Diritto Religione Società Multiculturali
Law Religion Multicultural Societies
Право Религия Мультикультурные Общества
القانون والدين في المجتمعات متعددة الثقافات
多元化社会中的法与宗教

RELIGION, LAW AND COVID-19 EMERGENCY

State of emergency and religious freedom: constitutional stress in German law (art. 4 of the Basic Law for the Federal Republic of Germany)

by **Stefano Testa Bappenheim***

stefano.testa-bappenheim@unicam.it

De qua agitur - I. Introduction – II. Spiritual assistance – III. Compression, not infringement - IV. Health (art. 2 of the Basic Law for the Federal Republic of Germany) – V. Human dignity (art. 1 of the Basic Law for the Federal Republic of Germany) – VI. Lack of legitimacy – VII. The right of assembly (art. 8 of the Basic Law for the Federal Republic of Germany) – VIII. The arguments – IX. The comparison with supermarkets – X. The BVerfG [Federal Constitutional Court] [Federal Constitutional Court]: religious freedom can undergo compressions only if proportionate to the purpose - XI. Religious freedom between state of emergency and proportionality.

De qua agitur

The proliferation and spreading of the Covid-19 epidemic has meant that even in various European states, and not only in Italy, gatherings of people have been prohibited with the issuing of specific rules, which have also included community religious celebrations. This has resulted in a certain friction in

* Professor of Law and Religion, University of Camerino (Italy).

various countries with the relative constitutional provisions for the protection of religious freedom. The case of a State that intervenes on religious functions depicts a complex and needy picture of specialists, thus calling into question the comparative ecclesiastical law which again, in the current situations, fulfilled the prophecy that saw it, for "the intermediate position within the juridical disciplines" and "the undeniable historical-political assumptions", "not as a science in the process of exhaustion, but as a bank of evidence of the most delicate dogmatic problems"[1].

I. Introduction

The emergency rules issued in the various states have already been the subject of an appeal. The objection of unconstitutionality for violation of religious freedom was raised in Spain before the *Tribunal constitucional*; in France, before the *Conseil d'État*, and in Italy at the TAR del Lazio, while in Germany the issue has already come before the *Bundesverfassungsgericht* three times, on the basis of cases developed before the administrative jurisdictions. This shows how it is a problem common to countries that are very distinct and distant according to the Habermasian articulation of the three well-known paradigms: on the one hand the "absolute" secularism (French model)[2], at the extreme, opposing the

[1] M. TEDESCHI, *Sulla scienza del diritto ecclesiastico,* Milan, 1987, p. 55; P. CONSORTI, *La scienza del diritto ecclesiastico in Germania*, in *qdpe*, 1992, pp. 119 ff.

[2] See P. CONSORTI, *Dalla Francia una nuova idea di laicità per il nuovo anno*, in *statoechiese.it*, no. 1/2018, https://www.statoechiese.it/images/uploads/articoli_pdf/Consorti.M2_Dalla_Francia.pdf ; M. D'ARIENZO, *La "religione della laicità" nella Costituzione francese*, in P. BECCHI - V. PACILLO, *Sull'invocazione a Dio nella Costituzione federale e nelle Carte fondamentali europee*, Lugano, 2013, pp. 139 ff.; EADEM, *La laicità francese secondo Nicolas Sarkozy*, in *DeR*, 2008, pp. 257 ff.; EADEM, *La laicità francese: "aperta", "positiva" o "im-positiva"?,* in *statoechiese.it,* 2011, https://www.statoechiese.it/images/uploads/articoli_pdf/maria_darienzo_la_laicit_francese.pdf; P. VALDRINI, *La 'laicità positiva'. A proposito del discorso del Presidente Sarkozy al Laterano (20 dicembre 2007,* in AA.VV., *Le sfide del diritto*, Soveria Mannelli, 2009, pp. 409 ff.; ID., *Il principio di laicità nel diritto francese. Neutralità dello Stato e libertà dei cittadini*, in *Eph.,* 2015, pp. 39 ff.; P. CAVANA, *Laicità, politica e religioni in Francia*, in *Iustitia,* 1998, IV, pp. 365 ff.

"open-minded" one (Italian-Hispanic model[3], for various historical reasons), and, in the middle, the "neutralist" one (German-style).

This system presents a particularly complex constitutional framework for the protection of fundamental rights, conditioned partly by the emergency situation, foreseen by the constitutional rules, and partly by the principle of *Verhältnismäßigkeit* elaborated by the constitutional jurisprudence itself. As is known, the German *Grundgesetz [Basic Law for the Federal Republic of Germany]* contains, in the preamble, an explicit reference to God[4], which is moreover deeply rooted in the German cultural-historical milieu[5] (and European one in general[6]).

On the basis of the *Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz, IfSG)*, §§ 28 ff., the State can order restrictions and limitations also on constitutionally recognised

[3] B. PELLISTRANDI, *Catolicismo e identidad nacional en España en el siglo XIX*, in P. AUBERT (edited by), *Religión y sociedad en España*, Madrid, 2002, pp. 91 ff.; V. CARCÉL ORTÍ, *Historia de la Iglesia en la España contemporánea (siglos XIX y XX)*, Madrid, 2002, pp. 249 ss.; L. DIOTALLEVI, *Religione, Chiesa e modernizzazione, il caso italiano,* Roma, 1999, passim; E. GALLI DELLA LOGGIA, *L'identità italiana*, Bologna, 1998, passim; G.E. RUSCONI, *La religione degli italiani - Religione civile e identità italiana*, in *Il Mulino*, 2003, 409, pp. 832 ff.

