

RELIGIOUS FREEDOM IN COVID-19 PANDEMIC TIMES

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ABSTRACT: This paper aims to explain the legal measures enacted by the European Union and the European countries –and further references to other ones- about the necessity of containing covid-19 spread. The effects of those measures on the religious freedom are also studied, and also the reaction of religious denominations.

KEY WORDS: COVID-19. Religious freedom. Public powers. Legal sources. Case of Law.

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ABBREVIATIONS: CCEE: Council of the Bishops' Conferences of Europe. CEC: Conference of European Churches. CEE: Conferencia Episcopal Española (Spanish Bishops Conference). CEI: Conferenza Episcopale Italiana (Italian Bishops Conference) COMECE: Commission of the Bishops Conferences of the European Union. EEA: European Evangelical Alliance. EUAFR: European Union Agency for Fundamental Rights. OJEU: Official Journal of the European Union. USCIRF: United States Commission on International Religious Freedom.

- The web links quoted have been checked for the last time between December 15 and 18, 2020.

1. Introduction

Covid-19 has spread across Europe and other continents very fast. It has caused thousands of deaths in less than a year. Public authorities have had to act quickly to prevent its effects. So, for instance, the European Union has supported several economic, legal, or health initiatives, and it has tried to help and to coordinate member States. It has not been an easy task either for supranational organizations or for States. Sometimes, the need to carry these measures forward quickly has caused that legal sources have not always been used appropriately. So, there has even been a risk of violating some fundamental rights, such as religious freedom. In fact, a few of the legal measures enacted in order to avoid the covid spread have limited this right.

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This paper aims to analyze which has been the European institutions' response to covid, above all from the legal point of view (sections 1 and 2). Then, it will be possible to carry on the study of the measures enacted by the EU member States and the way that they have touched the religious freedom. I've focused attention on some of the most representative countries, such as Spain, Portugal, Italy, France and Germany, even if there are more references to other European and overseas countries (sections 3 and 4). This approach will let us understand the reaction of the religious denominations (section 5). The most of them have display a collaborative behavior with the civil powers and the rules enacted by them. But it has not prevented them from complaining when necessary.

Regarding the methodology, I've followed the most appropriate for legal research. As a result, I have distinguished the institutions involved (European ones, States, and finally religious denominations). Acts or other legal texts related to covid have been systematized and studied, and conclusions about their effects on religious freedom have been drawn. The pronouncements of religious confessions in this regard have been collected and analyzed. Finally, I've explained the meaning of the courts decisions in the cases in which there have been.

2. The European Union response to COVID-19

Coronavirus has arrived to European continent so suddenly than in the other places in the world. The epidemic reached a peak in most of the EU countries (as well the United Kingdom) in April or early May 2020. The European governments implemented non-pharmaceutical measures in order to reduce contact between people, such as restrictions of mobility or even home confinement. As a result, the number of confirmed cases of morbidity and mortality decreased quickly. The amount of covid transmissions was quite lower in summer than in spring. Consequently, the intensity of legal measures and fundamental rights limitations was lightened. However, infections began to increase at the end of the summer. The situation in the middle of October was similar to that of spring. It has been the second wave of infections, not only because there have been done more tests –and we are able to know better the number of infections- but also because the transmissions have increased. As a result, many countries have re-introduced more stringent control measures to reduce the contact between people. Some of them feel once again to fundamental rights. We can see the results of transmissions and deaths as a whole in some national and EU documents, such as

the *Updated projections of COVID-19 in the EU and the UK* delivered monthly by the European Centre for Disease Prevention and Control¹.

The European Union had to take quick measures in order to avoid the spread of the virus across the continent. From the first moment that COVID gathered strength, the European Union has tried to support national health systems and counter the socio-economic impact of the pandemic at both national and EU level.

It has fostered different measures in almost the whole of the legal and social grounds, such as economic measures, supporting research treatment, diagnostics and vaccines, public health, borders and mobility, and fighting disinformation. It supplies updated information in the web about Overview of the Commission's response². It is also summarized in the document entitled *The EU response to the coronavirus crisis*³.

3. The European reaction to COVID-19

3.1. National legal measures to face coronavirus

At the same time that the EU institutions began to face the spread of the virus, every country tried to care about their own situation for their part. We can anticipate that the situation has been rather uncoordinated, and even somewhat chaotic. Every country has ruled legal and health measures in different ways, and they have changed them really fast. The number of rules enacted in every country about COVID has been actually huge. For instance, Spain has joined these rules in six codes⁴ that join almost four thousand pages as a whole.

