

Violations of Religious Freedom During the Covid Crisis in Europe

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Many articles have already been published on restrictions on religious freedom in the context of the fight against Covid 19¹. The present text does not wish to repeat what can already be read elsewhere, but to focus on the analysis of the situation in the light of the case law of the European Court of Human Rights (ECHR), and to take advantage of the author's access to the national reports on the impact of Covid on the practice of worship drawn up by the legal officers of the Catholic bishops' conferences that are members of the Council of European Bishops' Conferences. These reports are not public, but they contain interesting information about the content and the way in which the regulation of worship was adopted during the health crisis.

The measures vary so much from country to country and from period to period that it is easier to take 'snapshots' of the situation than to present a global picture. For example, at the beginning of November 2020, public worship was free in the following countries: Croatia, parts of Spain and Switzerland, Denmark, Finland, Bulgaria, Greece, Hungary, Estonia, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, Norway, Poland, Portugal, Czech Republic, Romania, Slovakia and Sweden. They were subject to conditions in the following countries: Austria, Germany, Slovenia, parts of Spain and Switzerland, and Ukraine. Finally, they were banned in France, Belgium, Great Britain and Ireland².

There is some similarity in the measures adopted in most countries, consisting, during periods of strict confinement, of a ban on public worship and the continued opening of places of worship for private prayer, followed by very limited permission for public worship subject to relatively similar gauges during periods of lesser confinement. Some countries, such as Ireland, stand out for the severity and duration of their restrictions, while others, such as Spain and Poland, have never banned public worship.

There are also differences in the way the crisis was handled. Some governments acted brutally, unilaterally banning all public worship for months on end, while others were careful to work

¹ See *inter alia* *COVID-19 y Libertad Religiosa*. Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid, Iustel, 2021 ; *The Crisis of Religious Freedom in the Age of COVID-19 Pandemic*, Adelaide Madera, MDPI, 2021 ; *Fides et Libertas, Special Edition on Covid-19 and Religious Liberty*, IRLA, 2021 ; Frédéric Dieu, « Le culte aux temps du Corona : la liberté de culte en période d'urgence sanitaire », *Revue du droit des religions*, N°11, mai 2021 ; Rodrigo Lara, M.B. “La libertad religiosa en España durante la pandemia de COVID-19”, in *Revista General de Derecho Canónico y Eclesiástico del Estado*, 54, 2020 ; *Law, Religion and the Spread of COVID-19 Pandemic*, Fabio Balsamo and Daniela Tarantino. Pisa: DiReSoM.

² European Centre for Law and Justice, *Limitations portées à la liberté de culte en Europe au nom de la lutte contre la Covid-19*, novembre 2020. On line at <https://eclj.org/religious-freedom/coe/limitations-portees-a-la-liberte-de-culte-en-europe-au-nom-de-la-lutte-contre-la-covid-19?lng=fr>

with religious leaders and respected their authority on worship. This aspect is essential for the Catholic Bishops' Conferences interviewed, and is legally formulated in the context of the principle of autonomy of religious communities.

These restrictions have given rise to very few disputes in comparison to the number of faithful affected. A few ministers of religion and lay people have taken legal action before national courts in Greece, Poland, Germany or the United Kingdom, but also in the United States. Only in France, it seems, have bishops officially supported and participated in these actions. The national bishops' conferences have always sought to cooperate with, rather than confront, the civil authorities.

Following national appeals, several cases have been brought to the ECHR. Only one case has been decided so far, in an expeditious manner: *Dalibor Magdić v. Croatia*.

On 1 September 2022, the ECHR rejected the application *Magdić v. Croatia* (no. 17578/20) brought by a Croatian Catholic worshipper complaining about the complete ban on public worship during the spring 2020 confinement. The Court declared it inadmissible, finding that Mr Magdić had complained *in abstracto*; it criticised him for failing “*to specify which public gatherings he could not attend because of the measures in question. Similarly, he complained of the breach of his freedom of movement without mentioning where and when he intended to travel but could not because of the impugned measures*” (§ 10). Mr. Magdić should therefore have recalled some of the obvious; as a Catholic, he wanted to go to Sunday mass. In the absence of these details, the Court concluded that “the complete absence of any such individual particulars makes it impossible for the Court to conduct an individual assessment of the applicant’s situation” (§ 11).

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Another application introduced by the Association of Orthodox Churchmen against Greece (no. 52104/20) was much more specific. The Orthodox association indicated exactly how its freedom had been affected by the ban on worship. But, sadly, the lawyer representing the Church failed to answer to the court; and the case has been stricken down.

The European Court also gave an important, but contested, judgment in the case of *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*³. In this case, the Court ruled that the ban on political demonstrations during the confinement violates the freedom of assembly and demonstration because of its general nature and its duration of two months. This case was referred back to the Grand Chamber at Switzerland's request, with the original judgment being adopted by four judges to three.

