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**COVID-19 restrictions on religious worship:  
how to ensure effectiveness while respecting religious autonomy? \***

**TABLE OF CONTENTS: 1. Introduction - 2. The existing model of Coronavirus restrictions and its impact on freedom of religion - 3. Towards a new model of restriction - 4. Advantages of the new model of restrictions - 5. Safeguarding compliance with restrictions - 6. Conclusions.**

**ABSTRACT:** The topic of the article is to evaluate legal measures aimed to stop the spread of the coronavirus that limited religious rights. The restrictions are assessed from the perspective of its effectiveness in preventing infection as well as its proportionality. The argument is that proportionality of the restrictions depends on their effectiveness, which in turn should be evaluated in the light of current pandemic situation, which includes vaccination level and scientific knowledge on coronavirus transmission. Consequently, two kinds of restrictions are distinguished: premises-oriented and activities-oriented. The former focuses mainly on the capacity of the church premises and not so much on the activity of the gathered, whereas the latter pays attention to the activities of the worshippers, including religious practices. Given the epidemiological effectiveness and the balance between protecting public health and religious freedom, activities-oriented restrictions are identified as a proper model of restrictions.

## **1 - Introduction**

The ongoing COVID-19 pandemic is an obvious threat not only to public health but also to human rights. Freedom of religion or belief seems to be particularly vulnerable in this respect. Social distancing rules, which have become the most popular legal measure to stop the spread of the coronavirus, prevented or significantly reduced the enjoyment of freedom of religion in its collective aspect. Coronavirus legislation has also strained the relationship between the state and religious associations. On the one hand, there was a need, from a public health perspective, to impose far-reaching restrictions, but on the other hand those restrictions had to be consistent not only with the proportionality principle, but also with the principle of autonomy of religious associations.



Surprisingly, at the same time this challenge to the relationship between the state and religious associations might also have a positive aspect. As Javier Martínez-Torrón argues, the pandemic did not raise new questions concerning religious freedom, but rather encouraged reconsidering the existing ones within a new context<sup>1</sup>. Taking into account the importance and necessity of maintaining the restrictions, the positive and cooperative attitude displayed by religious associations, as well as the fact that restrictions will stay in force for at least some more time, it seems that the pandemic offers a chance to rethink some aspects of the autonomy and proportionality principles within the scope of religious freedom. Attention should be paid to possible forms of cooperation between the state and religious associations with regard to designing and enforcing restrictions. Religious associations cannot question the power of the state to impose the restrictions by relying on the autonomy principle, yet at the same time the state cannot regulate such issues in a blind, top-down administrative way<sup>2</sup>.

Javier Martínez-Torrón proposed four sets of issues that should receive special attention in relation to the pandemic. These are: (i) legal regulation of the fight against coronavirus, (ii) equal treatment of religious freedom in relation to other fundamental rights, (iii) the reactions of religious communities to governmental measures, and (iv) cooperation between the state and religious communities<sup>3</sup>. The aim of this article is to advance this argument by suggesting the legal shape of such cooperation, but understood differently. Martínez-Torrón argued that cooperation between the state and religious associations should result in society having a positive attitude toward fighting the pandemic. While stimulating the social spirit is obviously necessary, I claim that the focus should rather be on formal safeguards that will ensure both sanitary effectiveness and the proportionality of the restrictions<sup>4</sup>. The best way for

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\* Paper selected by the organizing Committee.

<sup>1</sup> **J. MARTÍNEZ-TORRÓN**, *COVID-19 and Religious Freedom: Some Comparative Perspectives*, in *Laws* (<https://www.mdpi.com/journal/laws>), vol. 10, issue 2 of 2021, p. 2.

<sup>2</sup> **S. BUDAEV**, *Safety and Reverence: How Roman Catholic Liturgy Can Respond to the COVID-19 Pandemic*, in *Journal of Religion and Health* (<https://www.springer.com/journal/10943>), vol. 60, issue 4 of 2021, p. 2333.

<sup>3</sup> **J. MARTÍNEZ-TORRÓN**, *COVID-19 and Religious Freedom*, cit., p. 5.

