



**Matteo Giannelli**

(Post-Doc Research Fellow in Public Law at University of Florence,  
Department of Legal Sciences)

## **Unilateralism and Bilateralism in the Restrictions on Worship in Italy During the Pandemic \***

**TABLE OF CONTENTS: 1. Introduction - 2. The Italian constitutional framework and the principle of pactional bilaterality - 3. Restrictions on worship after the first phase of the pandemic - 4. The impact of the Protocols on the system of sources of Ecclesiastical law - 5. Conclusions. From bilaterality to “loyal cooperation”?**

**ABSTRACT:** This contribution presents an investigation through the legal sources on which the restrictions on worship were imposed with the aim of verifying whether, and how, the normative management of the pandemic affected the bilaterality that characterizes relations between the State, the Catholic Church, and the various religious denominations. The main point of reference for the analysis will be the contents of the decree-laws, the Prime Ministerial Decrees (DPCM) and their annexes and the aim is to verify, in the context of the peculiar Italian ecclesiastical policy, the differences in treatment between the Catholic Church, religions with an agreement and religions without an agreement.

### **1 - Introduction**

During the Covid-19 pandemic, also freedom of worship was balanced with other fundamental rights<sup>1</sup>. The need to protect public health and fulfil the duties of social solidarity led to numerous restrictions: the proportionality, non-discrimination and consistency of these restrictions has been widely discussed by scholars<sup>2</sup>. At the same time, the closure of

---

\* Paper selected by the organizing Committee.

<sup>1</sup> See generally, for a comparative perspective, **J. MARTÍNEZ-TORRÓN**, *Covid-19 and Religious freedom: Some Comparative Perspectives*, in *Laws*, 10(2), 2021, 39 (available at <https://www.mdpi.com/2075-471X/10/2/39/html>). **P. MAZURKIEWICZ**, *Religious Freedom in the Time of the Pandemic*, in *Religions*, 12(2), 2021, 103 (available at <https://doi.org/10.3390/rel12020103>).

<sup>2</sup> The Italian scholarly debate on these topics is so extensive that it would be impossible to tackle it in its entirety. See **V. PACILLO**, *La sospensione del diritto di libertà*



places of worship and the suspension of liturgies has been decreed not only as a mere consequence of State regulations, but in some cases independently of religious organizations<sup>3</sup>. Other questions on the legitimacy of the limitations have specifically referred to the freedom of worship of Catholics, as a reflection of the specific protection assigned to the Roman Catholic Church under Article 7 of the Italian Constitution.

Based on these considerations, my contribution intends to carry out an investigation through the legal sources on which the restrictions on worship were imposed, with the aim of verifying whether, and how, the normative management of the pandemic affected the bilateralism that characterizes relations between the State, the Catholic Church, and the various religious denominations.

This, then, is the central question. Does the constant appeal to unilateral production, based on the principle of secularism, affect the constitutional model, which expressly mentions bilateral sources? Does it constitute a revision, an inconsistent abandonment of the constitutional model based on the agreement model?<sup>4</sup>

The main point of reference for my analysis will be the contents of the Decree-laws and the Prime Ministerial Decrees (DPCM) and their annexes<sup>5</sup>. My aim is to verify, in the context of the Italian ecclesiastical policy, the differences in treatment between the Catholic Church, religion

---

*religiosa nel tempo della pandemia*, in *Oliv.it*, 16 March 2020; **N. COLAIANNI**, *La libertà di culto al tempo del coronavirus*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica (<https://www.statoechiese.it>), 7, 2020, p. 25 ff.; **P. CONSORTI**, *La libertà religiosa travolta dall'emergenza*, in *Forum di Quaderni Costituzionali*, 2/2020, p. 369 ff.; **G. MACRÌ**, *La libertà religiosa alla prova del Covid-19. Asimmetrie giuridiche nello "stato di emergenza" e nuove opportunità pratiche di socialità*, in *Stato, Chiese e pluralismo confessionale*, cit., 9, 2020, p. 23 ff.; **F. ALICINO**, *Costituzione e religione in Italia al tempo della pandemia*, in *Stato, Chiese e pluralismo confessionale*, cit., 19, 2020, p. 1 ff.

<sup>3</sup> See **M.L. LO GIACCO**, *In Italy the Freedom of Worship is in Quarantine too*, in P. CONSORTI (ed.), *Law, Religion and Covid 19 Emergency*, DiReSoM Papers 1, 2020, pp. 37-44. **M. MASSA**, *I limiti al culto pubblico durante la pandemia*, in *Quaderni costituzionali*, 3/2020, pp. 602-605; **P. CONSORTI**, *La libertà religiosa*, p. 379.

<sup>4</sup> **N. COLAIANNI**, *Laicità e prevalenza delle fonti di diritto unilaterale sugli accordi con la Chiesa cattolica*, in *Politica del diritto*, 2/2010, p. 184.

