



AA. VV. (Pietro Faraguna, Javier Martínez-Torrón, Pierluigi Consorti, Maksymilian Hau, Giuseppina Scala, Matteo Giannelli, Silvia Baldassarre, Simone Gianello, Paolo Zicchittu, Greta Pavesi, Marco Croce, Marcello Toscano),
Religious freedom before, during and after Covid-19 between Europe and the Member States

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Papers selected by the organizing Committee



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Parte prima



Pietro Faraguna

(professore associato di Diritto costituzionale presso l'Università di Trieste, Dipartimento IUSLIT, e coordinatore accademico del modulo Jean Monnet "EULERIT: The European impact on Law&Religion in Italy and beyond"¹)

**"Religious freedom before, during and after covid-19
Between Europe and the Member States":
Introduzione alla prima sezione dello special issue**

ABSTRACT: This contribution introduces the special issue and focuses on the content of its first section, including contributions by Javier Martínez-Torrón (and related comments by Pierluigi Consorti), Maksymilian Hau, Valerio D'Alò, Giuseppina Scala and Matteo Giannelli.

1 - COVID-19 disrupted many aspects of public and private life. Among these, the impact of the pandemic on the exercise of religious freedoms makes no exception. Strict restrictions have been adopted all over Europe (and most of the world) with the aim of limiting social contacts and the widespread of contagion. Among the activities that have been restricted, the limitation of religious freedom generated particular criticism and concern. This is due to the fact that religious freedom in Europe is widely considered not only a matter of individual conscience, but as also entailing the freedom to manifest one's religion, in private places, and, above all, together with others in public places. Moreover, the impact of pandemic put a great pressure on society, with losses and a great existential impact that emphasized the impact of restrictions of religious freedom (among the many example of particularly impacting restrictions one could mention the strict limitations applying to funerals in a time of sudden and lonely losses).

¹ The Eulerit Academic Forum is an international workshop that took place in Trieste on Friday 26 November 2021. The international workshop convened junior and senior scholars from different countries, with different academic backgrounds, sharing their thoughts on the topic "*Religious freedom before, during and after covid-19 between Europe and the Member States*". A call for papers, launched with the support of the Jean Monnet Module on "*The European impact on the regulation Law&Religion in Italy and Beyond*" led to the selection of eight papers by the academic committee of Eulerit, to be discussed together with prominent experts in the field of Law&Religion, EU law and constitutional law. In this special issue, we are collecting the results of this intellectual journey.



However, the pandemic raised similar challenges to the exercise of most of constitutional rights and freedoms guaranteed in western constitutionalism, attracting vast attention from legal scholars worldwide.

Within the frame of the academic activities organized with the support of the ERASMUS+ Program of the European Union, and specifically within the Jean Monnet Module on “The European Impact on Law&Religion in Italy and Beyond”, and in in co-partnership with ORFECT (“Observatory on Religious Freedom in the jurisprudence of the European Court of Human Rights” - *www.orfect.net*), a group of scholars from different countries, of different academic seniority, and coming from different legal fields convened in-person on 26 November 2021 at the University of Trieste with the idea of exploring some of these challenges.

The forum convened young scholars and connected them with more senior scholars in the field. In the following pages, we collected the result of an intellectual debate where scholars have been called to answer the following questions:

a) Is it possible to identify a European standard in the management of the pandemic crisis as far as limitations of religious freedom are concerned? If so, what is the essential core of this European standard, if compared with non-European alternative reactions to the pandemic (especially, but not limiting the analysis to, the US scenario)?

b) Does a model of European secularism emerge from the actions adopted by Member States, or, on the contrary, did each Member State react autonomously?

c) Did EU law or the ECHR played any role with regard to the limitation of religious freedom due to the restrictions aimed at limiting social contacts?

d) How did religious groups react? Did religious associations connected to the same religion react to the legal restrictions coherently across different Member States?

2 - With these questions in mind, the special issue opens with the article by Javier Martínez-Torrón. His article, together with Pierluigi Consorti’s insightful reaction, is naturally located at the top of the special issue not only because of the authoritativeness of the authors, but mainly because of the overarching character of the thoughts expressed there.

Martínez-Torrón notes that the COVID-19 pandemic has some distinctive characteristics in comparison with other health crisis occurred in the past. He identifies three peculiar characters: 1) a biological one (SARS-CoV-2 is a virus that is transmitted with tremendous facility,



mutates fast, acts in unpredictable ways on people who get infected, and is proving to be particularly resilient); 2) a contextual one (the virus has spread very rapidly and uncontrollably because of the mobility of the population in today's global world); 3) finally, a social one (reactions of people, and of governments, have been distinctive). His article devotes special attention to the third of those three peculiar elements.

His article moves from the idea, widely shared by other contributors in this special issue, that the COVID-19 crisis, rather than raising new questions, has forced us to deal with familiar questions under unprecedented circumstances.