Other cases in relation to the lock down have been lodged with the ECHR, and some are still pending, concerning, *inter alia*, compulsory vaccination⁴, compulsory masking⁵, the arrest of a health control protester⁶, separation within families⁷, the closure of sports clubs⁸, freedom of

³ *Communauté genevoise d'action syndicale (CGAS) c. Suisse*, no. 21881/20, 15 mars 2022.

⁴ *Pierrick Thevenon c. France*, no. 46061/21.

⁵ *Zsolt István Árus c. Roumanie*, no. 39647/21.

⁶ *Valentīns Jeremejevs c. Lettonie*, no. 44644/21.

⁷ *D.C. c. Italie*, no. 17289/20. Case Strike down by a decision of October 15, 2020.

⁸ *Toromag, S.R.O. c. Slovaquie*, no. 41217/20. Case declared irreceivable by a decision of June 28 2022.

demonstration⁹, critical expression of health control¹⁰, and sanctions imposed for non-compliance with confinement¹¹.

Following the reasoning of the European Court, we will examine successively the legality of the restrictions (1), their purpose (2), and their proportionality (3). We will then recall the prohibition of discriminatory (4) or arbitrary (5) restrictions, as well as the need to respect the autonomy of religious communities (6), which implies cooperation between religious and civil authorities (7).

1. The legality of restrictions

During the Covid-19 crisis, restrictions on freedoms were often imposed by decree and accompanied by criminal sanctions. The legality of these measures was called into question, notably in the *Communauté genevoise d'action syndicale* case, without the European Court ruling on this point. Unlike the United Nations Human Rights Committee, the Court considers that the notion of "law" must be interpreted broadly. However, the extent to which rights and freedoms are infringed in a health crisis situation means that it is necessary to ensure that the legislature's role as guardian of freedoms is respected. For example, in Poland, the Krakow Administrative Court ruled in favour of a priest on the grounds that the contested restriction on religious freedom should have been introduced by Parliament, not by an administrative act¹².

2. The legitimate objective of protecting public health

The restrictions adopted were aimed at the legitimate objective of protecting public health. Indeed, the European Court found that “there can be no doubt that the COVID-19 pandemic may have very serious effects not only on health, but also on society, the economy, the functioning of the State and life in general”¹³. The Court also stated, with regard to the first containment, that “the threat to public health from the coronavirus was very serious, that knowledge of the characteristics and dangerousness of the virus was very limited at the initial stage of the pandemic and, therefore, that the States had to react rapidly”¹⁴.

Public authorities have not only a legitimate power to restrict rights and freedoms to protect public health, but also “a positive obligation [...] to protect the life and health of persons within their jurisdiction under, inter alia, Articles 2 and 8 of the Convention”¹⁵.

However, in European and international human rights law, the protection of public health is not a right or a freedom, but only a legitimate limit to the exercise of individual freedoms, including

⁹ *Central Unitaria de Traballadores/AS c. Espagne*, no. 49363/20 ; *Mihaela Nikolaeva Petrova c. Bulgarie*, no. 938/21 ; *Viktor Aleksandrovich Nemytov c. Russie*, no. 1257/21 ; *Marek Jarocki c. Pologne*, no. 39750/20.

¹⁰ *Mariya Anatolyevna Avagyan c. Russie*, no. 36911/20.

¹¹ *Cristina Bracci c. San Marin*, no. 31338/21.

¹² Administrative Court of Warsaw, III SA/Kr 677/21, December 6 2021.

¹³ *Cristian-Vasile Terhes c. Roumanie*, no. 49933/20, 13 avril 2021, § 39 (unofficial translation).

¹⁴ CGAS, *op. cit.*, § 84 (unofficial translation).

¹⁵ CGAS, *op. cit.*, § 84 ; *Vavřička et autres c. République tchèque* [GC], nos 47621/13 et 5 autres, 8 avril 2021, § 282. Voir aussi *Lopes de Sousa Fernandes* [GC], no. 56080/13, § 164.

religious freedoms. Thus, in the legal equation, freedom of religion should be the main, major value, while the protection of public health should be the minor component, the need for which must be strictly justified by the public authorities. It goes without saying that the authors of restrictions on religious freedom should not use the health crisis as a pretext for other purposes, especially political ones, such as strengthening the government's power over the churches.

3. The proportionality of restrictions

3.1. *The relative value of religious freedom*

Examining the proportionality of restrictions on religious freedom involves a prior judgement on the value of this freedom in relation to other freedoms and interests, and in particular in relation to the objective of protecting public health. This question is not theoretical, and is particularly relevant to religious freedom, as its value is highly debated.

