



UNIVERSITÀ  
DI TRENTO

Facoltà di  
Giurisprudenza

# STATE AND RELIGION: AGREEMENTS, CONVENTIONS AND STATUTES

CINZIA PICIOCCHI  
DAVIDE STRAZZARI  
ROBERTO TONIATTI  
(eds.)

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# ITALY AND RELIGIONS UNDER PRESSURE: AGREEMENTS AND BILATERAL CONVENTIONS TO THE TEST OF PANDEMIC

## RETHINKING A RELATIONSHIP MODEL

*Erminia Camassa*

*Francesca Oliosi\**

**SUMMARY:** *1. Religious freedom or protection of health? A difficult balance. 2. The Italian choices in the emergency regulation: exception or violation of the agreement-based bilateral principle? 3. The opportunities opened up by the protocols with the religious denominations. 4. From danger to opportunity: initial considerations.*

### *1. Religious freedom or protection of health? A difficult balance*

The restrictions on fundamental freedoms and the limitations posed by states in response to the global crisis caused by coronavirus SARS-CoV-2 have changed all societal categories as known so far, including those of religion and law<sup>1</sup>.

The whole framework of agreements, bilateral conventions and norms to regulate the relationships between states and religious denom-

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\* This contribution is the product of the research and personal interaction of the Authors and is to be attributed as a whole to them. Nevertheless, they have authored single sections and, specifically, Erminia Camassa is the author of sections 1 and 2, and Francesca Oliosi of sections 3 and 4.

<sup>1</sup> Maria D'Arienzo has referred to a «dilemma of choices. The prevalence given to the needs of protection of health acquires a specific dimension in the health sector, where the decision concerning the “right choices” involves a delicate balance amongst science, professional conscience and personal conscience». See M. D'ARIENZO, *Scienza e coscienza ai tempi dell'emergenza sanitaria da Covid-19*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica* ([www.statoechiese.it](http://www.statoechiese.it)), 22, 2020, p. 1. All quotations – in this and subsequent footnotes – have been translated into English.

inations has been changed, as well, often by giving absolute priority to the right to (and protection of) public health. In this unprecedented picture, there have been numerous areas of possible conflicts concerning religious denominations (suffice it to think of the closure of places of worship or the prohibition to celebrate any type of religious and other ceremonies).

Whereas in what is now called “the first wave” it seemed for a few weeks that only in Italy – among the European countries – the epidemiological impact of coronavirus was especially virulent, as weeks passed by all the states had to deal with the first world pandemic defined as such by the WHO<sup>2</sup> and with what it implies and has implied also in terms of rethinking of personal freedoms including – and certainly not secondarily – religious freedom.

In fact, the exponential and continuous growth of contagion has led all legal systems to adopt strictly restrictive measures, characterized by a progressive incisiveness reflecting and following the growing trend of the epidemic curve.

The remodulation of the rights and freedoms recognized by constitutions and by the Universal Declaration of Human Rights has taken place in different, and sometimes, opposite ways, but with a common element: the central role of the debate about the limitations on religious freedom. The reason is simple: on the one side because of the nature itself of the manifestation of freedom of worship (aggregating and community-based); on the other side because the subjects concerned, at the institutional, political and religious level, have brought a continuous and heated debate concerning not only the measures to adopt (and their necessariness) but also their nature and legitimacy<sup>3</sup>.

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<sup>2</sup> The term pandemic, as its etymology suggests (πάνδημος, that is, “what concerns all persons”), indicates the spread of a pandemic disease in large geographical areas on a global scale, thus involving a great part of the world’s population. On 11 March 2020, the World Health Organization communicated that the levels of infection from Sars-CoVid19 had reached such a level as to consist in a pandemic. See WORD HEALTH ORGANIZATION (WHO), *Director-General’s opening remarks at the media briefing on COVID-19*, 11 March 2020, in [www.who.int](http://www.who.int).

<sup>3</sup> This heated debate may be found amongst scholars, too. See M.L. LO GIACCO, *In Italy the Freedom of Worship is in Quarantine, too*, in P. CONSORTI (ed.), *Law, Religion and Covid-19 Emergency*, DiReSom Papers, 2020, pp. 37-44, F. BALSAMO, *The loyal*

Considering how every state has intervened to regulate and find the difficult balance between the right to (and protection of) health on the one hand and freedom of religion and worship on the other hand, it is possible to identify models of relationships which, to a certain extent, retrace and relive each nation's history of relationships with religious denominations<sup>4</sup>.

After the first, strictly emergency-related phase when states imposed prohibitions and limitations often unilaterally<sup>5</sup>, in the subsequent modalities of agreement and dialogue with the representatives of religious denominations it is easy to find the peculiar notion of secularism characterizing, with all its unprecedented nuances, every single nation.

On the other hand, virtually in all Europe religious denominations have taken charge of a role of mediation and facilitation of the respect for the limitations prescribed by state authorities. There have certainly been different approaches, sometimes in open contrast with state limitations<sup>6</sup>, but most religious denominations have endorsed such measures,

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*collaboration between State and religions at the testing bench of the Covid-19 pandemic. A perspective from Italy*, in P. CONSORTI (ed.), *Law, Religion and Covid-19 Emergency*, DiReSom Papers, 2020, pp. 47-55; V. PACILLO, *La sospensione del diritto di libertà religiosa nel tempo della pandemia*, in *OliR.it*, 16 March 2020; ID., *La libertà di culto al tempo del coronavirus: una risposta alle critiche*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 8, 2020, pp. 85-94.

