

RELIGION, LAW AND COVID-19 EMERGENCY

Is the lockdown of churches an aggression towards freedom of religion or belief?

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1. Introduction

According to international standards, states cannot suspend FoRB during war or emergency state. However, religious freedom can be limited as an exceptional measure, to reestablish order and public security, or in the case of an epidemic as an exceptional measure and with the fulfillment of the following terms: 1. to be provided by law 2. to serve purposes of the political body in its whole (protection of security, public order, health, etc.) 3. to be nondiscriminatory in language and application 4. to strictly serve the purpose and announced period.

With reference to the Covid-19 pandemic, the World Health Organization recommends “states to maintain a fine balance between protection of health, the reduction of the negative economical and social impact and the fulfillment of human rights”.

If we understand FoRB in the normative sense, as a right that has its limits in the exercise of other rights (for example, the right to a healthy life) than the

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governmental measures are not in fact restrictions, but instruments to democratically harmonize multiple rights. If we take religious freedom broadly, as one of the fundamental rights of democracy, susceptible to not having limitations precisely because it stands at the base of the human rights and freedoms pyramid, the governmental measures are restrictions, but are justifiable.

European states must worry more about closing churches than religious organizations, because it is the duty of the state to facilitate the exercise of rights and liberties, in the logic of liberal democracies the religious organizations being just one of the instruments by means of which free citizens freely associate with the purpose of exercising a common faith.

2. What is the emergency state in terms of political science?

The modern state resulted from the dissolution of plural medieval jurisdictions (guilds, churches, feudal estates, etc.) and was founded both with military power but especially through bureaucracy. Subsequent to that it liberalized consolidating its dimension of rule of law, separated political powers and constitutions were established. Passing from absolute monarchies to the constitutional ones or even forms of incipient republican governments was made by the gradual neutralization of the head of state, which in most cases kept attributes of the sovereignty, and in others it kept the executive power.

This state's spine is represented by the political neutrality and liberal separations in different areas and with different intensities: separates the government from the people, religion, art, culture and science, the state from society and is grounded on the hypothesis (in accordance with the trend of the era – birth and explosion of the number of political parties) that in most parliament legislatures you will have coalition majorities. As liberal regimes become more democratic and have the Parliament as their core, as the

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representative organism of the people, the head of state, being monarch or president, remains with the attributes of sovereignty, even if he cannot be considered sovereign any longer.

This monarchic position being simultaneously in the center but also on the edge of the political regime, gives the president of the modern republic the attribute of neutral and intermediary power (*pouvoir neutre*, Benjamin Constant), power placed not above the constitutional powers, but by its side, separated and with specific competences. This is where his competences as a mediator between state, society and state powers begin. Being a mediator between the powers of state, the elementary logic tells us that he cannot be part of these.

From the 19th century continental liberal constitutions we can identify principles that have been borrowed in the actual constitutions (post-war and post-communist): the representation of the people belongs exclusively to the Parliament, to the will of which depends the Government, and the head of the state or more precisely the President of the republic has competences that tie him either to the Parliament (the voting of the state of emergency or international treaties signed lastly by the President), or to the Government (by the countersignatures of the ministers and/or of the prime minister). As such, the President of the republic, just like a secularized king, emptied of the legitimacy of the divine right, rules but does not govern.

The president as *pouvoir neutre*, chosen democratically directly by the people, plays a role that cannot be assumed by the Parliament. His independence to the Parliament and in equal his election directly by the people are consequences of him being detached from the particular interests of a parliamentary majority, reason for which during the exercise of his position he cannot be simultaneously neither member of the Parliament nor member of a political party. When the Parliament forces the Constitution in name of maximizing the rights and liberties or for populist public policies, the President, as a mediator authority, is the one that protects it and sends the law to the

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Constitutional Court. This neutral power is not in competition with the other powers which is precisely why it becomes active only during emergency situations or war.

Carl Schmitt understands the presidential position as the representation of the unity of the political will of the sovereign people, reason for which the President can skip parliament and can go directly to the people and calling for popular consultations. The President of the republic has the duty to create political consensus in the horizon of the reason of state itself and protection of democracy. He must be non-partisan, neutral arbiter, mediator and moderator, but also to withhold from deciding. The President as a representative of the national unity of the State is in fact the opposite of the Parliament as the people representative.

In the alternative in which the president is elected by Parliament, so in fact by a parliament majority, like in Italy or Hungary, the President is either extremely loyal to the dominant party, or nonexistent and without reaction to what takes place in the Parliament. He is a ceremonial annex, stripped of the real capacity of being an arbiter and also of the power to act different to the will of the parliament majority.

In case of the emergency state, the President's duty is to simultaneously assume all qualities and attributes granted by the Constitution and can decree, initially by himself, and then with the agreement of the Parliament, to a certain period of time during which the political decision requires a quick reaction and cannot be subjected to the parliamentary debate but to a single authority. The authority least touched by vanity and political partisanship is the President. With eyes set on reason of state, by decreeing the emergency state, the President has the authority to place the interests of the state above the interests of the people (that for various reasons does not accept for example to self isolate) and assumes the executive power. The state revs its engine to the maximum to

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produce order and public security and leaves on a secondary level, without forgetting them, the citizen rights and liberties.