For some scholars, especially in the Anglo-Saxon world, religious practice is just one activity among others and does not deserve specific protection; its various components are sufficiently protected by the other freedoms of conscience, association, assembly and expression, as well as by the principle of non-discrimination¹⁶. This trend considers freedom of religion to be redundant, and contests the “exceptionalism”¹⁷ that it would enjoy, which would offer it a higher level of protection than other freedoms.

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This exceptionalism is reflected in Article 4 of the 1966 Covenant on Civil and Political Rights, which prohibits any derogation from freedom of religion, even “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed”. Similarly, the Portuguese Constitution provides that freedom of conscience and religion cannot be affected, even in a state of emergency (Article 19.4). In the French Conseil d’État, the relief judge echoed this idea to justify a difference in treatment favourable to places of worship compared to other establishments open to the public, such as restaurants or theatres, noting that “the activities carried out there are not of the same nature and the fundamental freedoms at stake are not the same”¹⁸. But the idea of a hierarchy between rights and freedoms is strongly opposed by some academics, on the grounds that they are all universal, indivisible, interdependent and interrelated, as was declared at the end of the 1993 World Conference on Human Rights in Vienna.

Without going so far as to challenge the legal and philosophical legitimacy of religious freedom, the pandemic has also, and above all, put its importance in the context of public health requirements into perspective. Indeed, the hierarchy of human activities, between the essential

¹⁶ James W. Nickel, *Who Needs Freedom of Religion?*, 76 *Colo. L. Rev* 941 (2005) ; Cécile Laborde, “Religion in the Law: The Disaggregation Approach”, *Law and Philosophy*, vol. 34, no. 6, 2015, pp. 581–600. *JSTOR*, <http://www.jstor.org/stable/24572387>.

¹⁷ Laura S Underkuffler, “*Religious Exceptionalism and Human Rights*” (2014). Cornell Law Faculty Publications ; Peter Petkoff, “Religious Exceptionalism, Religious Rights, and Public International Law”, in Malcolm Evans, Peter Petkoff, and Julian Rivers (eds), *Changing Nature of Religious Rights under International Law*, Oxford, 2015.

¹⁸ Conseil d’État, Juge des référés, 18/05/2020, 440366, § 32 ; see also Conseil d’Etat, Ordonnance of novembre 29 2020, § 19.

and the non-essential, implies the determination and imposition on society of a scale of value. This is particularly delicate and revealing in the case of religious activities, which are essential for many believers, but whose usefulness is difficult to measure. Collective religious practice has often been seen as a non-essential activity, in terms of health, economics and culture. It has suffered from a utilitarian approach to crisis management, which tends to consider human activity only in terms of infection statistics, “in the name of the protection of life, and of a life sometimes reduced to its strictly biological character”¹⁹. The fact that a priest or a member of the faithful is prepared to risk his health in order to give or receive a sacrament seemed a form of socially irresponsible and reprehensible egoism.

It is worth noting that in most European countries, places of worship have remained open, with restrictions on the ability of worshippers to meet beyond a limited number, which varies from country to country and according to the extent of the virus' circulation. This finding supports the idea that the freedom to manifest one's religion may be subject to proportionate restrictions, but not to general and absolute derogations. In this sense, the UN Human Rights Committee states in its General Comment No. 29 that “Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant”²⁰. The Human Rights Committee further states: “Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified.” (§7). It is for the judge to sanction any derogation, and to assess the proportionality of any restriction. The European Convention on Human Rights does not confer any special status on freedom of religion. Its manifestations (in the external forum) may therefore be subject to restrictions provided for by law and “necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”. (Article 9.2 of the ECHR).

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3.2. *No excessive restriction in scope*

According to the majority case law of the European Court²¹, “for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned”²². In *CGAS v. Switzerland*, the European Court recalled that “a general prohibition of a certain conduct is a radical measure which requires solid justification and particularly serious review by the courts, which are authorised to weigh up the relevant interests at stake”²³.

The principle of proportionality requires that national authorities put in place the least restrictive measures possible. Such measures should take into account, inter alia, differences in health conditions between territories, or the size of religious buildings, the place of worship (indoor or outdoor), or the relative dangerousness of a particular religious practice. It is up to the

¹⁹ Frédéric Dieu, « Le culte aux temps du Corona : la liberté de culte en période d'urgence sanitaire », *Revue du droit des religions*, N°11, mai 2021, p. 173.

²⁰ General Comments n° 29 on article 4 (24 July 2001) CCPR/C/21/Rev.1 / Add.11, § 4.

²¹ But this principle has not been applied in the ruling *Vavříčka et autres c. République tchèque*, no. 47621/13, of 8 April 2021. See the separate opinion of judge Krzysztof Wojtyczek.

²² *Glor c. Suisse*, 30 April 2009, no. 13444/04, § 94.

