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*The state's attitude towards religious  
communities in a health crisis:  
pursuing toward new  
interpretative approaches?*

**Państwo wobec wspólnot religijnych w sytuacji kryzysowej  
dotyczącej zdrowia. W stronę nowych podejść interpretacyjnych?**

**Abstrakt:** Jako swego rodzaju przełom wybuch COVID-19 w 2020 r. głęboko zmienił nasze zwykłe wyobrażenie o życiu społecznym. Taki bezprecedensowy stan zagrożenia zdrowia stanowi również poważne wyzwanie w zakresie podstawowych praw i wolności, będąc testem radzenia sobie w skrajnych warunkach dla nowoczesnych konstytucyjnych systemów pluralistycznych. Ożywił obawy dotyczące „wyjątkowej” roli religii w postsekularnych społeczeństwach demokratycznych, ze szczególnym uwzględnieniem wolności religijnej. Celem tego artykułu jest zbadanie, poprzez analizę porównawczą, implikacji ery pandemii jako okazji do refleksji nad potrzebą ponownego przyjrzenia się roli organizacji religijnych w ramach sieci aktorów społecznych. Artykuł pokazuje, że współpraca między aktorami politycznymi i wspólnotami wyznaniowymi może przyczynić się do wdrożenia nowych sposobów wspólnego życia, w których wszyscy aktorzy społeczni promują wspólne zaangażowanie na rzecz wspólnych celów z myślą o budowaniu bardziej zrównoważonej przyszłości.

**Słowa kluczowe:** stan zagrożenia zdrowia, środki ograniczające, wspólnoty religijne, współpraca

**Abstract:** As a sort of watershed, since 2020, the outbreak of COVID-19 has deeply altered our ordinary idea of social life. Such an unprecedented health emergency has also raised a serious challenge in terms of fundamental rights and liberties, acting as a stress-test for modern constitutional pluralistic systems. With specific regard to religious freedom, it has revitalized concerns about the “special” role of religion in post-secular democratic societies. Through a comparative analysis,

the aim of this paper is to investigate the implications of the pandemic age as an opportunity to reflect on the need to revisit the role of religious organizations within the network of social actors. The paper shows that cooperation among political actors and faith communities can contribute to the implementation of new ways of living together, where all social actors promote shared commitments to common goals with a view to building a more sustainable future.

**Keywords:** health emergency, restrictive measures, religious communities, cooperation

## 1. Introduction

As a sort of watershed, since 2020, the outbreak of COVID-19 has deeply altered our ordinary idea of social life: lockdowns, social distancing and, most of all, wearing masks for sanitary reasons have imposed a new, dystopic notion of “living together” [ECHR 2014]. Such an unprecedented health emergency has not only deeply undermined the feeling of safety of modern democratic societies coming from the evolution of technology and medicine but has also raised a serious challenge in terms of fundamental rights and liberties, whose protection is founded on a complex international framework [Martínez-Torrón 2021a: 1]. Although the restrictive measures have been aimed at protecting the “supreme good” of life [Colaïanni 2020: 32], the pandemic has emphasized underlying legal, political, social and economic tensions [Madera 2020: 115]. With specific regard to religious freedom, it has revitalized concerns about the “special” role of religion in post-secular democratic societies, where it seems less and less acceptable and reasonable that religion should enjoy special treatment and exemptions from general rules [Ibidem:110]. In an era where “cultural wars” are expanding, claims for religious accommodation are seen as a means of protection of values and convictions that are becoming progressively politically divisive in a highly secularized and multicultural society [Bean and Fretwell Wilson 2020: 247]. Such a never-ending debate has been exacerbated during the pandemic: should the exercise of religious freedom be equalized to that of other secular activities or does its legal regime deserve special treatment? [Schwartzman 2012: 1351].

However, during the health crisis due to the COVID-19 infection, religious communities have played a key role. In many cases, such groups have provided guidelines to their faithful to limit the spread of the virus, as well as being deeply engaged in providing primary goods and services to vulnerable classes [Madera 2021: 6].

