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## **State, Religion and COVID-19: can Religious Freedom be Guaranteed in Exceptional Circumstances? \***

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**ABSTRACT:** This article explores peculiarities of the COVID-19 pandemic in comparison to other health crisis experienced in the past. Each character is thoroughly examined in the article. The article focuses on four thematic areas: the legal regulation of the fight against coronavirus; the equality of treatment of religious freedom in relation to other fundamental rights; the cooperation between the State and religious communities; and the reactions of religious communities to governmental measures. The article argues that rather than raising new questions, COVID-19 has forced us to deal with familiar questions under unprecedented circumstances. In this frame, time has played a central role as a factor to be taken into account to scrutinize the legitimacy of measures introducing severe limitations to fundamental rights and freedoms. Finally, the article claims that from a legal perspective, the experience of the past months reveals that, especially in times of crisis, we need a scrupulous respect for the requirements of the rule of law, including a strict accountability and transparency from governments, and putting especial emphasis on the protection of fundamental rights, among which is freedom of religion or belief.

### **1 - The coronavirus crisis: a tragedy and an opportunity**

The reflections that follow address a very complex subject and contain, in response to a kind invitation of Professor Pietro Faraguna, some personal thoughts upon the impact that the pandemic of COVID-19 has had on religious freedom and the relations between State and religious communities. And I will commence by recognizing that I am indebted to



some collective works that have been published in 2020-2021 and provide insightful comparative studies<sup>1</sup>.

The COVID-19 pandemic, although is not strictly speaking unprecedented, has some distinctive characteristics in comparison with other health crisis we have had in the past, such as the 1918 flu<sup>2</sup> and some other lesser and more recent pandemics. First, there is a biological factor: leaving aside the lethality and mortality indexes, the SARS-CoV-2 is a virus that is transmitted with tremendous facility, mutates fast, acts in unpredictable ways on people who get infected, and is proving to be particularly resilient. Second, since it was first detected, the virus has spread very rapidly and uncontrollably because of the mobility of the population in today's global world. And third, the reactions of people, and of governments, have been distinctive. The third aspect is of particular interest from the perspective of this article.

It is probably fair to say that the emergence of COVID-19 has put an end to the "complex of invulnerability" that has characterized for years the societies in the more developed areas of the planet. Once disappeared the cold war and the threat of a nuclear catastrophe, our societies took for granted that no factor - external or internal - could actually endanger

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\* This article has been written in the context of the Project HUDISOC (PID2019-106005GB-I00, Spanish Ministry of Science); the Research Group REDESOC at Complutense University; and as a result of the research stay as FCFP Marie Skłodowska-Curie Senior External Fellow in FRIAS (*Freiburg Institute for Advanced Studies*) in the academic year 2020-2021.

<sup>1</sup> In particular, P. CONSORTI (ed.), *Law, Religion and COVID-19 Emergency*, DiReSoM Papers 1, 2020, followed by *Law, Religion and the Spread of COVID-19 Pandemic* (ed. by F. BALSAMO & D. TARANTINO), DiReSoM Papers 2, 2020 (both available at: <https://diresom.net/category/ebook/>); the special issue of *Laws* by A. MADERA (ed.), *The Crisis of Religious Freedom in the age of COVID-19 Pandemic* (available at: [https://www.mdpi.com/journal/laws/special\\_issues/religious\\_freedom](https://www.mdpi.com/journal/laws/special_issues/religious_freedom)); and J. MARTÍNEZ-TORRÓN & B. RODRIGO (eds.), *COVID-19 y libertad religiosa*, Iustel, 2021. The latter volume, and my own chapter in it, have especially inspired these pages. I will try to keep bibliographical references to a minimum in this article.

<sup>2</sup> The 1918 flue is also known, improperly, as the "Spanish flu" and caused millions of deaths around the globe. The actual number of victims caused by the 1918 flue remains unclear after decades of studies - with a tendency to raise the figures with the passage of time. Some studies suggest a death toll of between 50 and 100 million. See N.A.P.S. JOHNSON & J. MÜLLER, *Updating the Accounts: Global Mortality of the 1918-1920 "Spanish" Influenza Pandemic*, in *Bulletin of the History of Medicine*, 76 (2005), pp. 105-115. I am grateful to Professor John Eicher, Fellow at FRIAS (Freiburg Institute for Advanced Studies) in 2020-2021, for bringing this work to my attention.



them<sup>3</sup>. COVID-19 changed this state of mind. For the first time in decades, Western societies experienced real and serious fear. Many people feared for their lives, for their families, for their economy, for their jobs, for their future - virtually for everything. This fear made them accept more or less easily - or at least without resistance and often without criticism - the restrictions imposed by authorities to contain the disease in 2020 and 2021.

Today, fear has no doubt diminished as the vaccination process has progressed and the spread of the virus is deemed to be under control; but still, the attitude of most people is characterized by prudence and alert, and the occasional threats of possible new waves of infections keep reviving past anxieties. Nevertheless, some other people, tired of the substantial changes that the coronavirus has brought to their routines and having lost confidence in government (and in the WHO, World Health Organization), have recently questioned the necessity of keeping most of the anti-COVID-19 restrictive measures and decided to act as if the pandemic was completely over.

The fact is that the 2020 pandemic has affected all areas of social life, including the law. In the field of human rights, rather than raising new questions COVID-19 has forced us to deal with familiar questions under unprecedented circumstances. In other words, this pandemic has cast new light on how our legal systems face issues that are essential in our conception of the rule of law and manifest with particular clarity in moments of crisis.

It is therefore important to try to learn from what this pandemic has revealed about our societies, our conception of political organization, our understanding - and guarantee - of fundamental rights, including freedom of religion or belief. This is an opportunity to recognize our societies' strengths and flaws - what should be preserved or improved, what is dispensable or unacceptable.

## 2 - Demanding governments' accountability

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<sup>3</sup> For most people in the West, there have been two biggest global concerns in recent times. One is climate change, which is often deemed to be too far in the horizon and too "intangible" as to cause proper fear. The other, since 2001, is jihadist terrorism, which has been mentally "digested" as something that produce isolated attacks - certainly, a matter of concern that requires "adjustments" but not an immediate global danger for the survival of our societies as we know them.



Simplifying a complex reality, we could say that we can distinguish two types of governmental measures against COVID-19: those aimed at fighting the virus and its expansion, and those that were meant to mitigate the pandemic's consequences for economy and public health. Both types of measures deserve the jurists' attention. In addition, the legal analysis of the coronavirus pandemic must pay attention to each society's reaction to government's measures, for such a reaction could trigger new measures or move to the modification of the existing ones.

Needless to say, jurists do not have difficulty in understanding that exceptional circumstances call for exceptional measures of government. But situations of exception raise a certain concern especially about two aspects of governmental action. First, to what extent the essential procedures of democratic governance have been affected by the extraordinary regulatory powers assumed by the executive, which have led to a simplification, and sometimes a cancellation, of parliamentary control (often with a certain deferential attitude on the part of the courts). Second, to what extent it was necessary to impose so severe limitations on fundamental rights and freedoms such as freedom of movement, freedom of trade and entrepreneurial freedom in general, freedom of assembly, the right to respect for private and family life, the right to education, and of course freedom of religion or belief.