²³ *CGAS, op. cit.*, § 85. See, for instance, *Lacatus c. Suisse*, no. 14065/15, § 101, 19 January 2021, *Hirst c. Royaume-Uni (no 2)* [GC], no. 74025/01, § 82, CEDH 2005-IX, et *Schlumpf c. Suisse*, no. 29002/06, § 115, 8 janvier 2009.

national authorities to show that they have taken these circumstances into account in order to reduce, as far as possible, the infringement of the freedom, taking into account scientific knowledge at the time of the facts. In this respect, the European Court has already recognised that the deprivation of a community of its place of worship renders meaningless its right to manifest its religion²⁴.

On 29 April 2020, the German Constitutional Court of Karlsruhe condemned the ban on public worship on the grounds that the general nature of the ban was not justified, and thus violated the religious freedom guaranteed by the German Constitution (Order No. 1 BvQ 44/20). Similarly, the general and absolute prohibition of collective worship was sanctioned by the French Conseil d'Etat as being disproportionate to the objective of preserving public health in the light of developments in the health situation²⁵.

In Scotland, Justice Braid ruled similarly, finding the closure of places of worship to be disproportionate, as the Government had not demonstrated the inadequacy of less restrictive measures to deal with the health situation²⁶.

The US Supreme Court, in its decision in *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.* (2021), also applied this test to the proportionality of the measures taken by the State of California. It found that the authorities had not explained why less restrictive measures to achieve the same objectives had not been adopted; the judges also made several less restrictive proposals that could have been implemented by the authorities, including the wearing of masks and the use of plexiglass windows.

By way of comparison, in another case the European Court upheld a national measure restricting the applicant's freedom of movement, as he retained many opportunities to go out and still make social contacts²⁷. The interference was found to be proportionate to the protection of public health, as it did not completely eliminate the applicant's ability to move around.

3.3. No restriction of excessive duration

Restrictions on freedoms should also be prescribed for the shortest possible time. Furthermore, the authorities should continuously assess the necessity of such measures in the light of the changing health situation and scientific knowledge. The German Constitutional Court has recalled that “any extension of such temporary measures must be subject to a rigorous assessment of their proportionality, taking into account the current situation”²⁸. This has proven to be important for believers, for whom the pain resulting from the deprivation of worship increases with the duration of the restriction, particularly in the run-up to religious holy days.

With regard to freedom of demonstration in Switzerland, in the *CGAS v. Switzerland* judgment, the European Court found it “worrying” that “the general ban was maintained for a considerable period of time” (§ 86). However, the period of the ban on demonstrations retained by the ECHR

²⁴ *Association de Solidarité avec les Témoins de Jéhovah et autres c. Turquie*, no. 36915/10 et 8606/13, 24 May 2016, § 90.

²⁵ Conseil d'État, Juge des référés, décision n° 440366, 18 mai 2020.

²⁶ Outer House, Court Of Session, Opinion de Lord Braid in *Rev'd Dr William J U Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32.

²⁷ *Terhès c. Roumanie*, no. 49933/20, 13 April 2021, § 43.

²⁸ Bundesverfassungsgericht, 1 BvQ 28/20, 10 avril 2020 (unofficial translation).

was from 20 March to 30 May 2020. In Greece and Croatia, the period of the ban on worship ran from 17 March to 12 May and from 20 March to 2 May respectively, *i.e.* a duration comparable to the Swiss ban on gatherings²⁹. In Portugal, limitations on the exercise of fundamental rights were maintained by the Government even after the end of the state of emergency³⁰.

4. No unjustified discriminatory restrictions

Restrictions on the exercise of freedom of religion must not discriminate, directly or indirectly, between the different religions under consideration, nor between practices of a religious or secular nature. Indeed, in adopting restrictions, States must assess “whether and to what extent differences between otherwise similar situations justify a different treatment”³¹. Authorities should also, in principle, refrain from indirect discrimination. Indirect discrimination “Indirect discrimination may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, has a particular discriminatory effect on a particular group”³². Thus, even if the apparently neutral measure at issue is not specifically or intentionally targeted at a particular group, it may indirectly discriminate against that group. Indirect discrimination does not necessarily require a discriminatory intent.

The Human Rights Committee recalls in this regard, in its General Comment No. 22, that the criteria applied to restrictions may not have the effect (let alone the purpose) of “discriminating” on any of the grounds of Articles 2, 4 and 26 of the Covenant, including religion. Even if they are presented as necessary and proportionate to permissible restrictions, “Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.” (§ 8).

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4.1. No difference in treatment between religious and secular activities

The State should not treat religious activities more restrictively than similar secular activities from a health perspective. For example, it should not impose stricter restrictions on a gathering when held in a place of worship. Similarly, it should not, for example, prohibit religious education in schools or parishes, while maintaining the possibility of teaching secular subjects in schools. Or public authorities should not prohibit open-air worship, while allowing public events to take place there. Such differences in treatment cannot be justified by a value judgement of the public authorities as to the necessity of religious practices and their essential character in relation to secular activities, in particular commercial activities.