The aim of this paper is to analyze the implications of the pandemic period as an opportunity to reflect on the need to revisit the role of religious organizations within the network of social actors, and to develop new strategic partnerships between religious and public actors in the pursuit of shared goals [Martínez-Torrón 2021b: 30-32].

## **2. The restrictive measures aimed at reducing the spread of the infections**

The coronavirus pandemic has often been associated with the idea of an exceptional global crisis which has deeply affected societies, economies and legal frameworks. First, the exceptionalism and the severity of the situation has provoked an “aggrandizement” [Petrov 2020: 71] of the jurisdiction of the executive powers, with little parliamentary control, raising concern about the subtle boundary between broad discretion and arbitrariness [Martínez-Torrón 2021a: 1-16.]. Commentators questioned whether legislative reluctance to provide clear standards has been the effect of a broader marginalization of the role of the lawmaker [Casuscelli 2021: 1-16.]. Other scholars have seen the health crisis as an opportunity for a reflection on the adequacy and effectiveness of emergency rules in distinctive legal frameworks, their role being connected with their place within the hierarchical system of the sources of law: in some cases, emergency rules have been provided at a constitutional level; in others, at the level of ordinary legislation [Consorti 2021: 167]. In any case, many legal experiences have shown the weakness of their legal provisions aimed at regulating a health emergency.

Indeed, restrictive measures, due to the need to reduce the spread of the infection, have resulted in a drastic suspension of the exercise of fundamental freedoms: mobility, association, education, privacy, raising the question of whether and to what extent fundamental rights can be subject to restrictions. Several governments have had to take decisions, due to the state of emergency, resulting in “tragic choices” [Calabresi and Bobbit 1978] in the search of a difficult balance of conflicting rights, which are the expression of fundamental values in a democratic and pluralistic society, notwithstanding the lack of scientific certainty and evidence-based medical standards and guidelines.

Second, there has been an unimaginable medicalization of law, as political choices have been entangled with scientific data. Such an entanglement has provoked the need for a continuous follow-up, trying to keep up with the successive phases of the pandemic, the epidemiological data, the level of scientific knowledge, the workability of public health systems [Madera 2021: 5]. However, such measures

have been the object of a harsh debate: they have been criticized because of their lack of clarity, ineffectiveness, and self-serving nature [Martínez-Torrón 2021: 3].

In any case, the coronavirus health emergency has been qualified as a valuable opportunity to assess the scope and workability of the constitutional framework during the management of a dramatic health crisis [Ruggeri 2020: 210-211]. Acting as a stress-test for modern constitutional pluralistic systems, the health emergency has raised new unique legal challenges [Madera 2021: 1].

### **3. The management of religious freedom during the pandemic crisis: is religion still special?**

With specific regard to the management of religious freedom, the pandemic crisis has provided a valuable opportunity to question the controversial relationship between law and religion.

As a global crisis, it has allowed distinctive state responses to be compared, where public policies have had to reconcile “reasonableness” with “precaution” [Lazzaro 2021: 107.], “contingency” and “proportionality” [Ventura 2021]. Governments have offered various legal responses, ranging between two opposite poles: a full interruption of religious assemblies and an accommodation of religious worship [Madera 2021: 1]. Indeed, scientific uncertainty, the unavailability of effective treatments and a pandemic context in continuous evolution, where the only available option to reduce the spread of the infection was to impose social distancing and restrictions on mobility have resulted in a fragmented legal response.

In the US context, a discrepancy has arisen between federal general guidelines and more pervasive state restrictive measures. Such a divergence was emphasized during phase-two of the pandemic, underlining that Trump administration’s accommodationist approach towards the claims of mainstream religions clashed with state executive powers’ decisions, charged with the hard job of providing legal responses aimed at restraining the spread of the infection [Haynes 2021: 1-15].

On the other side of the Atlantic, European states have resorted to various procedural techniques, grounded on the ECHR’s legal framework, to impose restrictions on fundamental freedoms. Some states have asked for a derogation to the application of the ECHR’s guarantees resorting to article 15 of the European Convention; others have tried to manage the pandemic crisis with ordinary legal mechanisms,

namely, they have taken advantage of the principles of necessity and proportionality to balance competing rights [Van Drooghenbroeck 2020].