[4] J. ENNUSCHAT, *'Gott' und Grundgesetz'*, in *NJW*, 1998, pp. 953 ff.; S. TESTA BAPPENHEIM, *'Veluti si Deus Daretur': Dio nell'ordinamento costituzionale tedesco*, in J.I. ARRIETA (edited by), *Ius divinum,* Venice, 2010, pp. 253 ff.; P. HÄBERLE, *Gott im Verfassungsstaat?,* in ID., *Rechtsvergleichung im Kraftfeld des Verfassungsstaates*, Berlin, 1992, p. 216; S. MÜCKL, *In der Welt, nicht von der Welt. (Staats) Kirchenrechtliche Implikationen einer Entweltlichung der Kirche*, in AA.VV., *Theologia Iuris Canonici. Festschrift für Ludger Müller zur Vollendung des 65. Lebensjahres*, Berlin, 2017, pp. 115 ff.

[5] M. THELEMANN, *Als die Germanen zu Christus kamen*, Stuttgart, 1934, pp. 73 ff.; W. ANDREAS, *Deutschland vor der Reformation: eine Zeitenwende*, Stuttgart, 1948, pp. 372 ff.; K. STADTWALD, *Roman Popes and German patriots: antipapalism in the politics of the german humanist movement from Gregor Heimburg to Martin Luther*, Geneva, 1996, pp. 82 ff.; F. MARTI, *Il favor fidei in the ius novum,* in *IE*, 2014, pp. 359 ff.; M. D'ARIENZO, *Il contributo del pensiero riformato del XVI secolo all'ermeneutica della laicità*, in *AGFS*, 2018, pp. 697 ff.; S. TESTA BAPPENHEIM, *Cenni sulla costituzionalizzazione delle radici cristiane in Germania*, in *IE*, 2006, pp. 755 ff.; J.I. ARRIETA, *Le articolazioni delle istituzioni della Chiesa e i rapporti con le istituzioni politiche*, *ivi,* 2008, pp. 13 ff.

[6] P. BELLINI, *Respublica sub Deo. Il primato del Sacro nell'esperienza giuridica dell'Europa preumanista*, Firenze, 1981, *passim.*

fundamental rights, the implementation of which is then entrusted to the various *Länder* that act with their own regulations.

In this contribution we will address the judicial phenotypes produced in these two months, all revolving around the importance and relevance of the fundamental right of religious freedom even in conditions where its protection has been exposed to high levels of constitutional stress. Alongside the many 'collective' disputes, on the problem of the prohibition of religious celebrations with the presence of the faithful, however, there is also an 'individual' one, relating to personal spiritual assistance, which therefore, proceeding from the particular to the universal, we will address first.

II. Spiritual assistance

The intervention of the *Amtsgericht* of Altenburg[7], in Thuringia, was requested by a Lutheran minister of worship who wished to go to give spiritual assistance to his own parishioner, hospitalised with fever. It involved an eighty-nine year old woman, suffering from respiratory diseases considered incurable and undergoing palliative care, and the Lutheran pastor would go to visit her weekly, as a pastor with care of souls, having spiritual talks with her.

Thuringian regulatory provisions to combat coronavirus (*Zweite Thüringer Verordnung über erforderliche Maßnahmen zur Eindämmung der Ausbreitung des Coronavirus SARS-CoV-2* (Version of April 7, 2020), briefly *2. ThürSARS-CoV-2-EindmaßnVO*), however, have 'sealed' the places of treatment, preventing access even to ministers of worship, even if they were willing to comply with all the necessary health precautions to prevent contagion. The Court, questioned by the pastor, proved him right, on the assumption that his visits were not of a personal nature, but - says the sentence - constituted the exercise of a truly

[7] AG Altenburg, judgement of 14 April 2020, no. 26/ar(bd)/24/20.

central element in the heart of the mission of a minister of worship[8], particularly in times of epidemic, according to the example given by Martin Luther himself on the occasion of the bubonic plague epidemic in Wittemberg, in 1527[9].

The afore-mentioned federal law on the health emergency explicitly provides that in the case of quarantine, the minister of worship engaged in the care of souls "must absolutely" always be admitted, in compliance with all the safety procedures, to visit the sick person (art. 30 paragraph 4), while 'other persons' (for example a psychologist, relatives, friends, etc.) "may" be accepted at the discretion of the attending physician. The judges observe that the care of souls constitutes the heart of the duties of Churches. For this reason the norm does not foresee any limitation that can be imposed on the minister of worship, to whom an absolute right is recognised, reflecting the right of religious freedom foreseen by art. 4 of the Basic Law for the Federal Republic of Germany. On these conceptual bases, the legislator of the coronavirus emergency, which has also tightened certain rules established by the *Infektionsschutzgesetz*, has left the rule in question unchanged.

The law is an expression of the pro-religious neutrality of the Basic Law for the Federal Republic of Germany[10], which balances the protection of collective health with the spiritual needs of those forced to quarantine, who can benefit from a relationship with the minister of worship.

---

[8] See, for the general theoretical approach, P. CONSORTI – M. MORELLI, *Codice dell'assistenza spirituale,* Milano, 1993, passim

[9] P. CONSORTI, *Introduzione,* in ID. (edited by), *Law, Religions and Covid-19 Emergency,* Pisa, 2020, p. 9.