The obvious difference in treatment between religious and secular activities, and in particular the imposition of less stringent measures on the latter, has been regularly noted. This was the

²⁹ This point has been contested by judges Ravarani, Seibert-Fohr and Roosma in their dissenting opinion, at § 12.

³⁰ Miguel Assis Raimundo, « COVID-19 y libertad religiosa en Portugal », in *COVID-19 y Libertad Religiosa*, sous la direction de Javier Martínez-Torrón et Belén Rodrigo Lara. Madrid: Iustel, pp. 211–40.

³¹ *Chassagnou et autres c. France* [GC], n^{os} 25088/94, 28331/95 et 28443/95, 29 April 1999, § 91. See also *Larkos c. Chypre* [GC], no. 29515/95, § 29.

³² ECHR, *Guide on Article 14 of the Convention (prohibition of discrimination) and on Article 1 of Protocol No. 12 (general prohibition of discrimination)*, 2020, on line. See *Biao v. Denmark* [GC], 2016, § 103; *D.H. and Others v. the Czech Republic* [GC], 2007, § 184; *Sampanis and Others v. Greece*, 2008, § 67.

case in France, for example, which led the Conseil d'Etat to request the modification of the applicable derogation rules. The interim relief judge found that “no activity is subject to such a limitation [of persons admitted] regardless of the surface area of the premises in question”³³, “so that there was quasi-discrimination on religious grounds or at least discriminatory treatment of places of worship”³⁴.

In Lithuania, worship remained prohibited while other similar activities were no longer prohibited. In Croatia, and in other countries, supermarkets were subject to less strict rules than places of worship. In Brazil, at the beginning of the state of emergency, barbershops and beauty salons were considered "essential" and allowed to remain open, unlike places of worship³⁵. Conversely, in Portugal, religious celebrations were exempted during the new lockdown declared in March 2021, whereas they had been adversely regulated during the first lockdown.

The US Supreme Court also examined the blatant difference in treatment between religious and secular activities and noted that this was not justified in the absence of an increased risk of contamination³⁶. In another decision, it recalled that the First Amendment to the Constitution requires at least comparable treatment between religious and secular activities³⁷. In the same vein, the Chilean Supreme Court ruled that the authorities should have applied a similar authorisation system to religious activities as that imposed on secular activities, as noted by Frédéric Dieu³⁸.

In the *CGAS v. Switzerland* judgment, the ECHR insisted on the unjustified nature of the difference in treatment between work and demonstration activities. Thus, “the Court recalls that the applicant argues that access to workplaces, such as factories or offices, was always allowed, even when these places hosted hundreds of people. In this connection, the Court considers that the Government did not answer the applicant's question as to why the continuation of such activities was possible on condition that employers took organisational and technical measures to ensure compliance with the recommendations on hygiene and social distance, whereas the organisation of a demonstration in the public space, namely in the open air, was not, even if the necessary health regulations were observed” (§ 87).

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4.2 No unjustified difference in treatment between religions

The State must not impose unjustified discriminatory restrictions based on religion³⁹. This should cover both direct and indirect discrimination. Public authorities should thus take into account differences in religious practices in order to avoid imposing restrictions that may indirectly discriminate against certain religions only. Indeed, the failure to treat persons in

³³ CE, réf., 29 nov. 2020, no. 446930 et a., *Association Civitas et a.*

³⁴ Frédéric DIEU, « Le culte aux temps du Corona : la liberté de culte en période d'urgence sanitaire », *Revue du droit des religions*, N°11, mai 2021, p. 179.

³⁵ Souza Alves, Rodrigo Vitorino, Andréa Letícia Carvalho Guimarães, José Renato Prata Resende, Gabriellen da Silva Xavier do Carmo. 2021. *La libertad de religión o de creencias y la pandemia del COVID-19. Análisis de las medidas restrictivas adoptadas en Brasil*. In *COVID-19 y Libertad Religiosa*, (Dir.) Javier Martínez-Torrón et Belén Rodrigo Lara. Madrid: Iustel, pp. 353–76.

³⁶ SCOTUS Unis, *South Bay United Pentecostal Church v Newsom*, 592 U. S. (2021).

³⁷ SCOTUS, *Diocèse catholique romain de Brooklyn c. Cuomo*, 592US ____ (2020), 25 Novembre 2020, No. 20A87.

³⁸ Supreme Court of Chili, 3rd chambre, 29 March 2021, n° 19062–2021.

³⁹ See Rafael Palomino, *Neutralidad del Estado y Espacio Público*, Navarra: Thomson Reuters Aranzadi, 2014.

significantly different situations differently may result in a violation of Article 14 ECHR⁴⁰. Thus, when imposing a national measure that may affect religious practice, the State must take into account the historical context, ritual and institutional particularities of the religion in question⁴¹.