In both aspects, the time factor has proved to be especially relevant. As time passed by, once the most immediate urgent measures were taken and the initial uncertainties about the nature and expansion of the pandemic began to wither away, most countries have returned to the normality of parliamentary life. Still, the jurists' retrospective look at the situation caused by the pandemic seems important in order to assess if the executive exercised its extraordinary powers in a reasonable and responsible fashion, and if the necessity and proportionality of the specific restrictions imposed on fundamental rights - including religious freedom - was sufficiently substantiated (their legitimate aim - the protection of public health - was never in question).

Even if there is the risk that it can be used opportunistically for political purposes through blaming and shaming, such retrospective analysis is important because accountability and transparency must be essential characteristics of every legitimate government. Citizens have the right, and the reasonable expectation, to be explained why their rights are being limited and why the normal procedures of democracy and parliamentary control cease to be fully functional. Otherwise, the broad discretion that is reasonably recognized to governments in exceptional circumstances may easily degenerate into arbitrariness.



This is the reason why, in every country, legal scholars have examined with a critical eye the legal norms and policy measures adopted by governments to control the expansion of the pandemic, in order to scrutinize their actual consistency with the constitutional framework and the whole legal system<sup>4</sup>. Such analysis is particularly complex in countries with a decentralized structure, where the distribution of competences between the different levels of State's organization often was not designed taking into account emergencies of these nature, seriousness, and global dimension<sup>5</sup>. The level of constitutional meticulousness when regulating emergency situations has been another element of uncertainty. The less precise a national Constitution is in this point, the more unpredictable are the reach and duration of the powers that the central government can assume in these circumstances<sup>6</sup>.

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<sup>4</sup> The legal literature about this issue multiplies at incredible speed, but it is still enlightening to see the early studies published in the first months of the pandemic. In Spain, see, for instance, from a general perspective **S. SIEIRA MUCIENTES**, *Estado de alarma*, en *Eunomía. Revista en Cultura de la Legalidad*, 19 (2020), pp. 275-305; see also the contributions of different authors gathered in the special issue of the legal periodical *El Cronista del Estado Social y Democrático de Derecho* 86-87 (March-April 2020).

<sup>5</sup> In countries with a federal or regional structure, normative production and consistency becomes more intricate, and the possibility of confusion or even conflict between rules is higher than in centralized States, with the consequence that the national legal chart may become irregular. Thus, in Italy, the initial construction of normative measures against COVID-19 was expressively described as *a macchie di leopardo* (leopard-design), i.e., heterogeneous and uneven - and maybe not as beautiful as that feline's fur. See **P. CONSORTI**, *Emergenza y libertad religiosa en Italia frente al miedo a la COVID-19*, in *COVID-19 y libertad religiosa*, cited in note 1, p. 171. Something similar has been said about the legal situation in Spain, Brazil, Argentina and Mexico. Conversely, in Germany the federal government was determined, since the very beginning, to coordinate its action with that of each of the *Länder's* government. See, within the same volume *COVID-19 y libertad religiosa*, cited in note 1: **S. MÜCKL**, *Libertad religiosa y COVID-19: la situación en Alemania*, pp. 76-83; **B. RODRIGO LARA**, *La libertad religiosa en España durante la pandemia de COVID-19*, pp. 125-142; **J. NAVARRO FLORIA**, *La pandemia y la libertad religiosa en Argentina: algunas reflexiones*, pp. 312-334; **R. SOUZA ALVES ET AL.**, *La libertad de religión o de creencias y la pandemia del COVID-19. Análisis de las medidas restrictivas adoptadas en Brasil*, pp. 361-367; **A. PATIÑO REYES**, *Libertad religiosa ante la pandemia por COVID-19 en México*, pp. 460-476.

<sup>6</sup> The problem aggravated if the country, in addition, passed through an unstable political situation, as occurred in Belgium after the May 2019 elections. See **L.L. CHRISTIANS & A. OVERBEEKE**, *El derecho belga sobre los grupos religiosos frente al desafío de la crisis sanitaria por COVID-19. Normativa de crisis entre viejos reflejos y nuevas realidades*, in *COVID-19 y libertad religiosa*, cited in note 1, p. 102.



Legal analyses of the measures adopted by governments in Europe and America in the first months of the fight against the pandemic<sup>7</sup> suggest that in most countries there was lack of clarity, which was often perceived by citizens as the result of improvisation and incompetence and caused uncertainty, confusion and scepticism. This, in turn, had negative consequences for the degree of acceptance of and respect for the rules - and therefore for their efficacy - as well as for the citizens' trust in public institutions<sup>8</sup>.

Existing comparative legal studies<sup>9</sup> show also that virtually in every country a number of concerns have been raised about the legitimacy of restrictions on fundamental rights, both from the point of view of *procedure* and *substance*<sup>10</sup>. With regard to the latter, the main issue has been the actual proportionality of the limitations imposed by governments on the exercise of various fundamental rights. Naturally, a judgment of proportionality in these circumstances must be based on scientific and technical criteria; and it seemed sensible at the time to recognise a wide discretion to governments considering the discussion and disagreement among scientists about key aspects of the spreading of COVID-19 and the most efficient means to fight it. Nevertheless, to be acceptable, limitations on fundamental rights must be justified with a reasonable degree of specificity and not just by vague references to risks for public health. If citizens must yield large parts of the exercise of their fundamental rights they are entitled to know why. Here, the time factor plays an important role: the more time passed by, the less urgency existed - because there was more knowledge about how the virus works and can be contained - and therefore the more precise must the governments be in justifying the necessity to restrict certain rights of the population. Extreme limitative

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<sup>7</sup> See the books cited in note 1, *passim*.

<sup>8</sup> As a US scholar wrote with regard to his country, the effects caused by the citizens' lack of trust in their government and their public institutions are potentially more harmful than the effects caused by the pandemic itself (see **B. SCHARFFS**, *El coronavirus y la libertad religiosa: un análisis preliminar de Estados Unidos*, in *COVID-19 y libertad religiosa*, cited in note 1, pp. 447-451).

<sup>9</sup> See, for example, the legal literature cited in note 1.

<sup>10</sup> With regard to procedure three main points have been discussed: to what extent the government respected the proper legislative channels after the first weeks of the pandemic, marked by uncertainty and by the urgency to adopt measures that could help save human lives; to what extent the central government coordinated its activity with regional and local authorities; and to what extent the main actors of civil society were consulted and their cooperation to fight the pandemic was actively sought, instead of relying on the exclusive official resources and personnel.



measures that would be easily obeyed at the beginning of the pandemic could seem less acceptable at a later stage. I will return to this point in section 6 of this article.

The doubts about the (procedural and substantial) legitimacy of the government's action have not remained in the realm of legal scholarship. In a number of countries, and with different outcomes, the courts have been called to judge whether the government respected the rules and boundaries set up by the relevant constitutions. For instance, in Spain, the Constitutional Court, in a very divided opinion, held recently that part of the royal decree that declared the "state of alarm" in March 2020 was unconstitutional, on the basis that the initial lockdown imposed on citizens entailed a proper suspension - and not a mere limitation - of the fundamental right to freedom of movement, and therefore the government should have followed the stricter procedure foreseen to declare the "state of exception"<sup>11</sup>. A second judgment of unconstitutionality came later, with regard to the suspension of the parliamentary control of the government during the state of alarm<sup>12</sup>.