[10] See F. FEDE - S. TESTA BAPPENHEIM, *Dalla laïcité di Parigi alla nominatio Dei di Berlino, passando per Roma*, Milano, 2007, pp. 39 ff.; J.T. MARTIN DE AGAR, *Libertà religiosa, uguaglianza e laicità*, in *IE*, 1995, pp. 199 ff.; A. MELLONI, *Laïcité, mot fallacieux*, in AA.VV., *Idee per una scuola laica*, Rome, 2007, pp. 49 ff.; A. RICCARDI, *Cos'è (diventata) la laicità: una chiave di lettura storica per comprendere il pluralismo*, in AA.VV., *Il filosofare per le religioni: un contributo laico al dialogo interreligioso*, Soveria Mannelli, 2016, pp. 21 ff.

This relationship between the quarantined faithful and the minister of worship cannot be subjected to any temporal limitation, and indeed must be facilitated, for example by making telephones or IT tools available.

Since federal law expressly provides for this absolute right to the spiritual assistant (without prejudice to the protection procedures: gowns, masks, gloves, etc.), it follows that the regulations of the individual *Länder* must comply with them, as it explicitly establishes the sentence, and therefore we can say that throughout Germany the fundamental right to spiritual assistance is recognised as immune from the effects of the quarantine, a segment of the multifaceted right to religious freedom pursuant to art. 4 of the Basic Law for the Federal Republic of Germany.

The same cannot be said, however, of the right to religious services, on which the jurisprudence, in the space of only two months, has been copious, constantly present, despite being an expression of the Courts of various and different *Länder*, and has already arrived three times before the Judges of Karlsruhe.

III. Compression, not infringement

A Society apostolic life of Berlin of pontifical right[11], linked to the celebration with the Extraordinary Rite[12], presented an administrative appeal

[11] On SVA, see S. TESTA BAPPENHEIM, *La vita fraterna. Fenotipi storico- canonistici dei consacrati a Dio,* Lecce, 2006, pp. 239 ff.; G.F. GHIRLANDA, *Iter per l'approvazione degli istituti di vita consacrata a livello diocesano e pontificio e delle nuove norme di vita consacrata,* in *Periodica* , 2005, pp. 621 ff.; F. PUIG, *La consacrazione religiosa. Virtualità e limiti della nozione teologica*, Milano, 2010, pp. 289 ff.; O. CONDORELLI, *Sul principio di sussidiarietà nell'ordinamento canonico: alcune considerazioni critiche,* in *DE*, 2003, pp. 942 ff.; L. NAVARRO, item *Incardinación,* in *Diccionario General de Derecho Canónico*, IV, Pamplona, 2012.

[12] See, for the general theoretical approach, A.S. SANCHEZ-GIL, *Gli innovativi profili canonici del Motu proprio 'Summorum Pontificum' sull'uso della Liturgia romana anteriore alla riforma del 1970*, in *IE*, 2007, pp. 689 ff.; J. FOSTER, *Reflexiones canonicas acerca de Universae Ecclesiae, Instruccion sobre la Aplicacion de Summorum Pontificum*, in *IC*, 2012, pp. 191 ff.; J.M. HUELS, *Reconciling The Old With The New Canonical Questions On Summorum Pontificum*, in *The Jurist*, 2008, pp. 92 ff.; C.J. GLENDINNING, *The significance of the liturgical reforms prior to the second Vatican*

against the *Verordnung über erforderliche Maßnahmen zur Eindämmung der Ausbreitung des neuartigen Coronavirus SARS-CoV-2* (abbreviated to *SARS-CoV-2-Eindämmungsmaßnahmenverordnung*, or even SARS-CoV-2- *EindmaßnV*) of Berlin, which, in the context of the containment measures of Covid-19, while expressly allowing individual visits to places of worship, had at the same time prohibited religious celebrations open to the public, outdoors or indoors, as a harbinger of potentially dangerous gatherings.

The application was rejected by the *Verwaltungsgericht* of Berlin, as the prohibition to participate in public religious celebrations certainly constitutes a compression, but not a violation of the right to religious freedom, as it is a proportional balance with other fundamental rights, also recognised by the Basic Law for the Federal Republic of Germany, such as the right to life and physical integrity, pursuant to art. 2 paragraph II of the Basic Law for the Federal Republic of Germany.

The Basic Law for the Federal Republic of Germany, moreover, provides for a state of emergency, with the constitutionally legitimate possibility of compressing, for a limited period of time, in the face of an absolutely emergency situation, certain fundamental rights, concentrating the forces to guarantee the vital energies necessary for the survival of the State, which is the foundation, with its existence, of all guarantees and protection for all fundamental rights; the compression of the right to religious freedom is also admissible because it is partial, as both the possibility of going individually to pray in places of worship and that of attending religious services via television or via the Internet is always permitted[13].

The SVA appealed before the Berlin-Brandenburg *Oberverwaltungsgericht*, whose 11th Senate confirmed the day after the outcome of the first instance,

council in light of Summorum Pontificum, in *SC*, 2010, pp. 293 ff.; J. MIÑAMBRES, *Attribuzione di facoltà e competenze alla Commissione "Ecclesia Dei"*, in *IE*, 1991, pp. 341 ff.

[13] VG Berlin, ordinance of 7 April 2020, no. 14/L/32/20.

placing the principle of *Verhältnismäßigkeit*, proportionality, as *ubi consistam* of its reasoning; the fact that the right to religious freedom, pursuant to art. 4 paragraphs I and II of the Basic Law for the Federal Republic of Germany, is affected by the contested measures is beyond doubt. It is in any case necessary to establish whether it is subject to compression, as deemed in the first instance judgement, or a violation or aggression, as the appellants claim[14].