Legal commentators have analyzed whether a more or less benevolent state attitude toward claims for accommodation of religious exercise has been affected by the model of church-state relationships adopted [Mosquera Monelos 2021: 6-7]. There is little doubt that specific views of religious freedom can have an impact on public policies [Fornerod 2021: 6-7]. However, the variability of restrictions has been affected by multiple and not only legal factors, giving rise to a complex mismatch of different state provisions and grounds, which in some cases “challenges stereotypes” [Ventura 2021], showing the dynamic nature of church-state interplay [Madera 2021: 5]. It goes without saying that where a fair level of religious freedom has been guaranteed to all religious communities, states have given a higher level of consideration to religious needs [Mosquera Monelos 2021: 6.]. However, in certain legal contexts, the pandemic crisis has emphasized a disparate treatment between mainstream religions and minorities, and has provoked increasing repression, even persecution, of already marginalized groups, empowering a “new dimension of hate speech” [Ahmad 2021: 2].

From a legal point of view, the key question is whether religious freedom still deserves special protection and requires accommodation toward religiously neutral, generally applicable law. As is known, the place of religious freedom in the scale of values in a modern democratic post-secular society is the object of lively debate. On one hand, there is an increasing pressure to consider religious and secular values on the same footing for the sake of a secular egalitarianism [Schwartzman 2012: 1351.]. On the other hand, the uniqueness of religion as a “marker of collective identity”, embedded with “compelling affective experiences and a moral authority”, has been emphasized [Ysseldyk, Matheson, and Anisman 2010: 60-71].

Thus, the pandemic has emphasized the coexistence of conflicting views on this issue as a result of a pluralistic society, where academic arguments have ranged between complaining that during the health crisis religion has been considered a good people can do without, so its protection has often been unduly compromised, and claiming that religion has been granted a privileged position compared to other secular activities, enjoying an undue exceptional status [Balsamo and Tarantino 2020].

Restrictions on religious exercise have not been implemented with the intent to target religion *qua* religion [Madera 2020: 114]. Religious exercise has been affected

within a broader framework of unparalleled restrictions on public gatherings and collective social activities. However, religious gatherings have often been deemed as super-spreader events (mass gatherings, religious festivals, burial practices), requiring a high level of monitoring. This approach has given rise to the risk of a discriminatory treatment of religious gatherings compared to other secular activities [Licastro, 2021. 130]. However, the question is still open, as to whether this governmental approach has been the result of the secularization of civil society, namely of a deep change of the role of religion in society, affecting public policies or, instead, whether a split has developed between a government “blind” toward religious claims coming from civil society [Ventura 2021].

#### **4. The key role of the courts during the pandemic crisis**

The judiciary has played a difficult role during the pandemic, as they have been charged with the negotiation of conflicting interests. Courts have often adopted an attitude of deference toward executive powers, showing reluctance to second-guess the restrictive measures [Madera 2021: 5].

In various cases, courts have resorted to the neutral standard of the comparable threshold of risk. On this point, courts have often been charged with the hard job of identifying a reasonable secular comparator for churches: in such a dystopic pandemic age, they have referred to stores, cinemas, theaters, and even casinos.

Therefore, churches have been deemed as analogous to theaters, as both are indoor spaces where people gather and sit in proximity for two-three hours, but have been considered different from stores, where people walk around for a few minutes to buy what is necessary. Also, the judicial scrutiny of activities has been more often strictly entangled with the location where activities take place (capacity of a building, indoor-outdoor, organizational ability to guarantee the respect of sanitization measures), avoiding any value judgements. Such a minimalist judicial approach led to the paradoxical result, in certain legal contexts, that during the reopening stage, economic activities have been privileged, raising concern about the relevance accorded to religious activities.<sup>1</sup>