<sup>4</sup> I believe that while soft law instruments are better suited for the purpose of encouraging society's spirit and resilience, it is hard law which should address the issue of restrictions.



public authorities to minimize the severity of coronavirus restrictions while maximizing their effectiveness is to work closely with religious groups and try to identify their needs, especially concerning rituals and ceremonies. It is the religious community that knows best which aspects of worship could be limited without placing too much of a burden on the everyday operation of religious services. Cooperation with religious partners will not only safeguard the religious associations' autonomy and guarantee respect for the proportionality principle, but it may also improve the effectiveness of sanitary restrictions by adapting them to the specifics of religious beliefs, in accordance with the World Health Organization recommendations<sup>5</sup> and current knowledge on coronavirus transmission.

The key point of this article is that the current model of restrictions, which I call 'premises-oriented', is no longer effective or proportionate and should be replaced by a new model of restrictions, which could be called 'activities-oriented'. In the first part of my article, the dominant model of the premises-oriented restrictions is reviewed. Given that premises-oriented limitations are widespread in the European and US legislation and their structure is very similar, I focus on Polish law, treating it as a representative example. In the second part, a new model of restrictions, the activities-oriented one, is presented. I also briefly discuss two examples taken from UK and Italian law which show how activities-oriented restrictions can be implemented in pandemic legislation. The third part is devoted to the advantages of the activities-oriented model, by considering its epidemiological determinants, the attitude of religious associations toward this kind of cooperation with the government, and its compliance with the autonomy principle. The fourth part is focused on the issue of respecting the restrictions. In the final part, I present my brief conclusions.

## **2 - The existing model of Coronavirus restrictions and its impact on freedom of religion**

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<sup>5</sup> The document called "Practical considerations and recommendations for religious leaders and faith-based communities in the context of COVID-19", dated 7 April 2020, pays much more attention to the kind of activities conducted within the church premises than to the issue of physical distance between the believers. See: <https://www.who.int/publications-detail-redirect/practical-considerations-and-recommendations-for-religious-leaders-and-faith-based-communities-in-the-context-of-covid-19> (access: 13 November 2021).



As far as freedom of religion is concerned, the restrictions aimed at preventing the spread of the coronavirus took the form of limiting or prohibiting religious gatherings. In most European countries and in the United States<sup>6</sup>, the number of people who could gather at the same time in religious premises was limited. The details may vary, but in general, this kind of restriction seems to reflect the same approach to the problem, so I will take Polish law as an example, not only because this is the legal system I am most familiar with, but also because it can serve as a representative model for further analysis<sup>7</sup>.

In Polish law, the collective aspect of religious freedom was limited in four ways<sup>8</sup>: (i) the maximum number of people who could gather was fixed and explicitly mentioned in the legislation; (ii) the maximum number of people who could gather needed to be calculated in accordance with the legislation, which specified the maximum ratio of people per square meter; (iii) the maximum number of people who could gather was to be determined in relation to the maximum occupancy of the church premises; and (iv) the possibility of gathering dependent on following the social distancing rules (wearing protective face masks, maintaining physical distance from other people). The order of these restrictions also corresponds to the degree of their severity - from the most to the least severe<sup>9</sup>. It is evident that the restrictions were focused mostly on the

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<sup>6</sup> J. MARTÍNEZ-TORRÓN, *COVID-19 and Religious Freedom*, cit., p. 11.

<sup>7</sup> This is because the differences, if any, were mainly technical in nature and the main idea was the same - to limit in a more or less arbitrary way the maximum number of people which could gather together in the church premises. These similarities have been revealed in the research project EXCEPTIUS: Exceptional powers in time of SARS-COV-2 crisis, part of which consisted in investigating the restrictions on religious gatherings within European countries during the pandemic. See more on the project's website: <https://exceptius.com>.

<sup>8</sup> See: W. BRZOZOWSKI, *Polonia: La libertad religiosa en tiempos de la pandemia del COVID-19* in *COVID-19 y Libertad Religiosa*, edited by J. MARTÍNEZ-TORRÓN, B. RODRIGO LARA, Iustel, Madrid, 2021. I am focusing mainly on indoor activities. Nevertheless, in Poland the same mechanism was applied to restricting religious burial ceremonies, which in part take place outdoors. Considering the way that coronavirus is transmitted, as described later in the article, this seems to be an even more serious breach of proportionality principle.

<sup>9</sup> This logic, appealing to the degree of severity, was also present in Nevada, where the maximum number of people who could take part in a religious gathering was mentioned explicitly in the legislation (50 people), whereas the number of people allowed to be in casinos, breweries, bowling alleys and gyms depended on the capacity of the premise (fifty per cent allowed). This differentiation was considered by the church as unconstitutional and was brought before the Supreme Court. See: *Calvary Chapel Dayton*



capacity of the church premises and not so much on the activity of the gathered. Briefly put, they were predominantly premises-oriented.