<sup>4</sup> Suffice it to think to the French case, where the total and non-derogable prohibition to gather in places of worship has been regarded as disproportionate with regard to the aim to protect human health. After the total and *de auctoritate* closure of places of worship by virtue of the Decree of 11 May 2020, the administrative court defined this measure a serious violation of the freedom to manifest a religious belief, being religious freedom completely sacrificed in the balance of the interests at stake. For a comment, see A. LICASTRO, *La Messe est servie. Un segnale forte dal Consiglio di Stato francese in materia di tutela della libertà religiosa*, in *ConsultaOnline.it*, II, 2020, pp. 312-323; M.C. IVALDI, *La via francese alla limitazione delle libertà e il dialogo con le religioni al tempo del coronavirus*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 14, 2020, pp. 70-121.

<sup>5</sup> In this phase the need to protect public health also prevailed on that to find a dialogue. On this issue, see V. PACILLO, *op. cit.*

<sup>6</sup> Only the most integralist or traditionalist segments of religious denominations have had a different approach. See J.L. SCHLEGEL, *La religion au temps du corona-*

inviting the faithful to abide by any limitations prescribed by law and also anticipating the state restrictions<sup>7</sup>, by adopting self-limiting measures even before the intervention of state's emergency legislation, which confirms the goodness of the trend followed without being forced<sup>8</sup>.

On closer inspection, Covid-19 pandemic is not challenging only the health or economic system, but also the legal system itself and the lawmakers who – in the face of the adoption of decisions which were unthinkable until a few months ago – are forced to rethink of the set-up itself of Western constitutionalism and of the possibility to envisage limitations (and to do legitimately so) on freedoms regarded undisputedly as universally recognized and thus untouchable.

In the range of the adopted solutions and in the analysis of possible balances, the Italian example is very interesting both for the modalities of adoption of emergency-related measures and for its contents in some ways unprecedented. In the country of the so-called inclusive, «Italian-style» secularism, in the definition of what belongs to Caesar and what belongs to God in the time of a pandemic Italy has found itself to deal with religious denominations in order to find solutions sometimes hasty and other times definitely satisfactory.

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*virus*, in *Esprit*, 5, 2020, p. 70, at <https://esprit.presse.fr/article/jean-louis-schlegel/la-religion-au-temps-du-coronavirus-42714>.

<sup>7</sup> Suffice it to think to the Catholic Church. When the pontiff decided the suspension of the celebrations *coram populo* in March, he anticipated in fact the restrictions that the State (in France as well as in Spain and Portugal) later introduced.

<sup>8</sup> In a press release of 5 March 2020, the Italian Bishop's Conference declared to «share the situation of uncomfotableness and sufferance of the country» and to «adopt initiatives in a co-responsible way to contain the spread of the virus», thus supporting the decision taken first by the Diocese of Milan and the Dioceses of Lombardy and then by other Italian Dioceses to suspend Sunday celebrations, weekdays Masses *coram populo* and more generally all types of celebration.

## *2. The Italian choices in the emergency regulation: exception or violation of the agreement-based bilateral principle?*

Everybody's mind is imprinted with dates which in a way or another have marked permanently their life, and it does not seem exaggerated to state that in Italy the date of 8 March 2020 should be added to them.

It was on that date that the first act – in the form of a Decree of the President of the Council of Ministers (DPCM) – impacting significantly on some of our freedoms, including religious freedom, was adopted in order to face the health emergency<sup>9</sup>. Since that day and for a few months all organized manifestations as well as events in a public or private place, «including those having a cultural, recreational, sports, *religious* and trade fair character, even in enclosed spaces open to the public» were suspended. Starting from that day and still nowadays the opening of places of worship has been subjected to the adoption of such organization-related measures as to avoid big gatherings of people, taking into account the dimensions and characteristics of such places, and

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<sup>9</sup> The DPCM of 8 March was not the first and only measure adopted by the government. See also Law-Decree no. 6 of 23 February 2020 (converted into Law no. 13 of 5 March 2020 with amendments), Law-Decree no. 19 of 25 March 2020 (converted into Law no. 35 of 22 May 2020 with amendments), DPCM of 8 March 2020, 9 March 2020, 1 April 2020, 10 April 2020 and 26 April 2020, by virtue of which the government progressively adopted the measures regarded as necessary and urgent in order to contain and manage the Covid-19-related epidemiological emergency. DPCM of 8 March 2020 expressly prescribed: «g) all organized manifestations as well as events in a public or private place, including those having a cultural, recreational, sports, religious and trade fair character, even in enclosed spaces open to the public, like for example big events, cinemas, theatres, pubs, dance schools, amusement arcades, betting sites and bingo halls, discos and similar, are suspended; in the abovementioned places all activities are suspended» (Art. 1). Further, «i) the opening of places of worship is subjected to the adoption of such organization-related measures as to avoid big gatherings of people, taking into account the dimensions and characteristics of such places, and to guarantee that attending people may respect social distancing of at least one meter between each other according to Attachment 1, letter d). All civil and religious ceremonies, including funerals, are suspended» (Art. 1). DPCM of 9 March 2020 (extending the rules prescribed by DPCM of 8 March 2020 to the entire national territory) further stipulated that «all forms of gatherings of people in public places or places open to public is prohibited on the entire national territory» (Art. 1 § 2).

to guarantee that attending people may respect social distancing of at least one meter between each other.

The emergency rules further prescribed the suspension of civil and religious ceremonies, «including funerals» – a measure which, albeit perhaps proportionate to the seriousness of the health situation, has left deep wounds in people who, in those days, lost a dear one and could neither render a final salute nor provide for a burial consistent with their religion's rules<sup>10</sup>.

