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Religious freedom during Covid-19 in Courts' evaluation *

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ABSTRACT: The purpose of this paper is to examine the position and the scope of the right to religious freedom in the case law of the national courts of some European and non-European countries, which are called upon to establish the legitimacy or otherwise of the balancing realized by the emergency regulation against Covid-19 between this interest and the equally important one of health. Such evaluations, essentially conducted by the judges using the principle of proportionality (as well as that of reasonableness), betray, in fact, in the phase of verification of the adequacy of the measure (so-called *Verhältnismäßigkeit im engeren Sinne*) the identification of the sphere of intangibility within the right, removed from further balancing. The systems taken into consideration for this purpose are the Italian, German, French and American ones, identified as significant expressions of different regimes of relations between the State and religious denominations, and, therefore, tending to a different overall attitude of the State towards religious experience.

1 - Premise

The Covid-19 pandemic has required all States to adopt measures to manage the risk, whether remote or realised, arising from the spread of the virus. This is to protect the health of individuals, recognised and guaranteed as a fundamental right, as affirmed not only by national Constitutions but also by supranational charters of rights¹.

* Paper selected by the organizing Committee.

¹ See Art. 25, par. 1, of the Universal Declaration of Human Rights of 1948; Art. 12 of



Measures to combat the pandemic have highlighted the problems of balancing health protection with other fundamental rights and freedoms².

In this context, religious freedom has also seen its sphere of operation restricted, particularly in the dimension of the public exercise of worship, through measures that have led to the suspension of religious rites or limited the number of participants³.

The aim of this article is therefore to examine the position and scope of the right to religious freedom recognised by the case law of the national courts of some European and non-European countries - specifically, Italy, Germany, France and the United States of America - called upon to establish the legitimacy or otherwise of the balancing realized by the emergency regulation between this interest and the equally important one of health.

Such evaluations, essentially conducted by the judges using the principle of proportionality⁴ (as well as that of reasonableness⁵), betray, in

the International Covenant on Economic, Social and Cultural Rights of 1966; Art. 35 of the Charter of Fundamental Rights of the European Union of 2000. It is particularly noteworthy that Art. 12, par. 2, lett. c), ICESCR expressly mentions “*the prophylaxis, treatment and control of epidemic, endemic, occupational and other diseases*” as measures to be adopted by States to ensure the full implementation of the right to health. Cf. *ex multis* **M. SSENYONJO**, *Economic, Social and Cultural Rights in International Law*, Hart, Oxford, 2009.

² Cf. G.A. CHIESI, M. SANTISE (edited by), *Diritto e Covid-19*, Giappichelli, Torino, 2020; S. STAIANO (edited by), *Nel ventesimo anno del terzo millennio. Sistemi politici, istituzioni economiche e produzione del diritto al cospetto della pandemia da Covid-19*, Editoriale Scientifica, Napoli, 2020.

³ Cf. P. CONSORTI (edited by), *Law, Religion and Covid-19 emergency*, DiReSoM, Pisa, 2020, <https://diresom.net/2020/05/07/diresom-papers-1-ebook-law-religion-and-covid-19-emergency/>; F. BALSAMO, D. TARANTINO (edited by), *Law, Religion and the spread of Covid-19 pandemic*, DiReSoM, Pisa, 2020, <https://diresomnet.files.wordpress.com/2020/11/law-religion-and-the-spread-of-covid-19-pandemic.pdf>; J. MARTÍNEZ-TORRÓN, B. RODRIGO LARA (edited by), *COVID-19 y libertad religiosa*, Iustel, Madrid, 2021.

⁴ Cf. **A. STONE SWEET, J. MATHEWS**, *Proportionality Balancing and Global Constitutionalism*, in *Columbia Journal of Transnational Law*, 47, 2008; **A. BARAK**, *Proportionality*, Cambridge University Press, 2012.

The principle of proportionality results from the combination of three different elements: - suitability (*Geeignetheit*), which is the ability of the act to achieve the objectives which it proposes; - necessity (*Erforderlichkeit*), which, among several equally effective means, makes it possible to identify the one which has the least negative impact on the sphere of the individual; - adequacy or proportionality in the strict sense (*Verhältnismäßigkeit im engeren Sinne*), which is a “quantitative constraint on choice”, comparing and weighing the benefits arising from the pursuit of the objective at which the act is aimed against the costs it imposes on other rights and interests at stake.



fact, in the phase of verification of the adequacy of the measure (so-called *Verhältnismäßigkeit im engeren Sinne*) - which, as known, expresses the "quantitative constraint of the choice"⁶ - the identification of the sphere of intangibility within the right, removed from further balancing⁷.

The attention is focused on the German and French legal systems, as significant expressions of a regime of relations between the State and religious denominations, the first of a pact matrix⁸ - similar to the Italian one -, the second of a separatist⁹ and "lay"¹⁰ type, and, therefore, tending to a different overall attitude of the State towards religious experience.