In Europe, litigation apropos of COVID-19 measures begins to proliferate, as can be seen in the cases that arrive to the European Court of Human Rights. Although all those applications have been declared inadmissible so far<sup>13</sup>, no doubt we will see more of them in the next future. In addition to applications contesting the restrictions on fundamental rights during the first months of the pandemic<sup>14</sup>, it is foreseeable that other cases will relate to legislation imposing vaccination or EU green-pass as a requirement to access some places or exercise some activities<sup>15</sup>. The

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<sup>11</sup> STC 148/2021, 14 July 2021. Available in Spanish at <https://www.boe.es/boe/dias/2021/07/31/pdfs/BOE-A-2021-13032.pdf>. The judgment (adopted by 6 votes to 5) dealt with restrictions on religious freedom in a rather superficial way (cf. FJ 10 of the judgment).

<sup>12</sup> STC 168/2021, 5 October 2021, available in Spanish at <https://hjt.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2021-18371.pdf>. This time the judgment was adopted by 7 votes to 4.

<sup>13</sup> See, e.g., *Le Mailloux v. France* (Dec. Adm. 18108/20), 5 November 2020; *Terheş v. Romania* (Dec. Adm. 49933/20), 13 April 2021; *Bah v. the Netherlands* (Dec. Adm. 35751/20), 22 June 2021; *Fenech v. Malta* (Dec. Adm. 19090/20), 23 March 2021.

<sup>14</sup> See, e.g., the communicated cases *Communauté Genevoise d'Action Syndicale v. Switzerland* (App. 21881/20), lodged on 26 May 2020; and *Madgić v. Croatia* (App. 17578/20), lodged on 15 April 2020.

<sup>15</sup> See, for instance, *Zambrano v France* (Dec. Adm. 41994/21), 21 September 2021; and the communicated case *Thevenon v. France* (App. 46061/21), lodged on 10 September 2021.



precedent of the Strasbourg Court's Grand Chamber judgement in the Czech vaccination case, although unrelated to anti-coronavirus vaccines, will likely play an important role in what may be the European Court's attitude about these cases<sup>16</sup>.

### 3 - The conditions for legitimate restrictions on freedom of religion or belief

The general legal and policy measures adopted by governments to control the pandemic have had an impact, direct or indirect, on religious freedom and on the relations between State and religion. Here we can identify, in my view, four thematic areas of special interest: the legal regulation of the fight against coronavirus; the equality of treatment of religious freedom in relation to other fundamental rights; the cooperation between the State and religious communities; and the reactions of religious communities to governmental measures.

With regard to the first of these areas, we should keep in mind that, according to international standards and jurisprudence<sup>17</sup>, limitations on religious freedom - as on other fundamental rights - must pursue a legitimate aim. The existence of such aim, in the case of the measures adopted against COVID-19 is undisputed: the protection of public health, as well as the rights and freedoms of others. But there is more room for interpretation - and disagreement - with regard to another essential requirement, namely that limitations are *necessary*, and not only useful or convenient. Establishing the necessity of a restriction on a fundamental right, and therefore on religious freedom, entails a judgment about the

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<sup>16</sup> *Vavříčka et others v. The Czech Republic* (App. 47621/13), 8 April 2021. The dissenting opinion of Judge Wojtyczek contains interesting reflections on the proportionality principle, the burden of proof, and the implications for freedom of conscience (which were virtually ignored by the Court). For an analysis of this judgment, see **S. MESEGUER**, *Libertad religiosa, salud pública y vacunación COVID-19*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 56 (2021), pp. 23-32.

<sup>17</sup> For a detailed explanation, see, for example, **J. GUNN**, *Deconstructing Proportionality in Limitations Analysis*; **J. VAN DEN VYVER**, *Limitations on Freedom of Religion or Belief: International Law Perspectives*; and **J. MARTÍNEZ-TORRÓN**, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, all of them in *Emory International Law Review*, 19 (2005), pp. 465-498, 499-537, and 587-636, respectively. With specific reference to public health as a legitimate justification for limitations, see **H. PAYNE & N. DOE**, *Public Health and the Limits of Religious Freedom*, in the same journal and issue, pp. 539-555.





existence of a relation of proportionality between the restriction in question and the aim that it is declaredly pursuing<sup>18</sup>.

When we look at the limitations on religious freedom derived from anti- COVID-19 measures, the first point is of course to scrutinize the *actual necessity* of the limitation in question, which requires proving the absence of reasonable alternatives to pursue the legitimate aim of public health without restricting religious freedom<sup>19</sup>.

In addition, two criteria seem *prima facie* especially relevant to determine the proportionality of limitations on religious freedom. One of them is the *duration* of the restrictions, because they have almost always impinged on the freedom of worship (collective and individual) and on the religious assistance to people in particularly vulnerable situations, such as being in a nursing home or in a hospital, perhaps with the prospect of a near death. Not only is it important to justify which limitations can - or must - be imposed on the practice of worship or on religious assistance, but also for *how long* they will be held. For religious believers - and for their churches - there is a big difference between eliminating, or severely reducing, the possibility of worship and religious assistance for two weeks or for several months. The prolonged length of a restriction involves a degree of invasion of religious freedom that is not only quantitative but also qualitative. This applies not only to regular or periodical religious worship but also to episodic ceremonies of special significance, such as baptisms (or their equivalent in non-Christian religions), weddings and funerals among others.

The other criterion is the *equal treatment* of religious freedom vis-à-vis other fundamental freedoms which have been subject to qualitative and quantitative limitations as a result of anti-COVID-19 actions. Besides proving that restrictive measures are necessary and proportionate, States are obliged to regulate and apply those measures in a way that is neither arbitrary nor discriminatory. For the same reasons that religious freedom

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<sup>18</sup> Among the immense legal literature on proportionality, with different positions and from a comparative perspective which includes references to the Strasbourg jurisprudence, see: **M. KLATT & M. MEISTER**, *The Constitutional Structure of Proportionality*, Oxford University Press, 2012; **S. TSAKYRAKIS**, *Proportionality: An assault on human rights?*, in *International Journal of Constitutional Law*, 10 (2012), pp. 468-493; **K. MÖLLER**, *Proportionality: Challenging the critics*, 709-731; **J. CIANCIARDO**, *The Principle of Proportionality: The Challenges of Human Rights*, in *Journal of Civil Law Studies*, 3 (2010), pp. 177-186.

<sup>19</sup> See, *mutatis mutandis*, the judgment of the European Court of Human Rights *Bayatyan v. Armenia* (GC), App. 23459/03, 7 July 2011, para. 124.



should not be privileged in relation to other fundamental rights, it should not be discriminated either. For instance, when some preventive measures are adopted about safety distance between people or occupancy rates of closed spaces, it would not be reasonable to apply to churches different criteria from those used for supermarkets, museums or theatres. Hence, it is no surprise that religious communities have sought the courts' protection when they thought that the equality principle had been infringed<sup>20</sup>. Equality, on the other hand, is perfectly compatible with requiring a specific legal treatment of religion, i.e., that limitations imposed on religious freedom are based on the comprehension of the importance or centrality that certain acts of worship or religious assistance have for the faithful of churches and religious communities.

