

Exercising Religious Freedom in Pandemic Era During the State of Emergency – a Legal Perspective*

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Abstract: *The COVID-19 virus pandemic has placed countless challenges before the states with which these were not fully prepared to cope. Bearing in mind that this danger threatened the existence of the state and its citizens, states have often responded by introducing a state of emergency, in which they had to maintain a balance between the state's survival and the guaranteed human rights, in particular the freedom of religion. As a result of the comparative analysis of normative solutions from the constitutions of some of the European countries that introduced the category of non-derogable rights in a state of emergency, it was concluded that all analysed cases incorporated religious freedom under this category, following the solution in the International Covenant on Civil and Political Rights. The author refutes the view that the choice of the European Convention on Human Rights, which does not list among non-derogable rights religious freedom, is obsolete and unjustified. In many states having a state of emergency in effect for Easter 2020 during the pandemic, religious freedom had factually been derogated from by the suspension of freedom of movement, making it impossible to go and attend the service. In this paper, the author advocates returning to the solution of the European Convention on Human Rights as one capable to respond appropriately to the modern challenges (not only pandemics but also the increasingly frequent terrorist activities). In this context, the author argues that derogation from religious freedom is inevitably permissible, but only in respect of forum externum, while forum internum remains an absolute right.*

Keywords: Religious freedom, COVID-19, State of Emergency, Non-derogable rights, European Convention on Human Rights, International Covenant on Civil and Political Rights.

Introductory remarks

A state of emergency, being an exceptional, extraordinary situation, which can occur in the life of every state, poses numerous challenges to the government. As this way of state functioning necessarily leads to the temporary concentration of power aimed at overcoming a crisis, there is always a fear of its resulting in the suspension of some of the constitutional provisions to an extent greater than necessary. During a state of emergency, among the first to be affected are the constitutionally protected human rights. Urgent response by the state, when the state's survival must be secured, almost necessarily leads to derogation from certain human rights, to a greater or lesser extent. For this reason, this delicate issue of weighing the greater good with lesser evil usually presents a matter of

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constitutional regulation, while particular constitutions offer different solutions. On the one side stand the solutions that provide, in keeping with the logic of the most essential international human rights conventions, an enumeration of human rights that cannot be derogated from even in states of emergency, the so-called absolutely protected human rights (e.g., Russian Federation Art. 56, Bulgaria Art. 57, Serbia Art. 202, Montenegro Art. 25, Slovenia Art. 16, Croatia Art. 17, North Macedonia Art. 54).¹ On the other side are constitutions not making any provision for human rights derogation in states of emergency (e.g., Austria, Germany, Italy, France, Hungary), or at least not explicitly.² Omission to constitutionalise this issue has at least several potential reasons. First, regarding this delicate matter, the constitutions simply rely on the direct application of ratified international human rights conventions and their provisions concerning the (im)possibility to derogate from human rights in a state of emergency. Second, the constitution-maker considers that provisions allowing limitations on human rights in ordinary circumstances provide sufficient basis for government intervention in a state of emergency as well. Third, constitution-makers are knowingly reluctant to tie the government’s hands too tightly in a situation when

¹ Importantly, all these constitutions explicitly stating the scope of non-derogable rights include among these rights the freedom of religion. Bulgarian Constitution approaches this issue with greater caution, explicitly including under the category of non-derogable rights (Art. 57, para 3) only the forum internum aspect of religious freedom (Art. 37), while recognising the forum externum in Article 13 as ‘unrestricted’ (which means only in normal rather than also in extraordinary circumstances). The Greek solution is somewhat distinctive for being explicit about the rights that can be subject to suspension in times of emergency (Art. 48), with religious freedom not being one of them. This regime is rather strict and Greece applies it primarily ‘to threats to national sovereignty and security from external or ‘internal’ enemies of the State’. In the case of the COVID-19 pandemic, Greece resorted to a lighter regime, an ‘atypical emergency law’ based on Article 44 (1) of the Constitution, suitable for facing natural disasters or social and economic disruptions and unexpected events when the exercise of rights is not fully suspended but provisionally limited. See: G. Karavokyris, „The Coronavirus Crisis-Law in Greece: A (Constitutional) Matter of Life and Death“, available at: <https://verfassungsblog.de/the-coronavirus-crisis-law-in-greece-a-constitutional-matter-of-life-and-death/>, accessed: November 17, 2020.

