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**CHALLENGES TO THE FREEDOM OF THE CHURCH IN THE CONTEXT OF
THE PANDEMIC**

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The Covid crisis allowed everyone to experience the power of fear over society. In retrospect, the ease with which we consented to the abrupt surrender of so many freedoms is disturbing. Obligations that would normally be inconceivable were easily accepted. The Covid crisis also allowed everyone to experience the media's power to stun the population.

The fear and confusion caused by any major crisis must not result in even greater power being given to governments, it must instead prompt the lawyers to exercise their control with greater care and firmness. It requires lucid and vigilant counter-powers. In times of crisis, when blinded by fear, people tend to lower themselves unworthily. Society then has a particular need for witnesses who do not give in to fear and maintain a correct vision of the hierarchy of values, and who thus preserve freedom. This responsibility belongs, first of all, to the Church in that she has the capacity to maintain a supernatural view of events, by which she sees that the preservation of health and life are not the ultimate values. Others are superior to them: notably inner freedom, charity, the duty to render public worship to God and the reception of the sacraments.

It is therefore important, following the example of St. Charles Borromeo during the plague, that Christians do not give in to fear, but keep a spiritual, and therefore lucid and rational, eye on the tribulations of our time. Legal discipline can help us do this, for it is a tool of reason; even in times of confusion, it preserves and provides us with criteria for discernment.

Thus, in the face of the many attacks on the Church's freedom, her juridical defense coincides with that of reason and justice. The restrictions on the freedom of the Church have been various, serious, numerous and unprecedented even during war times. Restrictions to the freedom of religion have varied considerably depending on the political-religious culture of the countries. Some governments have acted brutally, unilaterally banning all public worship for many months - depriving the faithful of access to the sacraments, while others, on the contrary, have respected the bishops' own responsibility for the administration of their dioceses. Often, the teaching of catechism, pastoral visits to the sick, the dying, the elderly or prisoners were forbidden or made impossible. Many processions were also forbidden. With all these prohibitions, the civil authorities and the faithful were deprived of many graces at a time when society is in even greater need of them.

The restrictions imposed in the emergency have often been inconsistent, even irrational. For example, the prohibition of gatherings in churches was interpreted broadly to include prohibiting open-door Masses, the celebration of Masses in the street, and even the simple act of praying there, while political demonstrations were still allowed outdoors (in France). In

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Belgium, priests were not allowed to move around during the confinement. Other serious restrictions are being introduced: in particular, the obligation to be vaccinated or to have a health pass in order to celebrate or attend religious services. More generally, compulsory vaccination challenges freedom of conscience, bodily integrity and the rights and responsibilities of parents regarding their children.

Three cases were filed before the European Court of Human Rights on these issues. One has already been decided, concerning compulsory vaccination (*Vavříčka and others v. the Czech Republic*), and two others are pending, challenging the closure of churches in Greece and Croatia (cases *Association of Orthodox Church obedience v. Greece* and *Dalibor Magdic v. Croatia*). The ECLJ intervened before the ECHR, as *amicus curiae*, in these three cases.

The present presentation is largely based on our interventions before the ECHR, as the reasoning applied to analyze the cases covers the main legal aspects of the issue and will enable lawyers to assess the conformity of their national legislation to these "standards". We will therefore follow the reasoning of the ECHR, examining successively the legality of the restrictions, their goal, the fact that freedom of religion shall not receive any "derogation", the proportionality of the restrictions, the absence of discriminatory and arbitrary restrictions. We will conclude recalling the right of the Church to internal autonomy and the need for a proper cooperation between civil and religious authorities so as to appropriately regulate religious activities in times of epidemic.

In terms of facts, the presentation is based on the reports presented by the legal officers of the national bishops' conferences.

1. The legality of restrictions

The importance of the infringements of the rights and freedom in the situation of health crises requires a strict interpretation of the notion of "law", in order to respect the legislator's function as guardian of freedoms. Minimal infringements of rights and freedom can be based on texts of lesser legal value, such as regulatory acts, but this should not be the case for serious infringements which should result from a democratic decision. Contrary to the ECHR, the notion of law, under the Covenant on Civil and Political Rights, is not conceived as a wide and broad legal basis empowering the executive to adopt regulatory measures restricting freedoms, but as parliamentary law.

We have witnesses that, in the covid crisis, restrictions to freedoms were often established by government's decrees, along with penal or criminal sanctions, and were sometimes deemed illegal.