The measures adopted to counteract the pandemic have been much hotly debated, and criticism has been raised *inter alia* with regard to the strict limitations imposed not so much on religious freedom as such, as on freedom of worship, especially because, in the first phase of the emergency, the government adopted them in quite an autonomous way, without any sort of involvement by religious authorities.

The Central Office for Religious Affairs (*Direzione Centrale degli Affari dei Culti*) intervened in the interpretation of the DPCM and subsequent Law-Decrees and clarified, given the uncertainty of the moment, that «no closure of places of worship has been prescribed except in the case of a different decision by the religious authorities»; that the liturgical celebrations are «not forbidden *per se*, but they may be still performed without the faithful's participation, in order to avoid gatherings which may become possible occasions of contagion»<sup>11</sup>.

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<sup>10</sup> For a first appraisal, see A. GIANFREDA, *Tra cielo e terra. Libertà religiosa, riti funebri e spazi cimiteriali*, Tricase, 2020.

<sup>11</sup> «Liturgical celebrations without the faithful's participation, limited only to the celebrant and acolytes necessary for the celebration, are not included in the normative prohibition, because they are activities involving a small number of people. By respecting social distancing and taking the necessary precautions, they do not result in large gatherings or situations of possible infection which may justify a normative intervention prescribing limitations». The document specifies that «similar considerations may apply to marriages, which are not prohibited *per se*» since the rule prohibits public ceremonies – civil and religious – only in order to avoid gatherings that may be an occasion of viral infection. Where the rite is performed only at the presence of the celebrant, the spouses and the witnesses – and social distancing amongst the participants is respected – «it is not to be included in the prohibition prescribed by the measures to contain the current epidemiological spread of Covid-19».

These rules have deeply changed the modalities of religious manifestation for all believers<sup>12</sup>, although the government's measures to contain the pandemic have been immediately complied with by religious denominations, groups and communities on the territory<sup>13</sup>.

The Catholic Church first of all<sup>14</sup>, but also the Union of the Methodist and Waldensian Churches (*Tavola Valdese*), the Orthodox Church,

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<sup>12</sup> Many religious denominations have resorted to participation *via streaming* by their own faithful, so that the pandemic has affected not only the right to religious freedom but also the liturgical and sacramental aspects of religious denominations, shifting the participation in the rites to the virtual reality. Social platforms have provided for moments of aggregation, for a long a time and in periods liturgically rich of meaning for all religious denominations (Jewish Carnival, Christian Easter, *Id al-Fitr*, that is, the celebration ending the Ramadan for Muslims).

<sup>13</sup> See Law-Decree no. 6 of 23 February 2020 (converted into Law no. 13 of 5 March 2020 with amendments), Law-Decree no. 19 of 25 March 2020 (converted into Law no. 35 of 22 May 2020 with amendments), DPCM of 8 March 2020, 9 March 2020, 1 April 2020, 10 April 2020 and 26 April 2020. Here the heated debated developed amongst scholars concerning the legitimacy of the limitations imposed by the measures concerned, especially with regard to the manifestation of worship, will not be dealt with. On the main points of this debate as well as on the different positions emerged therefrom, see M.L. LO GIACCO, *In Italia è in quarantena anche la libertà di culto*, in *Diresom.net*, 12 March 2020; V. PACILLO, *op. cit.*; A. GIANFREDA, *Libertà religiosa e culto dei defunti nell'epoca del Coronavirus*, in *Olir.it*, 17 March 2020; A. FERRARI, *Covid 19 e libertà religiosa*, in *Settimananews.it*, 6 April 2020; N. COLAIANNI, *La libertà di culto al tempo del coronavirus*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 7, 2020, pp. 25-40; A. FUCCILLO, M. ABU SALEM, L. DECIMO, *Fede interdetta? L'esercizio della libertà religiosa collettiva durante l'emergenza COVID-19: attualità e prospettive*, in *Calumet. Intercultural law and humanities review*, 10, 2020, pp. 87-117.

<sup>14</sup> In this sense see the ITALIAN BISHOPS' CONFERENCE, *Una Chiesa di terra e di cielo*, 12 March 2020: «It is with this look of trust, hope and charity that we aim to face this season. Sharing the limitations to which each citizen is subject is part of it. Everyone, in particular, is asked to pay the utmost attention, because any carelessness on his/her part may in observing the health measures may endanger other people. The decision to close the churches may be an expression of this responsibility. This is not because the State is imposing this on us, but for a sense of belonging to the human family, exposed to a virus whose nature or spread is still unknown. The ministers celebrate every day for the People, live the Eucharistic adoration with a greater addition of time and prayer. While abiding by the health measures, they get closer to their brothers and sisters, especially the neediest ones. We know we can rely on a continuous prayer for

the Union of the Italian Jewish Communities, numerous Muslim communities, the Italian Buddhist Union and many others, have immediately complied with these rules with a great sense of responsibility, sharing the preoccupations with the protection of public health, avoiding polemics in most cases<sup>15</sup>, and showing the readiness also on the part of religious denominations, in such a difficult moment and without abdicating their mission, to do their own part by accepting the rules progressively imposed.

These were painful decisions also because of the temporal coincidence with Easter rites for Catholics, with Pesach for Jews, whereas the renunciation of collective celebrations marking the end of Ramadan was equally tormented for Muslims.

Beyond the aspects related to liturgy and law of religions concerning them “from within”, it is interesting to note how, from the legal point of view, the deepest criticism was raised in particular with regard to the first phase when, according to some scholars, the balance between the necessity to protect public health and that to guarantee the faithful’s fundamental rights resulted in the complete prevailing of the former also to the detriment of constitutional norms.