⁵ Cf. **AA. VV.**, *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale. Riferimenti comparatistici*, Atti del seminario - Roma, Palazzo della Consulta, 13-14 ottobre 1992, Giuffrè, Milano, 1994.

Reasonableness, according to a first meaning, represents a criterion of judgement aimed at censuring the decision of a public authority which - according to the so-called *Wednesbury test*, which is the leading English case on the subject - is "so absurd that no sensible person could ever dream that it lay within the power of the authority" or "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

According to another meaning, the principle of reasonableness expresses the prohibition of arbitrary treatment, i.e. a rule of coherence of the legal system, constituting a manifestation of the principle of equality. It requires an assessment of whether, from the point of view of the *ratio legis*, it is justifiable that the contested rule should be different from the rule used as a *tertium comparationis*. Such control will be particularly rigorous (*strict scrutiny*) if the difference in rules runs counter to the strong core of the principle of equality.

⁶ Cf. **A. SANDULLI**, *La proporzionalità dell'azione amministrativa*, CEDAM, Padova, 1998, p. 373.

⁷ Cf. **J. RIVERS**, *Proportionality and Variable Intensity of Review*, in *Cambridge Law Journal*, 65, 1, 2006, pp. 174-207; **M. KUMM**, *Political Liberalism and the Structure of the Rights: On the Place and Limits of the Proportionality Requirement*, in G. PAVLAKOS (edited by), *Law, Rights, Discourse. The Legal Philosophy of Robert Alexy*, Hart, Oxford, 2007; **G. PINO**, *Diritti fondamentali e principio di proporzionalità*, in *Ragion pratica*, 2, 2014, pp. 541-556, in particular p. 550 ff.

⁸ Cf. **A. LICASTRO**, *Il diritto statale delle religioni nei paesi dell'Unione Europea: lineamenti di comparazione*, Giuffrè, Milano, 2012, p. 36 ff.; **C.G. JOPPKE**, *Religion and Loyalty in a Non-Laic Regime*, in *Quad. dir. pol. eccl.*, 1, 2016, p. 85 ff.; **H.M. HEINIG**, *The Concept of Religious Neutrality under German Constitutional Law: General Problems and Current Debates*, in *Quad. dir. pol. eccl.*, 1, 2018, p. 57 ff.; **A. FRANCIA, L. TRAPASSI**, *I rapporti giuridici fra lo Stato e la Chiesa in Germania. Lineamenti di diritto ecclesiastico*, Giappichelli, Torino, 2021.

⁹ See *loi 9 décembre 1905, concernant la séparation des Eglises et de l'Etat*. In argument, cf. **J. BOUSSINESQ**, *La laïcité française*, Éditions du Seuil, Paris, 1994; **L. GOVERNATORI RENZONI**, *La separazione tra Stato e Chiesa in Francia e la tutela degli interessi religiosi*, Giuffrè, Milano, 1977; **B. BASDEVANT-GAUDAMET**, *État et Églises en France*, in G.



From this point of view, the analysis of the jurisprudence of the Supreme Court of the United States is inspired not only by the objective of examining the approach adopted to the issue in question in a legal context outside of the so-called “European legal space”¹¹, but also by the intention of analysing the solutions adopted in a legal system which, although belonging like the French one to the separatist model¹², expresses an attitude of general favour towards the religious factor¹³.

2 - Italy: the relevance of the possibility of satisfying religious feeling through the alternatives offered by computer tools

ROBBERS (edited by), *État et Églises dans l'Union européenne*, 2th ed., Nomos Verlagsgesellschaft, Baden-Baden, 2008, p. 166 ff.; A. LICASTRO, *Il diritto statale*, cit., p. 31 ff.

¹⁰ See Art. 1 of the 1958 French Constitution, which expressly describes France as an “indivisible, laïque, démocratique et sociale”. Cf., in argument, F. MARGIOTTA BROGLIO, *Stato e religioni nella Francia separatista e nell'Italia concordataria. Verso un modello europeo di laicità?*, in *Rivista di Studi Politici Internazionali*, 4, 2006, p. 562 ff.; M. d'ARIENZO, *La laicità francese: “aperta”, “positiva” o “im-positiva”?*, in *Stato, Chiese e pluralismo confessionale*, Online journal (<https://www.statoechiese.it>), December 2011; EAD., *La “religione della laicità” nella Costituzione francese*, in P. BECCHI, V. PACILLO (edited by), *Sull'invocazione a Dio nella Costituzione federale e nelle Carte fondamentali europee*, Eupress-FTL, Lugano, 2013, p. 139 ff.; P. VALDRINI, *Il principio di laicità nel diritto francese. Neutralità dello Stato e libertà dei cittadini*, in *Eph. iur. can.*, 2015, p. 39 ff.