2. The legitimate goal of public health protection

There is no doubt that the restrictions adopted aimed for the legitimate goal of public health protection, the European court having considered "*there is no doubt the COVID-19 pandemic*

can have very serious effects non only on health, but also on society, on economy, on the State's functioning and on life in general".²

Public authorities not only had the capacity to restrain rights and liberties to protect public health; but they had the positive obligation as well, regarding article 2, to *"take the necessary measures to the protection of the life of people within its jurisdiction."*³

This being the case, the protection of public health is not a right or freedom competing with religious freedom, but only a legitimate limit to the exercise of religious freedom.⁴ The individual right is therefore the protected principle, and the protection of public health a limit to the exercise of this principle, which must be justified by the state that imposes it. Yet the State's obligations to protect fundamental rights do not diminish in times of pandemic, and constitutional guarantees cannot be set aside or forgotten, as the US Supreme Court recalled in November 2020.⁵

Ones may suspect that some Governments, opposed to the Church for ideological reasons, took advantage of these circumstances to strengthen their power over the Church, reduce the celebration of the sacraments and detach the faithful from religious practice, while the times of sanitary crisis arouse in general to increase the religious practice. Such a vexatious purpose is obviously not acceptable.

3. No derogation to FoRB: the hierarchy of liberties

The liberty to manifest one's religion or convictions can be subjected to proportionate "restrictions", but no general and absolute 'derogations'.

Article 4 of the 1966 Covenant on civil and political rights prohibits any "derogation" from freedom of religion, even "[i]n cases of public emergency which threaten the life of the nation and are proclaimed by an official act". As noted in General Comment No. 29 on Article 4 (24 July 2001) CCPR/C/21/Rev.1/Add.11: "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." (§4). The 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 up to the judge to sanction any derogation, and to assess the proportionality of any restrictions.⁶ Thus, on April 29th, 2020, the Constitutional Court of Karlsruhe condemned the ban on public worship on the grounds that the general nature of the ban was not justified, and therefore violated the religious freedom guaranteed by the German Constitution. According to the Court, restrictions must be adaptable to the circumstances. Similarly, the absolute prohibition of collective worship was severely

² *Cristian-Vasile Terheş v. Romania*, No. 49933/20, 13 April 2021, § 39. Free translation.

³ *Lopes de Sousa Fernandes [GC]*, No. [56080/13](#), § 164.

⁴ See for example article 9 § 2 Convention. See also: CEDH, *Ceylan v. Turkey*, n°23556/94, 8 July 1999, § 32 - ii.

⁵ "But even in a pandemic, the Constitution cannot be put away and forgotten". [Roman Catholic Diocese of Brooklyn v Cuomo](#), Supreme Court of the United States, 592 US (2020), 25 November 2020.

⁶ The Human Rights Committee recalls in its General Comment No. 22 (48) (art. 18)1/ CCPR/C/21/Rev.1/Add.4, 27 September 1993 that "Article 18 (3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others." (§8)

disapproved by the French Conseil d'État as a “serious and manifestly illegal infringement” of religious freedom.⁷

As a general remark, it is important to recall that there is a hierarchy within liberties and rights, and freedom of conscience and religion is at the top of them, along with the right to life, or the prohibition of torture. In this time of covid, the authorities have often forgotten this hierarchy, treating public worship on the same footing as cultural gatherings, and below commercial activities.

4. No excessive restriction: the proportionality

The Prohibition of derogations does not preclude the adoption of restrictions “prescribed by law and that are 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 ECHR). According to the Court, “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”.⁸

In the context of the Covid-19 epidemic, the European Court did not lower fully its requirement in terms of protection of fundamental rights. Thus, it validated a national measure restricting the applicant's freedom of movement, insofar as the applicant retained numerous possibilities of going out and could still establish social contacts.⁹ The interference was deemed proportionate by the Court as it did not completely extinguish the applicant's ability to use his right to freedom of movement.

4.1. No undue restriction on its scope

The principle of proportionality requires that national authorities put in place the least restrictive possible measures in terms of their duration, geographical range, and purpose. Such measures should also consider, for example, differences of health situation between territories, or the size of religious buildings, the place of worship (indoor or outdoor), or the relative risk of such or such particular religious practice. It is for the national authorities to show that they have taken these circumstances into account to reduce, as far as possible, the infringement of freedom, considering scientific knowledge at the time of the events.

