



Pierluigi Consorti

(full Professor of Law & Religion at University of Pisa, Department of Law)

Religious freedom before, during and after COVID-19 between Europe and the member states (a comment to Martínez-Torrón keynote address)¹

The key issue that emerges from the reports of Martínez-Torrón can be summarised in one question: “can religious freedom be guaranteed in exceptional circumstances?”.

The immediate answer is just: “yes, it can”. Clearly, we must be able to find proper ways to do that, while bearing in mind that it is not only a question of verifying whether it is possible to do so, because protecting religious freedom is not just an option among many others, but it is an unavoidable necessity.

In this regard, I want to highlight the following 4 points:

1. The coronavirus emergency outbreak suddenly, as it usually is when it comes to emergencies, and not all states were ready to tackle it, not only from a health point of view, but also from a legal viewpoint. For instance, in Italy there wasn't a framework law to handle this health emergency. The difficulties faced by scientists in the medical research field were no less than those faced by legal experts. From a legal standpoint, the current situation cannot be compared to what happened in the 1920s (Spanish flu), as the current legal principles are completely different from the ones we had back then. The different guarantees given to the rights of freedom in the two occasions are a striking example of such diversity. Lastly, we must remember that Law is a social issue, not just a system of rules; thus, emergency law must cope with the typical feelings in emergency situations - namely, fear, anxiety, and so on - and assist in determining the emergency legislation.

2. States have not always been able to work together on the identification of emergency rules. Even the EU member States have handled the emergency each in its own way, rather than being keen in maintaining the necessary level of cooperation. We know that the spread of coronavirus is not confined to any area of the globe, but it affects the whole world.

¹ Paper selected by the organizing Committee.



However, no EU law is specifically related to this issue. Given that at the EU level there is not a framework to cooperate in these special emergency circumstances, each EU State has faced the emergency by itself. The EU has hesitated to look for possibilities for cooperation, and focused only on the economic level (e.g., to buy vaccines).

3. The protection of fundamental rights requires to strike a balance: the point is «are we able to strike this balance?», especially whenever we have to balance between *fundamental* rights - in our specific case, between the right to religious freedom and public and personal health. The risk is to establish the prevalence of one right over the other, which would be then overpowered. In these cases, we talk about “tyrant rights”. They often derive from economic issues, which, in their turn, further complicate the overall picture, given that they are not a matter of fundamental right. Thus, public authority has to balance between issues of a different nature, and this makes the situation particularly entangled. Balancing techniques have stressed the States, because balancing is not an easy thing to do, and Governments have struggled to find the right proportion between the imposition of restrictions and the maintenance of guarantees of freedom. This is a question of substance and procedures. In Italy, that is also a question of division of competences - particularly, the division between the competences of the State and those of Regions, especially in health matters (other states have similar problems), as it has consequences for the sources of law. To face the pandemic, the Government adopted special decrees, which cannot in principle conflict with the law and are subject to different limitations in comparison with laws created in “normal” circumstances. This fact has consequences not only for the normal scheme of the hierarchy of law, but also for the judiciary control, as well as at the social level.

4. Lastly, we come to discuss the *status* of religious freedom in comparison to other fundamental rights and the cooperation between states and religious communities. Religious freedom does not have a privileged *status* and during the pandemic we experienced limitations on the possibility to go to places of worship, which restricted religious freedom, or, at least, one of its typical aspects (freedom of worship). This circumstance offered an unexpected opportunity: the chance to launch new models of collaboration between the State and religions that are much less formal than those provided for in the Constitution, but which are, at the very same time, very effective in finding useful solutions to limit restrictions. This kind of collaboration between the State and religious



communities is important because of the role and the social meaning of religion. Obviously, this cooperation took different forms in the context of the different EU member states - it was possible under the umbrella of Art. 17 of the TFUE, which is the proper ground to deepen this collaboration: an open and transparent dialogue between EU institutions and Churches, as well as religious, philosophical and non-religious associations.