On the other hand, more than half of the EU's Member States have proclaimed a state of emergency⁵. In some cases, it is lasting much longer than an exceptional situation would be. It has been criticized that some countries are taking advantage to enact a few of important acts in this pandemic time, while the state of emergency is being prolonged, without the necessary social and parliamentary debate⁶. In other cases, legal doctrine has pointed out that

¹ It is possible to consult these documents in internet. The last one, corresponding November 2020 is available in <https://www.ecdc.europa.eu/sites/default/files/documents/covid-forecasts-modelling-november-2020.pdf>.

² https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/overview-commissions-response_en

³ https://ec.europa.eu/info/sites/info/files/20201116_eu_response_covid.pdf

⁴ They are available in this web: https://www.boe.es/biblioteca_juridica/index.php?modo=1&tipo=C, last Access on 26th December 2020.

⁵ *Joint European Roadmap towards lifting COVID-19 containment measures*, p. 2, available in https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/european-roadmap-lifting-coronavirus-containment-measures_en

⁶ For instance, Spain is currently processing two important Organic Acts. One of them is the Organic Act regulating eutanasia, whose proposal and timing is available in the oficial weg of the Spanish Congress:

the system of sources of Law is being used incorrectly. From this point of view, certain important measures that touch the fundamental rights are being enacted by rules that are not suitable for this task such as decrees, or other rules of lower level, instead of acts or higher rules. As a result, some authors have hesitated about the legitimacy of the legal means ruled in every State (ARAGÓN REYES, 2020. COTINO HUESO, 2020. DE LA SIERRA, 2020, pp. 38-41. ASSIS, ADragão, COSTA, TAMALHO, 2020, p. 7 and ff.).

It is also necessary to point out that all Member States closed (totally or partially) schools and introduced border/travel restrictions, and they have prohibited public gatherings (included religious ones and other religious and worship celebrations) for the first COVID wave in spring. The majority of them even declared home confinement at least for some weeks. We have already said that infections and deaths decreased in Summer. As a result, this kind of measures were arisen in an atmosphere called “new normal time”. Nevertheless, in October the covid context became worse and the EU States have had to establish further restrictive measures. May be that they have not been so strong than in spring (for example, member States haven’t used to order home confinements and schools and universities go on developing lessons), but containing rules are applied as the virus changes. As a result, they have often established curfew; Portugal has passed from local confinements, to time restrictions (in the latest weeks it is forbidden walking or driving between 23.00 and 5.00 hours, and between 13.00 and 5.00 in weekends⁷); in Spain, public Administrations are constantly changing confinement modalities (they touch towns, districts or regions, depending on covid evolution).

To sum it up, it is possible to state that every country has faced covid irruption in different ways, so changing as the virus itself. It is not easy to find coherent and coordinated measures between the EU State members because their own pandemic situation and political perspectives are different. As a matter of fact, in every country, it is possible to find several rules depending on their own territories.

https://www.congreso.es/web/guest/busqueda-de-iniciativas?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_iniciativas_mode=mostarDetalle&_iniciativas_legislatura=XIV&_iniciativas_id=122%2F000020 The other one is the Education Organic Act, available in https://www.congreso.es/web/guest/busqueda-de-iniciativas?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_iniciativas_mode=mostarDetalle&_iniciativas_legislatura=XIV&_iniciativas_id=121%2F000007. Most of the processing of both has taken place during the pandemic, and under the state of alarm. There hasn’t been social debate and or discussion with collectives and organizations related to these topics.

⁷ <https://agoraeuropa.com/ultimas-noticias/portugal-governo-declara-toque-de-recolher-noturno-e-aos-finais-de-semana/>, and <https://canalportugal.pt/prorrogado-o-toque-de-recolher-em-portugal/>

3.2. European Union institutions attempts to deliver guidelines and coordinate States members

Even though it was thought that the way back to normality would be very long, it was also clear that the Spring extraordinary confinement measures could not last indefinitely⁸. As a result, at their meeting on 26th March 2020⁹, the Members of the European Council decided to go on working to limit the spread of the virus with measures similar to the already forenamed. It is important to outline that, in the same document, the Members added that they should however start to prepare the necessary measures to get back to a normal functioning of our societies and economies and to sustainable growth, and drawing all lessons from the crisis. This would require a coordinated exit strategy. As a result, the President of the Commission and the President of the European Council signed a *Joint European Roadmap towards lifting COVID-19 containment measures*¹⁰, on 15th April. It sets out recommendations to Member States, with the goal of preserving public health while gradually lifting containment measures to restart community life and the economy¹¹. Anyway, we cannot forget that it would be to re-imposed restrictions as necessary, if a high number of new cases occurs (e.g. introducing a cordon sanitaire)¹². As a matter of fact, it has happened so, and it has been already said that this kind of measures have been approved.