For the OVG Berlin-Brandenburg, the limitation measure is not preordained in order to compress religious freedom, but this compression is the indirect result of very general measures aimed at limiting the spread of the coronavirus, i.e. measures in compliance with art. 2 paragraph II of the Basic Law for the Federal Republic of Germany, that is the protection of life and physical integrity, which are also constitutional rights that could not have been achieved otherwise.

The right to religious freedom, the Court states, has not been harmed: because there was no intention of it, because places of worship have always remained open to allow people to enter to pray, and finally because it is possible, and indeed it is seen that religious communities have made extensive use of the streaming transmission of religious services. If therefore religious celebrations continued to be celebrated and seen by the faithful, and the latter continued to be able to go to their buildings of worship for prayer, taking into account the emergency situation, we can say that the restrictive measures did not affect the substance of religious freedom, but rather its methods of organisation, which undoubtedly underwent such a forced disarticulation, though limited in scope and duration.

The Administrative Court of Appeal, then, concludes that freedom of religion can also be limited in the event of a collision with fundamental rights of third parties, or collective rights of constitutional rank, but it is, in fact, a

[14] OVG Berlin-Brandeburg, judgement of 8 April 2020, no. 11/S/21/20.

limitation-compression, in the sense that, apart from the cases mentioned above, the right to religious freedom expands again; this orientation is shared by the VG Leipzig[15], called to judge an appeal against art. 7 letter a of the ad hoc legislation of Saxony.

IV. Health protection (art. 2 of the Basic Law for the Federal Republic of Germany).

The reasoning explained by the VG Hamburg[16], which was called to pronounce on the appeal against the *Verordnung zur Eindämmung der Ausbreitung des Coronavirus SARS-CoV-2 in der Freien und Hansestadt Hamburg (HmbSARS-CoV-2-EindämmungsVO)*, is more detailed and complex, in § 2, no. 1, a general prohibition of demonstrations and meetings, public or non-public, expressly also referring to churches, mosques, synagogues and other religious denominations: hence the appeal for violation of religious freedom pursuant to art. 4 of the Basic Law for the Federal Republic of Germany.

For the judge of Hamburg, religious freedom protected pursuant to art. 4 of the Basic Law for the Federal Republic of Germany certainly also includes participation in community religious functions, public or non-public, however religious freedom is not without limits: since art. 4, paragraphs 1 and 2, of the Basic Law for the Federal Republic of Germany does not foresee specific limits, they must be inferred from the Basic Law for the Federal Republic of Germany itself, and are the fundamental rights of third parties and those of the community.

The applicant claimed that religious freedom, i.e. art. 4 of the Basic Law for the Federal Republic of Germany, had been violated because the prevalence of art. 2 of the Basic Law for the Federal Republic of Germany had been applied to the closure of places of worship and not also to supermarkets, whose opening

[15] VG Leipzig, judgement of 3 April 2020, no. 3/L/182/20.
[16] VG Hamburg, judgement of 9 April 2020, no. 9/E/1605/20.

has continued to be allowed, but the VG Hamburg clearly refuted this topic. On the basis of scientific evidence, in fact, the risk of contagion rises exponentially when being in contact for more than 15 minutes with a sick person. In the case of the supermarket, however, as it is a place where people move about, it is very unlikely to be constantly in the vicinity of a sick person for 15 minutes, while in a religious building, on the occasion of a religious function, people remain in their places for the duration of the rite. For this reason there is a substantial difference between the danger rate of contagion in supermarkets and that in places of worship, which justifies, on the basis of the protection of the fundamental right to health and physical integrity, the compression of the right to religious freedom.

The applicants then claimed that these prohibitions would deprive them of the possibility of celebrating Easter, a central solemnity in the Christian religion and not postponed to another date, which would constitute a double injury to their fundamental right to religious freedom.

According to the VG Hamburg, however, the compression of the right to religious freedom, which certainly exists, however, was not so intolerable, concerning only a subset thereof, that is, that of community participation in religious celebrations, given that, in effect, the faithful maintain full freedom to practice their religion in a different way, with individual prayer, at home or by going individually to places of worship, and religious celebrations themselves are not denied to them *in full*, their *streaming* transmission being possible and indeed organised by the ministers of worship themselves. It is understandable that this is not a perfectly equivalent substitute, however it is suitable to compensate for the limitations imposed by the special regulations for the epidemic emergency.

V. Human dignity (art.1 of the Basic Law for the Federal Republic of Germany)

The Weimar OVG[17], which dismissed an appeal against the *Zweite Thüringer Verordnung über erforderliche Maßnahmen zur Eindämmung der Ausbreitung des Coronavirus SARS-CoV-2 (2. ThürSARS-CoV-2-EindmaßnVO)*, prohibited, pursuant to § 3 no. 1, meetings and gatherings of more than two people, explicitly specifying how this prohibition also extended to churches, mosques, synagogues and to the buildings of worship of other religious denominations and philosophical organisations.

The applicant claimed that this prohibition, not including exceptions for religious services even at Easter, a very important Christian holiday, violated not only art. 4 of the Basic Law for the Federal Republic of Germany, but - as religious freedom is an expression of human dignity - also art. 1 of the Basic Law for the Federal Republic of Germany, which precisely protects it, so that religious freedom should be evaluated as pre-eminent with respect to other fundamental rights, given that precisely metaphysical thought - religious, atheist or philosophical in general - is a specific characteristic of man.