¹¹ On the meaning of “European legal space” cf. A. VON BOGDANDY, *Il diritto europeo oltre l'Unione sempre più stretta: ricostruzione del concetto e della metodologia comparativa della Corte di giustizia*, in *Il diritto dell'Unione europea*, 1, 2017, p. 9 ff.

¹² Cf. M. TEDESCHI, *Stato e Chiese negli Stati Uniti d'America*, in *Vecchi e nuovi saggi di diritto ecclesiastico*, Giuffrè, Milano, 1990, p. 104 ff.; ID., *Alle radici del separatismo americano*, in *Archivio giuridico Filippo Serafini*, 2006, p. 157 ff.; F. ONIDA, *Il fenomeno religioso nei sistemi giuridici extraeuropei*, in F. MARGIOTTA BROGLIO, C. MIRABELLI, F. ONIDA, *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, il Mulino, Bologna, 2000; G. D'ANGELO, *Libertà religiosa e diritto giurisprudenziale. L'esperienza statunitense*, Giappichelli, Torino, 2015.

¹³ Cf. P. SCHAFF, *Church and State in the United States, or the American Idea of Religious Liberty and Its Practical Effects, With Official Documents*, Charles Scribner's Sons, New York, 1888, in which is exposed the well-known formula “[Religious liberty] is freedom in religion, not freedom from religion”; M.W. McCONNELL, *Accomodation of religion: an update and a response to the critics*, in *George Wash. L. Rev.*, 1992, p.685 ff.; C. CARDIA, *Stato e confessioni religiose. Il sistema pattizio*, il Mulino, Bologna, 1992, p. 30 ff.



In Italy, during the first phase of the emergency, measures were adopted that drastically limited the public exercise of religion, which is generally protected by Article 19 of the Constitution¹⁴.

In contrast to what happened in other countries, there were no questions of legitimacy in terms of violation of religious freedom brought before the courts, except for a monocratic decree of the *Tribunale Amministrativo Regionale* (Administrative Regional Court) of Lazio, which will be returned to shortly.

In spite of the undoubted tension to which religious freedom was subjected by the first measures, the enhancement of loyal and reciprocal cooperation between the State and religious confessions - elevated, as is well known, as regards relations with the Catholic confession to the rank of principle by Article 1 of the 1984 Agreement between the Italian Republic and the Holy See¹⁵ - had prevented potential conflicts that could arise from measures drawn up, inter alia, without prior agreement with the ecclesiastical authority¹⁶.

More specifically, with Art. 2, par. 1, lett. v), Prime Ministerial Decree of 8 March 2020¹⁷, as well as with the combined provisions of Art. 1, par. 1, Prime Ministerial Decree of 9 March 2020¹⁸ and Article 1, par. 1, letter i), Prime Ministerial Decree of 8 March 2020, it was established that:

“the opening of places of worship is conditional on the adoption of organisational measures such as to avoid crowds of people, taking

¹⁴ “All people have the right freely to profess their religious faith in any form, individually or in association, to propagate it and to worship in private or in public, except for rites contrary to public morality” (my translation).

¹⁵ “The Italian Republic and the Holy See reaffirm that the State and the Catholic Church are, each within its own order, independent and sovereign, committing themselves to full respect for this principle in their relations and to mutual cooperation for the promotion of the human person and the good of the Country” (my translation). Cf. **G. LO CASTRO**, *Ordine temporale, ordine spirituale e promozione umana. Premesse per l'interpretazione dell'art. 1 Accordo di Villa Madama*, Giuffrè, Milano, 1985; **G. CASUSCELLI**, *La crisi economica e la reciproca collaborazione tra le Chiese e lo Stato per “il bene del Paese”*, in *Stato, Chiese e pluralismo confessionale*, cit., October 2011; **O. FUMAGALLI CARULLI**, *Lo Stato italiano e la Chiesa cattolica: indipendenza, sovranità e reciproca collaborazione (a proposito dell'art. 1 Accordo di revisione concordataria)*, in *Stato, Chiese e pluralismo confessionale*, cit., no. 3 of 2014.

¹⁶ Cf. **F. BALSAMO**, *The loyal collaboration between State and religions at the testing bench of the Covid-19 pandemic. A perspective from Italy*, in P. CONSORTI (edited by), *Law, Religion and Covid-19 Emergency*, cit., p. 47 ff.

¹⁷ Cf. G.U. 8 March 2020, no. 59 (available at <http://gazzettaufficiale.it>).

¹⁸ Cf. G.U. 9 March 2020, no. 62 (available at <http://gazzettaufficiale.it>).



into account the size and characteristics of the places, and such as to ensure that visitors are able to respect the distance between them of at least one meter referred to in Annex 1 letter d). Civil and religious ceremonies, including funeral ceremonies, are suspended”.

On the basis of this rule, churches and, in general, places of worship can be open, provided that distances can be maintained within them, but the ban on holding “ceremonies” persists.