The European Union has developed further tools in order to check the legal health of the EU Members States, and to help them to cut down the covid spread. One of the most representatives has been the Council of the European Union's recommendation¹³, on 13 October 2020, aimed at ensuring the coordination and timely communication at the EU level of measures taken by Member States that restrict free movement due to the COVID-19 pandemic. As a result, European citizens and travelers across the Union will be able to get more clarity and predictability on measures about movements, getting information about areas of high or low risk, and what to do when travelling.

⁸ *Joint European Roadmap towards lifting COVID-19 containment measures*, cit., p. 3.

⁹ <https://www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf>.

¹⁰ *Joint European Roadmap towards lifting COVID-19 containment measures*, cit., quoted in the footnote nr. 5.

¹¹ *Joint European Roadmap towards lifting COVID-19 containment measures*, p. 3.

¹² *Joint European Roadmap towards lifting COVID-19 containment measures*, p. 11.

¹³ COUNCIL OF THE EUROPEAN UNION: Recommendation 2020/1475, of 13 October 2020, on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, in DOUE L337, on 14 October 2020.

Then, the Commission has delivered a communication entitled *2020 Rule of Law Report. The rule of law situation in the European Union*¹⁴. It also analyzes as a result of the risk for the rule of Law that some of the legal measures enacted by the member States in relation to Covid. As for the Commission, it should be ensured that any such restrictions on our rights are limited to what is necessary and proportionate, limited in time and subject to oversight by national parliaments and courts. This exam carried out by the Commission is consistent with other previous announcements. Let's recall that this institution assured in the above mentioned Roadmap that it would continue to analyze the proportionality of measures taken by Member States to deal with the COVID-19 pandemic as the situation evolves and will intervene to request the lifting of measures considered disproportionate¹⁵.

More recently, on 11th November, the European Commission¹⁶ has announced the need of building the European Health Union. This institution has put forward a set of proposals to strengthen the EU's health security framework, and to reinforce the crisis preparedness and response role of key EU agencies. In order to step up the fight against the COVID-19 pandemic and future health emergencies, more coordination at EU level is needed.

To remark some conclusions, it is possible to notice that the European Union has made an effort to help member States, trying to coordinate their work, and supporting the most important and urgent politics. It has also pronounced a few of interesting proposal to enhance the health European system. It is obviously positive, but perhaps it has not been enough to assure a true reliable cooperation between the States and the predivibility of the measures and kinds of restrictions of the citizens' right aimed to weaken the virus spread.

4. Religious freedom in the COVID framework

4.1. National restrictions

It is interesting to point that de United States Commission on International Religious Freedom (USCIRF) has offered a broader view of the situation in other countries in the world in its document *The Global response to the Coronavirus: Impact on Religious Practice and*

¹⁴ EUROPEAN UNION COMMISSION: Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 *Rule of Law Report. The rule of law situation in the European*, COM(2020) 580 final, 30 September 2020, in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=ES>.

¹⁵ *Joint European Roadmap towards lifting COVID-19 containment measures*, p. 15.

¹⁶ https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2042.

*Religious Freedom*¹⁷, on March 2020. We are going to focus the attention in the European countries from now on.

Before going deeply into specific and representative countries, it should be suitable to underline a few of common features. First of all, we can state that the vast majority of countries have not established the obligation to close places of worship, nor they have prohibited the celebration of religious acts. This has not prevented the fact that there have been restrictions for it in fact. This situation could have been due either to there have been limitations to the general mobility of the people that have prevented them from accessing these places, or to the fact that a certain number of people have been prevented from attending a same place (such as a place of worship).

Although we are going to deal with the religious denominations attitude later on, it is interesting to advance that spring limitations were not problematic. Complaints arose during the lifting of restrictions as States postponed the readmission of liturgical activities and gatherings in places of worship. These events were allowed later than other ones perhaps not so important for the life of many people. We can say that something similar has happened in more recent times, during the Covid “second wave” in autumn. In any case, we are going to have the chance to examine this topic further on.