#### **4 - The significance of equality and State's neutrality for the protection of religious freedom**

This leads us to consider an immediate question: to what extent can a religiously neutral State - as is the case of most European States - define which aspects of the practice of religion are essential and therefore deserve to be recognized as an exception to rules that restrict freedom of movement and freedom of assembly<sup>21</sup>? Are the State authorities entitled to decide by themselves which expressions of religious worship must be included in - or excluded from - those "essential services" that will be allowed to function during a situation of emergency or alert, in the same way they take such decision with regard, for example, to pharmacies, supermarkets, public transportation or accommodation services?

Responding to this question requires more than an analysis of the rationality or consistency of the actions taken by public authorities when they establish which services are considered essential for society. There is also a deeper question that relates to the legal notion of discrimination. In order to assess if a differential legal treatment is discriminatory or not, the first criterion consists in determining if such difference is based on a "reasonable and objective justification"<sup>22</sup>. And, certainly, it is not easy to

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<sup>20</sup> See below, section 6 of this article.

<sup>21</sup> The question was raised by Professor Rafael Palomino in an international seminar held at Complutense University on 13 November 2020. For a detailed explanation of his ideas on this point, see **R. PALOMINO**, *Neutralidad del Estado y espacio público*, Thomson Reuters Aranzadi, 2014.

<sup>22</sup> This is a common and well-known judicial doctrine in Europe. In the case law of the



reconcile the State's religious neutrality with a judgment of public authorities deciding if religious worship - be it collective worship or individual worship practiced in a temple - is or not "sufficiently essential" to be distinguished, "reasonably and objectively", from other more dispensable activities.

Public authorities are neither legally competent nor intellectually qualified to make such a judgment by themselves. They need to take into account the view of the relevant churches and religious communities, among which there is a remarkable diversity of rules about the mandatory character, and the dispensability, of various manifestations of worship. This is not only a consequence of the constitutional principles governing the relations between States and religion in many countries. It also derives from the international standards on freedom of religion or belief. It would certainly be wrong to interpret international conventions as imposing a particular system of relations between State and religion - and no international jurisdiction or advisory body has held it - for this is a delicate matter in which culture, history and socially accepted values play a crucial role. But at the same time, it is gaining momentum the idea that without a minimum neutrality of the State and public institutions it is not viable to provide full protection to religious freedom and to avoid some level of discrimination of all individuals and communities, especially minorities<sup>23</sup>.

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European Court of Human Rights, it dates back to 1968 (*Belgian linguistic case*). For an analysis of the principle of equality in the Strasbourg Court in the context of other European institutions, see **S. BESSON**, *Evolutions on Non-Discrimination Law within the ECHR and ESC Systems: It Takes Two to Tango in the Council of Europe*, in *American Journal of Comparative Law*, 60 (2012), pp. 147-180. For a summary of criteria and case law of the Strasbourg Court, see the *Guide on Article 14 of the Convention (prohibition of discrimination) and on Article 1 of Protocol No. 12*, European Court of Human Rights, 30 December 2020 (available at: [https://www.echr.coe.int/Documents/Guide\\_Art\\_14\\_Art\\_1\\_Protocol\\_12\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf)).

<sup>23</sup> With specific reference to Europe, see, in Spain, **S. CAÑAMARES ARRIBAS**, *Ministros de culto y autonomía confesional en la jurisprudencia del Tribunal Europeo de Derechos Humanos*, and **M.J. VALERO ESTARELLAS**, *Autonomía de las confesiones religiosas, neutralidad del Estado y prohibición de arbitrariedad, en la reciente jurisprudencia del Tribunal Europeo de Derechos Humanos*, both in J. MARTÍNEZ-TORRÓN & S. CAÑAMARES ARRIBAS (eds.), *Libertad religiosa, neutralidad del Estado y educación. Una perspectiva europea y latinoamericana*, Thomson Reuters Aranzadi, 2019, pp. 81-100 and 55-79, respectively. See also **J. MARTÍNEZ-TORRÓN**, *State Neutrality and Religious Plurality in Europe*, in W.C. DURHAM JR. & D. THAYER (eds.), *Religion, Pluralism, and Reconciling Difference*, Routledge, 2018, pp. 159-176; and, from a broader perspective, **J. MARTÍNEZ-TORRÓN**, *La neutralidad religiosa del Estado*, in M. CARBONELL SÁNCHEZ Y O. CRUZ BARNEY (eds.), *Historia y Constitución*, vol. II, Instituto de Investigaciones Jurídicas de la UNAM, México



Indeed, the State's religious neutrality has received a progressive attention on the part of international jurisdictions, especially in Europe, as one of the criteria that must be used to interpret national constitutional provisions on religious freedom in order to make them compatible with international standards<sup>24</sup>.

In a number of European and American countries, the rules enacted by governments to contain the pandemic, especially in 2020, were characterized by a generic and ambiguous justification of the alleged necessity of the restrictions imposed on freedom of worship. In addition, we would have expected from governments to show more sensibility to understand the importance - for individuals as well as communities - of some aspects of the exercise of religious freedom which have been particularly impaired by anti-COVID-19 measures. Among these aspects was, of course, collective worship, which by definition implies the congregation of people in the same place, often a closed space. But we must also include individual worship in a church or sacred place, for praying in a temple has a special meaning for many people<sup>25</sup>. We can add religious assistance - which has singular moral transcendence in the practice of the sacraments of penance and the anointing of the sick in some Christian churches. Moreover, in most religions there are collective rituals or ceremonies of remarkable significance, either because they must be performed in specific times of the year or because they are linked to special moments in the life of a person, such as baptism (or rites with an analogous meaning of initiation), weddings, and funerals and burials.

For obvious reasons, religious rites concerning the dead are of the utmost importance here, and the religious perspective has not always been duly considered by State authorities. The drastic limitations on the celebration of funerals and the number of persons who could be present have caused remarkable anxiety in many people all around the world. There is also the issue of how to handle properly the body of the deceased. No doubt, public authorities had the responsibility of avoiding that an inadequate handling of the corpses could contribute to spreading the

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2015, pp. 313-339.

<sup>24</sup> For a comprehensive and insightful study of the Strasbourg Court's jurisprudence on the State's religious neutrality, in the light of the constitutional principles of France and Germany, see **M.J. VALERO**, *Neutralidad del Estado y autonomía religiosa en la jurisprudencia de Estrasburgo*, Tirant Lo Blanch, 2022.

<sup>25</sup> This offers a particular nuance in the case of Catholics and Orthodox Christians, because of the theological doctrine of transubstantiation and the belief in the real and continued presence of Jesus-Christ in the consecrated form.



virus, but not always and everywhere have they shown sufficient sensibility towards religious rules and practices. Some religious traditions, among them Judaism and Islam, have precise provisions about the proper and respectful treatment of a dead person's body, which often includes a firm rejection of cremation. This led to some statements and guidelines by religious authorities and international organizations with the aim of reconciling, as much as possible, the concern for public health and the respect for religious funeral practices<sup>26</sup>. By contrast, the Sri Lankan government, since April 2020, began a policy of forced cremation of COVID-19 deceased, regardless of their religion or their wishes. This policy was not interrupted until February 2021, shortly after a public joint statement of four UN special rapporteurs urging the government to stop the forced cremations, as they ran contrary to the beliefs of Muslims and other religious and there was no evidence to suggest that cremation was an efficient means to prevent the spread of the virus<sup>27</sup>.