It is worth recalling the case law in which the Court has recognized that, if a religious community cannot have a place to worship, its right to manifest its religion is rendered meaningless.¹⁰

The US Supreme Court in its decision in *South Bay United Pentecostal Church v Newsom* (2021) applied this test to ascertain the proportionality of the measures taken by the State of California. It found that the authorities had failed to justify why less restrictive measures to achieve the same objectives had not been taken; the judges also made several less restrictive

⁷ Order of the Council of State, interim relief jury, decision n° 440366, 18 May 2020. (free translation)

⁸ *Glor v. Switzerland*, 30 April 2009, n° 13444/04, § 94.

⁹ *Terhes v. Romania*, n° 49933/20, 13 April 2021, § 43.

¹⁰ *Solidarity Association with Jehovah's Witnesses and others v. Turkey*, n° 36915/10 et 8606/13, 24 May 2016, § 90.

proposals that could have been implemented by the authorities, including the wearing of masks, the use of plexiglass windows.

4.2. No undue restriction on its duration

Restrictions on freedoms should also be prescribed for the shortest possible time that should be specified at the time of their adoption; in addition, there should be an obligation to constantly evaluate 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 these temporary measures must be subject to a rigorous assessment of their proportionality, taking into account the current situation”.¹¹

5. No discriminatory restriction

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, States must “assessing whether and to what extent differences between otherwise similar situations justify a different treatment”.¹² Similarly, the Human Rights Committee recalls in its General Comment No. 22 that the criteria applied to restrictions cannot 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 necessary and proportionate, “Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.” (§8).

5.1. No unjustified difference in treatment between religions

The State must consider differences in religious practices in order to avoid restrictions that may indirectly discriminate between religions. Indeed, the absence of differential treatment of persons in significantly different situations may result in a violation of Article 14 of the ECHR.¹³ Thus, in the case of the imposition of a national measure that may affect religious practice, the State must consider the historical context, the particularities of the religion in question, whether dogmatic, ritual, structural or other.¹⁴

For example, the infringement on religious freedom through prohibition of public worship is much greater for the followers of religions that adhere to a public worship obligation. As a result, restrictions must be adapted as far as possible to the different religions. Failure to take account of the specific nature of religious denominations cannot result in a proportionate restriction on freedom of religion.

Several courts have recalled in their judgments the importance of the collective dimension of religions in the general exercise of freedom of religion, and of the celebration of the sacraments in several religions which, according to the doctrines, are not substitutable. In Scotland in particular, the Court recalled that “*the celebration of the Eucharist at public Mass on Sunday is of particular importance. Participation in Mass is seen as an essential, not optional, part of the*

¹¹ Federal Constitutional Court of Germany (Bundesverfassungsgericht) 1 BvQ 28/20, 10 April 2020 (free translation)

¹² *Chassagnou and others v. France* [GC], n^{os} 25088/94, 28331/95 et 28443/95, 29 April 1999, § 91.

¹³ *Thlimmenos v. Greece*, [GC] n^o 34369/97, § 44

¹⁴ *Cha'are Shalom Ve Tsedek*, [GC], *op. cit.*

Catholic religion".¹⁵ De même, en mars et avril 2021, la Cour suprême du Chili a rappelé que « *La messe du dimanche serait le noyau de leur religion. Ce n'est pas par définition du requérant, mais les définitions normatives et d'autorité de ceux qui dirigent la religion et le culte qu'il professe*¹⁶ ».

The recognition of this essential dimension also allowed the court of the District of Columbia to rule that the possibility of using virtual means could not be considered as allowing the effective exercise of the religious freedom of individuals. Thus “Unlike many other religious entities, the Church does not offer virtual worship services”. To the Church, “a weekly in-person worship gathering of the entire congregation is a religious conviction for which there is no substitute.”¹⁷

5.2. No difference in treatment depending on whether the activity is religious or secular.

The State must not treat religious activities more restrictively than secular activities that are similar from the sanitary point of view. Thus, it may not impose stricter restrictions on a gathering held in a place of worship than in a secular place. Similarly, it may not, for example, prohibit religious instruction in schools or parishes, while maintaining the possibility of instruction in secular subjects. Similarly, it cannot prohibit the celebration of worship outdoors, while authorizing the holding of public demonstrations outdoors, as the French authorities have sometimes done.

Such differences in treatment cannot be justified by a value judgement by the public authorities as to the “usefulness” of beliefs and the “necessity” of religious practices, or as to their “essential” character in comparison with secular activities. This incompetence should thus prohibit the authorities from authorizing the opening of shops, while keeping places of worship closed on the (implicit or explicit) grounds that the practice of religion is less useful, less vital, than that of trade.