Such restrictions raise at least two kinds of objections. One of them has to do with the epidemiological effectiveness of such premises-oriented restrictions: do they successfully prevent the transmission of COVID-19? This, in turn, raises another doubt. How to determine the number of people allowed to gather which is still proportionate? In other words, what are the reasons for the legislator to pick a certain number? A natural response would be that such a number should be mainly determined on the basis of the scientific knowledge about coronavirus transmission and be as high as possible. When the answer to the first doubt is negative, the same must be for the second one. Ineffective restrictions are not proportionate, because their effectiveness is significantly lower than the burden of constraints imposed and, as a result, must be considered to be in breach of religious freedom.

With respect to the first doubt, the premises-oriented limitations are far-reaching and *prima facie* dangerous for religious freedom. It is not clear from the legislation how the specific number of people who are subject to the restrictions was established. Neither does it indicate when premises-oriented limitations should be replaced by activity-oriented ones (like in the Polish case, where the latter were considered as less severe). In the absence of any explanation, the power to make such a decision rests with the state and it does not allow for any control by religious associations (for example by initiating judicial review of the impugned measures). In Portugal, restrictions on religious freedom stayed in force, even though the state of emergency was over<sup>10</sup>. Communicating the logic behind the limitations would significantly impede such practices. If the restrictions stayed in force, but the reason for their introduction had disappeared, religious associations would be able to effectively challenge its validity. Another threat is related to concealing the ban on religious gatherings under the guise of merely restricting them. Technically, in Europe places of worship were not *closed* during the first waves of pandemic<sup>11</sup>. However, as an example, in Easter 2020 in Poland the limit of

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*Valley v. Sisolak*, 591 U.S. (2021) and **M. HILL QC**, *Coronavirus and the Curtailment of Religious Liberty*, in *Laws* (<https://www.mdpi.com/journal/laws>), vol. 9, issue 4 of 2020, p. 14.

<sup>10</sup> **J. MARTÍNEZ-TORRÓN**, *COVID-19 and Religious Freedom*, cit., p. 8.

<sup>11</sup> **J. MARTÍNEZ-TORRÓN**, *COVID-19 and Religious Freedom*, cit., p. 8; **M. HILL QC**, *Coronavirus*, cit., p. 7.



people allowed to gather in the church premises was reduced to five. Such a low limit was in fact tantamount to closure of church premises.

Considering the above, should the conclusion be that premises-oriented restrictions are not proportionate in every case? I think that the answer is no. The proportionality of the limitations should be assessed on a relative basis, which takes into account the current pandemic's situation, vaccination coverage and knowledge on COVID-19 transmission. What was proportionate during the first two waves of pandemic may no longer be proportionate during the third or fourth. With the increase of vaccine uptake, the growth of epidemiological data and knowledge of the degree of health risk associated with infection, the severity of the restrictions should decrease accordingly<sup>12</sup>. The same reasoning is present in the United States' cases regarding religious freedom during the pandemic. In his dissenting opinion to the case *Calvary Chapel Dayton Valley v. Sisolak*, justice Alito observed that "[a]s more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights"<sup>13</sup>.

Addressing the second doubt requires understanding coronavirus transmission. COVID-19 is transmitted mainly through small respiratory droplets<sup>14</sup>. Activities other than breathing, such as speaking, coughing or sneezing, impact the rate and spreading range of droplets. The smallest droplets can stay in the air for a long time, and this constitutes the major transmission risk<sup>15</sup>. Consequently, the infection risk is minimized when the source of the smallest droplets is eliminated (by wearing a mask or refraining from speaking) or when premises are better ventilated. Obeying social distancing rules may not be crucial in this regard<sup>16</sup>. A sample catalogue of factors which influence the transmission risk includes the kind of the environment, the duration of the indoor exposure, the characteristics of the ventilation air exchange, the intensity of the indoor air flows, the kinds of the occupants' indoor activities (physical exercises with intense breathing, singing, talking versus being quiet), and possible

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<sup>12</sup> M. HILL QC, *Coronavirus*, cit., p. 18; S. BUDAEV, *Safety and Reverence*, cit., p. 2332.

<sup>13</sup> See: *Calvary Chapel Dayton Valley v. Steve Sisolak*, Governor of Nevada 591 U. S. (2020). Cited M. HILL QC, *Coronavirus*, cit., p. 14.