For example, the infringement of religious freedom through the prohibition of public worship is much greater for adherents of religions that involve an obligation to worship in public. Therefore, restrictions should be tailored to the different religions as far as possible. The failure to take into account the specificity of religious denominations

Several courts have recalled the importance of the collective dimension of worship. In Scotland, in the case of *Revd Dr William J U Philip & Ors*, Mr Justice Braid recalled that “*Eucharistic Celebration, at a public Sunday Mass, is of particular importance. The attendance at mass is seen as an essential, not optional, element of the Catholic faith*”⁴². In March and April 2021, the Chilean Supreme Court similarly recalled that “*Sunday Mass is the core of their religion and stressed that this does not depend on the will of the applicant*”⁴³.

The recognition of the essential character of Sunday worship also led the District Court of Colombia⁴⁴ to rule that the possibility of using virtual means could not be considered as allowing the effective exercise of freedom of worship. Thus unlike many other religious entities, the Church does not offer virtual worship. For the applicant Baptist Church, “*a weekly in-person worship gathering of the entire congregation is a religious conviction for which there is no substitute*”⁴⁵. Similarly, in the case *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, of November 25, 2020, the U.S. Supreme Court observed that “*Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.*”

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5. No arbitrary restrictions

In principle, the State is not competent to judge the importance of a particular religious practice, nor to unilaterally regulate such practices. Indeed, “*State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed*”⁴⁶. As a result, the State shall be “*the neutral*

⁴⁰ *Thlimmenos c. Grèce*, [GC] no. 34369/97, § 44.

⁴¹ *Cha’are Shalom Ve Tsedek c. France*, [GC], no. 27417/95, 27 June 2000.

⁴² Outer House, Court Of Session, Opinion de Lord Braid dans *Revd Dr William J U Philip & Ors for Judicial Review of the closure of places of worship in Scotland* [2021] CSOH 32.

⁴³ See Javiera Corvalán, Jorge Precht, *La Corte Suprema y la libertad religiosa. Comentario de la sentencia de la Tercera Sala C.S. 01/04/2021, rol N°21.963-2021*, *Diarioconstitucional.cl*, 3 May 2021. <https://www.diarioconstitucional.cl/articulos/la-corte-suprema-y-la-libertad-religiosa-comentario-de-la-sentencia-de-la-tercera-sala-c-s-01-04-2021-rol-n21-963-2021/>

⁴⁴ *Capitol Hill Baptist Church, Plaintiff, v. Muriel Bowser*, In her official capacity as Mayor of the District of Columbia, District of Columbia, case n°20-cv-02710 (TNM)), 9 October 9 2020.

⁴⁵ *Capitol Hill Baptist Church Sues D.C. Government; Claims It Has No Alternative To In-Person Services*, <https://www.hillfaith.org/first-amendment/capitol-hill-baptist-church-sues-d-c-government-claims-it-has-no-alternative-to-in-person-services/>.

⁴⁶ For instances : *Bayatian c. Arménie* [GC], no. 23459/03, 7 July 2011, § 120 ; *Manoussakis et al. c. Grèce*, no. 18748/91, 1996, § 47.

and impartial organiser of the exercise of various religions, faiths and beliefs”⁴⁷, including in times of health crises.

Thus, the choice made by the national authorities of several European countries to authorise religious funerals to the exclusion of all other public rites during confinement is not neutral and may be considered arbitrary when one considers that, for the Catholic faithful, participation in Sunday mass is an obligation, which is not the case for funerals. This led the District Court of Columbia to recall that “it is not for [the District] to say that [the Church’s] religious beliefs” about the need to meet together as one corporal body “are mistaken or insubstantial.”⁴⁸

By deciding to allow certain religious practices rather than others, public authorities are stepping outside their role. This was the case, for example, in Switzerland, when the federal authorities re-established public worship while recommending, on 18 May 2020, that communion not be distributed there⁴⁹. This was also the case when the civil authorities claimed to regulate the conduct of religious practices such as the rite of communion, the use of holy water, or singing, or imposed, as was sometimes the case in France, that mass be celebrated behind closed doors. In Strasbourg, the prefecture of the Bas-Rhin department even forbade praying "on one's knees" and even "in silence" during public demonstrations against the mass ban⁵⁰.

The decision by some governments to allow a fixed number of worshippers in places of worship, regardless of the size of the buildings - as was the case in France - is also arbitrary.

An inconsistent restriction is also likely to be found arbitrary. This could be the case of prohibiting open-air religious demonstrations when political demonstrations are still allowed (in France), or the failure to grant the clergy the right to move around during confinement that is granted to other professions. Some regulations, often adopted in a hurry, were ambiguous and did not allow the faithful to determine their behaviour. This was the case for access to places of worship. During the first confinement, places of worship were not closed in Belgium, France, Italy or Spain, although the public authorities did not explicitly provide for an exemption from confinement in order to be able to go there. In Italy, individual prayer in a church was allowed, but access to it was only legal if it was located on the way to a trip required by a situation of necessity or by a professional need.