Romania may be counted in as a democracy at the fine border between semi-parliamentarism and semi-presidentialism, having both a President elected directly by the people for a term which does not overlap as length to that of the Parliament, but at the same time does not really have executive powers. The competition for power between the Parliament, President and Government makes the radical political decisions to not be implemented. This fact is a gain for democracy despite the fact that the Romanian political regime was not constituted with the best democratic intentions, but rather to harmonize the battle for power between different influential political actors.

3. How was religious freedom restricted?

The constitutional solution chosen by Romania was the establishment of the emergency state at the request of the president of the republic with the agreement of the Parliament for two periods of 30 days each. In these periods, the government appealed to several military ordinances as the main governing instrument. The military ordinances used a legal-political language centered on restrictions mainly addressed to the Romanian Orthodox Church (which holds 59% of all religious organizations in Romania and a total of 86.45% of members) and, if we read through the lines, the main activity limited until forbidding it is the holy communion of the faithful. The state does not restrict the participation of the clergy to the Holy Mass (where all participant priests have the obligation to take communion from the same Chalice), but restricts the communion of the faithful with the same teaspoon.

The solution thought of by the Romanian authorities is not appropriate as a public policy because is not centered on social distancing as a measure to prevent the spreading of the virus, but, on the one hand on the harsh restriction

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to give communion to the faithful from the same Chalice and with the same teaspoon, and, on the other hand the separation of the Church in clergy and people, a valid dichotomy theologically until one point, but incomprehensible in relation to the access of the faithful to the exercise of religious freedom. The clergy retains the privilege of communion from the same Chalice, although in the case of large parishes and monasteries we speak of 4-5 or event 10 clerics that perform mass at the same time in small altars and unavoidable without keeping the social distance of 2 meters. Instead, the faithful is restricted from participating to the Holy Mass, for using the same teaspoon, reason that can be read through the lines.

The solution had in mind by the Romanian decision makers transpires from a corporate mentality and not a democratic one, meaning that it prioritizes the Church (the equivalent of the clergy body) as a social corporation to the detriment of the religious freedom as an individual right. Their intention seems to have been on the one side to ensure that the mass-media does not receive other images of the faithful receiving communion from the same Chalice and teaspoon, and on the other hand to not legislate too many prohibitions to the clergy.

Moreover, just to prove that the restrictions are not targeting the priesthood, the military ordinances, although they are meant to state restrictions and limit rights, add, without any legal logic, the fact that “religious/church servants (the term does not exist in legislation) can give communion to the ill in the hospital or at their place of residence”, which obviously was valid even before the outbreak of the pandemic. Furthermore, “the communion of the faithful” is not the practice of all religious organizations.

Further on, the expression “religious/church servants” not only does not coincide with the synonym it probably targets, which is “clerical staff” (legal and not discriminatory term established by Law No. 489 of 2006 regarding religious freedom), but is deeply discriminatory because it targets only those religious

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organizations that have instituted sacramental priesthood (Orthodox, Catholic, Protestant Churches, etc.) and exclude from the beginning some evangelical churches or the Jews and the Muslims, where the sermon directed by the clergy can be performed, in certain situations, by other members of the community.

The restrictions in the military ordinances target in fact practices specific to the Romanian Orthodox Church, leaving the apparent impression that it gives the Romanian Orthodox Church some free space (which is to perform sermons behind closed doors), but forbidding the access of the faithful to the sermon, which is the main gesture of exercising religious freedom.

In Romania's case the governmental positions are mediated arbitrarily by a mixture of anti-clergy (despite the fact that in democratic regimes the police force has the role to prevent and educate, the Romanian Police fined dozens of priest with the amount of 4.000 euro each for performing the memorial service with 4 to 5 people in the outdoors) and pietist ultra-conservatorism (the Police, neutral from a religious standpoint according to the legislation, offered to help within an agreement with the Romanian Orthodox Church, to spread the holy light in the night of the Resurrection, a gesture reserved solely to the clergy, and revoked because of the public pressure).

4. Further advancement of FoRB in Eastern Europe

The topic of restricting religious freedom, a right generally understood in eastern Europe as optional and not important, despite the recent experience of the communist regime and of the recent Western pressure, becomes for the next weeks a theme to think about for the Parliament, the guarantor of citizen rights and liberties. The Romanian Parliament has the chance to censor military vices and pay attention to the language and instruments used so that this period of crisis does not leave deep scars in the democracy especially given that the ease of restrictions regarding religious life are about to happen all over Europe.

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The call of US Ambassador at large for international religious freedom, Samuel Brownback, or that of Jan Figel, former Special Envoy for the Promotion of Freedom of Religion or Belief Outside of the EU regarding the release of political detainees abusively detained for religious purposes in many countries in the world, remain, for the moment, in countries such as Romania just a diplomatic speech and not concrete invitations to promote FoRB.

5. What is to be done?

- Replacing pro-/anti Church governmental positions with international guidelines to apply the principles of religious freedom for dignitaries, police officers, attorneys and judges;
- Branching the Romanian government to the International Alliance of Religious Freedom, organization launched by the US Department of State and which already includes almost all post-communist countries from Europe: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Greece, Hungary, Latvia, Lithuania, Slovakia, Slovenia, Ukraine;
- Collaboration with European institutions such as the Agency for Fundamental Rights of the European Commission and the Office for Democratic Institutions and Human Rights of OSCE which offers practical solutions for emergency situations, like the Covid-19 pandemic, etc.;
- The introduction of the culture of freedom of religion or belief in the public administration, at least on central level, starting from the minimal effort to religiously alphabetize at least the political decision makers.