Naturally, individual or collective manifestations of religious freedom not always must prevail over other legitimate interests deserving protection, as is the case of public health in situations like the one caused by the coronavirus. But, if we want to properly assess the necessity and

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<sup>26</sup> See **A. AL-DAWOODY** and **O. FINEGAN**, *COVID-19 and Islamic burial laws: Safeguarding dignity of the dead*, in *Humanitarian Law and Policy*, April 30, 2020 (available at <https://blogs.icrc.org/law-and-policy/2020/04/30/covid-19-islamic-burial-laws/>); (I am grateful to Judge Pavli, of the European Court of Human Rights, for bringing attention to this document in his partly dissenting opinion to the judgment *Gatsalova v. Russia*, App. 41318/10, 20 April 2021). Within the Organization of American States/Inter-American Commission on Human Rights, one of the practical guides published by the Rapid Integrated Response Coordination Unit to deal with COVID-19 was *What are the standards for ensuring respect for the grieving, funeral rites, and memorials of those who died during the COVID-19 pandemic?* ([https://www.oas.org/es/cidh/sacroi\\_covid19/documentos/GuiaPractica01\\_Duelo\\_En.pdf](https://www.oas.org/es/cidh/sacroi_covid19/documentos/GuiaPractica01_Duelo_En.pdf)). The International Committee of the Red Cross published a *General Guidance for the Management of the Dead* ([https://www.icrc.org/sites/default/files/wysiwyg/Activities/covid-19\\_general\\_guidance.pdf](https://www.icrc.org/sites/default/files/wysiwyg/Activities/covid-19_general_guidance.pdf)), as well as guides for the management of the dead from Islamic, Buddhist and Hinduist perspectives.

<sup>27</sup> The four special rapporteurs were those on freedom of religion or belief, on minority issues, on the rights of peaceful assembly and association, and on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The statement, in addition to describing forced cremations as a "human rights violation", insisted that such policy could exacerbate existing prejudices, intercommunal tensions, and religious intolerance, and it could also have the collateral effect of deterring some people from accessing public healthcare over fears of discrimination, which would have a negative impact on the fight against the pandemic. See: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26686&Lang%20ID=E>.



proportionality of limitations on freedom of worship, we need to depart from a realistic appraisal of the true impact that those limitations have in the life of people and communities. And such appraisal cannot - and must not - be done by the State authorities by themselves, ignoring the relevant religious perspective.

Certainly, *religious autonomy is not absolute*, and the State is entitled to impose coercively severe restrictions on worship to preserve public health in circumstances of serious risk. But *neither is the State's autonomy absolute*. The necessity of limitations on religious freedom must be precisely substantiated - generic references to public health are not enough - and those limitations are to be imposed in accordance with the principle of equality. This implies, on the one hand, that restrictions on freedom of worship cannot be different from limitations imposed on other freedoms unless there is an "reasonable and objective justification" - which, again, must be precisely substantiated. And on the other hand, every limitation must be adopted on the basis of a reasoned judgment about the importance that a particular type of worship has for individuals and communities. As mentioned above, a neutral State should not make such judgment on its own volition but in dialogue and consultation with the relevant churches and religious groups.

## 5 - Advantages of dialogue and cooperation between State and religion

Indeed, if generally speaking it is a good practice that the State keeps channels of communication with civil society, in this area the dialogue and cooperation with the collective actors of religious freedom becomes imperative. When State authorities unilaterally decide to consider some worship activities "dispensable", such decision not only is unrealistic but also risks weakening the essential separation between the secular and the religious as realms with their own reciprocal autonomy. In Western societies, the relations between State and religion have been eloquently described as a "frontier system". Certainly, the frontier may move with time - and has actually kept moving - and frontier conflicts are inevitable, but to abandon or blur the notion of frontier between those two realms has historically proved to be "lethal"<sup>28</sup>.

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<sup>28</sup> See R. NAVARRO-VALLS, *Neutralidad activa y laicidad positiva*, in A. RUIZ MIGUEL and R. NAVARRO-VALLS, *Laicismo y Constitución*, Fundación Coloquio Jurídico Europeo, 2009, p. 105.



Once again, the importance of the time factor emerges here. Initial invasions of central aspects of religious autonomy could be momentarily tolerated, because immediate measures were needed in an atmosphere dominated by uncertainty and fear. However, once the urgency disappeared, it was not acceptable that the State continued to restrict, or even suspend, religious worship without an appropriate consultation process with religious communities<sup>29</sup>.

During the COVID-19 pandemic, and especially in 2020, many governments have approached limitations on religious freedom - and usually also limitations on other freedoms - with an attitude characterized by unilateralism, imposition, and improvisation, instead of turning to consultation, cooperation, and reflection. The gravity of the circumstances called for broad social consensus, for *co-responsible deliberation* and not for unilateral imposition - especially when it often appeared to be not sufficiently informed (and sometimes uninformed). One of the collateral effects of such deficient governmental approach was the uncertainty raised among citizens about the precise reach of the limitations, in particular during the first months of the pandemic, which contributed to increase the feeling of anguish in many people<sup>30</sup>.

If we turn now to a more positive perspective, leaving aside the need for dialogical procedure in the determination of limitations to be imposed on religious freedom, one of the main lessons we can learn from this pandemic is that, in situations of crisis, the cooperation between State and religious communities is of the utmost importance. It would have

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<sup>29</sup> This is even less tolerable when, as occurred in Portugal, once the state of emergency was over and the constitutional normality restored, limitations on fundamental rights were kept on the sole basis of the government's will [see **M. ASSIS RAIMUNDO ET AL.**, *COVID-19 y libertad religiosa en Portugal*, in J. MARTÍNEZ-TORRÓN & B. RODRIGO (eds.), *COVID-19 y libertad religiosa*, Iustel, 2021, p. 231-238].

<sup>30</sup> To cite just a minor but revealing example: in countries such as Belgium, France, Italy or Spain, places of worship were never closed, not even during the pandemic's initial moments when the rules were most stringent. But at the same time, governments did not foresee explicitly that going to a place of worship to pray individually was a legitimate exception from lockdown at home; hence, it was unclear if that was an involuntary legal oversight or if that meant that temples could be visited only when they were within the route to one of the authorized places or activities, such as a pharmacy or a supermarket. See **L.L. CHRISTIANS & A. OVERBEEKE**, *El derecho belga*, cited in note 6; **V. FORTIER**, *La libertad de religión, en Francia, en tiempos de coronavirus*, **P. CONSORTI**, *Emergencia*, cit., and **B. RODRIGO LARA**, *La libertad religiosa*, cit., all of them in *COVID-19 y libertad religiosa*, cited in note 1, pp. 104-112, 150-157, 173-176, and 130-138, respectively.



been advisable that governments had requested - or sometimes just accepted - the collaboration of the vast network of entities and institutions that form what we normally call the religious “landscape” of a country. Churches and religious communities have at their disposal means that can be immensely useful to face emergency situations. This includes institutions that have a religious ethos, such as health institutions, religiously inspired NGOs, and volunteers mobilized by organized religions to provide services to and take care of particularly vulnerable people<sup>31</sup>. There are also less quantifiable or visible areas in which the contribution of religious communities can be of great help; for instance, in spreading and explaining hygienic measures; raising in the population consciousness of the significance - also moral - of complying with government’s rules and avoiding irresponsible behaviour that may endanger other people; identifying sources of risk and communicating them to public authorities; combatting the disinformation and hate speech that tend to proliferate in this type of scenarios, etc.