The rationale of the measure is clear and the decision is the result of a prior discriminating choice between “essential” and “non-essential” services, which the government authority took on the basis of political discretion, deciding that the needs of public manifestation of worship are not “essential” and therefore should certainly be prohibited¹⁹.

In line with the downward trend of the epidemiological curve, the Prime Ministerial Decree of 26 April 2020²⁰ provided for some relaxation of the restrictions ordered by the previous measures.

To this end, for example, travel has been allowed “to meet relatives, provided that the prohibition on gathering and interpersonal distances of at least one meter are respected and that respiratory protection is used” (Art. 1, par. 1., lett. a)), or the number of commercial activities (Art. 1, par. 1, lett. z)) and production activities (Art. 2, par. 1) that may be carried out has been extended.

With regard to religious activities, Art. 1, par. 1, letter i), of the cited decree, besides confirming the rule which subordinates the opening of places of worship to the adoption of organizational measures guaranteeing the interpersonal distance, has permitted

“funeral ceremonies with the exclusive participation of relatives and, in any case, up to a maximum of 15 persons, with functions to be held preferably in the open air, wearing respiratory protection and strictly respecting the interpersonal safety distance of at least one meter”.

This measure, unlike the previous limitations, was not welcomed by the Italian Episcopal Conference, which issued a press release²¹ stating that the exclusion of the possibility of celebrating Mass with the people

¹⁹ On this point, please refer to **V. D’ALÒ**, *Covid-19: limitations to public worship in Italy, Spain and Poland*, in P. CONSORTI (edited by), *Law, Religion*, cit., p. 73 ff.; **ID.**, *La libertà religiosa nell’emergenza da Covid-19*, in G.A. CHIESI, M. SANTISE (edited by), *Diritto e Covid-19*, cit., p. 561 ff.

²⁰ Cf. G.U. 27 April 2020, no. 108 (available at <http://gazzettaufficiale.it>).

²¹ See *Nota dell’Ufficio Nazionale per le Comunicazioni Sociali* of 26 April 2020, no. 34 (available at <https://comunicazionisociali.chiesacattolica.it/dpcm-la-posizione-della-cei/>).



was “arbitrary”, and complaining about the violation of freedom of worship and the Church's autonomy. Criticisms were soon overcome with the signing of a bilateral protocol on 7 May 2020, and its subsequent implementation in the Prime Minister's Decree of 17 May 2020²², which regulates the resumption of religious services with the participation of the faithful as of 18 May 2020. This solution was also discussed with the representatives of non-Catholic denominations.

The decree of 26 April 2020 was the subject of an application for a monocratic precautionary measure before the *Tribunale Amministrativo Regionale* of Lazio²³, which, in disregarding it, held that the sacrifice of the need to physically participate in religious ceremonies could be temporarily offset by the possibility of satisfying one's religious sentiments by taking advantage of the numerous alternatives offered by computer tools.

However, it should be noted that the grounds for the above-mentioned decision are limited to verifying the reasons of “extreme gravity and urgency”, such as “do not allow even the delay until the date of the council chamber” (see art. 56, paragraph 1, legislative Decree no. 104 of 2 July 2010 - Administrative Procedure Code). These requirements were clearly not met in this case.

It is not possible, therefore, to deduce a full assessment of the measure by the administrative judges, except that the Government's choice appeared at least appropriate to the objective pursued.

3 - Germany: the non-belonging of the public exercise of worship to the *Wesensgehalt* of the right to religious freedom

In Germany, questions of the legitimacy of emergency measures from the point of view of violation of religious freedom have been the subject of rulings by the courts of the various *Länder*, as well as the *Bundesverfassungsgericht*, which is ultimately referred to the institution of *Verfassungsbeschwerde* (Art. 93, par. 4, *Grundgesetz* - GG²⁴).

²² Cf. G.U. 17 May 2020, no. 126 (available in <http://gazzettaufficiale.it>).

²³ Cf. T.A.R. Lazio, Roma, First Section, decree of 29 April 2020, no. 3453 (available at <https://www.giustizia-amministrativa.it>).

²⁴ “The Federal Constitutional Court shall decide: [...] 4a. on appeals for constitutionality (*Verfassungsbeschwerden*) which may be brought by any person who considers that one of his fundamental rights or one of the rights provided for in Articles 20, par. 4, 33, 38, 101, 103 and 104 has been infringed by the public authority” (my



On the basis of the *Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz, IfSG)*²⁵ of 2000, the State may order restrictions and limitations even to constitutionally recognised fundamental rights, the implementation of which is left to the individual *Länder* through their own legislation²⁶.

For the purposes of this discussion, two cases deserve to be examined in order to appreciate the role played by the principle of proportionality.

The first arose from an administrative appeal lodged by a Pontifical Society of Apostolic Life against the *Verordnung über erforderliche Maßnahmen zur Eindämmung der Ausbreitung des neuartigen Coronavirus SARS-CoV-2* of Berlin, which had banned religious celebrations open to the public, either outdoors or indoors, as they were a source of potentially dangerous gatherings²⁷. However, places of worship were allowed to be open for individual visits.