<sup>14</sup> S. BUDAEV, *Safety and Reverence*, cit., p. 2334.

<sup>15</sup> S. BUDAEV, *Safety and Reverence*, cit., p. 2334.

<sup>16</sup> S. BUDAEV, *Safety and Reverence*, cit., p. 2336.





use of personal protective measures (face masks)<sup>17</sup>. Because of the number of factors that contribute to the possibility of infection, it is difficult to definitively settle what determines the safety of gatherings. Temporary exposure in a well-ventilated room with dispersed occupancy and minimal speaking activity may be safe in the absence of personal protection, whereas temporary exposure in a well-ventilated environment without personal protection and no speaking activity can make for a medium risk even at high occupancy<sup>18</sup>.

From the above considerations it follows that premises-oriented restrictions are not necessarily effective from the epidemiological point of view. The most significant transmission factor is the kind of worshippers' indoor activities. Consequently, the premises-oriented limitations are hardly proportional, since they impose significant constraints on religious freedom and do not effectively serve the goal of securing public health. At the same time, religious rights cannot be completely exempt from restrictions, because masses and other religious events had a significant impact on transmission of the coronavirus<sup>19</sup>. Accordingly, the question that must be answered is how to ensure epidemiological effectiveness while safeguarding religious freedom? Or more precisely, how can religious practices and rituals be adapted to minimize the spread of COVID-19 without interfering with the autonomy of religious associations<sup>20</sup>?

### 3 - Towards a new model of restriction

From the above findings it follows that the proportionality of the premises-oriented restrictions is in most cases questionable since their expected epidemiological effectiveness is low. Considering how COVID-19 is transmitted, limitations should apply to worshippers' activities during religious events. This section is devoted to investigating how to impose this kind of restrictions - called activities-oriented - without breaching the autonomy principle. The state is not allowed to interfere with the ways of performing religious practices and rituals, however this may be subject to the religious associations' approval. Modifying some

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<sup>17</sup> S. BUDAEV, *Safety and Reverence*, cit., p. 2336.

<sup>18</sup> S. BUDAEV, *Safety and Reverence*, cit., pp. 2336-2337.

<sup>19</sup> S. BUDAEV, *Safety and Reverence*, cit., p. 2332.

<sup>20</sup> S. BUDAEV, *Safety and Reverence*, cit., p. 2332.



worship activities can greatly reduce the risk of coronavirus transmission, while not necessarily compromising the identity of the religious association. It has been shown that with respect to Roman Catholic liturgy, some elements can be replaced with ones that significantly reduce the risk of infection and at the same time fully comply with theological norms<sup>21</sup>. This is precisely how restrictions should be developed in the current epidemiological circumstances, in order to replace premises-oriented restrictions.

The idea is simple - religious associations should be able to communicate to the appropriate public health authorities how they are ready to change their practices and rituals to minimize the risk of coronavirus spreading. The religious associations are the only entities that know best what aspects of worship can be changed or replaced without affecting the operation of religious services. As in the mentioned example of Roman Catholic liturgy, permissible elements of liturgy like reduced verbal participation on the part of the congregation, singing by a designated choir only, no con-celebration, and the *ad orientem* position are perfectly compatible with the Roman Catholic liturgy and also carry less risk of COVID-19 transmission. The role of the state should be to review the religious associations' proposals primarily in terms of their epidemiological effectiveness. The public health authorities should be entitled to ask further question and highlight issues of concern, but ultimately only religious associations would be able to submit specific proposals. In other words, the form of limitations may be subject to discussion, but at the end of the day the proposal should be fully accepted or rejected, without any conditions or the state suggesting modifications. If the changes decrease the infection risk to the currently desired level, religious gatherings should be allowed in the form as set out by the religious associations. In the event of any dispute between the state and religious associations and respective administration bodies, the discussion would take place on the basis of the objective arguments about the factors that affect transmissions. It is hard to assume that public health authorities would be blind to arguments showing how certain changes decrease the transmission risk.

The possibility of proposing changes to the liturgy to fit the restrictions should be voluntary. Accordingly, this would operate as an opt-out mechanism. Submitting a proposal on how to bring practices and rituals in line with the epidemiological conditions would be optional,

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<sup>21</sup> S. BUDAEV, *Safety and Reverence*, cit., pp. 2344-2345.





whereas other kinds of restrictions, even the premises-oriented ones, would be obligatory by default. Once the adoption is agreed, the religious associations would be subject mainly, or only, to activities-oriented limitations, in the proposed form. The opt-out mechanism ensures the state's main role in designing policies to counter COVID-19. At the same time, the ability of religious associations to suggest limitations according to their own preferences safeguards the principles of proportionality and autonomy. Even if some religious associations did not use the possibility to opt-out from general restrictions, this would not constitute a breach of religious freedom, since a less severe measure was available to them.

