 25 marzo 1985, n. 121, Ratifica ed esecuzione dell'accordo, con protocollo addizionale, firmato a Roma il 18 febbraio 1984, che apporta modificazioni al Concordato lateranense dell'11 febbraio 1929, tra la Repubblica italiana e la Santa Sede ("Gazzetta Ufficiale", 10.04.1985, n. 85 – Suppl. Ordinario).

[17] J. Krukowski, *Konkordat polski z 1993 r. – przedmiot i formy realizacji w krajowym porządku prawnym*, [in:] *Układowe formy regulacji stosunków między państwem a związkami wyznaniowymi (art. 25 ust. 4–5 Konstytucji RP),* eds. P. Stanisz, M. Ordon, Lublin 2013, p. 386.

[18] Corte cost. 1989, n. 203.

[19] Legge costituzionale del 9 dicembre 1928, n. 2693 ("Gazz. Uff.", 11.12.1928, n. 287).

stitutional Court that were issued in 1971 are referred to as historical rulings by the Italian press and are of crucial importance in this matter. These rulings focus on the interpretation of the Article 34 of the Concordat of 1929 and of the Act of May 27, 1929[20] implementing the provisions of the Concordat. The Constitutional Court authorized the review of the constitutionality of the Concordat norms in compliance with the supreme constitutional principles, that is the principle of equality and freedom of religion. Later they became the basis for the assessment by the Constitutional Court of the provisions of the new Concordat of 1984[21]. According with the content of the Article 34 of the Concordat, the Italian State recognizes the civil effects of the sacrament of matrimony regulated by Canon Law. Italy recognizes the judiciary of the Church in matrimonial matters concerning nullity of matrimony and dispensations from matrimony ratified but not consummated (paragraph 4 of Article 34), while the Church shall transmit the matters concerning separation to civil courts and agrees to publication of matrimony not only in the parish, but also in the communal hall. The content of the Article 34 of the Concordat and the implementing Act No. 847 of 1929 caused many interpretation problems. Later, in the year 1984, an attempt was made to resolve these problems in the agreement signed at Villa Madama, yet without changing the basic principles set out in the Concordat of 1929[22].

As it has already been noted, the Italian Constitutional Court spoke on numerous occasions about the provisions of the Concordat concluded between the Italian Republic and the Roman Catholic Church. In the crucial sentence of March 1, 1971[23], regarding the hierarchy of the sources of law the Constitutional Court reviewed the constitutionality of the Concordat concluded between the Holy See and the Italian State. When examining the case brought

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[20] Legge 27 maggio 1929, n. 810, Esecuzione del Trattato, dei quattro allegati annessi e del Concordato, sottoscritti in Roma, fra la Santa Sede e l'Italia, l'11 febbraio 1929 – VII ("Gazz. Uff." 5.06.1929, n. 130).

[21] G. de Vergottini, *Diritto costituzionale*, Padova 1997, p. 333, W. Adamczewski, *Uznanie skutków cywilnych małżeństwa kanonicznego w najnowszych umowach konkordatowych*, "Ius Matrimoniale" 1996, No. 1 (67), p. 175.

[22] A. Ferrari, S. Ferrari, *Religion and the Secular State: The Italian Case*, [in:] *Religion and the secular state: National reports,* 2015, https://original.religlaw.org/content/blurb/files/Italy%202014.pdf (19.04.2019), p. 444.

[23] Corte cost. 1971, n. 30.

up by the praetor from Turin in the criminal proceedings against Ferdinando Gualtier, who was accused of failing to fulfill his duty to assist his spouse, the praetor put forward the following arguments: first of all, he pointed out that there was a pending proceedings conducted before the ecclesiastic tribunal in Palermo concerning the annulment of marriage on the grounds of the charges against him due to the failure to assist his spouse, in which Mr Ferdinando Gualtieri argued that in case of the annulment of his concordat marriage, the obligation to help his spouse should be considered as nonexistent. Moreover, the praetor stated that the jurisdiction of the ecclesiastic tribunal in cases regarding the annulment of matrimony is the jurisdiction of the special court prohibited under the second paragraph of the Article 102 of the Constitution saying that extraordinary or special judges may not be established. Only specialized sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary. In addition, according to the praetor, the Concordat does not give the ecclesiastic tribunal any jurisdiction, since its provisions apply only to the extent that they do not stand in conflict with constitutional regulations. The State Bar in turn, claimed that under the Article 7 of the Constitution, it follows that the State and the Catholic Church are independent and sovereign, each within its own sphere, as a result of which it is forbidden to establish special judges for that purpose. Having examining the case, the Constitutional Court resolved that the ecclesiastic tribunal is a special court, and thus not provided for in the Constitution as having the subject-matter jurisdiction to adjudicate in matters concerning matrimony and the resulting obligations incumbent on spouses under the Italian civil law. The fact that the Church and the State remain mutually independent of each other and as such are fully sovereign entities cannot form the basis for questioning the supreme principles of the political organization of the Italian State, arising from the provisions of the Constitution. However, in the opinion of the Constitutional Court, the motion of the praetor from Turin shall be dismissed due to the fact that there are no grounds to conclude that the ecclesiastic tribunal is a special judicial body within the meaning of the second paragraph of the Article 102 of the Constitution, and thus it is not allowed to rule in matters of Italian civil law. To recapitulate, the Court considered that the State and the Catholic Church