<sup>5</sup> For an overview **S. CIVITARESE MATTEUCCI**, **A. PIOGGIA**, **G. REPETTO**, **D. TEGA**, **M. PIGNATARO**, **M. CELEPIJA**, *Italy: Legal Response to Covid-19*, in J. KING, O. L.M. FERRAZ et al. (eds.), *The Oxford Compendium of National Legal Responses to Covid-19*, Oxford University Press, 2021 (available at <https://oxcon.oup.com/view/10.1093/law-occ19/law-occ19-e11>).



organizations with an agreement and without an agreement<sup>6</sup>. The main acts will undoubtedly include the annexes to the DPCM of the 17th of May 2020 reproducing the Protocols on the resumption of celebration signed also with the religious denominations that have not signed agreements with the State<sup>7</sup>.

The contribution of the Technical and Scientific Committee (CTS), whose meetings defined the measures that were then applied, should not be underestimated<sup>8</sup>. It is not by chance, in fact, that the criticism from the Italian Bishops' Conference (CEI), contained in the statement of the end of April 2020, was also addressed to this body<sup>9</sup>.

Moreover, some of these considerations may be considered in the light of the peculiarities and possible developments of the discipline related to the so-called green pass (Decree Law No. 105 of 2021). This discipline does not apply to the performance of religious services but is, instead, autonomously adopted by individual religious denominations for the performance of other activities that take place indoors (e.g. catechism)<sup>10</sup>.

In summary, my contribution aims at comparing the structural weakness of a system - based on the differentiation between majority and minority confessions - with the necessary equidistance and neutrality of the State, known as the main result of the supreme principle of secularism.

---

<sup>6</sup> On the fragile balance between mainstream religions and religious minorities during the pandemic see **A. MADERA**, *The Implications of the COVID-19 Pandemic on Religious Exercise: Preliminary Remarks*, in *Laws*, 10(2), 2021, 44 (available at <https://doi.org/10.3390/laws10020044>).

<sup>7</sup> See *infra* paragraph 4.

<sup>8</sup> On the relationship between politics and science in the pandemic context and on the experience of the body established by art. 2 of the order of the Head of the Department of Civil Protection No 630 of February 3, 2020, see **A. IANNUZZI**, *Leggi "science driven" e CoViD-19. Il rapporto fra politica e scienza nello stato di emergenza sanitaria*, in *Biolaw Journal - Rivista di BioDiritto*, Special Issue 1/2020, p. 119 ss., **F. LAVIOLA**, *La decisione politica science-based e il ruolo del Comitato tecnico-scientifico nella gestione dell'emergenza Covid-19 tra arbitrarie pretese di segretezza e riaffermazione del diritto alla trasparenza*, in *Federalismi*, 20/2021, p. 127 ss., **S. PENASA**, *Scienza, comitati tecnici e responsabilità politica: spunti da un'analisi comparata dei modelli di consultazione scientifica durante l'emergenza Covid-19*, in **A. PAJNO, L. VIOLANTE** (eds), *Biopolitica, pandemia e democrazia. Rule of law nella società digitale*. Vol. II. *Comunicazione, etica e diritti*, il Mulino, Bologna, 2021, p. 59 ss.

<sup>9</sup> See *infra* paragraph 3.

<sup>10</sup> See the letter sent, on September 8, 2021, by the CEI Presidency to all the Bishops at the beginning of the new pastoral year (available at <https://www.chiesacattolica.it/curare-le-relazioni-al-tempo-della-ripresa/>).



My final aim is to assess the repercussions on the form of state in the (post-) emergency period.

## 2 - The Italian constitutional framework and the principle of pactional bilaterality

Religion is the subject of multiple provisions in the Italian Constitution: in the articles specifically dedicated to it<sup>11</sup>, in the statement of the principle of formal equality in Article 3, par. 1, which explicitly prohibits any discrimination based on religious grounds. Article 19 of the Constitution protects the freedom of each human being to profess and propagate his religion. The Constitution also protects freedom of worship, both individually and in a group, whether in a private and in public places: the only limit to the freedom of worship is that it can be applied with rites contrary to morality. This does not, however, affect the application of the rules governing meetings that take place in a public area<sup>12</sup>: even if they are religious in nature, they may be prohibited or dissolved if they may pose a threat to public safety.

The Constitution explicitly protect freedom of religion also in its collective moment: social groups with religious purposes are protected, whether they are associations or religious organizations<sup>13</sup>. According to the Article 20, it is forbidden, therefore, to impose special burdens on social formations due to religious purposes they may pursue.

This constitutional framework fits into a context that has historically been conditioned by the Catholics religious tradition<sup>14</sup> and by the troubled connections between the State and the Catholic Church<sup>15</sup>. For

---

<sup>11</sup> Articles 7, 8, 19 and 20 of the Constitution.