Since the Italian legal system is characterized by the so-called agreement-based bilateral principle in the regulation of the relationships with religious denomination (consisting in the concordat with regard to the Catholic Church), the decisions adopted *inaudita altera parte* might have changed «the legally binding concordatarian regime in *de facto* jurisdictionalism»<sup>16</sup>, at least in the first phase of the pandemic.

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the Country from monasteries and religious communities. With this spirit, we are living the days which are ahead: those up to 25 March (*end of the currently binding decree*), [and] the following ones, when the former decree remains in force (*until 3 April*)».

<sup>15</sup> As regards the sustainability from the Canon Law perspective of the decision to suspend public celebrations, see G. DALLA TORRE, *Gli ordini dati dallo Stato e gli ordini interni della Chiesa*, in *Avvenire*, 22 March 2020.

<sup>16</sup> See Vincenzo Pacillo, who holds that the Constitution was breached in respect of the Catholic Church insofar as the choice to suspend the celebrations did not receive «an explicit backing by the Holy See, or better from the joint commission (*commissione paritetica*) which – under Art. 14 of Villa Madama Agreement – should intervene every time difficulty of interpretation of the agreement-based norms arise. The failure to convene the committee thus starts a constitutional practice: when those who can decide on



These measures – also at the level of scholarly debate – have challenged from the very beginning not only the individual and collective right to religious freedom guarantee by Art. 19 const. and its declinations, but also Arts. 7 and 8 regulating the relationships between the State and religious denominations.

The polarized debate – on this and many other aspects – has been characterized by the contrast between those who deemed this way to act as a violation of the agreement-based bilateral model envisaged by the Constitution (which should have been respected also in this emergency situation), and those who regarded the resort to unilateral norms as legitimate in the context of the current situation endangering the right to life and to health<sup>17</sup>. In addition to this opposition, another equally interesting debate among scholars of constitutional law has concerned the sources of law of emergency-related measures<sup>18</sup>.

In this perspective, the opinion of those defining such measures, formally administrative, as substantively sources of primary law, may be certainly endorsed<sup>19</sup>. This view is confirmed by the simply remark that all of their contents are aimed at derogating from constitutional and statutory norms.

The prolongation in time of the limitations has nevertheless raised legitimate concerns about the fairness of the balance which was being

the state of exception think they can suspend the concordatarian regulation, they will do so *inaudita altera parte*, thus turning the concordatarian regime into one of *de facto* jurisdictionalism. It thus belongs to the State, under Art. 7 § 1 const., to decide how, how long and under what conditions the Church's freedom may be restricted, regardless of the fact that the other party agrees on such restrictions» (V. PACILLO, *op. cit.*).

<sup>17</sup> See N. COLAIANNI, *op. cit.*, p. 32.

<sup>18</sup> For a general treatment of this issue, M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, in *Rivista AIC*, 2, 2020, pp. 109-141. On the complex interactions between the different normative levels – national and regional – see F. RUGGIERO, A. BARTOLINI, *Sull'uso (e abuso) delle ordinanze emergenziali regionali*, in *Giustizia Insieme*, 23 aprile 2020. Specifically on religious freedom, see P. CONSORTI, *La libertà religiosa travolta dall'emergenza*, in *Forum di Quaderni Costituzionali*, 2, 2020, pp. 369-388.

<sup>19</sup> See Francesco Alicino, who grounds this opinion on «their tendency to derogate from constitutional and statutory norms». F. ALICINO, *Costituzione e religione in Italia al tempo della pandemia*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica* ([www.statoechiese.it](http://www.statoechiese.it)), 19, 2020, p. 6.

struck between the rights to health and to religious freedom of the citizens-faithful, and it has led the Italian Bishops' Conference (vehemently) as well as the representatives of other religious denominations to claim, albeit with the necessary caution, the resumption of collective worship<sup>20</sup>. A dialogue has thus started, which had been completely lacking in the first phase, characterized by the State's imposition of limitations without any involvement of religious denominations.

Following this dialogue, on 7 May 2020 a *Protocol concerning the gradual resumption of liturgical celebrations with the people* was issued by the Ministry of Interior Affairs (Office for civil freedoms and immigration), in application of the measures of containment and management of Covid-19-related epidemiological emergency prescribed by DPCM of 26 April 2020. Both parties took part in drafting the text, which is thus the fruit of the joint effort of the Ministry of Interior Affairs and the Italian Bishops' Conference, and which was signed by President of the Council of Ministers Giuseppe Conte, the Minister of Interior Affairs Luciana Lamorgese as well as by the President of the Italian Bishops' Conference Cardinal Gualtiero Bassetti.

This is undoubtedly a peculiar act which may make the disenchanted think of a sort of «health jurisdictionalism»<sup>21</sup> with regard to its content and above all to the intertwining of norms for the protection of public health with specifically liturgical aspects, such as the modalities of the Eucharist as well as those of the administration of other sacraments, like baptism, marriage and funeral service.

If what has just been described has effectively redesigned (and in a negative way) the system of public worship in Italy with regard to the Catholic majority, in this “phase 2” this potentially destabilizing “precedent” may in exchange achieve (albeit partial) agreements with reli-

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<sup>20</sup> On the position of the ITALIAN BISHOPS' CONFERENCE, see C. MELZI D'ERIL, G.E. VIGEVANI, *Messe ancora senza fedeli: perché la reazione della Cei è eccessiva. La Chiesa «esige» di poter riprendere la sua azione pastorale ma il rischio di contagio è ancora troppo elevato*, in *Il Sole – 24 Ore*, 27 April 2020. Criticism has been raised also by A. FERRARI, *Cei, un'occasione mancata*, in *SettimanaNews.it*, 29 April 2020.