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6. Respect for the autonomy of religious communities

Such arbitrary decisions often violate the autonomy of religious communities. This is widely recognised in international law and in the case law of the European Court of Human Rights. It

⁴⁷ *Bayatian c. Arménie* [GC], no. 23459/03, 7 July 2011, § 120.

⁴⁸ *Capitol Hill Baptist Church, Plaintiff, v. Muriel Bowser*, In her official capacity as Mayor of the District of Columbia, District of Columbia, case n°20-cv-02710 (TNM), 9 October 9 2020, p. 11. See *Hobby Lobby*, 573 U.S at 725; see also *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 911 (W.D. Ky. 2020)

⁴⁹ Jean-François Mayer, “How essential is religion? Meanings and perceptions of religion during the COVID-19 pandemic in Europe”, *Fides Et Libertas The Journal of the International Religious Liberty Association*, Special Edition on Covid-19 and Religious Liberty, 2021, p. 112.

⁵⁰ Valeurs actuelles, *Interdiction de prier, « même en silence », 16 novembre 2020* : <https://www.valeursactuelles.com/societe/interdiction-de-prier-meme-en-silence-cest-un-devoir-de-resister-a-des-ordres-autant-absurdes-que-illegaux/>

derives from the collective dimension of religious freedom and the incompetence of the state in matters of religion. This principle was recalled by the Grand Chamber in *Sindicatul Păstorul v. Romania*⁵¹, *Fernandez-Martinez v. Spain*⁵² and *Károly Nagy v. Hungary*⁵³. From this principle derives a series of institutional rights⁵⁴, including the freedom of religious communities to administer themselves in accordance with their doctrine. Without respect for the autonomy of religious communities, states enter the religious sphere: they are no longer neutral or impartial.

The European Court “Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. (...) Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference.”⁵⁵. Indeed, the organisational functioning of churches, their structure, may be an integral part of their doctrine. State interference in the free institutional functioning of the Church then constitutes interference with the religion itself, and therefore with the freedoms guaranteed in Articles 9 and 11 of the Convention⁵⁶.

The European Court has often emphasised that “*the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable*”⁵⁷. The Court has consistently applied this principle. Thus, the principle of autonomy prohibits the civil authorities from taking decisions internal to the life of the churches. A fortiori, the way in which rites are celebrated is the exclusive competence of religious organisations.

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Therefore, public authorities should not unilaterally impose changes in the practice of religions, but should consult with the leaders of the religions in order to adopt the measures best suited to the circumstances and to each religion.

In many cases, religious leaders have adopted health measures on their own initiative. For example, as early as February 2020, the Romanian Orthodox Church asked its followers to stop kissing icons. This was the case in Muslim communities⁵⁸. Similarly, the bishops of Scotland closed their churches in spring 2020 on their own authority.

The lack of consultation and the deafness of the public authorities to the demands of the faithful has led some religious authorities to take legal action against the State. This was the case in

⁵¹ *Sindicatul Pastorul c. Roumanie* [GC], no. 56030/07, 12 June 2014.

⁵² *Fernandez-Martinez c. Espagne* [GC], no. 56030/07, 12 June 2014.

⁵³ *Károly Nagy c. Hongrie* [GC], no. 56665/09, 14 September 2017.

⁵⁴ See Jean-Pierre Schoupe, *La dimension institutionnelle de la liberté de religion dans la jurisprudence de la Cour européenne des droits de l'homme*, Paris : Éditions A. Pedone, 2015.

⁵⁵ *Hassan et Tchaouch c. Bulgarie*, [GC], no. 30985/96, 26 October 2000, § 62 ; See also *Kohn c. Allemagne* (déc.), no. 47021/99, 23 mars 2000, et *Dudová et Duda c. République tchèque* (déc.), no. 40224/98, 30 January 2001.

⁵⁶ *Saint-Synode de l'Église orthodoxe bulgare (métropole Innocent) et autres c. Bulgarie*, no. 412/03 et 35677/04, 22 January 2009, § 103.

⁵⁷ *Hassan et Tchaouch c. Bulgarie*, *op. cit.*, § 62.

⁵⁸ Jean-François Mayer, *op. cit.*, p. 107 et s.

France, Germany, Greece and the United Kingdom, where in November 2020, 122 religious leaders challenged the ban on public worship, denouncing its "criminalisation"⁵⁹. In Scotland, twenty-seven religious leaders obtained on 24 March 2021 the condemnation of the Scottish government's decision to close churches in January 2021.

In Greece, the Orthodox Church openly flouted the ban on public worship by celebrating Christmas on 6 January 2021⁶⁰, without being prosecuted.