<sup>12</sup> **M. CROCE**, *La libertà religiosa nell'ordinamento costituzionale italiano*, Edizioni ETS, Pisa, 2012, p. 70 ff.

<sup>13</sup> On the absence of a general law on religious freedom in the Italian legal system, see **C.M. REALE**, *Freedom of Religion: Is a General Law Missing in Italy? The Doctrinal Debate around a General Law and the 2019 Astrid Law Proposal*, in C. PICIOCCHI, D. STRAZZARI, R. TONIATTI (eds.), *State and Religions. Agreements, Conventions and Statutes*, Editoriale Scientifica, Napoli, 2021, p. 327 ff.

<sup>14</sup> On the cultural religious pluralism in Italy see **F. ALICINO**, *Agreements, Intese and beyond: The Italian Instruments to Regulate the Relations between Religions and the State*, in C. PICIOCCHI, D. STRAZZARI, R. TONIATTI (eds.), *State and Religions*, cit., p. 283 ff.

<sup>15</sup> A circumstance well highlighted by **S. MANCINI**, *Introduction: constitutionalism and religion in an age of consolidation and turmoil*, in S. MANCINI (ed.), *Constitution and Religion*, Elgar, Cheltenham-Northampton, 2020, p. 3, for whom "the Western concept of



these reasons, the Italian legal system has recognized a specific position to Catholicism<sup>16</sup>. The Constitution provides a concordat between the State and the Catholic Church (art. 7), and a bilateral agreement for the religious organizations who wish to formalize their relations with the State (art. 8).

The Italian Constitution often stresses equality of religious denominations even though the Catholic Church enjoys a privileged position as illustrated by Articles 7 and 8<sup>17</sup>. Although Article 8, par. 1, states that, “all religious denominations are equally free before the law” the Constitutional Court did not interpret this as meaning that all other religious organizations should enjoy parity of legal treatment with that afforded the Catholic Church.

Indeed, the Italian Constitutional Court has consistently reaffirmed that the principle of the secular State - based on Articles 2, 3, 7, 8, 19, 20 of the Italian Constitution - does not mean that it is indifferent to the existence and operation of religious denominations, but that it is instead committed to guaranteeing freedom of religion, within a context of cultural and confessional pluralism (see decision 203/1989<sup>18</sup>). However, the fact that the Constitution provides for agreements with all religious denominations - a Concordat with the Roman Catholic Church and a series of “agreements” with other religions - does not mean that the theoretical equality enjoyed by all religions will lead to a unique legal treatment of the relations between the State and different religious organizations, but simply implies the adoption of rules which will vary in accordance with ad hoc bilateral agreements. Thus, it is rather a question of how to limit such “inequality”<sup>19</sup>.

---

secularism is inescapably tied to the Christian religious tradition. Moreover, historically, secularism is the process of separation of the state from *Christian churches*, not from *religion* as such. It thus entails not only an obvious accommodation of Christian majorities, but also the culturalization of Christianity and its infusion into the entire fabric of the polity”.

<sup>16</sup> On the majority religion model see **S. FERRARI**, *Constitutional models of law and religion relations in Western Europe*, in S. MANCINI (ed.), *Constitution and Religion*, cit., pp. 105-107.

<sup>17</sup> See **R. TONIATTI**, *Consensual Legal Pluralism: Assessing the Method and the Merits in Agreements between State and Church(es) in Italy and Spain*, in C. PICIOCCHI, D. STRAZZARI, R. TONIATTI (eds.), *State and Religions*, cit., p. 74 ff.

<sup>18</sup> A. CARDONE, M. CROCE (eds.), *30 anni di laicità dello Stato. Fu vera gloria?*, Nessun Dogma, Roma, 2021, pp. 1-480.

<sup>19</sup> See **P. CARETTI**, *Art. 8*, Carocci, Roma, 2017, p. 65 ff; **B. RANDAZZO**, *Diversi ed eguali. Le confessioni religiose davanti alla legge*, Giuffrè, Milano, 2008, p. 181 ff.





### 3 - Restrictions on worship after the first phase of the pandemic

After the first phase of the pandemic and the heavy restrictions imposed by the Government<sup>20</sup>, which were also applied to the religious phenomenon, the limitations in terms of attending Churches and other places of worship has been interpreted by the law as a short-circuit in the interorganizational dynamics and, particularly, in relation to the principle of pactational bilateralism that marks the constitutional system of the relations between State and religions organizations<sup>21</sup>.

Therefore, the measures adopted, by influencing the ritual activities of religious confessions<sup>22</sup>, have created, from a constitutional point of view<sup>23</sup>, the doubt of an invasion of the order of competence of the religious organizations, which is granted by the Constitution, being here ignored the bilateral obligation derived from the Concordat agreements that solemnly recognize the Church itself (and other religious confessions, too), the freedom of public exercise of worship.