are independent institutions, whereas the concordat should respect the basic principles of the Italian Constitution. It should be emphasized that, unlike in the case of an extraordinary judges, any judge may be appointed as a special judge, if he differs from an ordinary judge due to the scope of powers as well as the organizational structure of judicial bodies. Hence the ban on the appointment of special judges[24].

In another decree, also dated to March 1, 1971[25], when examining the case brought up by the Court in Milan of October 23, 1968, the Constitutional Court reviewed the constitutionality of the Article 7 of the Act No. 847 of May 27, 1929, in the part in which it does not provide for opposition to the publication concerning concordat matrimony due to of first-degree of affinity of the future spouses. The Court in Milan raised the issue of inequality in the treatment of citizens who want to contract a concordat marriage and spouses who want to marry in a civil ceremony, because the exemption from the obligation of publication is applicable only to concordat marriages. In the proceedings before the Constitutional Court, the Prime Minister argued that a marriage governed under Lateran Pacts recognized on the basis of the Article 7 of the Constitution is a different institution than a civil matrimony. Considering that the Catholic religion is professed by the majority of citizens, the State decided that it was justified to facilitate contracting Catholic marriages and legal effects were attributed to an objective and frequently occurring situation, which presents its own ethical and religious aspects. The plurality of denominations among the citizens of the same state is a historical reality, and does not constitute a situation that gives privileges or imperiously shapes otherness, considering the most important rites of each denomination. Every citizen has the right to choose between the concordat and civil matrimony. A separate treatment would only take place if the concordat rite was imposed. The Prime Minister argued that the concordat matrimony is regulated under the Article 7 of the Constitution. When considering the case, the Constitutional Court stated that as regards the obstacle of first-degree affinity, there is an indisputable difference between contracting a marriage in a civil ceremony and a concordat marriage, and the obstacle to entering into such a union

[24] P. Perlignieri, A. Federico, *Article 102,* [in:] *Commento alla Costituzione Italiana,* ed. P. Perlingieri, Napoli 1997, p. 707.

[25] Corte cost. 1971, n. 31.

may be subject to dispensation according with the Canon law but not under the civil regulations. Marriage of first-degree relatives that is permitted under the Canon law, following prior dispensation, may violate the fundamental principles of the constitutional law. The Constitutional Court invoked the principle of equality due to the obvious discrimination between spouses marrying in a civil ceremony and those who decide to have a concordat celebration[26]. The Constitutional Court referred to the basic principles of the constitutional law in many subsequent sentences. As an example, the judgment of January 27, 1972[27], in which the Court referred directly to previously issued sentences No. 31 and 32 of 1971, stated that in these judgments the exception to the principle of equality due to concordat solutions encounters irremovable restrictions due to basic principles of legal order[28].

In the third sentence No. court 32[29] issued on March 1, 1971, the Constitutional Court decided about constitutionality of Article 16 of the Act No. 847 of May 27, 1929 on the basis of the petition of April 10, 1968 filed by the Court in Milan. The proceedings before the Court in Milan concerned the case brought up by Marco Leporadi against his wife, Iolanda Bolza. Marco Leporadi wanted the court to determine that his wife was insane at the moment of contracting the concordat marriage on October 1, 1938. When considering the case, the problem of constitutionality of the Article 16 of Act No. 1929/847 was raised as regards the part in which this provision excludes the condition of insanity of one of the nupturients (contracting parties) as the reason for annulment of the concordat marriage. The Milan court argued that the contested provision led to unequal treatment of Italian citizens who conclude a concordat marriage and those who marry within a civil ceremony for whom the possibility of annulment is provided for in the Article 120 of the Civil Code. The Constitutional Court ruled that the Article 34 of the Concordat and the Act No. 1929/847 oblige the State to grant civil effects to matrimony under the Canon law and to give ecclesiastic tribunals the right to rule on cases con-

[26] S. Lener, *Corte costituzionale, concordato, divorzio*, "La civiltà cattolica" 1971, vol. I, a. 122, p. 535.

[27] Corte cost. 1972, No. 12.