This new topic, namely religious freedom as a phenotype of human dignity, and therefore also protected by art. 1 of the Basic Law for the Federal Republic of Germany, is not contested by the OVG, which however develops a more pragmatic reasoning. Fundamental rights in general, and those defined by the Basic Law for the Federal Republic of Germany in particular, are not self-fulfilling, but need a state apparatus that guarantees and defends them. So, before asking if the right to religious freedom, being a phenotype of an anthropological *quid peculiaris*, also falls within the protection of human dignity pursuant to art. 1 of the Basic Law for the Federal Republic of Germany, and therefore prevails over art. 2 of the Basic Law for the Federal Republic of Germany which protects health and physical integrity, it is necessary and appropriate to recognise that no fundamental right can be concretely enforced

[17] OVG Thüringen, judgement of 9 April 2020, no. 3/EN/238/20.

without an efficient state apparatus. Therefore, in an epidemic situation, the objective contemplated by art. 2 of the Basic Law for the Federal Republic of Germany, being in the absence of protection of health and physical integrity, the epidemic could spread also affecting the state apparatus, weakening its structure and causing the collapse of the health system. The result would be to make it impossible to protect any fundamental right.

The prevalence of art. 2 of the Basic Law for the Federal Republic of Germany is not based so much on the fact that the right to health and physical integrity is genotypically more important than the other fundamental rights, as on the fact that its phenotype allows the survival of the state apparatus. In any case, the prevalence of art. 2 does not admit the violation of art. 4 of the Basic Law for the Federal Republic of Germany, which in fact has not been violated, but only suspended in its operating methods. The ministers of worship can continue to celebrate religious services, the faithful can attend them through modern digital media, and they can attend places of worship, as these modes do not contravene the general prohibition of assembly. Moreover, for decades religious confessions have also resorted, in ordinary times and conditions, to the transmission of their rites via television or via the web[18], therefore it is legitimate to believe that they themselves do not recognise the physical presence of the faithful as essential to the rite.

VI. Lack of legitimacy

In Lower Saxony, an appeal was made against local provisions complaining that they prevented the celebration of Easter and Pesah fittingly. The XV Section of the VG Hannover[19] rejected the appeal with the well-known

[18] See P. CONSORTI, *Liturgia e diritto. Conseguenze giuridiche della riaffermazione del Magnum principium per cui la preghiera liturgica deve essere capita dal popolo*, in *RL*, 2019, pp. 37 ff.; M.G. BELGIORNO DE STEFANO, *La parrocchia prima e dopo il Concilio Vaticano II*, in AA.VV., *Studi in onore di P.A. D'Avack*, I, Milan, 1976, pp. 206 ff.

[19] VG Hannover, judgement of 7 April 2020, no. 15/B/2112/20.

argument of compression and non-violation of art. 4 of the Basic Law for the Federal Republic of Germany, also justified pursuant to. Art. 2 of the Basic Law for the Federal Republic of Germany. However, the ruling also introduced a new topic, relating to the active procedural legitimacy, signalling the absence of the title to act for the individual faithful, given that they can go individually to places of worship and can attend religious services broadcast via web or via television. They cannot participate personally, but this limit depends on the absence of celebrations offered by the religious denominations themselves, which have been forbidden from celebrating community religious functions, and who would be entitled to take legal action in this regard.

VII. The right of assembly (art. 8 of the Basic Law for the Federal Republic of Germany).

Another interesting perspective is outlined by the VGH Hessen[20], which shifts the issue out of the perimeter of religious freedom. The appeal was filed against the *Vierte Verordnung zur Bekämpfung des Corona-Virus*, which, pursuant to § 1, prohibits community celebrations in churches, mosques, synagogues and in the buildings of worship of other religious denominations, but allows these buildings to remain open i.e. recognises the right of all religious communities to practice "alternative forms" of religious celebrations and rites, which do not require gatherings of people, suggesting "the transmission of religious services via the Internet".

The Administrative Court recognises the exceptional limitation of the fundamental right of religious freedom, which however it considers proportional to the prevailing protection pursuant to art. 2 of the Basic Law for the Federal Republic of Germany but observes some peculiarities. First, it signals the lack of active legitimacy of the applicant, given that he is a Roman

[20] VGH Hessen, judgement of 7 April 2020, no. 8/B/892/20-N.

Catholic from the diocese of Limburg, whose Bishop had decreed the suspension of all community religious functions even before the Land law was issued. Secondly, it considers the possible violation of art. 8 of the Basic Law for the Federal Republic of Germany, which generally protects the freedom of assembly, with respect to which religious celebrations are a type. Gatherings, it goes without saying, are banned to prevent contagion.

VIII. *The arguments*

The latter orientation is also partially adopted by the *Verwaltungsgerichtshof* of Bavaria[21], where the law provides for the general prohibition of meetings and assemblies, explicitly declared also applicable to churches, mosques, synagogues and places of worship of other religious denominations, except for exceptions granted by the competent civil authorities. A Roman Catholic believer brought a dispute, claiming his religious freedom pursuant to art. 4 days and art. 107 BayVf, contesting both the general prohibition, which the applicant claimed was unjustified because the community religious functions could have been organised with health checks and reservations by telephone or via app, and against the absence of an exception, admissible on the basis of the legislation itself. In his opinion, the ban on attending Sunday Mass was a violation of religious freedom, but that of attending Masses on Easter solemnities constituted a double violation.