The response to the emergency necessity to contain the pandemic has given rise to a debate that has not only focused on the question of the

---

<sup>20</sup> The Prime Ministerial Decree of March 8, 2020, which extends for the first time at national level the measures for the containment of the virus, has provided the suspension of “all organized events, as well as events in public and private places, including those of a cultural, recreational, sporting, religious, fair and exhibition nature” (art. 1, lett. g). Moreover, the opening of places of worship is subject to compliance with the rules on social distancing, but - as stated in lett. i) of the same article - “civil and religious ceremonies, including funerals” cannot take place. On these topics see **E. CAMASSA, F. OLIOSI**, *Italy and Religions under Pressure: Agreements and Bilateral Conventions to the Test of Pandemic. Rethinking a Relationship Model*, in C. PICIOCCHI, D. STRAZZARI, R. TONIATTI (eds.), *State and Religions*, cit., p. 309; **S. MONTESANO**, *Libertà di culto ed emergenza sanitaria: sintesi ragionata delle limitazioni introdotte in Italia per contrastare la diffusione del Covid-19*, in *Quaderni di diritto e politica ecclesiastica*, 2/2020, pp. 255-263.

<sup>21</sup> See **F. BALSAMO**, *The loyal collaboration between State and religions at the testing bench of the Covid 19 pandemic. A perspective from Italy*, in *Law, Religion and Covid*, cit., p. 47 ff. **V. PACILLO**, *La libertà di culto al tempo del coronavirus: una risposta alle critiche*, in *Stato, Chiese e pluralismo confessionale*, cit., 8, 2020, p. 85 ff.

<sup>22</sup> As clarified by the Ministry of the Interior, places of worship are not required to be closed unless the religious authorities decide otherwise: liturgical celebrations are not prohibited per se but can still be performed without the participation of the faithful, in order to avoid gatherings. See the interpretation provided in <https://www.interno.gov.it/sites/default/files/allegati/specifiche-chiese.pdf>.

<sup>23</sup> **M. CARRER**, *Salus rei publicae e salus animorum, ovvero sovranità della Chiesa e laicità dello Stato: gli artt. 7 e 19 Cost. ai tempi del Coronavirus*, in *Biolaw Journal - Rivista di BioDiritto*, Special Issue 1/2020, pp. 339-343.



limits to the freedom to exercise religion in public and its associated forms but has involved issues of religious autonomy and institutional relations between the State and the Church and other religious denominations, too. With a variety of positions, the focus has shifted, time after time, on the prerogatives of an international body placed to protect the sovereignty of the Holy See and to guarantee the *libertas ecclesiae*; on the general principle of religious autonomy; and on the constitutional duty of the pactational regulation of relations between the State and religious denominations; or even on the principle of cooperation<sup>24</sup>. The principle of cooperation, laid down in Article 1 of the Villa Madama Agreement<sup>25</sup>, was used to highlight, in some cases critically, the fact that the measures for managing the pandemic emergency were adopted unilaterally by the State and therefore without any involvement of the religious authorities, as should have been the case in view of the foregoing principles<sup>26</sup>.

#### 4 - The impact of the Protocols on the system of sources of Ecclesiastical law

The most critical phase in the balancing between freedom of worship and the right to health is the one following the Prime Ministerial Decree of the 26<sup>th</sup> of April. This decree, while maintaining the key rule of the prohibition to gather, provides, for example, the possibility to move to meet relatives or, again, the re-opening of parks and public gardens. These decisions are counterbalanced by the extension of the suspension of all events - including those of a religious nature - and the prohibition to celebrate civil and religious ceremonies, with the only exception of funerals, which may be attended only by "relatives" and in any case "up to a maximum of

---

<sup>24</sup> G. D'ANGELO, J. PASQUALI CERIOLI, *L'emergenza e il diritto ecclesiastico: pregi (prospettivi) e difetti (potenziali) della dimensione pubblica del fenomeno religioso*, in *Stato, Chiesa e pluralismo confessionale*, cit., 19, 2021, p. 50.

<sup>25</sup> The article refers to relations between the State and the Catholic Church by establishing that both are committed to "mutual cooperation for the promotion of mankind and the good of the country".

<sup>26</sup> According to Colaianni, the government could not, at that juncture, allow itself "to regulate the protection of health in a geometrically variable manner according to the confessions", nor could it submit, as far as its strictest relevance to the Catholic confession is concerned, to the logic of the concordat, deprived of its task by the exclusive state competence to legislate on health matters (see N. COLAIANNI, *La libertà di culto*, cit., p. 33).



fifteen people". Following this measure, in fact, a harsh statement by the Italian Bishops' Conference (CEI) was issued, in which it is stated:

"Now after these weeks of negotiations that have seen the CEI present Orientations and Protocols with which to address a transitional phase in full compliance with all health regulations, the Decree of the Presidency of the Council of Ministers passed this evening arbitrarily excludes the possibility of celebrating Mass with the people. The Prime Minister's Office and the Technical and Scientific Committee are reminded of their duty to distinguish between their responsibility - to give precise health indications - and that of the Church, which is called to organize the life of the Christian community, respecting the measures laid down, but in the fullness of its own autonomy"<sup>27</sup>.