7. Cooperation between religious and civil authorities

In order to avoid such arbitrary restrictions and violations of the autonomy of religious communities, public authorities should, as far as possible, consult and cooperate with the religious communities concerned. Furthermore, in order to better protect religious freedom, it is always better to favour decision-making by the Church itself rather than the imposition of non-consensual measures.

From the reports of the legal experts of the national bishops' conferences, it is possible to distinguish differences between countries on these two points.

In some countries, religious and civil authorities have regularly consulted each other. This was the case in Austria, Bosnia-Herzegovina, Croatia, Italy and the United Kingdom, where a task group⁶¹ was set up. It seems that these consultations and cooperation were mostly spontaneous. In Poland, the measures were adopted by the government, after simple consultation of the religious authorities. In Italy, cooperation between civil and religious authorities led to the signing of a protocol on 7 May 2020 on security measures for the resumption of liturgical celebrations with the people from 18 May 2020. In Lithuania, in the spring of 2020, religious authorities were consulted after the state ban on worship, with the aim of enforcing the ban, not discussing its terms. The Government then issued health recommendations to the Catholic Church. Although not binding, they were adopted and implemented by the Catholic episcopate.

In Hungary, the authorities left it to the religious communities to adopt the necessary measures of their choice⁶². In Austria, there were "intense" exchanges between civil and religious authorities; the Bishops' Conference itself defined the rules for its own religion, while taking inspiration from those imposed by the State on secular activities with a comparable epidemiological risk. In Portugal, it was the law that banned public worship in spring 2020, after consultation with the religious authorities, but it was the bishops' conference that decided

⁵⁹ Harriet Sherwood, "Communal Worship 'Criminalised' under Lockdown, Church Leaders in England Say," *The Guardian*, November 14, 2020.

⁶⁰ Kaki Bali, "Orthodox Church Undermines Greece's COVID Pandemic Measures," *DW*, January, 16, 2021, <https://www.dw.com/en/orthodox-church-undermines-greeces-covid-pandemic-measures/a-56251674>

⁶¹ The government set up a working group to bring together leaders of the main churches and other denominations to help advise on restrictions on religious practice, but also on the efforts of religious organisations to support society in an emergency. This proved useful and effective, and high-level contacts continued, often extending to wider issues.

⁶² During the spring lockdown, religious communities decided to suspend all public services in churches. Catholic churches remained open only for individual prayer. According to the rules of the state of emergency, all public events were prohibited, including cultural events, but religious communities' services were organised by their decision.

on its own to suspend worship in January 2021, without direct state coercion. Such cooperation avoids arbitrary violations of the rights and freedom of the Church and the faithful.

In contrast, restrictions have been imposed unilaterally by civil authorities in Belgium, Croatia, Scotland, France or Greece. In Spain, the official National Commission on Religious Freedom was not even consulted during the first months of the pandemic⁶³. In Belgium, consultations took place only at a later stage, albeit limited. In some cases, religious authorities were not informed of the decision to close places of worship again during the second containment, despite their monthly meetings with government authorities (Scotland).

In France, it was finally the judge who required the civil authorities to undertake consultations with religious representatives, prescribing “*the prompt undertaking of a consultation with all the representatives of the main religions*”⁶⁴.

Whether or not there has been consultation between religious and civil authorities, a distinction must be made between countries where decisions have been taken by the religious authorities and those where the civil authorities have imposed the rules. In the first case, freedom of worship was perfectly respected, since it was the religious organisations themselves that were able to adapt their practices to the health situation, without direct interference from the State.

Conclusion

The Covid crisis allowed everyone to experience the power of fear to stun society. In retrospect, the ease with which society consented to the abrupt surrender of so many freedoms, and the imposition of so many constraints, is disturbing. The fear and confusion caused by any major crisis should not lead to arbitrary power for governments, but should instead lead lawyers to exercise their control more carefully and firmly. It requires lucid and vigilant counter-powers that do not give in to fear and maintain a correct view of the hierarchy of values and law, thus preserving freedom.

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It is also (over)naturally the task of religious communities to remind people that the protection of life and health is not necessarily the highest human value; other realities may be superior to it. Because these religious communities aim at a common good that goes beyond the protection of life and health, they can constitute a critical body in the face of exceptional measures imposed by civil authorities, and thus a counterweight.

Beyond this, it is essential to ensure that the faithful do not feel abandoned by their pastors and churches. The worst damage to religious freedom would be if it were to appear irrelevant and useless in times of crisis.

⁶³ Javier Martínez-Torrón, *COVID-19 y Libertad Religiosa*. Madrid, Iustel, 2021, p. 9.

⁶⁴ Conseil d’État, réf., 7 nov. 2020, n° 445825 et a., *Association Civitas et a.* : the judge rejects the request but obliges the cults and the public authorities to hold consultations by 16 November 2020 at the latest.