At first instance, the application was rejected by the *Verwaltungsgericht* of Berlin²⁸, which stated that the measure did not infringe the right to free exercise of religion, recognised and guaranteed by Art. 4, par. 2, GG²⁹.

In fact, the *Gericht* found that the prohibition of religious ceremonies is, first of all, a measure proportionate to the aim of protecting the right to life and physical integrity protected by Art. 2, par. 2, GG³⁰.

translation).

²⁵ Available at <https://www.gesetze-im-internet.de/ifsg/ifsg.pdf>

²⁶ See, in particular, parr. 28a and 28b (*Special protective measures to prevent the spread of coronavirus disease-2019 (Covid-19)*).

²⁷ Cf. GVBl. S. 220, ber. S. 224 (available at https://lexcorona.de/lib/exe/fetch.php?media=rechtsakteland:berlin:ber_eindaemmungsmassnahmenvo-nach-senat-2020-03-22.pdf).

²⁸ VG Berlin, ordinance of 7 April 2020, no. 14/L/32/20 (available at <https://gesetze.berlin.de/bsbe/document/JURE200007387>).

²⁹ Art. 4 GG: “1. Freedom of opinion, of conscience and freedom of religious and ideological confession are inviolable. 2. The free exercise of worship shall be guaranteed. 3. No one may be compelled against his conscience to perform armed service in time of war. The details are laid down in a federal law” (my translation).

³⁰ Art. 2 GG: “1. Everyone has the right to the free development of his or her personality, insofar as he or she does not violate the rights of others or transgress the constitutional order or moral law. 2. Everyone has the right to life and physical integrity. The freedom of the person is inviolable. Only the law may restrict these rights” (my translation).



Above all, however, the restriction imposed does not constitute a violation of the freedom to worship, since the possibility of going individually to pray in places of worship and attending religious services by means of telematic and computerised means are still permitted.

The *Oberverwaltungsgericht* (Higher Administrative Court) of Berlin-Brandenburg³¹ followed the same line of argument, confirming the decision of the court of first instance and pointing out that the measure did not affect the substance of religious freedom, but rather the way it is organised.

Lastly, the matter was referred to the *Bundesverfassungsgericht*, which rejected the request for a "suspensive order" in an order dated 10 April 2020³², stating that the contested measure was proportionate to the contingent need to protect health and physical integrity, although any extension would require a further rigorous examination of its proportionality.

In an order dated 29 April 2020³³, the Federal Constitutional Court came to a partially different conclusion with regard to the Lower Saxony regulation challenged by the local Islamic community, which established a total ban on assembling in places of worship³⁴.

In support of its appeal, the applicant association invoked not only a violation of Art. 4 GG, but also of the principle of equality under Art. 3, par. 1, GG, complaining that situations of assembly involving less constitutionally protected interests - for example, queues in front of shops - were allowed, while the inter-personal safety distance of 1.5 meters was established.

However, while the *Oberverwaltungsgericht* of Lünenburg³⁵ considered the measure proportionate, since its effects were limited in

³¹ OVG Berlin-Brandenburg, 8 April 2020, no. 11/S/21/20 (available at <https://openjur.de/u/2257561.html>).

³² Bundesverfassungsgericht, Erster Senat, 10 April 2020, no. 1/BVQ/31/20 (available at https://www.bverge.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200410_1bvq003120.html).

³³ Bundesverfassungsgericht, Erste Senat, 29 April 2020, no. 1/BVQ/44/20 (available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429_1bvq004420.html).

³⁴ Cf. §§ 2, 8 and 9 of *Niedersächsische Verordnung zum Schutze vor Neuinfektionen mit dem Corona-Virus* of 17 April 2020, as modified by *Änderungsverordnung* of 24 April 2020 (available at https://lexcorona.de/lib/exe/fetch.php?media=rechtsakteland:niedersachsen:niedersaechsische_verordnung_zum_schutz_vor_neuinfektionen_mit_dem_corona-virus_vom_17._april_2020.pdf).

³⁵ OVG Niedersachsen, 23 April 2020, no. 13/MN/109/20 (available at <https://openjur.de/u/2199303.html>).



time and involved only the expression of collective religious freedom, and not also the possibility of exercising forms of spiritual assistance and outdoor religious services, the *Bundesverfassungsgericht* considered the measure disproportionate in its absolute nature. More specifically, the Constitutional Court stated that the principle of proportionality would be breached if a religious community was able to provide the health authority with guarantees to exclude the risk of the virus spreading.

From the assessments of the German judges, it seems to be possible to infer that the dimension of the public exercise of religion does not belong to the essential content (*Wesensgehalt*) of the right to religious freedom provided for in Article 4 of the GG. In fact, according to Art. 19, par. 2, GG, “under no circumstances may a fundamental right be infringed in its essential content (*Wesensgehalt*)”.