There is a very significant passage in the statement in which it is said that "the Church has accepted, with regret and a sense of responsibility, the restrictions introduced by the government to deal with the health emergency". This is a very important reference because it testifies to the fact that the Italian Bishops' Conference (CEI) has acted by implementing the State's regulatory measures, which it has not suffered passively<sup>28</sup>.

Thereupon, there was a real turning point. After having overcome the phase of general *lockdown*, the need to adopt new control measures during the Covid-19 epidemiologic emergency also in relation to liturgical ceremonies has determined a quicker resumption. This was achieved through the shared adoption of some protocols, by each of the interested religious confessions of ritual ceremonies with the participation of worshippers.

After the announcement of the protocol of 7 May 2020, with which the Ministry of the Interior, in agreement with the Italian Bishops' Conference, established the conditions for "the gradual resumption of liturgical ceremonies with the people"<sup>29</sup>; later on May 15, the government

---

<sup>27</sup> To read the full text of the statement: <https://www.chiesacattolica.it/dpcm-la-posizione-della-cei/>.

<sup>28</sup> Moreover, as appropriately pointed out by **G. CIMBALO**, *Il papa e la sfida della pandemia*, in *Stato, Chiese e pluralismo confessionale*, cit., 9, 2020, p. 15, this is not a new approach by the Catholic Church which "has operated - as often happens - by implementing the regulatory measures of the State, shunning, as much as possible, the issuing of its own measures".

<sup>29</sup> These negotiations, it should be noted, took place outside the procedure laid down in Article 14 of the Concordat Revision Agreement, which the parties evidently did not consider legally binding in this case.





announced that the Prime Minister, the Minister of the Interior and the representatives of numerous religious denominations had signed similar protocols for the safe resumption of public religious worship<sup>30</sup>.

In the wake of this approach, the subsequent Decree-Law no. 33 of 16 May 2020 regulated the matter of public worship, stipulating, in Article 1, par. 11, that

“religious functions with the participation of persons shall be held in compliance with the protocols signed by the government and the respective confessions containing the appropriate measures to prevent the risk of contagion”.

Paragraph 12 specifies that certain provisions, including the one just mentioned, “shall be implemented with measures adopted pursuant to Article 2 of Decree-Law No 19 of 2020, which may also establish different terms of effectiveness”.

Following these provisions, the new Decree of the President of the Council of Ministers of 17 May 2020 finally amended a regulatory framework that had been repeated, with minimal variations, in the following Decrees (24 October 2020 and 2 March 2021). In fact, Article 1, par. 1, deals for the first time with the issue of religious ceremonies separately from the other hypotheses of events, demonstrations, and gatherings. So, letter n) states that

“access to places of worship shall take place with organizational measures to avoid crowds of people, considering the size and characteristics of the places, and such as to ensure that visitors are able to keep a distance of at least one meter between them”.

It must be considered that this provision essentially concerns the use of places of worship for individual prayer, or in any case outside ceremonies, and is therefore a residual provision with respect to the provisions of letter o) below. The latter, on the other hand, states that “religious functions with the participation of persons are held in compliance with the protocols signed by the Government and the respective confessions”. The Prime Ministerial Decree itself, thus closing the circle of references, contains the texts of the protocols in Annexes 1 to 7.

As regards the rules governing places of worship, it is interesting to note that PM Decree of March 8<sup>31</sup> referred to the opening of places of

---

<sup>30</sup> See *infra* in this paragraph.

<sup>31</sup> See *supra* footnote 14.



worship and made it conditional on the adoption of organizational measures to avoid gatherings of people. The new one, on the other hand, refers to access to places of worship, which is no longer conditioned by measures of interpersonal protection: the new legislation merely establishes, in much more cautious language, that access should take place through organizational measures to avoid gatherings of people. In this way, the discipline of freedom of worship, following the entry into force of the new PM Decree, is divided into a general principle - applicable to all denominations and relating precisely to access to places of worship - and a detailed discipline that regulates the individual liturgies through a reference to protocol agreements.

Contrary to initial assumptions, the path chosen by the Ministry of the Interior to regulate the resumption of public worship by denominations other than the Catholic Church was not to adopt a single document valid for all, but rather a series of protocols signed with the representatives of one or more religious denominations. The signing of these protocols was preceded by an institutional meeting attended by representatives of the various confessions. This marked the transition from a bilateral pactional policy to a policy of “multilateral” concertation in the regulation of the relationship between the State and religious denominations<sup>32</sup>.