Therefore, it is surprising that in so many countries State authorities have fought this battle almost solo, especially at the beginning of the pandemic, precisely when they needed most help. This was an ideal opportunity to build bridges and channels of collaboration between the secular and religious environments, united in a common cause irrespective of one’s personal position in matter of beliefs. Even more striking was the fact that some countries did not even make use of the already existing channels of communication; this was the case of Spain and Portugal, where, to my knowledge, their respective commissions on religious freedom were neither consulted nor informed for months after the pandemic started<sup>32</sup>.

## 6 - Support and doubts in the reaction of religious communities to governmental measures

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<sup>31</sup> Clear examples of this activity are provided, in the context of Peru, by **G. FLORES SANTANA**, *El respeto a la libertad religiosa en las políticas sanitarias del gobierno frente al coronavirus en el Perú*, in *COVID-19 y libertad religiosa*, cited in note 1, pp. 507-510.

<sup>32</sup> For a critical analysis of the Spanish Advisory Commission on Religious Freedom, from various perspectives, including some comparison with the Portuguese Commission, see the collective volume *Comisión Asesora de Libertad Religiosa: realidad y futuro*, Ministerio de Justicia, Madrid, 2009.





The way churches and religious communities have reacted to governmental measures against the pandemic also deserves the jurists' attention. Social behaviour in relation to State laws is of interest for legal studies, for it has an impact on the norms' efficacy and can contribute to their consolidation or to their reform and even their abrogation. Moreover, the analysis of the motives underlying negative reactions may shed light on possible flaws or anomalies in the normative process, or in the content of the norms, which could explain why they are socially rejected.

Except for some isolated positions of negationism or radical providentialism<sup>33</sup>, the vast majority of religious communities have acted, since the beginning of the pandemic, in a sensible and responsible fashion with regard to governments' anti-COVID-19 rules, even though they involved severe restrictions on freedom of worship. They immediately acknowledged the gravity of the problem, put their trust in State authorities, and recognized - explicitly or implicitly - their competence to take rapid and drastic action. Furthermore, some churches and religious communities took the initiative before the government did and enforced self-imposed limitations on collective worship, or on the opening of places of worship, that went beyond the governmental measures. The details of the religious communities' reaction varied from country to country, but it is probably fair to say that their attitude was not only prompted by prudence but also by loyalty and support of the government, irrespective of how much they were convinced of the consistency and accuracy of the scientific foundations flagged by the government when adopting restrictive measures<sup>34</sup>. They knew that, when a health emergency arises, support of the authorities, and not criticism, is what society needs most.

Significantly, when the existence of the pandemic was officially recognized, many churches and religious communities opted for the self-restriction of collective worship and prayer even when most governments did not formally oblige to close the temples. The most common governmental solution was a limitation on the number of participants in collective ceremonies. In Germany, public worship was prohibited only

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<sup>33</sup> Some examples of these attitudes in Asia, Africa and Latin-America are provided by **P. CONSORTI**, *Religions and virus*, **G. FATTORI**, *Religious freedom at the time of coronavirus*, and **M. INTROVIGNE**, *Lesson from the Shincheonji Case in South Korea: Monitoring without Scapegoating*, all of them in *Law, Religion and COVID-19 Emergency*, cited in note 1, pp. 15-18, 57-64, and 145-150, respectively. See also **S. PICCIAREDDA**, *Covid-19 in Africa and Latin America. Certain forms of religious negationism favor the pandemic*, in *Law, Religion and the Spread of COVID-19 Pandemic*, cited in note 1, pp. 129-140.

<sup>34</sup> See **L.L. CHRISTIANS & A. OVERBEEKE**, *El derecho belga*, cited in note 6, p. 99.



for some weeks in almost all *Länder*, following the same criteria applied to any public event that involved congregation of people<sup>35</sup>. The Church of England was particularly cautious and meticulous in this regard<sup>36</sup>. In some Latin-American countries, as Argentina or Peru<sup>37</sup>, because of the irregular itinerary of governmental rules and their interpretation, some Catholic bishops felt obliged to close the churches. Some churches suspended open-air ceremonies with deep popular roots, as Holy Week processions in Mexico and Spain<sup>38</sup>, in Spain the suspension was kept in 2021, even though many have criticized that regional governments had by then permitted the reopening of touristic activities that involved agglomeration of people in the open.

By and large, most religious communities showed a high degree of responsibility and respect for the relevant governments' rules and guidelines. At least for the first months, religious communities did not discuss restrictions on worship and focused on making their own rules and praxis more flexible in order to keep pursuing their mission through alternative ways, including the use of contemporary communication technologies to broadcast religious ceremonies and provide religious instruction and religious assistance<sup>39</sup>. However, the attitude of a number of religious communities began to change as the urgency faded away and

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<sup>35</sup> See **S. MÜCKL**, *Libertad religiosa*, cited in note 5, pp. 76-78.

<sup>36</sup> See **F. CRANMER & D. POCKLINGTON**, *El impacto de la pandemia de COVID-19 en la práctica religiosa en Reino Unido*, in *COVID-19 y libertad religiosa*, cited in note 1, pp. 261-268. Updated and detailed information on the Church of England and the UK regulations can be found in the blog *Law & Religion UK* (<https://lawandreligionuk.com>).

<sup>37</sup> See **J. NAVARRO FLORIA**, *La pandemia*, cited in note 5, pp. 312-322; **G. FLORES SANTANA**, *El respeto*, cited in note 31, pp. 495-497.

<sup>38</sup> See **A. PATIÑO REYES**, *Libertad religiosa*, pp. 465-469, and **B. RODRIGO LARA**, *La libertad religiosa*, cit., pp. 138-140, both of them cited in note 5.

<sup>39</sup> These practices have become rapidly spread all over the world. In Europe, see, for instance, **V. FORTIER**, *La libertad de religión, en Francia, en tiempos de coronavirus*, and **W. BRZOZOWSKI**, *Polonia: la libertad religiosa en tiempos de la pandemia del COVID-19*, both in *COVID-19 y libertad religiosa*, cited in note 1, pp. 153 and 200-205, respectively. Such deference of religious communities to governments has not always received a positive judgment by scholars. For instance, some Uruguayan scholar has maintained that the Catholic bishops of his country were too subservient in their acritical obedience to governmental policies and did not take sufficiently into account the medium-term impact that such policies could have on the religious freedom of Catholic citizens (see **G. GONZÁLEZ MERLANO**, *La libertad religiosa en Uruguay durante la pandemia. Entre el derecho fundamental y el espectáculo público*, in *COVID-19 y libertad religiosa*, cited in note 1, p. 518).



many governments kept taking their decisions about such important issues in small and hermetic circles, with hardly any real contact with civil society's main actors.