On the other hand, the relationship with a minister of religion for the purpose of spiritual assistance seems to be taken into account differently, both in law and in case law, since it constitutes, as the *Amtsgericht* of Altenburg (Thuringia)³⁶ pointed out in an appeal brought by a Lutheran pastor against the absolute ban on access to places of care, the heart of the Churches’ duties. Moreover, the *Infektionsschutzgesetz*, the federal law on health emergencies, expressly states that in the event of quarantine, the minister of religion involved in the care of souls must always be allowed to visit the sick person, in compliance with all safety procedures (Art. 30, par. 4), while “other persons” may be admitted at the discretion of the attending doctor.

4 - France: the suspension of religious ceremonies as a “serious and manifestly unlawful interference” with religious freedom

As far as French law is concerned, mention should be made of the decision of the *Conseil d’État* no. 440366 of 18 May 2020³⁷, rendered in *référé-liberté*³⁸.

³⁶ *Amtsgericht Altenburg*, 14 April 2020, no. 26/ar(bd)/24/20 (available at https://www.Thueringen.de/th4/olg/gerichte_in_thueringen/landgericht_gera/amtsgericht_altenburg/index.asp).

³⁷ *Conseil d’État*, 18 May 2020, no. 440366 (available at <https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-18-mai-2020-rassemblements-dans-les-lieux-de-culte>).

³⁸ This is an emergency procedure, provided for by French law in a Article L. 512-2 of the Code of Administrative Justice, which can be initiated in the event of a serious breach of fundamental freedoms by a public authority, and in respect of which the court before



This ruling concerns the Decree of the President of the Council of Ministers no. 2020-548 of 11 May 2020 - which, in laying down measures to combat the pandemic in the so-called “phase 2” - established in Art. 10, par. 3³⁹, the permanence of the prohibition of any gathering or meeting in places of worship, with the exception of funeral ceremonies, limited to twenty people.

The *Conseil d'État* considered that such a provision was “disproportionate to the objective of preserving public health” and that, therefore, given the essential nature of collective participation in worship, it constituted “a serious and manifestly unlawful interference”⁴⁰ with freedom of worship.

In fact, the *Conseil d'État* states that measures aimed at safeguarding the health of the population may limit the exercise of fundamental rights and freedoms; however, they must be “necessary, appropriate and proportionate to the objective of protecting public health which they pursue”⁴¹.

The Supreme Administrative Court then pointed out that freedom of worship, as recognised by Art. 10 of the *Declaration de droit de l'homme et du citoyen* of 1798⁴², Arts. 1 and 25 of the *Loi de separation* of 9 December 1905⁴³ and Art. 9 ECHR

“is not limited to the right of each individual to express the religious convictions of his choice in compliance with public order”, but includes “among its essential components, the right to participate collectively, with the same reservation, in ceremonies, in particular in places of worship”⁴⁴.

which the case is brought is required to give its ruling within 48 hours.

³⁹ Available at <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000041898824/2020-05-21/>.

⁴⁰ Cf. *Conseil d'État*, 18 May 2020, no. 440366, par. 34.

⁴¹ *Ibidem*, par. 6.

⁴² “No one shall be harassed for his or her opinions, including religious opinions, provided that the manifestation of such opinions does not disturb the public order established by law” (my translation).

⁴³ Art. 1: “The Republic guarantees freedom of conscience. It guarantees the free exercise of religion subject only to the following restrictions in the interests of public order” (my translation).

Art. 25: “Reunions for the celebration of worship held in premises belonging to a religious association or placed at its disposal are public. They are exempt from the formalities of Article 8 of the Law of 30 June 1881, but remain under the control of the authorities in the interest of public order” (my translation).

⁴⁴ *Conseil d'État*, cit., par. 11.



The Court's reasoning also includes considerations of reasonableness and equal treatment.

In fact, the decree of 11 May 2020 provides for less restrictive regimes for access to the public for a number of activities, some of which are exposed to a greater risk than religious ceremonies (e.g. passenger transport services). Activities, it is stressed, in which “the fundamental freedoms at stake are not the same”⁴⁵.

The amendment in the sense indicated by the Conseil d'État was then made by Decree No 2020-604 of 20 May 2020⁴⁶.

5 - United States of America: the participation in religious services as the “heart of the First Amendment’s guarantee of religious liberty”

With regard to the assessment of the legitimacy of the measures adopted in the United States to combat the pandemic by limiting religious freedom, it is particularly interesting to analyse two cases brought to the attention of the United States Supreme Court, namely *South Bay United Pentecostal Church v. Newsom*⁴⁷ and *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*⁴⁸, which, although they challenge substantially similar measures, have different outcomes for the following reasons.

Before proceeding to a brief analysis of the arguments of the *opinions* rendered in the two cases that appear to be most significant for the different outcomes they reach, it seems appropriate to briefly recall that in the American legal system, religious freedom is specifically covered by the *free exercise clause* of the First Amendment of the US Constitution⁴⁹, which, according to the consolidated interpretation of the American Supreme Judges, prohibits the adoption of acts that limit or

⁴⁵ *Ibidem*, par. 32.