The six protocols of May 15 were signed respectively with representatives of the Jewish Community; the Church of Jesus Christ of Latter-day Saints; the Islamic Community; the Hindu, Buddhist, Baha’i, and Sikh communities; the Protestant, Evangelical and Anglican Churches; and the Orthodox Community. A seventh has been added to the above, which was published in draft form on May 25. It concerns the Christian Congregation of Jehovah’s Witnesses and was prepared independently by the Congregation and then submitted to the Ministry for approval, thus following a procedure similar to that followed by the Italian Bishops’ Conference for the Catholic Church.

As stated in the brief introduction - which is the same for all texts:

“the need to adopt measures to contain the epidemiological emergency caused by SARS-CoV-2 makes it necessary to draw up a protocol with the religious confessions. The Protocol, while respecting the right to freedom of worship, does not depend on the

---

<sup>32</sup> See **P. CONSORTI**, *Esercizi di laicità: dalla bilateralità pattizia al dialogo interreligioso (a causa del Covid-19)*, available at [https://people.unipi.it/pierluigi\\_consorti/esercizi-di-laicita-dalla-bilateralita-pattizia-al-dialogo-interreligioso-a-causa-del-covid-19/#\\_ftn1](https://people.unipi.it/pierluigi_consorti/esercizi-di-laicita-dalla-bilateralita-pattizia-al-dialogo-interreligioso-a-causa-del-covid-19/#_ftn1).



existence of bilateral agreements, balancing the exercise of religious freedom with the need to contain the epidemic in progress”.

The reference to agreements with the State pursuant to Article 8, par. 3, of the Italian Constitution underlines the fact that what is highlighted in the documents is a profile of the exercise of religious freedom. That is quite different from the enhancement of the specificity of confessions. Rather, it is a matter of guaranteeing all religious denominations that have expressed interest in the stipulation of protocols the consequent exercise of one of the rights provided for in Article 19 of the Constitution. A circumstance that must apply under the persisting conditions of emergency and thus according to a strict balance with other constitutional values. Not even religious denominations can act - even in the name of a fundamental freedom such as religious freedom - in a way that is potentially detrimental to other constitutionally protected interests or outside of the compositions necessary for a reasonable balance of social needs of which the State is the guarantor<sup>33</sup>.

Turning now to the normative contents, the text of the seven protocols - like the one agreed upon with the CEI - is divided into five sections, whose titles may change slightly from case to case, depending on the singularity of the individual religious denominations, but which follow a homogeneous trend: access to the religious site, procedures for the hygiene of places and objects, communication of the rules to the faithful and other suggestions. Since, apart from the titles, the texts of the protocols are also very similar to each other<sup>34</sup>, it is understood that the provisions that will be cited apply to all confessions, unless otherwise specified<sup>35</sup>.

---

<sup>33</sup> After all, the tendency to escape from these balancing acts was critically observable in the leaps forward attempted in April by various priests to celebrate Mass in the presence of the faithful. See **P. PALUMBO**, *Digital religious celebrations during and after the Covid-19. Limits and opportunities for regulation*, in *Stato, Chiese e pluralismo confessionale*, cit., 17, 2021, pp. 80-82

<sup>34</sup> See **G. MACRÌ**, *Brevi considerazioni in materia di governance delle pratiche di culto tra istanze egualitarie, soluzioni compiacenti e protocolli (quasi) “fotocopia”*, in *Stato, Chiese e pluralismo confessionale*, cit., 11, 2020.

<sup>35</sup> See **A. TIRA**, *Normativa emergenziale ed esercizio pubblico del culto. Dai protocolli con le confessioni diverse dalla cattolica alla legge 22 maggio 2020, n. 35*, in *Giustizia Insieme*, 8 June 2020. The nuances in terminology between the various protocols reflect the characteristics of the worship practiced, which can be very different in form and meaning for the faithful. Celebrations and meetings of a religious nature are permitted, whichever form they may take in practice, in compliance with all the precautionary rules laid down in terms of health containment of the epidemiological emergency.



In short, these protocols - which provide an operational translation of the general normative indications, relating them to the specific ritual needs of the subscribing communities of faith - have given rise to some discussion but were promptly framed within the framework of administrative participation, thereby signaling their substantial extraneousness to the logic of bilateralism strictly understood and, in this way, their full traceability within the State's own order and therefore the full discretion of the latter in regulating them<sup>36</sup>.

This does not exclude that such protocols can be considered as the expression of a more general principle of cooperation, partly detached from the fundamental statement of Article 1 of the Villa Madama Agreement mentioned above. In this sense, they indicate a trend towards the progressive inclusion of the same collaborative paradigm in the context of the general processes of democratization of public administrative power and, more broadly, in the dynamics of transformation of state sovereignty.

In other words, it can be said that the principle of collaboration now represents a real system principle and as such regulates - not only relations between orders or between the state and religious groups but - in a broad sense the interaction between the sacred and secular orders, while maintaining the constitutionally dutiful distinction. In this way, ecclesiastical collaboration is placed in the context of a broader evolutionary process that has led to the recognition and affirmation of a general principle of collaboration.