<sup>21</sup> See A. TIRA, *Libertà di culto ed emergenza sanitaria: il protocollo del 7 maggio 2020 concordato tra Ministero dell'Interno e Conferenza Episcopale Italiana*, in *Giustizia insieme*, 16 May 2020.

gious denominations not regulating their relationship with the state by virtue of a bilateral agreement *ex Art. 8 const.*, which would stop them from being still subject to the so-called *Law on admitted cults*.

### *3. The opportunities opened up by the protocols with the religious denominations*

In Italy, «the religious denominations lacking a bilateral agreement with the State do not exist»<sup>22</sup>, as it is provocatively written in authoritative literature. However, this is evident.

They do not exist because, without the agreement set out in Art. 8, the religious rights – especially in their collective dimension – which should be granted to *everyone* remain in fact partially precluded or difficult to enjoy.

We have seen a striking exception to this during the health emergency caused by the pandemic.

A few days after the signing of the protocol with the Italian Bishops' Conference, the conditions for the safe resumption of the participation in collective rites have been established also for the other denominations (with or without an agreement) through protocols concluded between the Central Office for Religious Affairs and the representatives of many religious denominations<sup>23</sup>.

News of the new protocols pertain to a new phase of reorganization of the legal subsystem now in force concerning the health emergency, a subsystem which, since last February, has been stratifying with not always harmonic results<sup>24</sup>.

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<sup>22</sup> V. TOZZI, *Le confessioni prive di intesa non esistono*, in *Stato, Chiese e pluralismo confessionale*, January 2011.

<sup>23</sup> While the denominations with a bilateral agreement (Jews, Waldensians, Buddhists...) resorted to the same interlocutors and representatives they had identified by themselves, in the case of Islam the age-old issue of representation was solved by identifying as interlocutors the presidents of the Muslim associations or communities (including the Great Mosque of Rome, UCOII, COREIS).

<sup>24</sup> A. TIRA, *Normativa emergenziale ed esercizio pubblico del culto. Dai protocolli con le confessioni diverse dalla cattolica alla legge 22 maggio 2020, n. 35*, in *Giustizia insieme*, 8 June 2020.

This state of sources resembles a «*regulatory matryoshka*, in which the higher-ranking measures have been somewhat shaped on the measures of different rank (the protocols)»<sup>25</sup>, which had come to light prior to or during the development of the new regulations and fill with concrete content the higher-ranking provisions.

The pandemic has given new meanings to the principle of collaboration between the State and the religious denominations.

The path chosen by the Ministry of Interior Affairs to regulate the resumption of public worship of religious denominations other than the Catholic one was not to adopt a single document applicable to everyone, but a series of protocols concluded with the representatives of one or more religious denominations<sup>26</sup>.

As written in the short preamble – the same for everyone –

the need to adopt measures to contain the epidemiological emergency caused by SARS-CoV-2 makes it necessary to draft a protocol with the religious denominations. The protocol, while complying with the right to religious freedom, does not depend on the existence of bilateral agreements, and balances the exercise of religious freedom with the need to contain the current epidemic.

The reference to the agreements with the State pursuant to Art. 8 § 3 const. highlights that the main point of the documents is one aspect of the exercise of religious freedom that is not the valorization of the specificities of the denominations. In fact, all religious denominations that have expressed an interest in the protocols are guaranteed the exercise of one of the rights provided for by Art. 19 const. (i.e., worship in asso-

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<sup>25</sup> A. TIRA, *ult. op. cit.*

<sup>26</sup> The six protocols of 15 May were entered into with, respectively, the representatives of the Jewish Communities; the Church of Jesus Christ of Latter-Day Saints; the Islamic Communities; the Hindu, Buddhist, Baha'i and Sikh denominations; the Protestant, Evangelical and Anglican Churches; and the Orthodox Communities. They were joined by a seventh protocol concerning the Christian Congregation of Jehovah's Witnesses, which appears to have been drafted autonomously by the Congregation and then submitted to the Ministry for approval, following a procedure similar to the one followed by the Italian Bishops' Conference for the Catholic Church. For an in-depth examination of the protocols, see A. TIRA, *ult. op. cit.*

ciation with others) in the current conditions of emergency and, therefore, according to a rigorous balance with other constitutional rights<sup>27</sup>.

What the protocols emphasize is that even religious denominations cannot act – even if it is for a fundamental freedom such as religious freedom – in a way that is potentially detrimental to other constitutionally protected interests or outside the scope of the procedures required for a reasonable balance of social needs of which the State is the guarantor.

It is worth discussing the government's decision to proceed through the identification of individual or small groups of interlocutors. This is an intermediate solution between a single legislative act (which would have had the merit of guaranteeing full equality of treatment for all religious denominations, including those not involved in the debate, but perhaps also the flaw of sacrificing at the outset the albeit limited specificities that emerge from the texts) and the conclusion of protocols with individual interlocutors (which, conversely, would perhaps have led to more “personalized” contents, but at the cost of greater practical difficulties). A «criterion of ‘religious familiarity’ has prevailed, whereby similar needs have been grouped together as much as possible», in the view of «a need for practicality and common sense»<sup>28</sup>. The protocol signed by the Jehovah's Witnesses at a later date shows in any case that this is an open system, to which single religious denominations that have not yet done so can access rather quickly and with predictable results.