This kind of mutual agreement between the state and religious associations regarding the form of religious freedom restrictions is not completely new to existing European coronavirus legislation. In the UK and Italy, the idea of activities-oriented restrictions, shaped with cooperation from religious associations, was implemented to some degree. The UK government issued non-binding guidance for the safe use of places of worship during the pandemic. The guidance included some general recommendations, like staging entry times, ensuring multiple entrances and one-way routes for entering and exiting the premises, providing hand sanitizers etc. More importantly, the guidance encouraged faith leaders to include changes that could be made to religious rituals that usually involve close contact between individuals and provided examples, such as preventing worshippers from touching or kissing objects of religious veneration that are handled communally, removing from use books and communal resources such as prayer mats, service sheets or devotional material, avoiding singing and/or playing instruments, ensuring that any prerequisite washing/ablution rituals are carried out outside the place of worship and closing shared washing areas<sup>22</sup>. As indicated, the guidance did not have general binding force, but it proves that the state recognized the need to introduce activities-oriented restrictions, in order to provide better protection against infection.

The Italian government went a step further. Several special protocols regarding the organization of religious gatherings in the state of epidemic have been signed with various religious denominations<sup>23</sup>. For

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<sup>22</sup> M. HILL QC, *Coronavirus*, cit., pp. 7-8.

<sup>23</sup> See: <https://diresom.net/2020/05/15/protocolli-per-le-celebrazioni-delle-confessioni-religiose-diverse-dalla-cattolica/>. Cited in A. MADERA, *The Implications of the COVID-19 Pandemic on Religious Exercise: Preliminary Remarks*, in *Laws* (<https://www.mdpi.com/journal/laws>), vol. 10, issue 2 of 2021, p. 6.



the most part, the protocols contain general safety provisions, similar to the ones indicated in the UK guidance and focusing on the obligation to wear masks, maintaining physical distance, ensuring multiple entrances etc. However, what is important is that in each protocol, section two is devoted to essential and possible changes to religious practices and rituals, and this varies in accordance with the specific characteristics of the practices and rituals of each religious association. As an example, according to the protocol signed with the Jewish community, only one cantor could be present during a religious event, whereas according to the protocol signed with the protestant churches, a special sanitary regime must be applied while administering the Lord's Supper. The scope of liturgy-profiled restrictions in the protocols may not be wide, but it is of great importance that they took into account the specificity of the religious practices and rituals within various denominations and that agreements were concluded with each religious denomination separately. This proves that it is possible to set up activities-oriented restrictions after mutual negotiations between the state and religious associations, and that both parties are positively disposed towards such cooperation.

#### **4 - Advantages of the new model of restrictions**

To show the advantages of activities-oriented restrictions, some further issues must be discussed, namely its epidemiological circumstances, religious associations' attitude toward this kind of cooperation with the government, and compliance with the autonomy principle.

By epidemiological circumstances I understand the need for existing restrictions to be constantly reviewed in the light of the ongoing epidemiological situation and reshaped whenever necessary. At the time of writing, the fourth wave of the pandemic is gaining momentum. It can be observed that, at least in the Polish case, the legislator seems to be confused. On the one hand, as the wave picks up, there is a pressing need for effective measures to combat the spread of coronavirus, but on the other hand, a major part of society is double vaccinated and the social willingness to obey far-reaching restrictions has been exhausted. This tension is reflected in legal discussions. Javier Martinez-Torrón rightly observed that the attitude to the limitations of the first waves was characterized by unilateralism, imposition and improvisation, instead of



consultation, cooperation and reflection<sup>24</sup>. Rethinking the policy from this perspective is not only a theoretical issue, but also an urgent practical need. As demonstrated previously, the premises-oriented limitations are ineffective in preventing transmission and hardly proportionate in the current stage of pandemic. Maintaining such limitations will most probably not gain the public's acceptance. Lack of clarity in the strategy of choosing the restrictions and their inadequacy raises doubts and leads to noncompliance, which negatively impacts effectiveness<sup>25</sup>. A new model of restrictions has to be developed, because it seems that the pandemic is not a one-time emergency, but is becoming our everyday life, so sooner or later social pressure will make it necessary to introduce new restrictions. Activity-oriented restrictions established together with religious association are a reasonable solution, considering their effectiveness in preventing COVID-19 transmission and compliance with a new model of restrictions, characterized by narrowly targeted scope and cooperation, instead of generality and a top-down administrative approach.