From the initial unconditional support, in many places religious communities shifted to more critical positions, when they considered that the government did not take the necessary steps to engage in a cooperative dialogue with religious actors and failed to comprehend the significance of religious worship, with the consequence that religious organizations felt discriminated in comparison with other entities or activities. An illustrative example is the comportment of Colombia's Bishops Conference, which went from the full endorsement of the government in early March 2020 to demand, about six weeks later, more flexible limitations on religious worship in parallel with the rules applicable to other secular activities<sup>40</sup>. Despite that criticism, most churches and religious communities have tried to respect precautionary measures aimed at avoiding contagion, probably with a higher degree or responsibility than other activities or organizations. For instance, carefully keeping an appropriate safety distance between persons, cleaning scrupulously the interior of temples and places of prayer, and taking hygienic measures such as providing disinfectant solution at the entrance, removing the holy water, or giving the holy communion always in the hand instead of in the tongue.

In general, the positioning of religious communities vis-à-vis governmental measures has depended much on their own internal organization and structure. Centralized and hierarchical structures have normally led to a more uniform reaction of the community. However, there have been exceptions, the most significant being probably the different attitudes adopted, after the first weeks of the pandemic, by the Vatican and the Italian Bishops Conference - the former very deferential to the government, the latter very critical to it<sup>41</sup>. Other important factors have been the severity of the restrictions on worship and religious assistance adopted in different countries, and the procedure followed to establish them; as could be expected, restrictive measures were accepted and respected more easily where governments consulted with religious

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<sup>40</sup> See **V. PRIETO**, *Pandemia y límites a la libertad religiosa. El caso colombiano*, in *COVID-19 y libertad religiosa*, cited in note 1, pp. 400-402 and 409-410.

<sup>41</sup> See **P. CONSORTI**, *Emergenza*, cit., and **P. CAVANA**, *Libertad religiosa y COVID-19 en el Vaticano y en la acción de la Santa Sede*, both in *COVID-19 y libertad religiosa*, cited in note 1, pp. 180-182 and 285-298, respectively.



communities beforehand. As a consequence, the panorama in Europe and America offers significant variations from country to country<sup>42</sup>.

Nonetheless, by and large it is probably fair to say that most religious communities have not expressed a systematic or blind opposition to limitations that appeared reasonable from the perspective of public health. The tendency has been rather to search a dialogue with the government with the purpose of reaching consensus on the limitations that should be imposed. And also to ensure that the religious communities' point of view was considered, and that they would not be discriminated because of a superficial assessment of the importance of freedom of worship or an arbitrary application of the rules.

Indeed, when tensions have led to litigation, the element of discrimination and arbitrariness has been central in some jurisdictions, as in some lawsuits pursued in Chile<sup>43</sup>, while in others, as Germany, the core issue has been the interpretation of the principle of proportionality<sup>44</sup>. The responses of the courts have been different depending on the countries. Furthermore, within the same country the courts' approach has sometimes changed depending on the moment that the claim was decided.

Revealing of such changes of direction was a decision of the Supreme Court of the United States of America, *Cuomo*, rendered in November 2020. Unlike what had occurred in similar occasions in previous months<sup>45</sup>, in this case the Supreme Court granted the injunctive relief requested by a Catholic diocese and an Orthodox Jewish association against an executive order issued by the governor of New York. That executive order imposed harsh restrictions on the number of people who

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<sup>42</sup> See, for instance, the examples provided by **B.W. BUSSEY**, *Contagio: el temor de los gobiernos a la religión durante la crisis del COVID-19*, in *COVID-19 y libertad religiosa*, cited in note 1, pp. 52-64, as well as by the chapters on American countries in the same book.

<sup>43</sup> See **A.M. CELIS BRUNET & R. CORTÍNEZ CASTRO**, *Religion y coronavirus: los desafíos en Chile en tiempos de estado de excepción constitucional*, in *COVID-19 y libertad religiosa*, cited in note 1, pp. 388-394.

<sup>44</sup> See **S. TESTA BAPPENHEIM**, *State of emergency and religious freedom: constitutional stress in German law (art. 4 of the Basic Law for the Federal Republic of Germany)*, in *Law, Religion and the Spread of COVID-19 Pandemic*, cited in note 1, pp. 227-254.

<sup>45</sup> For some interesting comments on the precedent decisions of the Supreme Court on comparable claims in 2020, see **A. MADERA**, *Reconciling the Protection of Public Health with Religious Freedom: the Viability of Shared Responses*, in *Law, Religion and the Spread of COVID-19 Pandemic*, cited in note 1, pp. 213-225; also **W.C. DURHAM, Jr.**, *The Coronavirus, The Compelling State Interest in Health, and Religious Autonomy*, in *Canopy Forum*, 2 October 2020 (<https://canopyforum.org/2020/10/02/the-coronavirus-the-compelling-state-interest-in-health-and-religious-autonomy/>).



could attend religious services, and those restrictions were applied irrespective of the capacity of the temple, while businesses providing services deemed “essential” (such as liquor stores, hardware stores or acupuncture facilities) were subject to much more lenient constraints. The Court emphasized the importance of equal treatment and held that the state must offer a convincing and compelling reason for such differential treatment of religious freedom in comparison with secular activities that involved an apparently equivalent risk. The time factor was considered also by the Court of the utmost importance when it came to the margin of discretion recognized to the executive power. Once the urgency of the first months of the pandemic disappeared and it was better understood how the coronavirus spread, giving carte blanche to the executive was not compatible with the guarantee of constitutional rights<sup>46</sup>.

Four months later, the Supreme Court of Chile delivered a unanimous decision in a similar direction in a claim that involved the celebration of the Catholic holy mass, holding that manifestations of religion should be treated on equal terms in comparison with other activities conducted in public<sup>47</sup>. In the same days, the Outer House of the Court of Session in Scotland took an analogous approach, with a strict scrutiny of the proportionality of the measures ordered by the Scottish government in the light of article 9 of the European Convention on Human Rights<sup>48</sup>.

Naturally, the history of the religious reactions to anti-COVID-19 measures will continue as far as the pandemic subsists. A new front appeared when the vaccines commenced to be distributed, and the situation may become more tense as, in fear of a new wave of the virus, some governments consider the possibility to make vaccination

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<sup>46</sup> *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. (2020) (25 November 2020, per curiam). The decision was taken by 5 votes to 4. For a quick and incisive comment, vid. M. McConnell and M. Raskin, *The Supreme Court Was Right to Block Cuomo’s Religious Restrictions*, in *The New York Times*, 1 December 2020 (<https://www.nytimes.com/2020/12/01/opinion/supreme-court-Covid-19-religion.html>). Later, the Supreme Court decided in a similar direction the (somewhat more complex) case *South Bay United Pentecostal Church et al. v. Newsom*, 592 U.S. (2021) (5 February 2021).

<sup>47</sup> Judgment of the Supreme Court of Chile (Third Chamber), 29 March 2021 (Rol 19062-2021).

<sup>48</sup> *Philip & Ors for Judicial Review of the closure of places of worship in Scotland*, [2021] CSOH 32 (24 March 2021).



mandatory for some activities or for employees to be permitted to enter their working place<sup>49</sup>.

Opposition to vaccination has existed for a long time and has been based on various grounds. Sometimes there are people with a conscientious objection, normally for religious reasons. In the USA and Australia, some movements of religious inspiration resisting COVID-19 vaccination began to emerge as early as 2020<sup>50</sup>. The traditional legal response to these objections - conscientious or not - has been to give priority to the protection of public health, which was deemed to prevail over the individual's right to reject a medical treatment and the objector's religious freedom<sup>51</sup>. Such reasoning seems sensible, for nobody is entitled to put anyone else's life at risk as a consequence of a personal moral decision.