This is a trend that should be evaluated very carefully, as we will try to do in the next section, because of the unusual way of expressing a purely political conflict such as that between State and religious organizations.

## 5 - Conclusions. From bilateralism to "loyal cooperation"?

The pandemic emergency has therefore contributed to accelerating processes that had already been underway for some time, the virtues, and shortcomings of which have become more evident and compelling. In other words, the pressure exerted by the new political and institutional priorities does not seem to have produced substantial changes in the

---

<sup>36</sup> See N. COLAIANNI, *Il sistema delle fonti costituzionali del diritto ecclesiastico al tempo dell'emergenza (e oltre?)*, in *Rivista AIC*, 4, 2020, 208 ff.



dialectical scope of the relationship between the legal system and religious social interests. In the face of the ever more accentuated extensive and transversal propensity of the latter, the former is continually called upon to recalibrate what has already been achieved in the attempt to reconcile its rightful autonomy and the equally rightful promotion of religious freedom.

The exhaustion of the first phases of immediate containment of the pandemic was thus accompanied by the reappearance of yet unsurpassed contrasts and fracture lines, in some respects physiological, which time after time may change their formal appearance but which refer to a dialectical tension that remains substantially unchanged.

From this point of view, the reason for the collaboration between the government and some confessions in tackling the pandemic, despite some reluctance, seems to be a matter of mature solidarity, in accordance with the constitutional provisions in many respects.

This form of collaboration must be framed within the supreme principle of secularism and the essential corollary of the distinction between orders. The experience of the protocols on “liturgical and religious services” submitted to the signature of the confessional representatives has shown us that the contents of the parties’ commitment were identified, correctly, after selecting interests framed within the framework reserved both for precautionary standards (in order to contain the spread of contagion), and for the adaptation to worship, understood in the broad sense, of such precautionary measures.

At this juncture, there was also a removal from the model of bilateralism designed after the questionable ruling offered to the political discretion of the Executive by decision no. 52 of 2016 of the Constitutional Court<sup>37</sup>, which now seems to be deputed only to calibrate, according to political reasoning, the rigidity of the “religious market”. In this last regard, it is worth pointing out that the opening reached in favor of religious groups not previously benefiting from the laws “on the basis of agreements”, respects the pluralist principle enshrined in the first paragraph of Article 8 of the Constitution, as long as it is open to any willing interlocutor, in order to remove any doubts of randomness in the selection of applicants.

---

<sup>37</sup> On this decision, which denied the right to open negotiations for an agreement with the State, see **M. CROCE**, *An Agreement Denied: How Non-Denominational Philosophical Associations are Discriminated by Italian Law*, in *Non-Believers’ Europe. Model of Secularism, Individual Statues, Collective Rights*, Bruxelles, 22-23 marzo 2018, Nessun Dogma, Roma, pp. 72-98.





But that is not all. The enlargement of the interested parties also seems to exclude that the parties have attributed to the aforementioned protocols an inter-ordinamental nature, typical of covenant sources at the service of the regulation of (mere) “relations”, technically understood pursuant to articles 7, par. 2, and 8, par. 3, of the Constitution, and exposed, by now, to politicization drives in contrast with the urgency of taking uniform decisions.

The academic literature has posed the problem of considering what kind of collaboration between the State and the confessions these protocols point to. In the opinion of some authors<sup>38</sup>, there are many aspects that lead to the conclusion that the protocols are extraneous, in the strict sense of the term<sup>39</sup>, to the discipline of inter-governmental relations between the Republic and the religious confessions as outlined in articles 7, par. 2, and 8, par. 3, of the Constitution, whose purpose is to settle available interests and therefore extraneous to the areas in which each party exclusively exercises sovereign powers<sup>40</sup>.

First of all, it is an undisputed fact that these protocols are issued by the Ministry of the Interior, although also signed by religious representatives, and are not anticipated by bilateral framework texts and, above all, are unrelated to the procedures of co-management of political direction between the Government and Parliament characterizing the pact's sources<sup>41</sup>.

These documents, on the other hand, concern unavailable matters - impervious to negotiation that could alter their content - such as the guarantee of individual and collective health, before which the State retains the power to intervene (as emerges in the case of the protocol with the CEI) by re-qualifying denominational conduct as a civil legal fact, thus considering the internal conduct of religious denominations in the same way as any other fact of social and health importance.

From this point of view, the protocols are instead, in form and substance, concerted forms of cooperation, like those that the State already

---

<sup>38</sup> See V. PACILLO, *La libertà di culto*, cit., p. 86.

<sup>39</sup> See F. FRENI, *I “nuovi accordi” Stato confessioni in Italia tra bilateralità necessaria e diffusa*, in *Stato, Chiesa e pluralismo confessionale*, cit., 18, 2020, p. 30 ff.