The appeal was dismissed for lack of active legitimacy and *petitum*, as all 27 German dioceses have taken autonomous protection measures against the epidemic, including in almost all the suspension of the precept of Sunday Mass and, in general, of all community religious celebrations[22]. In addition, the

[21] VGH München, ordinance of 9 April 2020, no. 20/NE/20704

[22] J.-P. SCHOUPPE, item *Suspensión de derechos*, in *Diccionario General de Derecho Canónico,* VII, Pamplona, 2012; E. BAURA, *Atto amministrativo e limitazione dei diritti*, in J.I. ARRIETA (edited by), *Discrezionalità e discernimento nel governo della Chiesa*, Venezia, 2008, pp. 187 ff.; C.J. ERRÁZURIZ, *La dimensione giuridica della configurazione e della realizzazione della liturgia cattolica*,

Archdiocese of München und Freising had already suspended all Community religious celebrations on 13 March, and until 3 April, that is, before the disputed provision, and on 2 April with a general decree, pursuant to can. 29 CIC, immediately in force pursuant to can. 8 § 2 CIC[23], had extended this suspension until 19 April, that is until after Easter.

IX. The comparison with supermarkets

The problem raised by the prohibitions towards gatherings has also affected the Islamic communities: that of Niedersachsen challenged the legislation (*Niedersächsischen Verordnung zum Schutz vor Neuinfektionen mit dem Corona-Virus*) which provided for the now well-known prohibition of gatherings in churches, mosques, synagogues and in the buildings of worship of other religious denominations. The applicant association stated however that this prohibition constituted a violation of both the right to religious freedom pursuant to art. 4 of the Basic Law for the Federal Republic of Germany, expected in his case which prevented the community celebration of Ramadan, and of the fundamental right to equality, pursuant to art. 3 paragraph 1 of the Basic Law for the Federal Republic of Germany, as it instituted a categorical and absolute prohibition of assembly of all kinds for places of worship, while it allowed it - respecting the reciprocal distance of 1.5 meters - for constitutionally less protected assembly situations, such as for example, was happening for the queues in front of flower shops or car dealers, etc.

The Higher Regional Court of Lüneburg[24] dismissed the appeal: *firstly* because the ban concerned only two Fridays of the month of fasting, therefore

in AA.VV., *Libro de Amigos dedicado al Profesor Carlos Salinas*, Santiago de Chile, 2018, pp. 137 ff.; M. DEL POZZO, *Autorità ecclesiastica e diritti dei fedeli nella liturgia,* in AA.VV., *Diritto e norma nella liturgia*, Milan, 2016, pp. 111 ff.; J. LLOBELL, *Note minime sulla distinzione fra l'«atto amministrativo» e l'«atto "non amministrativo" dell'Amministrazione»*, in *IE*, 2015, pp. 625 ff.

[23] *Donnerstag, 2. April 2020: Allgemeines Dekret von Kardinal Reinhard Marx, Erzbischof von München und Freising*.

[24] OVG Niedersachsen, ordinance of 23 april 2020, no. 13/MN/109/20.

the right to religious freedom was only included and temporally limited and proportionate; *secondly*, because the prohibition involved only the expression of collective religious freedom, since the mosques were open and forms of general spiritual assistance could be exercised, pursuant to § 3 no. 13, those to persons at risk of death, pursuant to § 3 no. 12 a, outdoor religious services, respecting the minimum distance of one meter and fifty cm, pursuant to § 2 no. 2.

X. The BVerfG [Federal Constitutional Court]: religious freedom can undergo compressions only if proportionate to the purpose.

As was probably foreseeable, the matter went as far as the *Bundesverfassungsgericht*, before which it was raised several times: first the judges of Karlsruhe were asked for an emergency measure to annul the sentence of 7 April of the *Verwaltungsgerichtshof* of Hesse (see above) relating to § 1 paragraph 5 of the *Vierte Verordnung zur Bekämpfung des Corona-Virus*: the applicant, as we have already seen, declaring that he is a practising Catholic, complained that the *V ierte Verordnung* made it impossible for him to attend Mass and particular religious rites specific to the Holy Week, and considered the limitations imposed on the exercise of the fundamental right of religious freedom pursuant to art. 4 of the Basic Law for the Federal Republic of Germany to be disproportionate, and therefore unconstitutional.

The *BVerfG [Federal Constitutional Court]* rejected[25] the application for an emergency measure, recognising it admissible but refuting it on the merits, because, it stated, if it accepted it and then reopened it for the celebration of Community Masses (but, more generally, for community religious functions of any confession religious), it would cause an enormous increase in the risk of infection, with the already reported certain consequence of an overload of the national health system, including the extreme risk of its collapse. Moreover, the

[25] BVerfG, ordinance of the Second Chamber of the First Senate, 10 April 2020, no. 1/BVQ/28/20.

Court considered the limitation proportionate pursuant to art. 2, the *BVerfG [Federal Constitutional Court]*, given that it is temporary and limited to a set deadline.

A second request for emergency measures was presented to the *BVerfG [Federal Constitutional Court]* by the already well-known SVA of pontifical law in Berlin, which asked Karlsruhe to ascertain that the hypothesis of unconstitutionality of the *Coronavirus-Eindämmungsverordnung* was not clearly unfounded, for violation of art. 4 of the Basic Law for the Federal Republic of Germany, and to issue a suspension, pending an in-depth judgement, pursuant to art. 32 paragraph 1 of the Basic Law for the Federal Republic of Germany.

