Constitution Before Administration

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On 5 December 2019, Italy's Constitutional Court nullified regional legislation which made it extremely difficult for religious minority groups to set up places of worship. The provisions in question vested the administrative authorities with nearly unfettered discretion in deciding on the approval of applications. The Constitutional Court has now made clear that the constitutionally guaranteed freedom of religion cannot be circumvented by administrative procedures.

Third time's still not a charm

On 27 January 2015, Lombardy, Italy's most populous Region, enacted a new law (RL 2/2015) to amend the former regional law (RL 12/2005) that regulated the planning of structures built for religious purposes. These amendments made building new places of worship extremely complex for all non-established religious denominations, particularly Muslims. Although the changes introduced were apparently formulated in neutral terms, the law of Lombardy was actually a blatant attempt to discriminate against minority religions, so that the new law was immediately called "the anti-mosques law". The enactment of the new rules immediately gave rise to a public debate, so that the law was the object of several judgments by the Italian Constitutional Court in order to see some parts of the law nullified. I strongly criticized the first enactment of the 2015 law and, after, highlighted the further decisions of the Constitutional court that have declared the nullity of some norms of the Lombardy law in 2016, and the nullity of similar norms enacted by the Veneto region in 2017.[1)] For a more comprehensive analysis, see G. Anello, *The Umma in Italy: Eurocentric Pluralism, Local Legislation, Courts' Decisions. How to Make the Right to Worship Real*, in *Journal of Muslims in Europe*, Brill, Leiden issue 9(2), June 2020, but soon online as Advance article.

Broad discretion for the authorities

Now, the Constitutional Court has returned to the Lombardy law with another decision (n. 254) which is the result of another appeal to the Constitutional Court by the Administrative Court of Lombardy (TAR Lombardia). Muslim associations involved in several trials concerning administrative and urban applications had challenged the legality of other provisions of this – so contested – regulation. This time, the provisions under scrutiny are articles 72, par. 1, 2 and 5 of the Regional Law 12/2005 after the amendments of the Regional Law 2/2015.

Put simply, these norms prescribe that:

- the construction of new religious buildings (in Italian "attrezzature religiose", for a definition see article 71, par. 1 c-bis RL of Lombardy 12/2005 after the

amendments of the RL of Lombardy 3/2011) must be planned in a specific Urban Plan (the so called “Religious Urban Plan” RUP) discussed and approved by every municipality. Without the enactment of this “special” plan there is no possibility to construct any building dedicated to the seat of religious associations, or religious communities, or to use any property for other kinds of religious services or activities.
- the RUP must specify exactly the proper size and the exact place of the areas for religious buildings in the municipal area;
- every RUP must be approved within a period of 18 months from the date of publication of the RL 2/2015. After this transitional period, the RUP must be approved along with the Territorial Urban Plan (TUP) that is the legal instrument that regulates all the urban necessities and projects of each municipality’s territory.

It is obvious that according these norms, the construction and the presence of places of worship are subject to the discretional decision of the local authorities. The municipality may simply not adopt the plan required in order to prevent the realization of new religious structures, or ask the payment of onerous taxes, or even use accessory pretexts – for example, the inadequacy of parking spaces – to hinder the exercise of religious freedom.

The latest decision of the Italian Constitutional Court on the “antimosques law” (n. 254/2019)

The recent decision of the Constitutional court nullifies two of the three contested norms (one not being relevant for the decision) requiring the necessity of the Religious Urban Plan (RUP).

In the preamble of its decision affirms well-known principles and calls the direct relevance of article 19 of the Italian Constitution in the issue at stake: Religious freedom – the Court declares – guarantees the freedom of worship, which in turn entails the right to have adequate spaces to practice religious rites. Therefore, when regulating the territorial government, the Regional legislator has a double duty to observe:

- the first duty is ‘affirmative’ by nature and entails that the public administration must take into account the needs of the faithful by providing enough and adequate spaces to worship;
- the second duty is ‘negative’ by nature and entails that the public authority cannot – in any case – hinder the construction of religious buildings, nor discriminate in the fruition of the public spaces dedicated to those purposes.