Only a few countries –such as Bulgaria- did not ban the development of religious activities. Nevertheless, most of the Protestant churches and the Catholic Church in Bulgaria have decided to go online during the state of emergency. The Orthodox Church continued its public worship in compliance with required anti-epidemic measures (TOPALSKI, 2020). In other cases, like in Austria, religious ceremonies were avoided –safe weddings and funerals up to 10 people-, but also the access to jails, hospitals, retirement homes, nursing homes – including all visits by priests were factually prohibited (KRÖMER, 2020).

The moment to check the framework of some countries has arrived now. Let's start for the better knew by me, which is Spain. The beginning of the state of alarm was approved by the Royal Decree (*Real Decreto*) 463/2020, on 14th March. This alarm lasted until 21st June. It has been established again by the Royal Decree 926/2020, on 25th October. In relation to religious freedom or the exercise of other fundamental rights, it is necessary to take in count that in Spain –like It happens in other European States- the state of alarm cannot bring about the suspension of them (art. 55 Spanish Constitution), even if the State can shape their exercise. Regarding religious ceremonies, there was information about them in the articles 11

¹⁷ <https://www.uscirf.gov/sites/default/files/2020%20Factsheet%20Covid-19%20and%20FoRB.pdf>.

and 7 of RD 463/2020. The former stated that: “attendance at places of worship and civil and religious ceremonies, including funerals, is conditioned to the adoption of organizational measures consisting of avoiding crowds of people, depending on the size and characteristics of the places, in such a way as to ensure that those attending are able to respect the distance between them of at least one meter”.

Nevertheless, art. 7 addressed that everybody is confined at home, and people were allowed to go out in order to develop the activities that were specifically pointed in this article. Religious ones were not placed in the list of the “essential services”, as it happened in several European countries. As a result, they did not constitute a justification to leave home. Then, there was not a direct prohibition to exercise religious freedom either alone or in community, but it was possible to speak about and indirect curtailment (RODRIGO LARA, 2020, pp. 12-16).

Some days later, the Ministry of Health enacted the Order 298/2020 (9th March)¹⁸ about exceptional measures regarding vigils and funeral ceremonies in COVID times. It stated (§ 5) that civil or religious funerals had to be delayed until the end of the alarm state. On the other hand, the entourage for the burial was restricted to a maximum of three persons. Nevertheless, this rule was in force only during the first confinement.

The Royal Decree that established the second state of alarm (926/2020) offers a better treatment to religious freedom. In fact, its article 8 says that people is allowed to remain in worship places to develop their religious activities in the number indicated by public authorities, as it happens with other similar situations.

As a result, we can point that religious or worship ceremonies haven't been banned in Spain, save the vigils and tighter restrictions to burials in the spring covid “first wave”. In spite of these previsions, some incursions of police or fines have been verified in some cases. Some courts have been concerned about it, such the Regional Court of Aragón¹⁹. It has considered that the state of alarm "has a legal regime that does not touch or even less allows the suspension, of the right to assembly and demonstration, which does not mean that these rights cannot be modulated by the circumstances carried out by the pandemic".

The legal landscape in other European countries has been quite similar. For instance, places of worship could remain open in Italy, but it was difficult to develop collective religious worship. The Decree (*decreto-legge*) n. 6, on 23 February 2020, and some other

¹⁸ Orden SND/298/2020, de 29 de marzo, *por la que se establecen medidas excepcionales en relación con los velatorios y ceremonias fúnebres para limitar la propagación y el contagio por el COVID-19*, en <https://www.boe.es/boe/dias/2020/03/30/pdfs/BOE-A-2020-4173.pdf>.

¹⁹ STSJ Region of Aragón, Sala de lo Contencioso-Administrativo, nº 151/2020, 30 April 2020.

enacted later²⁰, stated that every public gathering (included religious ones) were forbidden, even if it was not banned to go into these places individually²¹. The paradoxical result was (in a parallel way than in Spain) that a person was entitled to entry in a church alone if he or she were allowed to leave his or her home, but he or she was not allowed to leave his/her home to go to church (CONSORTI, 2020, p. 9).

A few more problems arose in April. The Italian Prime Minister ruled a Decree which allowed only fifteen persons in funerals. Other worship activities were still seriously limited – at least more than other ones-. The Italian Bishops Conference (CEI) regretted this behavior and was critical of the Government²². Finally, the Holy See had to mediate between them (MADERA, 2020, pp. 80-83). The result has been ingenious: The CEI and the Italian Government reached an agreement about the health and social measures to celebrate a safe collective worship. Then, the Government concluded other agreements with the rest of religious denominations. Eventually, the Decree 33/2020²³ let the development of public worships provided that those agreements are carried out.