The *Bundesverfassungsgericht* declared[26] an urgent appeal admissible but noted that granting of the 'suspension' could harm another constitutionally guaranteed right, namely that of health and physical integrity, pursuant to art. 2 paragraph 2 of the Basic Law for the Federal Republic of Germany, with risks that would reverberate on people (possible increase in the spread of contagion, of sick people, of the dead), and on the state apparatus, which could collapse. The *Bundesverfassungsgericht* recognised the compression of rights under art. 4 of the Basic Law for the Federal Republic of Germany, but considered it proportionate to the contingent necessity, given that the prohibition is temporary, subject to a pre-established deadline and any extension would require a further rigorous examination of the persistence of proportionality.

To date, the last case submitted to the Judges of Karlsruhe concerned the legislation of Lower Saxony, against which the applicant Islamic association had already unsuccessfully filed administrative appeals (see *above*). Before the Constitutional Court the association requested a suspension of the general prohibition without the possibility of exceptions, and presented a series of

[26] BVerfG, ordinance of the Second Chamber of the First Senate, 10 April 2020, no. 1/BVQ/31/20.

precautionary measures that would be adopted to prevent contagion[27]. On the basis of these elements, the *BVerfG [Federal Constitutional Court]* accepted the applicant's request, cancelling the part of the ordinance of Lower Saxony which excluded a priori possible exceptions to the ban on community religious celebrations: the Court considers this ban still admissible insofar as it refers to the simultaneous reopening of all mosques, cancelling only the part in which it excludes the possibility that the Public Authority may grant exceptions to individuals and specific religious buildings, after an in-depth assessment of the circumstances conducted with the responsible Health Authority; if the religious community requesting the exception could provide guarantees that the Authorities considered such as to exclude the risk of spreading of the virus, the principle of proportionality that justifies the compression of art. 4 of the Basic Law for the Federal Republic of Germany for the benefit of art. 2 of the Basic Law for the Federal Republic of Germany would be removed[28].

XI. Religious freedom between state of emergency and proportionality.

All the judgements issued regarding the provisions that prohibit community religious celebrations have recognised the suffering of art. 4 of the Basic Law for the Federal Republic of Germany, also establishing at the same

[27] That the association says it is willing to take to make Friday prayers in the mosque possible during the month of Ramadan: minimum distance of 1.5 meters between the faithful, ensured by marking out appropriate signs on the floor; maximum presence of 24 participants in a 300-person mosque; nominative invitations to individual participants with indication of the time, in order to avoid queuing outside; ritual washing before entering performed with antibacterial soap; mask requirement for faithful participants; dispenser with disinfectant at the entrance; disinfection of handles, doors, etc. after each 'shift' of 24 faithful; mosque with all doors wide open to ensure maximum ventilation; mandatory ban (already provided by ordinary Islamic rules, but applied with particular rigor) for sick people to participate; ritual with the only prayer of the imam, without spoken interventions of the faithful, to avoid – despite the mask – the risk of spreading the virus.

[28] BVerfG, ordinance of the Second Chamber of the First Senate, 29 April 2020, no. 1/BVQ/44/20.

time that compression is possible on the basis of two constitutional parameters: the rules on the state of emergency (*Notstand*) and the principle of proportionality (*Verhältnismäßigkeit)*[29].

Not introduced *ab initio* due to the terrible results produced by art. 48 of the Weimar Constitution, from 1968 onwards a number of framework rules relating to specific emergencies, exogenous or endogenous, were added to the Basic Law for the Federal Republic of Germany, which have the specific purpose of protecting the existence and institutional survival of the democratic and liberal system of federal government and of the individual Länder.

The emergency rules are not grouped neatly, but, having been added later to the original system, are scattered throughout the Basic Law for the Federal Republic of Germany, and, as a counterbalance, the right of resistance (*Widerstandrecht*) was simultaneously inserted, pursuant to art. 20 paragraph 4 of the Basic Law for the Federal Republic of Germany[30].

We have, therefore, exogenous emergencies: an armed attack on the federal territory, underway or certainly imminent (state of defence, or *Verteidigungsfall*), pursuant to art. 115 of the Basic Law for the Federal Republic of Germany[31], or very likely following an unresolved foreign policy crisis (state of tension, or *Spannungsfall*), pursuant to articles 80a and 12a of the Basic Law for the Federal Republic of Germany. Here the state of emergency for national defence is approved by the Bundestag with a two-thirds majority, at the request

[29] L. HIRSCHBERG, *Der Grundsatz der Verhältnismäßigkeit*, Göttingen, 1981, pp. 50 ff.; A. HEUSCH, *Der Grundsatz der Verhältnismäßigkeit im Staatsorganisationsrecht*, Berlin, 2003, pp. 37 ff.

[30] H.D. JARASS - B. PIEROTH (edited by), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar,* München, 2019, art. 20; V. EPPING - C. HILLGRUBER - P. AXER, H. RADTKE (edited by), *Grundgesetz: Kommentar,* München, 2020, art. 20.