The protocols are certainly part of a provisional system which, in the case of denominations without an agreement, has the merit of solving the age-old issue of *representation* pursuant to Art. 8 § 3, succeeding in

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<sup>27</sup> Art. 32 const., which treats health not only as a «fundamental right of the individual» but also as an «interest of the community», as well as the fundamental principle enshrined in Art. 2, according to which «The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed», and at the same time requires from both individuals and groups that «the fundamental duties of political, economic and social solidarity be fulfilled».

<sup>28</sup> P. Consorti in L.M. GUZZO, *Riprendono anche i riti non cattolici. Per la prima volta accordi con islamici e confessioni senza intesa* Intervista al Prof. Pierluigi Consorti, in *Diresom.net*, 16 May 2020, pp. 3-4.

identifying valid interlocutors also for the Islamic communities (albeit for a measure that has very limited scope).

Remaining in the path of the same constitutional provision, it is worth noting how the preparation of the protocols with denominations without an agreement (or a part of them) has shown once again the tendency to adopt a standard text (at least as far as the denominations other than the Catholic one are concerned), to which the religious parties directly concerned have made small variations, in agreement with the Ministry, to adapt them to their respective specificities. In doing so, it echoes the all-Italian tendency to make *carbon-copy agreements*, entered into by the religious denominations that are ready to renounce their own prerogatives and characteristics in order to reach an agreement with the State and escape from the «anonymous indistinct mass»<sup>29</sup>.

Furthermore, and in particular (but not only) with regard to places of worship, it is evident that, for those denominations that have not reached an agreement with the State, enjoying the rights of religious freedom guaranteed by the Constitution is certainly more difficult. The same risk could have occurred in this case: the denominations that do not sign the protocols would certainly not be denied the possibility for their believers to participate in collective rites but would at least find more difficulties in regulating and agreeing on the terms under which to do it.

From a systematic point of view, we should ask ourselves whether and in what way the unprecedented use of protocols has changed the type of collaboration between the State and religious denominations envisioned by the Constitution.

The academic literature is considering the issue of which type of collaboration between the State and the denominations exists after the use of such instrument<sup>30</sup>.

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<sup>29</sup> See G. PEYROT, *Significato e portata delle intese*, in C. MIRABELLI (ed.), *Le intese tra Stato e confessioni religiose. Problemi e prospettive*, Milan, 1978, p. 50.

<sup>30</sup> According to some scholars, several aspects suggest that the protocols are alien to the law on inter-governmental relations between the Republic and the religious denominations set out in Art. 7 § 2 and Art. 8 § 3 const., whose purpose is to regulate disposable interests, hence beyond the spheres in which each of the parties exercises its sover-

Formally, they are protocols of the Ministry of Interior Affairs which, even if signed by religious representatives, are not based on higher-ranking bilateral framework texts and, above all, they are unrelated to the procedures of co-management of the political direction of the Government and Parliament that characterize the agreements.

What is evident is that the protocols concern matters that are not subject to negotiation. There is no constitutional duty to negotiate bilaterally their content because the primary interest to be protected is the individual and collective health, with regard to which the State maintains the power to intervene (as shown in the case of the protocol with the Italian Bishops' Conference) by re-qualifying religious conducts as civil-law facts, thus also considering the internal conducts of religious denominations in the same way as any other fact of social and health relevance.

Whatever the most formally coherent solution may be, on a substantive level the solutions prepared with the religious denominations show the interest of the State in cooperating with them, in order to achieve a more effective balance between the needs of preventive healthcare and

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eign powers in an exclusive manner. See V. PACCILLO, *La sospensione del diritto di libertà religiosa nel tempo della pandemia*, in *Oliv.it*, 16 March 2020, and ID., *La libertà di culto al tempo del coronavirus: una risposta alle critiche*, in *Stato, Chiese e pluralismo confessionale*, 8, 2020. Other scholars highlight how, albeit in a formally unprecedented way, the protocols have in essence respected the principle of bilaterality: a new way to apply the constitutional principles that govern the relations between the State and the religious denominations, even in the simplified and sector-specific forms required by the health emergency, which are ultimately justifiable in view of the provisional nature of the measures. See N. COLAIANNI, *La libertà di culto al tempo del coronavirus*, in *Stato, Chiese e pluralismo confessionale*, 7, 2020, p. 32. A third opinion sees in the ministerial protocols the signs, although only at the beginning, of experiences of religious dialogue with the denominations which, by overcoming the structural rigidity of the traditional methods of the agreement-based bilaterality, could suggest future developments. Thus, «The comparison between century-old systems (agreement-based bilaterality) and contemporary experiences (religious dialogue) requires creativity and new energies». P. CONSORTI, *Esercizi di laicità: dalla bilateralità pattizia al dialogo interreligioso (a causa del Covid-19)*, 7 May 2020, available at [https://people.unipi.it/pierluigi\\_consorti/esercizi-di-laicita-dalla-bilateralita-pattizia-al-dialogo-interreligioso-a-causa-del-covid-19/](https://people.unipi.it/pierluigi_consorti/esercizi-di-laicita-dalla-bilateralita-pattizia-al-dialogo-interreligioso-a-causa-del-covid-19/), accessed 21 December 2020.

the needs of religion, which would otherwise remain unsatisfied and potentially in conflict with the former.

There is therefore the problem of assessing whether the pandemic has caused in Italy a derogation or a violation of the agreement-based bilateral principle<sup>31</sup>.

The answer is complex and implies a rethinking of the very meaning of the entire system in the light of an unprecedented situation such as the one in which we find ourselves.