The obvious difference in treatment between religious and secular activities, and particularly the imposition of less rigorous measures on secular activities, has been regularly observed. For example, in France, the finding of a less restrictive regime for secular activities receiving the public than for religious activities motivated the decision of the Council of State confirming the urgency of modifying the applicable derogation rules (November 29th 2020). The Supreme Court of the United States also considered the blatant difference in treatment between religious and secular activities and noted that this difference in treatment was not justified because the risk of contamination was not higher in a place of worship than in other activities.¹⁸ In another decision, it recalled that the First Amendment requires at least comparable treatment between religious and secular activities.¹⁹

¹⁵ Philip & Ors for Judicial Review of the closure of places of worship in Scotland, (2021)

¹⁶ (traduction libre) Voir : 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 mai 2021.

¹⁷United States District Court for the District of Columbia *Capitol Hill Baptist Church v Muriel Bowser*, in Her Official Capacity as Mayor of the District of Columbia (CaseNo20-cv-02710 (TNM)) on 9 October 2020.

¹⁸ Supreme Court of the United States *South Bay United Pentecostal Church v Newsom* (2021),

¹⁹ Supreme Court of the United States, *Roman Catholic Diocese of Brooklyn v Cuomo*, 592US ____ (2020), 25 November 2020, Concurring opinion of Justice Gorsuch.

6. No arbitrary restriction

The State is not competent to judge how essential the nature of a particular religious practice is, nor is it competent to unilaterally regulate such religious practices in detail. Indeed, “the State's duty of neutrality and impartiality is incompatible with any power of appreciation on its part as to the legitimacy of religious beliefs or the ways in which they are expressed.”²⁰ The result is that the State has a duty to organize with neutrality and impartiality “the exercise of the various religions, cults and beliefs”.²¹

Thus, the choice made by the State to authorize religious funerals to the exclusion of all other religious practices is not neutral and may be perceived as arbitrary when one considers the fact that for Christians, Sunday worship is a religious obligation, which is not the case for participation in a funeral, which is not a sacrament. This principle has been reiterated by the District Court of Colombia, which firmly reiterated that it is not for the authorities “to say that [the Church’s] religious beliefs” about the need to meet together as one corporal body “are mistaken or insubstantial.”²²

By deciding to allow certain religious practices rather than others, public authorities are stepping out of their role. They also step out of their role when they pretend to prescribe how religious practices such as the rite of communion, or singing, should be conducted, or impose, as has sometimes been the case in France, that Mass be celebrated with closed doors. In Strasbourg, the Prefecture of the Bas-Rhin department even prohibited praying "on one's knees" or even "silently"²³ during protests against the prohibition of Mass.

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

7. The respect of religious communities’ autonomy

Such arbitrary decisions often violate the autonomy of religious communities. The autonomy of religious communities is widely recognized in international legislation and by the European Court jurisprudence. It 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 the *Sindicatul Păstorul v. Romania*,²⁴ *Fernández-Martínez v. Spain*,²⁵ and *Károly Nagy v. Hungary*²⁶ cases. From this principle derives a series of “institutional rights”,²⁷ including the liberty for religious

²⁰ For example: *Manoussakis et autres c. Grèce*, n° 18748/91, § 47 ; *Bayatyan v. Armenia* [GC], n° 23459/03, § 120.

²¹ *S.A.S. v. France* [GC], n° 43835/11, 1 July 2014, § 127.

²² *UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA Capitol Hill Baptist Church v Muriel Bowser*, in Her Official Capacity as Mayor of the District of Columbia (CaseNo20-cv-02710 (TNM)) on 9 October 2020, page 11.

²³ 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-quiplegaux/>

²⁴ *Sindicatul Păstorul v. Romania* [GC], n° 56030/07, 12 June 2014.

²⁵ *Fernández-Martínez v. Spain* [GC], n° 56030/07, 12 June 2014.

²⁶ *Károly Nagy v. Hungary* [GC], n° 56665/09, 14 September 2017.

²⁷ See the closing Document from Vienna Conference, 19 January 1989, § 16.4. Quoted in Jean-Pierre Schouppe, p. 122

communities to administrate themselves according to their doctrine. Without respect for the religious communities' autonomy, States step into the religious area, they are no longer neutral nor impartial.