Thus, the emergency situation has given rise to a new categorization of activities as essential, whose continuation has to be guaranteed, and non-essential, which can

<sup>1</sup> Supreme Court of the United States, *Calvary Chapel Dayton Valley v. Steve Sisolak*, Governor of Nevada; Supreme Court of the United States, *South Bay Universal Pentecostal Church v. Newsom*..

be postponed or exercised in an alternative way [Licastro 2021: 126]. In any case, such standards of assessment have had an unavoidable impact on the exercise of the rights connected with those activities: thus, a new class of essential rights has arisen, whose protections cannot be suspended, even during an unprecedented health emergency, while the exercise of other less compelling rights can be postponed or satisfied through alternative means [Licastro 2021: 127]. The real question is whether and to what extent fundamental rights can be subject to restrictions.

In the US context, the pandemic case law deserves careful analysis, as in some cases it has provided the opportunity for a significant reconsideration of the usual standards of review, giving rise to serious concern about their implications in the near future [Blackman 2021: 637].

Should religious freedom be neutralized where a generally applicable law is concerned? Soon, the US courts will have to face the key question of whether and to what extent there is still room for a balancing process of competing rights. Also, the pandemic case law has emphasized that third-party burdens, provoked by the practice of religion have an increasingly significant weight in the equation [Corbin 2020: 1].

In the European context, according to article 52 of the EU Charter, limitations to rights cannot affect their essential content as an insurmountable barrier aimed at protecting rights against legislative discretion [Castelli 2021: 454]. Have the pandemic measures affected the core of fundamental rights? What are the boundaries of the protection?

The question is not easy, as the essential content of rights is not clearly defined: some commentators resort to the essential dignity of every human being, while others invoke a fair proportion between the strength of a limitation and the severity of the circumstances which caused the restriction [Castelli 2021: 467]. We cannot underestimate the fact that in several countries such as France, Belgium, Greece, Croatia, Scotland, Slovakia, Romania and Ireland, the proportionality of the restrictions (and in some cases blanket bans) on religious worship during COVID-19, has provoked litigation, and some cases, originating from Greece, Croatia and Slovakia, have culminated in complaints before the European Court of Human Rights (ECtHR).

On both the sides of the Atlantic, during the pandemic, the principle of precaution has received predictable consideration in the balancing process. Although

the adoption of neutral precautionary standards has found a strong justification in the need to prevent the spread of the infection, the weakening of any value judgment testifies a high risk of the neutralization or relativization of the importance of religion, undermining the recognition of its unique role [Madera 2020: 138].

In Europe, the courts have often resorted to the standards of necessity, proportionality and effectiveness; however, the application of these standards has given rise to disparate results, as it is extremely difficult to quantify the right amount in different legal environments. It cannot be underestimated that courts have had to reach a proper balance between unity (complying with uniform European standards) and diversity (taking into account domestic history, tradition, and culture, which can result in a local dimension of human rights) [Ventura 2021].

There is little doubt that during a serious health emergency the protection of public health has been given priority, provided that the sacrifice of other competing rights has a temporary nature. However, in the long run, a hierarchy of rights is not sustainable [Haynes 2021: 1-15]. Given the interdependence and indivisibility of all human rights, western scholars are aware that no right can be absolutized to the detriment of other competing rights. Infringing certain rights will inevitably have a negative impact on other rights [Neves-Silva, Martins, and Heller 2019: 14].

On both sides of the Atlantic, judicial decisions have raised concern about the risk of undue state interference in church matters. In democratic states, churches enjoy a space for self-governance, free from state interference. During the COVID-19 pandemic, restrictive measures have often underestimated the inner importance of religious rituals and practices, intruding in what is central and essential for a faith community, and arbitrarily imposing alternative means, which, in some cases, do not satisfy the spiritual needs of believers. Courts are not equipped to judge what the genuine message of a religious tradition is, what is a religious obligation is, which principles and doctrines are not negotiable [Durham 2020]. Furthermore, the dichotomy between essential or nonessential activities can easily become a strategic means for states to exercise pervasive monitoring on religious groups, or to adopt selective deference (privileging some religious groups and discriminating others) [Ventura 2021]. The issue is extremely complex, and it can also give rise to an internal crisis, namely to internal disputes within religious communities about what is essential on the basis of religious tradition [Ventura 2021].