As is well known, Art. 117 § 1 const. forces state and regional legislative power to comply with the Constitution and the constraints deriving from EU law and international obligations. The reference, then, is not only to Art. 7 (or 8) const. but also to Art. 9 ECHR, according to which the protection of health is one of the grounds prescribed by law that allow member countries to limit the freedom of expression, assembly, association, movement, and manifestation of a belief or religion. The key principles, then, are not only those concerning the agreement-based bilateralism, but also the precautionary principle<sup>32</sup> and the principle of necessity.

That said, we should also point out that the use of unilateral sources only formally signed by the religious denominations does not automatically mean a reduction in the space for participation and collaboration of religiously classified collective entities. On the contrary, following “phase 1” in which, because of the emergency, the executive branch centralized all powers, phase 2 has inaugurated an era of dialogue with the religious denominations, including those without an agreement. This event has actually started an intense dialogue with the representatives of religious communities, regardless of the previous signing of any agreement pursuant to Art. 8 § 3.

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<sup>31</sup> According to Francesco Alicino, it has not: «The provision is applicable only to the Pacts of 1929 and not to all the bilateral agreements of the republican period. This is why that provision cannot be used for the provisions set out in the Agreements of 1984 and the related ratification and implementation law no. 121 of 1985». See F. ALICINO, *Costituzione e religione in Italia al tempo della pandemia*, in *Stato, chiese e pluralismo confessionale*, 19/2020, p. 16.

<sup>32</sup> According to which protective measures may be taken without having to wait until the actual existence and seriousness of such risks have been fully proved.



This formal dialogue between the government bodies (namely the President of the Council of Ministers and the Ministry of Interior Affairs) and the representatives of the religious denominations does not seem to have reached its end but seems to have instead given a new impetus to the Ministry of Interior Affairs which, on 20 December 2020, appointed the new members of the “Council for relations with Italian Islam”. Far from being close to a stable and lasting solution with one of the numerically most important denominations in Italy, this is nevertheless a signal, albeit a small one, which should be emphasized and which, we hope, will give way to a new era for the agreement-based bilateral principle.

#### 4. *From danger to opportunity: initial considerations*

Religion teaches, threatens, inspires, comforts, provokes, guides our habits, or calls us to get our lives together<sup>33</sup>. As the Iranian sociologist and reformer Ali Aharyati said: «Religion is an extraordinary phenomenon that has contradictory consequences for people’s lives. It can destroy or revitalize, numb, or awaken, enslave or emancipate, teach docility or revolt»<sup>34</sup>.

It should come as no surprise that in the last fifty years religions have regained the public prominence that they had long lost<sup>35</sup>. The revival of religious affiliation and its importance in the public debate,

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<sup>33</sup> As said by Craig Calhoun, who also points out how «The relevance of religion still amazes the secular thinkers who clearly felt it was destined to disappear under the blows of the Enlightenment and modernity». C. CALHOUN, *I molti poteri della religione*, in E. MANDIETA, J. VAN ANTWERPEN (ed.), *Religioni e spazio pubblico. Un dialogo tra J. Habermas, C. Taylor, J. Butler e C. West*, cit., p. 112.

<sup>34</sup> Quoted in L. HAZLETON, *After the Prophet*, New York, 2009, Kindle edition.

<sup>35</sup> Cardia points out that this phenomenon is not only attributable to a process of secularization that is physiological in wealthy societies «but, if we look at it as a whole, we can see that the secular-separatist perspective of the Enlightenment has constantly pursued the objective of depriving man of religion, rendering religious doctrines irrelevant, and erasing any significance of religious legal systems in the world of law itself». C. CARDIA, *Democrazia, multiculturalismo, diritti religiosi*, in *Daimon*, 7/2007, pp. 7-8.

certainly due to other multiple and heterogeneous factors<sup>36</sup>, ultimately manifests itself in the need to belong to a community (κοινωνία) within which individuals feel fulfilled and understood, and which, above all, they trust. The advent of religions that are substantially new to Europe has led not only to a revolution in the confessional (now multi-confessional) order of the West, but also to the exponential multiplication of these “communities within communities” that are increasingly making claims and demanding rights that they sometimes formalize and make public, qualifying themselves as interlocutors of the institutions, while others apply and impose internally certain behaviors, which remain latent at the public level but are, in fact, fully binding on their members.

If this social order is often lived «with difficulty» by the institutions, the pandemic has shown the other side of the coin: religious denominations speak, communicate, teach, invite, indicate, forbid. And they do so with a strength and persuasion towards their own followers that probably no secular institution can have. The role played by the religious denominations, both during the initial phase of the health emergency and afterwards, has been far from secondary and is far from being over.

The religious rights have proved once again their ability to adapt and their elasticity that often remain in the background or concealed by the idea of the immutability of divine rights<sup>37</sup>.

Moreover – and more importantly – the collaboration between State and religious denominations has led to a widespread circulation of the hygienic-sanitary indications and to a prevailing attitude of loyal col-

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<sup>36</sup> Among these, the multicultural structure of society obviously stands out for its importance and relevance: «The shock is very intense when Western society and European societies in particular are for the first time in their history hit by the phenomenon of multiculturalism and have to deal with people who see religion as a reason to live and to be socially and publicly engaged. Multiculturalism shatters right down to the last piece the ideological mosaic built up by nineteenth-century separatism». C. CARDIA, *ult. op. cit.*, p. 10.