To quote the more relevant arguments of the decision:[2)] All translations are mine. I do not translate literally and I have decided to simplify the translation because of the technical style of the language of the Court.

> “The Regions must regulate the religious spaces within the framework of the principles of the government of the territory. In doing so, the Regions may pursue exclusively urban planning purposes that also include the specific consideration of the needs of religious places of worship. Moreover, in light of the constitutional value of freedom of worship, the public regulation has to face the further exigence to establish and realize religious places. Consequently, the possibility of edifying structures of this type must not be excluded or compressed.” *(p. 16)*

The Court expresses clearly that the contested provisions of the regional law this time not only do not fit the case, but also represent strong limits to the religious freedom of religious minorities: The nature of the provisions is absolute – the judge explains – because it covers all new religious buildings without any distinction. Moreover, the norms are irrespective of the public or private character, size or function, use to a greater or lesser number of the faithful, and hence their urban impact can be variable and seems potentially irrelevant. The result of such absoluteness is that buildings without any urban relevance and impact (like a small private prayer room of a religious community) must be located in the RUP, only because of their religious use. As a result, the members of a religious association cannot meet in a private office to carry out their worship activity, without a specific provision of the RUP for that. On the contrary, any other association that is not religious in nature can use and work in a property located in the municipal territory in compliance only with general rules. The judge goes further and concludes that the regional legislator, in issuing the norms, was acting in a discriminatory way:

> “In this case, the regional legislator demands a specific and preventive planning only from religious properties, and this condition implies that the *ratio* of the provision is apparently of urban nature, and that the objective of the law is actually to limit and control the realization of (new) places of worship. These limits apply, whatever their consistency may be, like a simple room of prayer for a few faithful, a great temple, a church, a synagogue or a mosque.” *(p. 17)*

Another rationale is dedicated to the point that such a regulation causes uncertainty in deciding the plan for buildings or properties dedicated to religious purposes:

> “The double approval of the RUP and the new TUP imposed by the regional law implies that any petition for the realization of new religious building can be evaluated without any certain period of time, or with big delay because this administrative decision is totally discretional. The power of each municipality to proceed to the formation of the TUP (which is necessary condition for the RUP) is, according to the administrative law, discretionary by nature. […] The contested rules hinder the planning of religious places of worship by the municipalities and constitute a strong curtailment of religious freedom. This situation can even go so far as to deny the freedom of worship, without any real interest based in the activity of territorial governance. […] Therefore, the norm providing the double approval of the RUP together with the TUP is not justified by the ends of the urban law and cannot be considered reasonable. Even more as this

norm concerns the realization of religious spaces, that are instruments to guarantee the constitutional right of religious freedom, so that it should rather be subject of a treatment of major consideration.” *(p. 19)*

A clear statement

Even though the new decision of the Italian Constitutional court seems to simply follow the trend of former decisions, it is in fact more remarkable.

First, the decision clarifies that the Regions, when regulating the territorial government, have the duty to take into account the needs of the faithful and must not hinder their interest in constructing new places of worship, nor discriminate in the evaluation of legal claims between different religious groups; second, there is – for the first time – a clear declaration of the special position the freedom of religion (as a constitutional right) before the technical and administrative needs of territorial and urban government. Finally, the Constitutional judge openly declares that legislation curtailing religious freedom through administrative procedures can be considered an unlawful strategy to hinder the construction of new mosques by means of the technical arguments of the administrative law.

Since the beginning of this “anti-mosques saga”, political actors have tried to insert norms that limit religious freedom within very technical and specified laws concerning administrative matters. The previous decisions of the Constitutional court nullified some provisions of the law for technical reasons, without criticizing this sort of ‘mimetic’ strategy. This latest decision of the Constitutional Court affirms in clear letters the priority of constitutional values before administrative needs, focusing again and definitively on the fundamental nature of the right to religion and worship.

References

- 1. For a more comprehensive analysis, see G. Anello, The Umma in Italy: Eurocentric Pluralism, Local Legislation, Courts’ Decisions. How to Make the Right to Worship Real, in Journal of Muslims in Europe, Brill, Leiden issue 9(2), June 2020, but soon online as Advance article.
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