The Portuguese situation also began with a general ban on the attendance of people in acts of worship. The Republic President's Decree (*Decreto do Presidente da República*) 14-A/2020²⁴ pointed that its contents could not touch the fundamental right of religious freedom (art. 5). In fact, articles 41 and 19.6 of Portuguese Constitution make impossible its suspension. However, art. 4.f of the Decree let public authorities restrict its collective dimensions. Some authors have addressed that it seems that the Decree considers the public display of the religious freedom as something different from this freedom itself (ASSIS, ADRAGÃO, COSTA, TAMALHO, 2020, p. 9). At any rate, the lifting measures plan opted for allowing public gatherings (included religious worship) depending on the number of people joined. From 30th May, generalized public worship was authorized. Even in the second coronavirus wave, the possibility of celebrating collective worship depends on the same rules

²⁰ Mainly, the Decree (*Decreto-legge*) 25th March 2020, n. 19, art. 2.g and h), in <https://www.gazzettaufficiale.it/eli/id/2020/03/25/20G00035/sg>.

²¹ Art. 2.c Decreto-legge 23rd February 2020, *Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19*, in <https://www.gazzettaufficiale.it/eli/id/2020/02/23/20G00020/sg>.

²² See the Prime Minister's Decree (*Decreto del Presidente del Consiglio di Ministri*) 26th April, in <https://www.gazzettaufficiale.it/eli/id/2020/04/27/20A02352/sg>, and the Bishops Conference's response on the same date in <https://www.chiesacattolica.it/dpcm-la-posizione-della-cei/>.

²³ Art. 1.11 Decree (*Decreto-legge*) 16th May, n. 33, *Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19*, in <https://www.gazzettaufficiale.it/eli/id/2020/05/16/20G00051/sg>.

²⁴ Republic President's Decree (*Decreto do Presidente da República*) 14-A/2020, 18th March 2020, that establishes the emergency state because of health disaster, in <https://dre.pt/pesquisa-/search/130399862/details/maximized>.

than common gatherings. So, in the current moment, worship could be developed out of the curfew.

Let's carry on with the French Law. The state of emergency was established by the act 2020-290, on 23rd March. The measures that involve most directly religious freedom were introduced by the Decree 2020-293, enacted in the same date, which prescribes general measures to deal with the pandemic within the framework of the state of health emergency. Article 8 indicates that places of worship may remain open, but any gathering within them was prohibited. The exception has been funerals, in which a maximum of twenty people could attend. This measure was applied until April 15 (IVALDI, 2020). Like it has happened in other countries, also complaints proliferated when restrictions began to be lift. The Government approved some decrees that kept limits to celebrate public worship, while they allowed other kinds of activities. Several claims were submitted to the *Conseil d'État*²⁵ to request the overriding of the articles of several decrees that prohibited gatherings in places of worship (save funerals, as it has been already told). The *Conseil* found that such measures violated the principles of proportionality and necessity, especially in comparison with the access that was beginning to be allowed to other public places. Consequently, they should be overridden for infringing the freedom of worship (IVALDI, 2020, pp. 102 and ff. LICASTRO, 2020, pp. 34-35). It has been a difference with the German framework, where the Federal Constitutional Court has ruled in an opposite way. Before examining it, we should settle finally that French authorities have decided in November to limit access to places of worship to thirty people. Religious denominations²⁶ have regretted this decision as it means that religious beliefs are accessory. The French Bishops Conference has asked the *Conseil d'État* to override Government's decision, and it has accepted the claim²⁷.

Finally, the German Federal Constitutional Court has ruled in an opposite way that the French *Conseil d'État* (MÜCKL, 2020, pp. 20-23). In fact, two decisions issued on 10th April admitted that the restrictions to public worship adopted by the States of Hesse and Berlin were legitimate. Of course, the limits to religious freedom were huge but, in pandemic, this freedom should yield to other constitutional interests such as third persons' life or physical integrity. From its point of view, this would be the outcome of the "proportionality exam".

²⁵ *Ordonnance*, n. 440366, de 18 de mayo de 2020, in <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000041897157/>.

²⁶ https://www.vaticannews.va/it/chiesa/news/2020-11/francia-messe-vescovi-coronavirus-limite-fedeli.html?utm_source=newsletter&utm_medium=email&utm_campaign=NewsletterVN-IT.