⁴⁶ Available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041897835/>.

⁴⁷ U.S. Supreme Court of the United States, *affaire* South Bay United Pentecostal Church et alii v. Gavin Newsom, Governor of California et alii, 29 May 2020, 590 U.S. (2020), available at https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf.

⁴⁸ U.S. Supreme Court of the United States, *affaire* Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York, 25 November 2020, 592 U.S. (2020), available at https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf.

⁴⁹ “Congress shall make no law respecting an establishment of religion (Establishment Clause), or prohibiting the free exercise thereof (Free Exercise Clause)”.



prohibit a certain activity solely because of its religious character or impose a specific burden on conduct that expresses religious beliefs⁵⁰.

Having said that, in the *South Bay United Pentecostal Church* case, the Supreme Court ruled on a *preliminary injunctive order* - i.e. a request for a precautionary suspension - against an executive order issued by the Governor of the State of California, which limited the presence in places of worship to 25% of the building's capacity or, in any case, to a maximum of 100 people. This order, in fact, amended the measures originally challenged before the State Court, which had ordered the closure of all non-essential activities, including places of worship.

On 29 May 2020, the supreme judges rejected the recourse by a majority of five votes to four, without providing any shared reasons (*per curiam*).

Within the majority, only *Chief Justice* Roberts wrote a *concurring opinion*⁵¹, in which he pointed out that the restrictions adopted by the Governor of California, first consisting in the total closure of places of worship, then in their reopening with restrictions, did not violate the *free exercise Clause* of the First Amendment, since the discriminatory nature of the restriction was not "indisputably clear", since other non-religious activities - such as conferences, concerts and theatrical performances - are also subject to more or less similar restrictions. To this conclusion, *Justice* Roberts also points out that with respect to "*political questions*", such as the protection of health, where decisions on the point are related to factual contingencies and medical and scientific knowledge is uncertain, the federal judiciary must adopt a "deferential" approach, ensuring the public authorities the necessary margin of action.

Of particular interest, however, is the *dissenting opinion* drawn up by *Justice* Kavanaugh and shared by *Justices* Gorsuch and Thomas⁵², who, on the other hand, found a violation of the free exercise clause, since the contested measures discriminate against places of worship with respect to other comparable activities and contexts.

⁵⁰ Cf. in argument **B. RANDAZZO**, *Le laicità*, in *Stato, Chiese e pluralismo confessionale*, cit., October 2008, p. 59 ff. and, in particular, the cases cited there.

⁵¹ U.S. Supreme Court of the United States, *affaire* South Bay United Pentecostal Church et alii v. Gavin Newsom, Governor of California et alii, 29 May 2020, 590 U.S. (2020), pp. 1-3 (available at https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf).

⁵² U.S. Supreme Court of the United States, *affaire* South Bay United Pentecostal Church et alii v. Gavin Newsom, Governor of California et alii, 29 May 2020, 590 U.S. (2020), pp. 4-6 (available at https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf).



Moreover, the dissenters point out that “California has ample options that would allow it to combat the spread of COVID-19 without discriminating against religion”, limiting itself, for example, to providing for respect for social distance during participation in religious ceremonies.

The latter observation constitutes no more than an application of the principle of proportionality, from the point of view of the necessity of the measure, since, according to the *dissenting opinion*, the objective of protecting public health could be achieved by means less invasive of freedom of religion.

The principle of proportionality, together with the principle of reasonableness, is the cornerstone of the *per curiam* opinion in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, in which the Supreme Court marks a strong discontinuity with its precedents.

In the case in question, the Supreme Court was called upon to rule on the application for injunctive relief submitted by the Catholic Diocese of Brooklyn, with which the Agudath (an organisation representing Jewish *haradim*) was associated, against the executive order of 6 October 2020 issued by the Governor of the State of New York, which divided the territory of the State into three risk zones (yellow, orange and red), setting a limit of ten people in the red zones and 25 in the orange zones for access to places of worship.

While the State Courts rejected the application for precautionary suspension, the Supreme Court, on the other hand, found that the conditions for granting it were met.

From the point of view of *fumus boni iuris*, the judges considered that the contested restrictions violated “the minimum requirement of neutrality” with regard to religion. In fact, it is noted that in the red zone, while a synagogue or a church cannot admit more than 10 people, businesses classified as “essential” - including acupuncture centres, campsites, garages - can admit as many people as they want without any limit. This inequality of treatment is even more evident in the orange zone, where even “non-essential” businesses can decide for themselves how many people to admit.

Consequently, restrictions on access to places of worship cannot be considered “neutral” and of “general applicability”. Therefore, they must satisfy *strict scrutiny*, i.e. they must be narrowly tailored to serve a compelling state interest. In other words, it must be verified that they restrict freedom of worship just enough to stem contagion.