[31] H.D. JARASS - B. PIEROTH (edited by), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar, cit.,* Art. 115 a; V. EPPING - C. HILLGRUBER - P. AXER, H. RADTKE (edited by), *Grundgesetz: Kommentar, cit.*, art. 115 a; A. WODITSCHKA, *Das Weisungsrecht der Bundesregierung im Verteidigungsfall nach Artikel 115f Abs. 1 Nr. 2 Grundgesetz*, Hamburg, 2017, pp. 41 ff.

of the Federal Government. It also needs the approval of the *Bundesrat* and is announced by the Federal President in the Official Journal[32].

The command of the Armed Forces (and conscientious objectors in civil service[33], pursuant to art.12a of the Basic Law for the Federal Republic of Germany[34]), passes to the Chancellor. In wartime the *Bundestag* and *Bundesrat* do not stop their activity with new elections, but the powers of the *Bundesverfassungsgericht* are not suspended.

Then there are the cases of endogenous emergencies, which can be the threat to the existence or to the liberal and democratic fundamental order of the Bund or of a single Land, art. 91[35] of the Basic Law for the Federal Republic of Germany, and the threat to public security and public order, or a natural catastrophe or disaster of another nature, which threaten a single Land, plus Länder or the Federation as a whole (art. 35 paragraphs 2 and 3 of the Basic Law for the Federal Republic of Germany[36]), and in these cases it is expressly provided that there may be limitations on personal freedoms.

The emergency legislation examined here can certainly be included in this second group of endogenous cases: an epidemic that affects all the Länder and that threatens to bring down the national health system, overloading it with patients, and endangering the survival of the Bund, infecting and therefore

[32] See, for the general theoretical approach, F. FEDE, *Il Capo dello Stato "arbitro" istituzionale*, in *GC,* 1997, pp. 1167 ff.

[33] P. CONSORTI, *Il servizio civile volontario come forma di difesa della Patria*, in *Reg.*, 2005, pp. 549 ff.; M.G. BELGIORNO DE STEFANO, *L'obiezione di coscienza al militare, diritto inviolabile dell'uomo e del cristiano*, in AA.VV., Writings in honour of P. Gismondi, Milan, 1991, I, pp. 33 ff.; M. IMPAGLIAZZO, *Guerra e religione nel Novecento*, in AA.VV., *Le guerre in un mondo globale*, Rome, 22017, pp. 277 ff.

[34] H.D. JARASS - B. PIEROTH (edited by), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar, cit.,* Art. 12 a; V. EPPING - C. HILLGRUBER - P. AXER, H. RADTKE (edited by), *Grundgesetz: Kommentar, cit.*, art. 12 a.

[35] H.D. JARASS - B. PIEROTH (edited by), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar, cit.,* Art. 91; V. EPPING - C. HILLGRUBER - P. AXER, H. RADTKE (edited by), *Grundgesetz: Kommentar, cit.*, art. 91.

[36] H.D. JARASS - B. PIEROTH (edited by), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar, cit.,* Art. 35; V. EPPING - C. HILLGRUBER - P. AXER, H. RADTKE (edited by), *Grundgesetz: Kommentar, cit.*, art. 35.

making medical and police personnel at least temporarily unavailable, i.e. the forces directly exposed on the front lines in dealing with and trying to contain the epidemic[37].

Here we associate art. 19[38] of the Basic Law for the Federal Republic of Germany, according to which a fundamental right can be limited with an ordinary law, or even by another type of legislation that is always based on a law, provided that this limitation is general and not specifically directed towards a single case (paragraph 1), and in no case can a fundamental right be infringed in its ontologically essential components (paragraph 2).

Then, finally, the proportionality principle (*Verhältnismäßigkeitsprinzip),* the result of the combined provision of art. 1 paragraph 3 and art. 20 paragraph 3 of the Basic Law for the Federal Republic of Germany, is particularly important in evaluating regulations that interfere with the fundamental rights guaranteed by the Basic Law for the Federal Republic of Germany. The interferences of the legislator, in fact, are only admissible if:

I) they have a legitimate purpose,

II) they are suitable for its achievement,

III) they are the only means available to achieve it, and

IV) this achievement brings more advantages than disadvantages.

Many judgements of the administrative jurisdictions, as we have seen, balance the right to health, pursuant to art. 2 of the Basic Law for the Federal Republic of Germany, but this in itself would not be sufficient, because it would not constitute an emergency situation, and in fact the *BVerfG [Federal*

[37] J. VON KALCKREUTH, *Die Sicherstellung medizinischer Versorgung in Katastrophen: Forderungen an Staat u. Ärzteschaft für Katastrophen-, Krisen- u. Verteidigungsfall*, Baden-Baden, 1988, pp. 72 ff.

[38] H.D. JARASS - B. PIEROTH (edited by), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar, cit.,* Art. 19; V. EPPING - C. HILLGRUBER - P. AXER, H. RADTKE (edited by), *Grundgesetz: Kommentar, cit.*, art. 19.

Constitutional Court] added another element: the protection of the national health system, which, if it collapsed because it had been overwhelmed by the epidemic, could constitute one of the collapse factors of the entire system.

It therefore seems that it cannot be stated that religious freedom, and therefore art. 4 of the Basic Law for the Federal Republic of Germany, can, if not sacrificeable then at least be subordinated to other fundamental rights, thus making it *de facto* a fundamental but not very fundamental right, or of series b, but that all fundamental rights at the same level can be frozen and suspended in the face of a situation of emergency, envisaged by the Basic Law for the Federal Republic of Germany, provided that this suspension is proportionate, which also implies a limited duration in time. Therefore, in the very latest analysis, there would be version 2.0 of the *Videant consules ne quid res publica detrimenti capiat.*