²⁷ https://www.vaticannews.va/it/chiesa/news/2020-11/francia-ricorso-chiesa-cattolica-limite-presenze.html?utm_source=newsletter&utm_medium=email&utm_campaign=NewsletterVN-IT.

4.2. European Union and Council of Europe treatment

The above mentioned Roadmap estates that constant dialogue with social partners will also be key²⁸. I think that it is included the dialogue with the religious denominations, as it is laid in article 17 of the Treaty on the Functioning of the European Union²⁹ and further guidelines³⁰ on its interpretation.

Anyway, in the Roadmap it is only said (§ 7) that, in this process of relaxing the confinement, “gatherings of people should be progressively permitted”. Member States should focus on the specificities of different categories of activity. The document refers to various types of meetings such as schools and universities, commercial activities, festivals, concerts, restaurants and cafes. However, it does not speak at any time about religious celebrations.

It is true that the European Union has warned that the measures adopted must always be respectful of fundamental rights. However, it is difficult to find specific references to religious freedom or the celebration of acts of worship. Unlike the UE context, the Council of Europe does make concrete mentions, such as in the document *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis*³¹, on 7th April. It is held in § 3.3 that “the significant restrictions to usual social activities, including access to public places of worship, public gatherings and wedding and funeral ceremonies, may inevitably lead to arguable complaints under the above provisions. It is for the authorities to ensure that any such restriction [...] is clearly established by law, in compliance with relevant constitutional guarantees and proportionate to the aim it pursues”. Here we have a text in compliance with USCIRF’s advices in case of taking measures to protect public health even in times of crisis³².

These differences between the European Union and Council of Europe mentions to religious freedom have been made evident by religious denominations. We will be able to cheek it below.

5. The reaction of religious denominations

²⁸ *Joint European Roadmap towards lifting COVID-19 containment measures*, cit., p. 4.

²⁹ Published in the OJEU C326, 26th October 2012, available in <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT>.

³⁰ https://ec.europa.eu/info/sites/info/files/guidelines-implementation-art-17_en.pdf

³¹ <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>.

³² I mean the aforementioned document about *The Global Response to the Coronavirus*.

5.1. Religious denominations facing civil measures

The most of religious denominations have cancelled their public worship activities and they have broadcasted them. They have adapted their rites to pandemic. The Holy See set up a Vatican COVID-19 Commission³³ indeed. Religious denominations have deployed a cooperative attitude with civil authorities. From the point of view of the EEA and CEC (BOSSE-HUBER, 2020), the civil measures that have halted large gatherings –including worship services- and that have established physical distancing, do not specially target the church. So, it does not constitute a direct infringement of religious freedom. Quite rather, it has been considered as necessary for the common health and well-being, and as a part of neighbourly love (NATHANIEL 2020. KARTTUNEN, 2020). Safety precautions have also been followed in the religious ceremonies, such as physical distance and hygiene rules, also in compliance with the World Health Organization Practical considerations and recommendations for religious leaders in the context of COVID-19³⁴, on 7th April.

This has not prevented them from showing their complaints about the limits imposed on religious freedom. From this point of view, the two Presidencies (COMECE-CCEE, 2020b) also dwelt on the strong limitation imposed on freedom of religion in the context of the closure of places of worship and the prohibition of liturgies, calling for the re-establishment of normal State-Church relations based on dialogue and respect for fundamental rights. Later, while gradually public Administration began to lift containment measures, they have claimed that the reopening of churches must be implemented in dialogue with ecclesial institutions (COMECE, 2020c). More exactly, the COMECE General Secretary has stated that “freedom of religion, including freedom of worship, is a fundamental right and a real necessity for many people [...]. the reopening of churches, in compliance with the rules of sanitary caution, must be implemented by civil authorities in a clear and non-arbitrary way, in full respect of and in dialogue with ecclesial institutions” (COMECE, 2020c). COMECE reiterates that religion is not a merely private issue. It also has a public and collective dimension, as clearly expressed in all main human right texts, including the EU Charter. The aggressive approach of certain secularist actors against the role of religion in the public square may have contributed to its marginalization in the context of the current crisis. Moreover, they

³³ <http://www.humandevelopment.va/es/vatican-covid-19.html>.