Martínez-Torrón focuses on governmental measures tackling the pandemic, and claims that most of these actions had an impact, direct or indirect, on religious freedom and on the relations between State and religion. He identifies four thematic areas of special interest: the legal regulation of the fight against coronavirus; the equality of treatment of religious freedom in relation to other fundamental rights; the cooperation between the State and religious communities; and the reactions of religious communities to governmental measures

Martínez-Torrón's analysis emphasizes the necessity to evaluate governmental reactions taking duly into account the time factor. In fact, he reports that in a number of European and American countries, the rules enacted by governments to contain the pandemic, especially in 2020, were characterized by a tolerable generic and ambiguous justification of the alleged necessity of the restrictions imposed on freedom of worship. If this could have been subject to criticism already since its onset, criticism was increasingly justified after that the emergency turned into a stable critical sanitarian situation. Immediate measures were issued in an atmosphere "dominated by uncertainty and fear", slowly fading away over time. The time factor, in Martínez-Torrón's analysis, plays a pivotal role also in the judicial scrutiny of measures implying restrictions on religious freedom.

3 - Maksymilian Hau responds to one of the intellectual challenges launched by the introductory overarching remarks by Martínez-Torrón. Hau agrees with Martínez-Torrón on the fact that cooperation between the State and religious association should result in society having a positive attitude toward fighting the pandemic.

Hau claims that the focus should rather be on formal safeguards that will ensure both sanitary effectiveness and the proportionality of the restrictions. His idea is that the best way for public authorities to minimize the severity of Covid-19 related restrictions - while maximizing their



effectiveness - to work closely with religious groups and try to identify their needs, especially concerning rituals and ceremonies. The key point of his article is that the model of restriction, which he calls “premises-orientes”, is not effective or proportionate, particularly if compared with a different model of restrictions, which he calls “activities-oriented”.

The passing of time, key element in the introductory analysis by Martínez-Torrón, may transform legal substances and their judicial assessment and this is particularly true for the proportionality principle. In fact, the same limitation of fundamental rights and freedoms may be considered compatible with the proportionality principle at a certain phase of the pandemics, and not anymore at another phase. This is a possible explanation of different judicial reactions to similar limitations of fundamental rights and freedoms across different jurisdictions and different times. In his article, Valerio D’Alò focuses exactly on this variety, by examining the position and scope of the right to religious freedom recognized in the case law of supreme and constitutional courts in Italy, Germany, France and the United States of America. D’Alò explores the variety of approaches towards the principles of proportionality and reasonableness in adjudicating measures imposing limits to religious freedom. He claims that this variety is connected to a different interpretation of the dimension of the public exercise of religious freedom in the context of regulation of religious freedom. From a comparative point of view, D’Alò’s analysis concludes that legal traditions based on a separatist model insist more on the collective dimension of worship. While models based on “concordatarianism” insist more on the possibility of satisfying one’s own religious sentiment. However, his analysis leads to partly unexpected outcomes, particularly focusing on the French reaction to tackle the crisis.

When it comes to the topic of attitudes of politics in fighting the pandemic and the role played by religious associations, Giuseppina Scalia supports Martínez-Torrón and Hau’s takes with empirical and normative evidence coming from the very peculiar Swedish experience. In fact, Sweden represents an interesting case study because the strategies it has adopted to limit the spread of the virus are distinct from those adopted in other European countries, and the peculiarity also applies to the impact of these strategies on the limitation of religious freedom. Sweden limited the spread of Covid-19 adopting binding and non binding rules, and mostly without the adoption of specific coercive policy and legislation such as the imposition of lockdowns, long quarantines, strict curfews and closures.

Scala’s analysis focuses on this very peculiar policy and notes that the reaction of the Lutheran Church and of other religious communities



could be considered as an example 'respectful collaboration' with the State. However, she also notes that this collaboration could be easily understood as the consequence of the historical relationship it has with the State, as far as the Lutheran Swedish Church is concerned. In fact, this specific attitude might rest on the concept of 'Trust' in the "good State", which has a Nordic foundation and, in many respects, is seen as a resource for the whole of society and makes democracy work. However, Giuseppina Scala's paper also concludes that, following Martínez-Torrón's introduction, the pandemic could encourage and reconsider the relationship between State and religious associations and this could also be the case for Sweden, where at present, the author still recognises deep inequalities and unresolved questions with regard, for example, to the allocation of public funds to religious communities other than the Church of Sweden. The pandemics, and the trust showed by religious associations, should serve an occasion to induce the Government to use the same trust to amend legislation in order to design a regulation that is in line with current times and a significantly transformed religious landscape in Sweden.

Similar considerations also emerge from Matteo Giannelli's analysis, focusing on restrictions imposed in Italy. Similarly, he notes that the pandemic made even more evident than before some structural weaknesses of a system based on the differentiation between "majority and minority denominations. His contribution explores the legal sources that imposed restrictions on the freedom of worship in Italy. His analysis aimed at assessing whether the management of the pandemic affected bilateralism, traditionally characterizing relations between the State, the Catholic Church, and the various religious denominations, in the Italian legal experience. In accordance with Martínez-Torrón's introductory remarks, Giannelli notes that the pandemic emergency has contributed to accelerating processes that had already been underway for some time, the virtues, and shortcomings of which have become more evident and compelling.