[28] It is noteworthy that the Constitutional Court referred to the basic principles of the constitutional law also in its sentences No. 1973/175, 1982/16, 1982/17, and 1982/18.

[29] Corte cost. 1971, No. 32.

cerning annulment of matrimony, and they introduced a differentiation due to religious motives, in the scope in which the choice between two marriage ceremonies was granted only to citizens who are eligible under the Canon law to religious celebration of matrimony. However, this discrimination does not constitute an infringement of the principle of equality referred to in the first paragraph of the Article 3 of the Constitution, because it is expressly allowed by the second paragraph of the Article 7 of the Constitution, which specifies that relations between the State and the Catholic Church are regulated by the Lateran Pacts, of which the Concordat forms an integral part.

It should be mentioned that relations between the Church and the Italian State changed further in the last decades of the 20th century. The adoption of the Act No. 898 of 1970[30] was an important breakthrough, providing for the possibility of dissolution of a church marriage by the Italian civil court. On July 8, 1971, the Constitutional Court issued another sentence[31] on constitutionality of the Article 2 of the Act No. 898 of December 1, 1970, as in the opinion of the applicant from the Court in Siena, it did not comply with the Article 7 of the Constitution in conjunction with the Article 34 of the Concordat. The contested provision providing for termination of the civil effects of a concordat marriage would undermine the relationship between those effects and the principle of the indissolubility of marriages under the Cannon law, in breach of the obligation assumed by the state to recognize the same effects of the union. An amendment to an ordinary law not preceded by an agreement with the Holy See would introduce an amendment to the Lateran Pacts, without the procedure for amending the Constitution, as required by the Article 7 and Article 138 of the Constitution. Considering the case, the Constitutional Court stated that ratification of the Lateran Pacts was not tantamount to assuming by the state the obligation not to introduce the institution of divorce into its own legal system. The Court stated that, although at the initial stage of negotiations between the Holy See and Italian Republic, it was proposed to include in the concordat agreement a provision on the commitment of the State to "keep intact, in all provisions regarding marriage, the principle of indissolubility and an obstacle to the

[30] Legge 1 dicembre 1970, No. 898, Disciplina dei casi di scioglimento del matrimonio ("Gazz. Uff.", 3.12.1970, No. 306).

[31] Cote cost. 1971, No. 169.

conclusion of the sacrament of matrimony", the subsequent discussions did not refer in any way to this principle and an agreement was reached as specified in the content of the Article 34 of the Concordat, according to which the state simply recognized the "civil effects" of the concordat marriage. Thus, according to the Court, the regulations of the Canon law concerning the institution of matrimony were not adopted in the Italian legal system, limiting solely to recognizing the marriage that is validly celebrated within the Catholic ceremony and properly registered by the Registrar of Marriages as a sufficient condition for the existence of identical civil and legal effects as in the case of marriage concluded before a registrar. In the opinion of the Constitutional Court, the effects of a concordat marriage are and must be identical to the effects attributed by law to a civil matrimony. The separation of the two legal orders, i.e. the legal system of the Italian Republic and the law of the Holy See, also shows that the marital bond in the state legal system, including its dissolubility or indissolubility, arises under the civil law and is regulated under the regulations of that law. In addition, because the Article 7 of the Constitution established the principle of independence and the principle of sovereignty in relation to both the state and the Church as regards their applicable systems of law, it is obvious that the limitation of state competences in this aspect would have to arise *sine qua non* from an expressly articulated legal norm, whereas in the absence of such a norm, the existence of such a limitation cannot be deduced on the basis of uncertain and unambiguous arguments of interpretative nature, which is all the more justified because in the case of international agreements the criterion of restrictive interpretation of obligations applies, which would lead to the acceptance by the contracting parties of restrictions on their own sovereignty. The Constitutional Court concluded that the concordat marriage uses the constitutional guarantee expressed in the Article 7 of the Constitution, however this guarantee is contained within the limits in which the concordat matrimonial system corresponds to the will of the parties manifested specifically in prescriptive regulations. Therefore, as no changes were introduced to the Lateran Pacts, the Court is of the opinion that the inclusion of concordat marriages in the new regulations as regards the possibility of dissolution adopted in relation to civil marriages did not require the application of any appropriate procedure providing for a prior amendment of the Constitution.

The analyzed sentences issued by the Constitutional Court concerned the regulation and legal nature of the Concordat in relation to the institution of matrimony. The Court undertook to rule on difficult matters concerning fundamental rights, which also include the freedom of religion. In the sentences subject to analysis, the Constitutional Court allowed the possibility of verification of concordat norms from the angle the basic principles of the constitutional law. As a consequence, the judicature of the Constitutional Court contributed to changes of legal instruments, including the act on divorce.

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