³⁴ https://www.who.int/publications/i/item/practical-considerations-and-recommendations-for-religious-leaders-and-faith-based-communities-in-the-context-of-covid-19?gclid=CjwKCAjwwab7BRBAEiwAapqpTMIfgzonac3QClybnNmtkAgGygMFBfKSgk2ziYT1DU_tf4ZvXytIaxoCANMQAvD_BwE.

regret that the Roadmap lacked any explicit mention of religious services, as it neglects the key role of religion in European societies (COMECE, 2020c). There have been other denominations, from the Evangelical side, that have also agreed on these words. It has been the case –for instance- of the Portuguese Council of Christian Churches (PINA CABRAL, 2020), the ensemble of the Christian Churches in Austria (KRÖMER, 2020), or the Roman Catholic and Anglo-Catholic Churches in the UK (PECK, 2020). These denominations complained about churches had to be still closed at the beginning of relaxing restrictions, whereas shops and restaurants were allowed to open, or it was possible to do sport in public places. These behaviors have led to a disregard of religious freedom, as it would be a right that only includes a set of minor acts. This has been the cause of the trials in courts of justice, whenever they have been issued.

On the other hand, some authors have hesitated about the legitimacy of the civil authorities to weigh the importance or utility of the religious activities for people, or whether they are “essential services”. May be that this attitude is difficult to reconcile with the neutrality of the public powers (LICASTRO, 2020, pp. 51 y 62).

As a matter of fact, the Card. Sarah, President of the Congregation for Divine Worship and the Discipline of the Sacraments, has signed a letter (SARAH, 2020) on 12th September in which he asserts that “it is up to the prudent but firm action of the Bishops to ensure that the participation of the faithful in the celebration of the Eucharist is not reduced by public authorities to a ‘gathering’, and is not considered comparable or even subordinate to forms of recreational activities. Liturgical norms are not matters on which civil authorities can legislate, but only the competent ecclesiastical authorities”. He recalls that “as soon as circumstances permit, however, it is necessary and urgent to return to the normality of Christian life”, as “no broadcast is comparable to personal participation or can replace it”.

For its part, going into a more specific case, the CEE (Spanish Bishops Conference) decided to adopt the most civic behavior, and to observe the recommendations prescribed by the State. It has made an appeal to the responsibility of the faithful in a statement on 13th March 2020 (CEE, 2020). The Conference declared, in the same document, the suspension of some activities such as catechesis, conferences or gatherings, or even Eucharists, and their substitution (whenever it was available) by on-line events. In case of Masses were let, communion is expected to be received in the hand, and the rite of peace is abolished or replaced by a gesture that avoids physical contact.

On the other hand, Jewish communities have had other important concerns³⁵. For them, what has been more disturbing has been the raise of hate speech, racism and bigotry, stereotyping of minorities, anti-Semitic conspiracy myths and misinformation. They have been particularly alarmed by the spreading of blaming the creation and propagation of the virus on the Jews or even accusing them of exploiting the disease for economic purposes.

For their part, Muslim communities have delivered guidances and advices for entities and Muslim believers for them to arrange to rules in force³⁶. Then, in some countries, such as the UK, they have also regretted that they have been blamed for coronavirus outbreaks³⁷. The European Union Agency for Fundamental Rights has confirmed the increasing attacks to minorities because of these reasons (EUAFR, 2020a, pp. 11, 33-35. EADEM, 2020b, pp. 11, 33-34). Actually, also in the USA religious gatherings of different denominations were often characterized in the press and by politicians as a particularly dangerous (SCHARFFS, 2020, p. 13).

As a result, it is possible to assert that coronavirus has not arisen problematic situations to the religious freedom. Generally, religious denominations have behaved in accordance to civil authorities proposals in order to accomplish the common health and the common well. It is also true that there have been some protests related to the curtailment of the right to religious freedom at some time, above all in relaxing measures time and the comparison with the permission of other activities before religious ones. Nevertheless, these situations have usually not reached the courts (save the in some countries such as Germany of France). Moreover there isn't case-Law in EU Courts or in the European Court on Human Rights in relation to religious freedom and COVID. Regarding the Strasbourg Court (ECHR), there have been lawsuits about close issues –such as family life in the decision D.C. v. Italy, 19th May-, or about difficulties for extradition of people based on health reasons (decision Hafeez v. U.K, 24th March), but not regarding religious freedom.

The framework has been different in other countries, such as the USA. Here, restrictions to religious freedom and the banning of religious gatherings have risen more often litigation in courts. It has happened in some federal courts (like California), and there have been cases that have reached the Supreme Court. In relation to Courts of Appeals, it is possible to notice that have been two kinds of decisions (LICASTRO, 2020, pp. 44-48).