When it comes to the attitude of religious associations, scholars point out two phenomena: the positive and cooperative attitude of religious associations toward the obligation to limit or even temporally suspend religious gatherings, and the need to work closer with religious associations on fighting the pandemic<sup>26</sup>. This should be particularly appreciated, because limitation of religious freedom is likely to result in conflict rather than dialogue. A survey conducted in Poland among the clergy of various religious denominations shows that all of them declared their readiness to suspend religious practices in part or in whole<sup>27</sup>. Javier Martínez-Torrón demonstrated that states were less committed to cooperation than religious associations<sup>28</sup>. Dissent was mainly voiced when the form or a particular element of a restriction became confusing. As long as restrictions on religious freedom placed as much of a burden as restrictions of other fundamental freedoms, objections were uncommon<sup>29</sup>.

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<sup>24</sup> J. MARTÍNEZ-TORRÓN, *COVID-19 and Religious Freedom*, cit., p. 3.

<sup>25</sup> J. MARTÍNEZ-TORRÓN, *COVID-19 and Religious Freedom*, cit., pp. 3-4; S. BUDAEV, *Safety and Reverence*, cit., p. 2334; M. HILL QC, *Coronavirus*, cit., pp. 9-10.

<sup>26</sup> M. HILL QC, *Coronavirus*, cit., pp. 8-9; J. MARTÍNEZ-TORRÓN, *COVID-19 and Religious Freedom*, cit., pp. 10-11.

<sup>27</sup> L. SULKOWSKI, G. IGNATOWSKI, *Impact of COVID-19 Pandemic on Organization of Religious Behaviour in Different Christian Denominations in Poland*, in *Religions* (<https://www.mdpi.com/journal/religions>), vol. 11, issue 5 of 2020, pp. 1-15.

<sup>28</sup> J. MARTÍNEZ-TORRÓN, *COVID-19 and Religious Freedom*, cit., p. 9.

<sup>29</sup> J. MARTÍNEZ-TORRÓN, *COVID-19 and Religious Freedom*, cit., p. 5.



This issue has been particularly debated in the United States. Mark Hill highlighted two cases on this matter which have been deliberated by the Supreme Court of the United States<sup>30</sup>. In the case of *South Bay United Pentecostal Church v. Newsom*, the preferential relief of restrictions on religious gatherings, vis-à-vis economic activities, was challenged, whereas *Calvary Chapel Dayton Valley v. Sisolak* concerned premises-oriented restrictions with respect to gambling premises, which were less severe than those imposed on religious premises. In the former case, the Supreme Court blocked the practice that breached religious rights, whereas in the latter the application was rejected, albeit not without strong objections<sup>31</sup>.

Given that the religious associations are open to cooperation, the main question is what are the limits of such an attitude? The survey referred to above shows that religious associations are not ready to resign from, nor substantially change, the important elements of worship, but they are willing to suspend religious services, partially or fully, if necessary<sup>32</sup>. This point is crucial, because it determines why cooperation with religious associations is necessary. Taking into account that activities-oriented restrictions are more effective from the epidemiological point of view, and are acceptable to religious associations, the issue remains how to safeguard religious autonomy. It is clear that the government has no power to decide which elements of religious practices and rituals are essential or unalterable, and which are not, and therefore can be suspended.

Javier Martinez-Torrón associated this with the state's neutrality principle<sup>33</sup>. This principle can be understood in different ways. One of the interpretations relates to the state's duty of non-interference and impartiality, whereas another one, more nuanced, refers to the issue of the place of religion in public institutions<sup>34</sup>. Let us focus on the first one,

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<sup>30</sup> M. HILL QC, *Coronavirus*, cit., pp. 12-16.

<sup>31</sup> Justice Alito wrote in the dissenting opinion that "Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing. We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility". See M. HILL QC, *Coronavirus*, cit., p. 14.

<sup>32</sup> L. SULKOWSKI, G. IGNATOWSKI, *Impact of COVID-19*, cit., p. 6.

<sup>33</sup> J. MARTÍNEZ-TORRÓN, *COVID-19 and Religious Freedom*, cit., p. 6-7.