## **5. The role of religious communities during the pandemic and the renewed need for a cooperation between religious and political actors**

A sociological study has identified a macro-level, a meso-level and a micro-level of involvement of religion in the fight against COVID-19 pandemic. At each level “best practices” and “worst practices” have been focused [Yendell, Hidalgo, Hillenbrand 2021]. Extreme religious groups in a few cases have promoted “worst practices” in terms of resistance against restrictive measures, violation of anti-COVID-19 provisions, spread of conspiracy theories, reluctance toward vaccination [Ibidem: 34 ff.]. However, the study shows that the best synergic strategies come from the implementation of “involvement, dialogue, networking” [Ibidem. 101]. During the pandemic, religion has proved to be a powerful driving force to face new social challenges, as they can affect people’s lives and social activities [Wijesinghe et al. 2021: 1-16]. The organizational dimension of religion (religious communities and Interfaith initiatives) has given a robust contribution during the health emergency [Martínez-Torrón 2021b: 30-32].

First, during the pandemic, various faith communities have shown their resilience: they have solicited their faithful to comply with restrictive measures, and they have self-imposed restrictive measures, anticipating state provisions and showing religious creativity in adapting their rituals and practices to the unprecedented situation of the health emergency [Hill 2020: 8-9]. They have played a pivotal role as “trusted agencies for communication, interaction, and information provision” [Yendell, Hidalgo, Hillenbrand 2021: 100].

Furthermore, the role of religious leaders cannot be underestimated. Given the trust and influence they enjoy in their communities, they have facilitated the spread of correct information with regard to COVID-19 appropriate behaviors, and they have had a positive impact on the adoption and acceptance of precautionary measures by their believers [Ibidem: 100]. In various social contexts, religious leaders have been deemed as “key stakeholders in community engagement activities”, as they have not only provided spiritual guidance and psychological support, but have also supported and coordinated prevention campaigns, cooperated in building trust with regard to COVID-19 appropriate behaviors, and been deeply involved in message dissemination and in countering discrimination and hate speech [Wijesinghe et al. 2021: 1-16].

Furthermore, religious communities have been traditionally involved in charitable apostolates (education, healthcare, social assistance), and during the pandemic,

they have given a significant contribution in providing primary goods and services to vulnerable classes [Madera 2021: 6].

Finally, a fruitful dialogue between religious actors and political decision makers has developed. Such a dialogue has taken different forms and has not always reached the highest level of institutional cooperation. Different options have been adopted in various legal contexts: institutional cooperation, advisory boards, task forces which included religious actors, and various models of consultation or concertation [Ventura 2021]. In some cases, consultation has been extended not only to religious groups but also to organized secularism [Christians and Overbeeke 2021: 97]. The possibility for religious organizations to have access to public relief on a par with secular undertakings, even in separationist environments, testifies state recognition of the vital social role of religious organization during the health emergency [Chopko 2021: 1-12].

The Italian solution has been the negotiation of memoranda (“*protocolli*”) with various faith communities, to facilitate the resumption of religious gatherings in the respect of safety measures. The State concluded these memoranda, irrespective of the previous enjoyment by the groups involved of church-state agreements. Furthermore, the state preferred to sign a protocol for every religious group instead of adopting a single act for all religious groups, although the content of all the memoranda is quite uniform [Lo Giacco 2020: 107-114].

In any case, a comparative analysis shows that faith-based organizations can affect the individual dimension of faith, its organizational dimension and can also have a positive impact on public policies, with a view to offering benefits to the population as a whole [Wijesinghe et al. 2021: 1-16].