³⁵ EUROPEAN JEWISH CONGRESS, <https://eurojewcong.org/?s=covid>.

³⁶ For instance, see the information of the Comisión Islámica de España, in <http://comisionislamicadeespana.org/recomendaciones-generales-ante-el-nuevo-coronavirus>, or from the Muslim Council of Britain, in <https://mcb.org.uk/resources/coronavirus/>

³⁷ <https://edition.cnn.com/2020/08/06/europe/muslims-coronavirus-england-islamophobia-gbr-intl/index.html>

Those ones from the 5th and 6th Circuit have been favorable to the suspension of restrictive measures towards religious freedom. On the contrary, decisions ruled by 7th and 9th circuit – and in accordance with the Supreme Court, as we are going to realize- have decided that restrictions fit the constitutional system. In relation to the Supreme Court, in lawsuits such as Calvary Chapel Dayton Valley v. Sisolak³⁸ (on 24th July 2020), it has rejected that state restrictions on worship violated the First Amendment's guarantee of religious freedom. The church argued that the State of Nevada treated houses of worship less favorably than it did casinos, restaurants and amusement parks, but the Supreme Court turned away the request. Something similar happened in the case South Bay United Pentecostal Church v. Newsom³⁹ (on 29th May 2020). The Supreme Court has ruled that these restrictions on places of worship appear consistent with the Free Exercise Clause of the First Amendment.

5.2. *Further contributions of religious denominations in COVID time*

There have been many contributions of religious denominations in these difficult times in every country. I'm going to point only the main facts that religious denominations themselves have underlined in the European framework. On one hand, the Catholic bishops have shown concern about the situation of immigrants. They have stated that the pandemic should not be an excuse to let human beings die in the external European borders (COMECE, 2020f). In the same concern about the most disadvantaged people, they have defended the elderly rights. It is time to stop the “culture of waste” and focus on more public policies supporting families (COMECE, 2020d). The prelates have also expressed their concern about the economic crisis and the consequent loss of a large number of Jobs. Also other denominations agree on this issue, such of other Christian ones in Europe joined in the CEC (2020). Then, COMECE has recalled that the EU recovery plan needs to be focused on justice and solidarity (COMECE, 2020e). The same institution has recalled the necessity and proportionality of any policy that suspends, even temporarily, fundamental rights (COMECE, 2020b).

It is interesting to have in count that COMECE again has delivered a list of measures to fight against the fake news and disinformation about COVID (COMECE, 2020a). This concern has been shared by EEA (2020, § 8). Finally, Presidents of COMECE and CCEE

³⁸ <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19a1070.html>

³⁹ https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf

have risen a common prayer to God for help, comfort and salvation (COMECE-CCEE, 2020a). This has also been considered a good attitude by the EEA (2020, § 8).

6. Conclusive remarks

May be that the countries that have been studied in this paper haven't had the specific purpose of enacting rules against the rights of the religious denominations or their faithful. Quite rather, they have had to act quickly in order to face a so unforeseen situation such as the outbreak of the virus. We can say that this has brought out a disorder in the legal system. It has had several effects that have been not always desired. On one side, many of the EU's Member States have proclaimed a state of emergency. But, in some cases, it is lasting much longer than an exceptional situation should be. We cannot disregard that some countries have taken advantage of this situation to process important acts avoiding suitable parliamentary and social debate. On the other hand, it is possible to point out that the system of sources of Law is being used incorrectly. Finally, some fundamental rights have suffered from unduly restrictions.

In the case of the religion freedom, even the religious denominations have understood that hard measures should be enacted. In fact, they have deployed a collaborative attitude with civil authorities and they themselves have adopted decisions that have gone longer than civil ones. The main problem has arisen in the moment of lifting restrictions. Religious denominations complained about churches had to be still closed, whereas shops and restaurants were allowed to open, or it was possible to do sport in public places. It was clear that the civil authorities had not considered religious activities so essential than other –at least- not more important for people. This involved a disregarding consideration towards religious freedom. This behavior also allows us to ask if civil authorities are entitled to rate if religious activities are “essential services”. There is a doubt whether this option is compatible with the neutrality of public powers. Perhaps, instead of speaking about the “essentiality” of the religious activities or services, it would be better recall that religious freedom is a fundamental right (so, it is evident that it is “essential” for people) and then it would be checked in every case whether religious activities pose a risk to public order or the rights of others. If this risk does not exist, the conclusion would be that this religious practice should be allowed.

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