<sup>34</sup> J. RINGELHEIM, *State Religious Neutrality As a Common European Standard? Reappraising the European Court of Human Rights Approach in Oxford Journal of Law and Religion* (<https://academic.oup.com/ojlr>), vol. 6, no. 1 of 2017, pp. 26-27.



developed primarily in *Hasan and Chaush v. Bulgaria*<sup>35</sup>. In that case, the European Court of Human Rights decided that the state cannot be a party to intradenominational conflicts. Most importantly, the Court added that the government is in principle not entitled to make judgments on the legitimacy of religious beliefs or the means used to express them<sup>36</sup>. This line of Court's reasoning does not address the main question directly, but none of the Court's previous cases explicitly does either. It suffices to say that according to the Court's established case law, state power over religious associations in terms of doctrine, including forms of religious practices and rituals, is extremely limited. This is even more visible in the cases regarding religious autonomy. The case of *Fernández Martínez v. Spain* shows how broadly the autonomy principle is construed under the European Convention of Human Rights. Even though the case did not directly concern religious practices and rituals, much attention has been paid to the concept of autonomy. The application was brought by Mr. Fernández Martínez, a former Catholic priest who has left the clerical state and was a teacher of Catholic religion in a public school. His contract for conducting religious education classes was not renewed because he had been removed from the list of persons authorized to teach religion at a local bishop's request. The removal decision was motivated by the fact that he had left the clergy and by his involvement in the "married priests" movement, which questioned the Catholic teaching on celibacy, divorce, abortion, and contraception etc. One of the main questions of the case was whether the state can take another position than the church on deciding who can teach religion.

The fact that the case was focused on the legal aspects of teaching religion education in public schools might be irrelevant here, but the essential point is why the Court, with the subsequent support coming from academia, was of the opinion that the state's role in deciding who

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<sup>35</sup> J. RINGELHEIM, *State Religious Neutrality*, cit., p. 30.

<sup>36</sup> J. RINGELHEIM, *State Religious Neutrality*, cit., p. 30; See also case of *Fernández Martínez v. Spain*, no. 56030/07, 15 May 2012: "128. The Court further reiterates that, but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (see *Hasan and Chaush*, cited above, §§ 62 and 78). Moreover, the principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty (see, mutatis mutandis, *Soyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, § 146, 14 June 2007).".





can teach religion education was very limited<sup>37</sup>. This is because the religious associations are the only entities authorized to define their own doctrine. The exclusive right of religious groups to decide who can teach their doctrine is an intangible aspect of religious autonomy, precisely because of the right to define their own doctrine<sup>38</sup>. Judge András Sajó in his dissenting opinion to *Fernández Martínez v. Spain* stated that the state's duty to respect autonomy is gradable, and that it is greater when it comes to matters concerning the internal organization of a religious groups and becomes absolute when it comes to defining religious doctrines. The state enjoys no discretion in determining whether the means of expressing religious beliefs are legitimate<sup>39</sup>. In other words, even if the principle of autonomy in the Convention standard is gradable, it has an absolute meaning when it comes to the most intimate aspects of religious worship. It cannot be forgotten that activities-oriented restrictions would affect the right of religious associations to define their practices and rituals. This sphere belongs to the same catalogue as defining the religious doctrine and consequently is exempt from state intervention. Consequently, activity-oriented limitations should not be imposed without being previously agreed with religious associations, because otherwise they are likely to violate the principle of religious autonomy.

## 5 - Safeguarding compliance with restrictions<sup>40</sup>

Even though premises-oriented restrictions seem to be better suited for the purposes of safeguarding both religious rights and public health, one may

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<sup>37</sup> J. MARTÍNEZ-TORRÓN, *Fernández Martínez v. Spain: An Unclear Intersection of Rights*, in *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?*, edited by S. SMET and E. BREMS, Oxford University Press, Oxford, 2017, pp. 207, 210.

<sup>38</sup> J. MARTÍNEZ-TORRÓN, *Manifestations of Religion or Belief in the Case Law of the European Court of Human Rights* in *Religion & Human Rights* (<https://brill.com/view/journals/rhrs/rhrs-overview.xml>), vol. 12, issue 2/3 of 2017, p. 119.

<sup>39</sup> I. LEIGH, *Reversibility, Proportionality, and Conflicting Rights*, in *When Human Rights Clash at the European Court of Human Rights*, cit., p. 225.