## **6. Concluding remarks: a lesson from the pandemic**

The COVID-19 pandemic has been one of the most challenging crises modern societies have faced, and its implications have affected not only our individual lives but also our legal frameworks. The pandemic has emphasized that an “absolutization” of principles risks giving rise to “irresolvable conflicts” [Lo Giudice 2021: 139]. On this point, the Italian Constitutional Court [2013] has argued that no right can become tyrant to the detriment of other competing values. In a pluralist perspective, there cannot be room for the crystallization of a hierarchy of absolute values, but a balancing process of competing interests is required, which takes into serious consideration the specific circumstances of the case [Haynes 2020: 9].

Following this perspective, various approaches can be followed regarding those who can be charged with the composition of competing interests. The pandemic has emphasized a dangerous change of balance among the three branches of the government, where the role of the lawmaker is increasingly marginalized, and the reconciliation of conflicting interests is left to the courts [Casuscelli 2021: 1-16]. The *status quo* has heightened the risk of the establishment of a kind of “juristocracy” [Hirschl 2004], where the judicial arena has become the preferential place where “tragic choices” [Calabresi and Bobbit 1978] are addressed.

The lawmaker should re-appropriate his role and should be charged with the search of an (even imperfect) composition of the conflicting values. Indeed, the democratic processes are the proper arena for a depolarization of the conflict of values. However, an open dialogue with all components of society is required to prevent the risk of legislative processes becoming just guarantors of majority views, underestimating dissenting voices [Casuscelli 2021: 1-16].

The lesson from the pandemic is that the knowledge of all the perspectives involved is necessary [Ventura 2021]. Mediation of conflicts requires the participation of all the actors concerned in the decisional processes [Lo Giudice 2021: 148]. Thus, the pandemic has emphasized the need to develop communicative channels between public and religious actors in the pursuit of shared goals [Martínez-Torrón 2021a: 8-9].

However, mediation implies that all stakeholders can be active participants in the decisional processes, claiming protection for their cultural-religious heritage but being aware that they cannot impose their values on others who do not share the same set of values [Lo Giudice 2021: 148].

Furthermore, the pandemic has highlighted the need for a re-visitation of the role of religious communities within the network of social actors and the advantageous effects coming from the development of partnerships between public authorities and religious groups [Madera 2021: 6].

On this point, the health- emergency has driven states to develop a constructive dialogue with religious groups in different legal contexts, regardless of their institutional models of church-state relationships. The more faith communities are involved in political decision making, the more effective can their contribution be [A. Yendell, O. Hidalgo, C. Hillenbrand 2021: 100 ff.].

Therefore, there is an increasing need for a three-party cooperation between religious actors, civil society and the government, with a view to reassessing the role of the institutional dimension of religion in the public sphere within “a model of participatory citizenship” [Herbert 2016: viii].

However, commentators underline that cooperation should not be selectively limited to the management of a health crisis but should become a “method” of interaction between the government and faith communities: in this way, religious communities would not act reactively when government measures affect them but could proactively participate in their definition, facilitating their acceptance and their implementation [ibid.: 100 ff.].

Also in the post pandemic era, the development of strategic partnerships between religious and political actors may become a key element in the pursuit of common goals [Madera 2021: 6]. As is known, religious communities are playing a impactful role in the immunization process, promoting correct information to overcome vaccine hesitancy, developing religious arguments which underline the importance of hygiene regulation, strengthening social values, building trust, and making available religious premises into vaccination centers [A. Yendell, O. Hidalgo, C. Hillenbrand 2021: 100 ff.]. Faith actor engagement can become a game-changer in the fight for immunization in low-income countries [Melillo et al., 2021]. Interreligious dialogue can give a powerful contribution in strengthening cooperation and combating discrimination in “fragile contexts” (Holden 2021). In the same way, faith communities can offer renewed support in facing both new and never-ending legal challenges (defense of new disadvantaged groups, overcoming of social injustice and structural inequalities, reduction of poverty, addressing the implications of climate change) government [A. Yendell, O. Hidalgo, C. Hillenbrand 2021: 100 ff.].

Such a model of cooperation among political actors and faith communities can contribute to the implementation of new ways of living together, where all social actors promote shared commitments to common goals with a view to building a more sustainable future.

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