The European Court “recalls that religious communities traditionally and universally exist in the form of organized structures. ... Where the organization 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.”²⁸ Indeed, the organizational functioning of the Churches, their ecclesial structure is an integral part of their doctrine. The State's interference with the free institutional functioning of the Church is an interference with religion itself, and consequently with the freedoms guaranteed in Articles 9 and 11 of the Convention.²⁹

The Court often emphasized 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. (...) Were the organizational 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.”³⁰ The Court has consistently applied this principle.³¹ Thus, the principle of autonomy prohibits the civil authorities from taking decisions internal to the life of the churches. *A fortiori*, the way rites are celebrated is the exclusive competence of religious organizations.

It derives from the religious communities' autonomy that they alone are competent to determine the methods of exercising their religion. Consequently, the public authorities cannot impose changes to the practice of religions "from outside" but must consult with the leaders of the religions in order to adopt the measures best suited to the circumstances.

8. The need for cooperation between religious and civil authorities

In order to avoid such arbitrary restrictions and violations of the autonomy of the religious communities, public authorities should, as far as possible, consult and cooperate with the religious communities concerned.

It seems, reading from the national reports, that such consultations and cooperation were most of the time spontaneous.

In some other countries, there has been regular discussions between religious and civil authorities, followed by decisions taken either by the civil or the religious authorities, like in Austria, Bosnia Herzégovina, in Croatia, or the United Kingdom with the constitution of a « Task group »³². In Portugal, in January 2021, the episcopal conference decided of its own

²⁸ Hasan and Chaush v. Bulgaria, [GC], [30985/96](#), §§ 62; see also *Kohn v. Germany* (déc.), n° 47021/99, 23 March 2000, et *Dudová and Duda v. the Czech Republic* (dec.), n° 40224/98, 30 January 2001.

²⁹ *Holy Synod of the Bulgarian orthodox Church (metropolitane Innocent) and others v. Bulgarie*, n° 412/03 et 35677/04, § 103, 22 January 2009.

³⁰ *CEDH*, 26 oct. 2000, *Hassan and Tchaouch v. Bulgaria*, *op. cit.*, § 62, see also notably *Serif v. Greece*, n° 38178/97, § 53, *CEDH* 1999-IX, *Metropolitan Church of Bessarabia and others v. Moldova*, above.

³¹ Except for the section judgment in *Sindicatul*, which caused it to go back before the Grand Chamber.

³² The government created a Task Group to bring together the leaders of the major churches and other faiths to assist in giving advice in relation to restrictions on religious practice, but also the efforts of religious organisations

accord to suspend worship services, after being forced to do so in 2020. In Hungary, the Church adopted its own regulation³³. By contrast, the restrictions were unilaterally imposed by the civil authorities in Belgium, France or Greece. In France, the judge ordered the civil authorities to undertake consultations with the religious representatives³⁴.

Such cooperation is the most basic, and necessary attitude in order to avoid arbitrary violations of the rights and freedom of the Church and the faithful.

Conclusion

I will insist on some key points as a conclusion.

If the Church wants to be credible, she needs to develop its own scientific and medical expertise – otherwise, the Church cannot pretend to any reasonable autonomy. The Church cannot only relay on the information provided by the civil authorities.

It is important to recall that the protection of life and health is not the ultimate value.

The Church is a bastion of freedom in the context of the over-strengthening of civil power; the Church should assume its role as a counter-power in the face of excessive restrictions of freedom.

It is of crucial importance to establish a proper cooperation with civil authorities, as well as it can be necessary and beneficial to take legal action in justice against their decisions when they are clearly arbitrary, disproportionate or discriminatory.

Regarding the compulsory vaccination, it is of primary importance to set a clear limit to the power of the State over the bodies of the persons. Compulsory vaccination violates the two most fundamental rights of medical ethics: the right to respect for physical integrity, and its corollary, the right to respect for informed and free consent prior to any medical intervention on people. This question of the respect of the physical and moral integrity of people in the face of the invasive uses of biotechnologies has only just begun. Here again, people are looking at the Church for guidance and protection.

In this time of crisis and fear, the most important is that the faithful do not feel abandoned but rather find within the Church the safe boat to cross the storm.

in supporting society in a time of emergency. This proved useful and effective, and the high-level contacts have continued, often branching out into wider issues.

³³ It was left to the decision of religious communities to adopt measures – measures that were expected to follow the general policy. During the spring lockdown religious communities decided to suspend all their public worship services at churches. Catholic churches remained open only for individual prayer. According to the rules of the state of danger all public events were forbidden, including cultural events”, however “worship services of religious communities were held upon the decision of religious communities.

³⁴ Par ordonnance de référé du 7 novembre 2020, le juge rejette la requête mais oblige les cultes et les pouvoirs publics à une concertation devant intervenir au plus tard le 16 novembre 2020,