However, we must not forget that this judicial doctrine was declared apropos of vaccines that were considered safe and necessary at the time, and that had the effect of preventing infection, not just to mitigate its consequences. Therefore, it should be taken with caution in the case of anti-COVID-19 vaccines, which have been developed and approved with unusual speed, and about whose actual efficiency and negative collateral effects there is still an ongoing scientific debate. If we take into account that vaccinated people can transmit the disease, as well as the so many uncertainties and controversies about anti-COVID-19 vaccines and the fact that only a low percentage of the population that oppose vaccination on religious grounds, making vaccination mandatory may seem an extreme and disproportionate measure, especially if it means

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<sup>49</sup> For an analysis of the implications that vaccination may have for religious freedom, from a comparative perspective and taking into account the recent case law of Strasbourg, see **S. MESEGUER**, *Libertad religiosa*, cited in note 16.

<sup>50</sup> See **B. SCHARFFS**, *El coronavirus*, cited in note 8, pp. 439-440. See also, for instance: <https://www.dailymail.co.uk/news/article-2915544/No-jab-no-play-Victoria-second-state-make-vaccinations-compulsory-children-day-care.html>. In Australia, before COVID-19, the issue was discussed by **R. BARKER**, *No Jab-No Pay, No Jab-No Play, No Exceptions: The Removal of Conscientious and Religious Exemptions from Australia's Childhood Vaccination Policies*, in *Quaderni di diritto e politica ecclesiastica*, 25 (2017), pp. 513-526.

<sup>51</sup> See, more than one century ago, the US Supreme Court judgment *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), denying exemption from smallpox vaccination requirement. Its doctrine has been reiterated in various subsequent judgments of the Supreme Court; with particular clarity - although the case was not related to vaccination but to child labor laws - in *Prince v. Massachusetts* (1944), where the Court said: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease" (321 U.S. 158, at 166-167).



overriding the freedom of conscience of an insignificant minority of citizens.

A different type of conscientious objection was raised not to vaccination per se but to specific types of vaccines, because in their research and development cell lines from electively aborted fetuses have been utilized. Some Christians experienced a moral dilemma and hesitated to accept those vaccines because it might constitute material passive cooperation with abortion<sup>52</sup>.

Within the Catholic world, in response to that concern, the Holy See's Congregation for the Doctrine of the Faith published, in December 2020, a tranquilizing note, approved by Pope Francis, stating that accepting inoculation with those vaccines is morally acceptable - the greater good of containing the pandemic makes licit such a remote and indirect cooperation in evil<sup>53</sup>. The same note made clear that this should not be understood as any kind of moral endorsement of the use of cell lines proceeding from aborted fetuses. Indeed, the note encouraged pharmaceutical companies and governmental health agencies to "produce, approve, distribute and offer ethically acceptable vaccines that do not create problems of conscience for either health care providers or the people to be vaccinated"<sup>54</sup>. The note was also in favour of implementing vaccination on a voluntary basis, but it remarked that those persons who in any event consider certain type of vaccines morally unacceptable must do their utmost to avoid, by other means, becoming agents for the transmission of the virus<sup>55</sup>.

## 7 - Final remarks

We are all aware that the COVID-19 pandemic has harshly revealed our vulnerability, both as individuals and as community, and has brought to light the best and the worst in us. We have witnessed incredible acts of altruism, generosity and dedication, in parallel with the desire of taking

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<sup>52</sup> See, for instance: <https://blogs.bmj.com/medical-ethics/2020/04/09/covid-19-and-vaccine-ethics-pre-empting-conscientious-objection/>; <https://blogs.bmj.com/medical-ethics/2020/04/09/covid-19-and-vaccine-ethics-pre-empting-conscientious-objection/>.

<sup>53</sup> Note of the Congregation for the Doctrine of the Faith on the morality of using some anti-Covid-19 vaccines, 21 December 2020. Available in: <https://press.vatican.va/content/sala-stampa/en/bollettino/pubblico/2020/12/21/201221c.html>.

<sup>54</sup> *Ibidem*, para. 4.

<sup>55</sup> See *ibidem*, para. 5.



unfair advantage of the situation - not only with criminal activities but also with the enormous profits made with the occasion of medical supplies, protection masks, disinfectants, lab tests, etc., with oscillations in prices that were not certainly moved by philanthropy.

When I write these pages, we have the hope that we begin to see the light at the end of the tunnel, and we are gradually asking ourselves what will remain in our societies after the pandemic finally ends. What will the world after COVID-19 be like?

On the positive side, it has been pointed out that the coronavirus crisis may lead hopefully “to a new sense of community”, in view of the feeling of shared responsibility and the many expressions of solidarity generated in a large amount of people, especially during the first months of the pandemic. But on the other hand, there are people who have started looking at fellow human beings as a danger, as potential carriers of the virus, which has led frequently to social distancing - not just physical distancing as a precaution - “as well as growing isolation and loneliness, especially among mentally unstable individuals”<sup>56</sup>. Certainly, the polarized debate about how coercively States should proceed with vaccination is not favouring the sense of community.

At the end of the day, the scientific challenges posed by COVID-19 are new to a large extent, but, when we look for the most appropriate legal response to the problems it has caused, our best bet is likely on traditional means. From a legal perspective, the experience of the past months reveals that, especially in times of crisis, we need a scrupulous respect for the requirements of the rule of law, including a strict accountability and transparency from governments, and putting especial emphasis on the protection of fundamental rights, among which is freedom of religion or belief. Each and every limitation on a fundamental right must be precisely justified and must carefully follow the appropriate procedure, avoiding the temptation to trivialize - moved by an erroneous sense of urgency - the guarantee of what are the actual pillars of a democratic society.

Religious freedom is one of the vital freedoms that should not be easily dispensed with, not even in times of emergency. Its adequate protection requires sensibility and a dialogue with religious communities, which channel and shape a large part of the citizens’ expressions of

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<sup>56</sup> See **B. KORTMANN & G.G. SCHULZE**, *The Post-COVID World*, in Deutschland Edition, 10 March 2021, p. 35 (<https://www.deutschland.de/en/fighting-corona-together-magazine-available-for-free-download>). From the same Authors, see the interdisciplinary book in German **B. KORTMANN & G.G. SCHULZE**, *Jenseits von Corona: Unsere Welt nach der Pandemie – Perspektiven aus den Wissenschaft*, Transcript, 2020.





religiosity. Moreover, religious communities and institutions constitute a unique and valuable resource that society has at its disposal to fight against critical threats. When the hard times hit, the gigantic welfare machinery of the State is not sufficient; we must rely also on the traditional resources of society, including its ethical resources. Unlike what some would like us to believe, the State does not - and cannot - absorb the entire society, of which religious communities are an integral and essential part. Opening ways of collaboration between States and religious communities is not only a good idea, it is also a necessary condition for the State to pursue the common good of society. But cooperation requires mutual trust, and trust must be earned.

These are lessons that the COVID-19 pandemic has taught us and could be of great help in possible future extraordinary crises. And, if we apply them also to ordinary situations, it would be even better.