<sup>40</sup> I would like to thank all the discussants and participants of the conference "Religious freedom before, during and after Covid-19 between Europe and the Member States" organized under Jean Monnet Module - The European impact on the regulation Law & Religion in Italy and Beyond in Triest, Italy, in November 2021 which helped me with developing this section. I am particularly grateful to Prof. Vincenzo Pacillo whose remarks were particularly meaningful.





raise an objection regarding their practical usefulness. The question is how to ensure that those limitations that are proportionate and compatible with religious rights will be followed by the people.

At the outset, it should be noted that the question “how to improve compliance with restrictions?” is separate from question “how to design restrictions correctly?”. The first question has to do more with the state’s general approach to the pandemic, by which I mean a choice between a strategy based on imposing restrictions and punishing non-compliance, or a strategy based on cooperation.

Nonetheless, the main approach focuses on punishment connected with breaches of restrictions. I believe that such a response creates more difficulties than it solves. Should they be criminal or administrative sanctions? Should the punishment involve a fine, or should it involve imprisonment? How to determine the severity of the penalty, especially since it is virtually impossible to accurately determine the risk that any particular individual will infect others (since there are too many variables affecting the extent of transmission)? Who would be in charge of the inspections? Should they be permanent or sample in nature?

I do not say that the punishment strategy does not work at all. On the contrary, it seems to be able to resolve big scale and large grain cases of restriction breaches, such as on the level of regional, institutional or social groups. If the residents of a certain region, members of a particular religious denomination or the adherents of specific social movements would object to following restrictions, the punishment approach could be effective. However, at the same time it is quite powerless when it comes to fine-grained everyday events.

Considering the above, I think that the scale of the pandemic necessitates adherence to the cooperative approach. As was discussed above, religious institutions have generally displayed a positive attitude to adopting the limitations aimed at fighting the pandemic. The same goes for the social response. The better the restrictions are shaped, the easier they are to understand, and consequently the less severe they are (and appear to be, which is quite important from this point of view), the higher their effectiveness and the level of compliance will be. Accordingly, efforts should primarily be focused on the quality of the limitations and communication with society.

## 6 - Conclusions



To sum up, I will ask and answer two questions that seem to bring together all the issues at stake.

The first one is as follows: do we need a new model of coronavirus restrictions? The answer is affirmative, for the following reasons:

- premises-oriented limitations no longer suit the current epidemiological situation. On the one hand, scientific research shows that premises-oriented restrictions are not effective in preventing virus transmission. On the other hand, the level of vaccination is higher. Taking all this into account, it is plausible to conclude that premises-oriented limitations ceased to be an effective protection tool;

- given the above, premises-oriented restrictions are no longer proportionate and perpetuating them may violate religious freedom. The aim of imposing restrictions is to safeguard public health and this legitimate aim justifies tolerating restrictions. However, if the legitimate aim cannot be achieved by a chosen tool, such as premises-oriented restrictions, the limitations become a pure and senseless burden on religious freedom;

- the social willingness to follow the premises-oriented restrictions is rapidly decreasing. From the social perspective, it may be confusing that especially after vaccination programs, which promised the return to suspended activities, the restrictions are almost as frustrating as at the beginning of the pandemic.

Having regard to the above, a new model of restrictions needs to be designed anyway, sooner or later. This brings me to my second question: is the activities-oriented model the right one? The answer is again affirmative, for the following reasons:

- there is growing scientific evidence that the main transmission factors are related to the kind of activities carried out within the premises. Consequently, the model of limitations should be focused on the type of religious activities performed and the central question should be how to adjust them to a new situation so that the risk of transmission risk would be significantly reduced;

- activities-oriented restrictions are proportionate, because in this case it would be the religious associations themselves which would decide on how and to what extent the religious rites and practices would be changed to minimize transmission risk; the scope of state's oversight in this aspect would be strictly narrowed and it would concern only the objectively measurable epidemiological effectiveness of the proposed changes;

- activities-oriented restrictions seem more likely to be accepted by society. Activities-oriented limitations would be less constraining, since



they do not prevent believers from attending religious gatherings, and they are also fair and balanced because they allow for account to be taken of changes in the epidemiological situation, along with factors such as increasing vaccination coverage.

Last but not least, it should be kept in mind that COVID-19 restrictions are not a one-time event. Unfortunately, another pandemic may strike again. However, the developed model of restrictions, which may contribute to a more general model of cooperation between the state and religious associations, will stay with us even when COVID-19 is gone, or at least when it will be restrictions to manage it as an endemic disease.