<sup>37</sup> This is true both for the rites, reorganized in such a way as not to expose the population to the risk of contagion (especially thanks to YouTube and the streaming of services), and for the exceptions to the precepts (for instance, Sunday for Christians, who have been invited to resort to the so-called *spiritual communion*).

laboration, which has led to the voluntary closure of places of worship or to invitations to comply fully with the health regulations, even at the cost of modifying the liturgy. If this is not surprising for the Catholic Church or for the Jewish communities (historically present in Italy and accustomed to an institutional collaboration with the State), we should point out that even Italian Islam has taken steps to reiterate and apply what has been established by the state authorities, giving indications to its members about the procedures to be followed to protect the health of both individuals and the community.

Islamic communities have autonomously decided the temporary closure of the places used for communal prayer and the suspension of all activities (daily and weekly prayers, as well as conferences, lectures, Koranic school).

Islam, too, has indicated alternative modes to public prayers, replacing *jumaat* (the Friday noon prayer) with the prayer at home with family members<sup>38</sup>. Like in Catholic churches, health and hygiene instructions were also posted and given for health protection (including the prohibition of shaking hands for the greeting, which also occurred in churches when the handshake during the liturgy was removed from the service) and the sanitation of places of worship was arranged at the end of each service.

Since the collective aspect of belonging to a community has proved to be an important channel for conveying messages, Islam has acted as a bridge between the demands and needs arising from the pandemic and the people (often immigrants from different cultures and with significant cultural and linguistic barriers) who, most likely, would not have received any guidance outside of their religious group.

It should be noted that before embarking on any kind of dialogue with state institutions, Muslim communities and organizations present on the national territory in various capacities had already forbidden

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<sup>38</sup> As pointed out by Miriam Abu Salem: «Moreover, in Islam it is not only the practical/external fulfillment of religious prescriptions that is of central importance, but rather the *nyya* – the actual intention – the absence of which invalidates the actions performed» (in A. FUCCILLO, M. ABU SALEM, L. DECIMO, *Fede interdetta? L'esercizio della libertà religiosa collettiva durante l'emergenza COVID-19: attualità e prospettive*, in *Calumet*, online journal, April 2020).

their members the communal celebration of the end of Ramadan, inviting them to replace it with a domestic celebration.

Another significant example in this period is the attempt to solve the issues related to the burial of the deceased Muslims, which has become very problematic in recent months<sup>39</sup>. Funerary freedom has become relevant in this situation for two aspects: the first concerns the liturgical-ritual adaptation for which it was necessary to identify, within the funeral rite, what was allowed and what was not. The second aspect is instead connected to the places of burial, in view of the impossibility of repatriating the bodies to their countries of origin.

The various documents issued after the suspension of funeral ceremonies and the subsequent ban on repatriation introduced a number of adjustments for both aspects.

The communities throughout the country have taken on the role of *pontifex* (in the epistemological sense of “builder of bridges”) between their members and the state requests resulting from the health emergency<sup>40</sup>. If this was to be expected from the Catholic Church, which led the way, and from all other denominations with an agreement, it certainly was not from Islam. Apart from the interesting aspects concerning the content<sup>41</sup>, we should point out that the Italian Islamic authorities have also spontaneously instructed their believers, prior to the beginning of the dialogue with government institutions. This spontaneous, grassroots and therefore widespread participation did not even need formal chan-

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<sup>39</sup> The Islamic experience in relation to liturgical-ritual adaptation but also to burial and the places used for it is the most significant and dense of contents, in particular with regard to cemeteries. Suffice it to say that while Catholics, Jews, Waldensians, and all other denominations have their own cemetery spaces, this is not the case for Muslims. The reason is also due to the practice of repatriation of the body that has significantly decreased the demand (including political-institutional demand in terms of local administration) making the issue suddenly “blow up” when repatriation became no longer possible.

<sup>40</sup> UCOII (Community Circular 1/2020, followed by a special Guide on funerals), the Great Mosque of Rome (*Guidelines of the Islamic Cultural Center of Italy on funerals during the CoVid-19 pandemic*, 19 March 2020), COREIS (which translated into Italian the *fatwa* the Islamic Community of Bosnia and Herzegovina on funerals) have acted in this direction.

<sup>41</sup> A. GIANFREDA, *Tra cielo e terra*, cit., pp. 363-365.

nels (such as protocols) but was immediately understood as binding by the believers and only later was it incorporated into the protocols.

The call for compliance – with commitment – and obedience to the health and safety protocols established by Italy concerned all denominations and, perhaps, made it possible to open a new era for the agreement-based bilateral principle which – finally free from the shackles of agreements (as designed and, above all, not applied by the executive power) – took a leap forward for a constructive dialogue filled with results.

Moreover, religious communities (including Islam, which is organized on a communitarian basis and not in a universally recognized hierarchy) have provided interlocutors, acted in a compact but organized manner, outlined behaviors, and delimited by themselves the freedoms of their believers with a self-restraint that, in reality, should not be surprising. It was about pursuing a transversal but common goal (protecting public health):

religions are not an opponent to the State, but entities capable of encouraging and facilitating the success of measures taken in the collective interest, by activating their own spiritual energies, in addition to the networks of solidarity that are linked to them<sup>42</sup>.

In pursuit of this goal, they have also shown their strong potential, not only for the immediate threat of this pandemic but also in the reconstruction of what is now a multiethnic and multicultural society, fragmented and yet (sadly) united by the invisible threat of this pandemic. After all, as John Kennedy said: «When written in Chinese, the word ‘crisis’ is composed of two characters. One represents danger and the other represents opportunity».

It is up to us to seize it.

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<sup>42</sup> P. CONSORTI, *Esercizi di laicità: dalla bilateralità pattizia al dialogo interreligioso (a causa del Covid-19)*, cit.