<sup>40</sup> The Protocol signed by Jehovah's Witnesses demonstrates that it is an open system, which individual religious groups that have not yet done so can access fairly quickly and with foreseeable results.

<sup>41</sup> As explained in the Preamble to the Protocols, this form of cooperation does not involve the existence of bilateral agreements. On the absence of a parliamentary role N. COLAIANNI, *Il sistema delle fonti*, cit., pp. 226-227.



adopts in other fields with the representatives of organized social interests<sup>42</sup>. For their part, the religious confessions, having taken note of the imperatives of safeguarding health, present to the State the forms of adaptation of their *interna corporis* that they consider most effective in pursuing the common good, to which all subjects, including religious confessions, are called in the name of the mandatory duties of solidarity under Article 2 of the Constitution. On the other hand, other authors point out that, albeit through unprecedented modalities from a formal point of view, the protocols have essentially respected the principle of bilateralism: this would therefore be a new way of applying the constitutional principles that regulate relations between the State and religious denominations - albeit in the simplified and sectorial forms imposed by the health emergency - and which are, in the final analysis, justifiable also because of the interim nature of the measures<sup>43</sup>.

A further position, finally, sees in the ministerial protocols the first signs of religious dialogue<sup>44</sup> with the confessions that, by overcoming the structural rigidity of the traditional methods of bilateral agreements, could prove to be harbingers of future developments<sup>45</sup>. Whichever the most consistent solution from a dogmatic point of view, on a substantive level the solutions prepared with the religious confessions show the interest of the state system to be in cooperation with religious orders, in order to balance the needs of health prevention and the demands of religion more effectively, which would otherwise remain unsatisfied and potentially in conflict with the former.

Certainly, the drafting of protocols with other religious denominations has shown a tendency to adopt a standard text (at least as far as the denominations other than the Catholic one are concerned), to which the parties directly concerned on the denominational side have made small variations, in agreement with the Ministry, in order to adapt them to their respective specificities. In doing this - as has already been mentioned in connection with the individual provisions - the ministerial text has maintained a "lighter" tone compared to the protocol with the

---

<sup>42</sup> See **A. CESARINI**, *I limiti all'esercizio del culto nell'emergenza sanitaria e la 'responsabile' collaborazione con le confessioni religiose*, in *Stato, Chiese e pluralismo confessionale*, cit., 18, 2020, 21.

<sup>43</sup> **N. COLAIANNI**, *La libertà di culto*, cit., p. 32.

<sup>44</sup> A trend focused on by **M. VENTURA**, *From Concordats to Dialogue. The Mutating Picture of Law and Religion in Europe. Concluding Remarks*, in C. PICIOCCHI, D. STRAZZARI, R. TONIATTI (eds.), *State and Religions*, cit., p. 355 ff.

<sup>45</sup> **P. CONSORTI**, *Esercizi di laicità*, cit.



Catholic Church, as regards the mention and regulation of individual aspects of the internal life of religious denominations, including liturgical ones. It is therefore clearer, in light of the overall developments, that in that case, it was the Ministry's receipt of a text prepared by the Italian Bishops' Conference, which had evidently prepared it with its internal discipline's needs in mind, that led the debate and therefore the normative outcome in that direction.

Lastly, doubts remain as to how the provisions of the protocols for the resumption of worship were interpreted and enforced. It is certainly not a novelty or a rule valid only in this field, but much has depended on the spirit of cooperation and sense of responsibility with which the recipients of the rules have been able to collaborate in achieving the balance that the protocols have sought to delineate: greater freedom, at the price of greater responsibility and the widespread commitment to consider even religious activities not only as something separate, divorced from the balancing of values that we mentioned earlier, but also as a situation potentially entailing health risks, like any other social situation.

In fact, such instruments of consultation, although describing areas of intervention referring to areas of reciprocal otherness, carry out their effects within the state order, dispelling the risk of a feared "widespread" bilateralism<sup>46</sup>. Indeed, it does not seem possible to attribute autonomous production power to the protocols, since they are mere annexes to the sources, formally and substantially unilateral, that refer to them.

However, the greatest point of the stress test of the pandemic on ecclesiastical law lies in the extension of the canon of "reciprocal collaboration", which has acquired the scope of a general principle in this field.

The commitment to "fully respect" the distinction of orders does not, in fact, give rise to any particular effort of interpretation as a rule that oversees the dynamics of State-Church relations, containing them within the margins of the prohibition of reciprocal interference in the spaces of exclusive sovereignty.

---

<sup>46</sup> On the potential risks of using widespread bilaterality for instrumental purposes other than the promotion of individual and collective religious freedom, and on the consequent and increasingly pressing need for a general law on religious freedom, see **G. CASUSCELLI**, *Gli "effetti secondari" (ma non troppo) della pandemia sul diritto ecclesiastico italiano e le sue fonti*, in *Stato, Chiese e pluralismo confessionale*, cit., 8, 2021, pp. 15-16.