This is not the case, since the contested measures are much stricter than what is shown to be necessary to prevent the spread of the virus in the applicants' services and there are many other rules that are less



restrictive than those that could be adopted to minimise the risk to those attending religious services.

The ruling also states that it is difficult to believe that admitting more than 10 people into a 1,000-seat church or a 400-seat synagogue would create a greater health risk than the many other activities that the State permits.

It can therefore be said that in the Court's assessment the measures adopted by the State of New York are in tension with the criteria of reasonableness and proportionality.

Finally, it is important to highlight what the Supreme Court said about the *periculum in mora* and the absence of prejudice to the public interest.

The judges state that

“the loss of First Amendment freedoms, even for minimal periods of time, undoubtedly constitutes irreparable harm”. Indeed, “[t]he remote viewing [of religious services] is not the same thing as personal participation. Catholics watching a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal presence”.

The Court ultimately considers attendance at “religious services” to be “the heart of the First Amendment's guarantee of religious liberty”. And since “even in a pandemic, the Constitution cannot be put away and forgotten” it is necessary to “conduct a serious examination of the need for such a drastic measure” as attending religious ceremonies.

The Court came to a similar conclusion in the application for injunctive relief in the *South Bay* case of 5 February 2021⁵³, thus adopting a decision to the contrary of that made in the interlocutory proceedings.

6 - Concluding remarks

The application of the principles of proportionality and reasonableness in assessing the legitimacy of measures restricting the right to exercise religious freedom has led to different outcomes in the various rulings of national courts.

⁵³ U.S. Supreme Court of the United States, *affaire South Bay United Pentecostal Church et alii v. Gavin Newsom, Governor of California et alii*, 5 February 2021, 592 U.S. (2021), available at https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf.



With regard to proportionality, there is first of all a different assessment of the necessity or adequacy of the measure, i.e. the tolerability of the compression of the right to religious freedom in relation to the interest of protecting public health pursued.

While the French *Conseil d'État* held that the suspension of religious ceremonies constituted a “serious and manifestly unlawful interference” with religious freedom, given the “essential nature” of collective participation in worship, German judges, on the other hand, generally held that the ban on religious celebrations open to the public was a proportionate measure in relation to the objective of protecting the right to life and physical integrity and that, in particular, there was no violation of the right to the free exercise of religion within the meaning of Art. 4, par. 2, GG.

The Italian judge, on the other hand, did not see any serious and irreparable damage such as to justify the issuing of a monocratic precautionary measure *inaudita altera parte* in the prohibition of religious ceremonies, considering that the sacrifice of that interest was temporarily offset by the possibility of satisfying one's religious feelings with the help of telematic and computerised tools (i.e. streaming of religious ceremonies).

On the other hand, in the case of *Diocese of Brooklyn v. Cuomo*, the Supreme Court of the United States went so far as to hold that there was no need for a measure limiting the number of participants in religious ceremonies; an assessment that was also linked to the finding of unequal treatment with respect to places of worship, as well as to the explicit statement that participation in “religious services” constitutes “the heart of the First Amendment's guarantee of religious freedom”.

While the assessment of necessity is unquestionably related to the concrete factual situation that serves as a basis for the various measures, it is of fundamental interest to note the different consideration given in the judgments analysed to the dimension of the public exercise of religion in the context of the regulation of the right to religious freedom.

Whereas French and American judges expressly affirm the essential nature of collective participation in religious rites, German judges take a different view. They seem to see the hard core of religious freedom in the possibility of satisfying one's own religious sentiments, to which collective participation in worship is merely instrumental. This is how the assessment of the adequacy of the measures to suspend religious ceremonies should be interpreted, given the possibility of satisfying one's religious feelings through other means, such as individual prayer, even in the place of worship, or through information technology.



In conclusion, there are two profiles that seem to emerge from the analysis carried out.

The first is that - at least with reference to the current historical phase - the dimension of the collective exercise of worship is not unequivocally considered to belong to the essential content of the right to religious freedom, *i.e.* to what the regulation of this right cannot absolutely not include, as such not susceptible to further balancing.

From a comparative point of view, it is extremely interesting to note that the recognition of the essential nature of the faculty of collective exercise of worship within the content of the right to religious freedom comes from systems expressing the separatist model, as opposed to those of the covenant type, where it seems to be reduced to the possibility of satisfying one's own religious sentiment. While this circumstance is not particularly surprising in the case of the American system, which is characterised by a traditional *favor religionis*, it may be unexpected in the case of the French system, where the idea of *laïcité*, although it has evolved in the sense of guaranteeing the pluralism of society through neutrality in religious matters, was historically born in the sense of a *laïcité de combat*, hostile and combative with respect to denominational claims⁵⁴.

⁵⁴ Cf. M. d'ARIENZO, *La laicità francese*, cit., p. 3 ff.