² The Constitution of Romania quite indirectly categorises certain rights as ‘non-restrictable’. Thus, only two rights can be inferred with certainty to be non-derogable even in a state of emergency – free access to justice (‘The exercise of this right shall not be restricted by any law’, Art. 21 para 2) and freedom of thought, opinion, and religious beliefs (‘Freedom of thought, opinion, and religious beliefs shall not be restricted in any form whatsoever’, Art. 29, para 1). The Constitution of Romania allows in its Article 53 the restriction on the exercise of certain rights and freedoms by law “only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens’ rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe“. However, it does not make this regime of restriction of human rights exclusive to the state of emergency; limitation of human rights is also possible in the state of normalcy.

it is expected to react promptly and efficiently, leaving it more room for manoeuvre instead.³

In seeking the best possible answer, this paper will analyse all three options mentioned above but focusing on specific aspects. The current pandemic of the coronavirus has changed the lives of all the people and has posed to the states unexpected challenges to which many of them responded by imposing a state of emergency. The first affected were human rights, notably the right to liberty of movement and the freedom of assembly, soon followed by religious freedom as well. Is introducing a state of emergency and measures derogating from religious freedom necessary, or is it sufficient to rely on ordinarily applicable measures limiting human rights? Is any derogation possible from religious freedom in a state of emergency, or is it an absolutely protected human right? In what way can states maintain a balance between the right to express religious freedom and the possibility of endangering human lives? Can the suspension of the right to liberty of movement also implicitly mean derogation from the right to manifest one's religion? These are just some of the issues that will be discussed in this paper.

Religious freedom in a state of emergency – international framework

Carl Schmitt begins his work *Political Theology* by a claim: "Sovereign is he who decides on the exception".⁴ In that setting, the state interest prevails over legal norm. „The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation, as one would say“. ⁵ A legal state, as a rule, as seen by Schmitt, unsuccessfully attempts to describe in as greater detail as possible a paradox where law suspends itself. The existence of the institution of a state of emergency genuinely defies elementary legal logic; however, historically, it proved to be necessary and useful.⁶ Law provides for an instance where it suspends itself.

³ As Čavoški well observes: '...acting by state governors in the national interest cannot be regulated in advance and limited by any moral or legal rules. It is a consequence of the very nature of the state of public emergency, which escapes any reliable prediction, and of the size of unbridled power which is sometimes in such a state necessary in order for the state to be saved or its power increased', K. Čavoški, *Uvod u pravo I [Introduction to Law I]*, Belgrade, Draganić, 1994, p. 137.

⁴ C. Schmitt, *Political Theology – Four Chapters on the Concept of Sovereignty* (translated by G. Schwab), Cambridge and London, The MIT Press, 1985, p. 5.

⁵ *Ibidem*, p. 12.

⁶ While being essentially a modern concept, a product of the Western European liberal democratic tradition of the 19th century, the legal institution of a state of emergency has its roots in the distant past and can be traced back to the institution of dictatorship (extraordinary magistrate) of Ancient Rome.

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Generally, it is impossible to find any legal justification for this institution, except primarily a political one.⁷

The assessment of reasons for imposing a state of emergency is a purely factual (essentially political) assessment left to the decision of the highest state authorities. Thus, the European Convention on Human Rights, as well as International Covenant on Civil and Political Rights, uses the wording also directly transposed by a large number of Constitutions (through the term ‘public emergency’) so as to leave the assessment of specific circumstances to the sovereign, the one who declares it. This view is further supported by the case-law of the European Court of Human Rights in its margin of appreciation doctrine, which originates in the disputes on the application of the provisions of Article 15 of ECHR concerning a state of emergency. Specifically, in cases *Cyprus, Lawless, and Greek*, the European Court took the stand that it should be left to the discretion of individual governments of the States to identify the existence of a public emergency threatening the life of the nation for which imposing a state of emergency is necessary.⁸ Both theoretically and practically, it is beyond any dispute that natural disasters and large-scale epidemics (pandemics) constitute potential reasons for declaring a state of emergency.⁹

The second essential characteristic of a state of emergency as a legal regime is timeliness. There is a more than obvious similarity between that which brought many states due to terrorist attacks into a permanent state of emergency and permanent violation of human rights on the pretext of “war against terrorism” and that which can happen if the coronavirus-caused pandemic endures.¹⁰ What cannot go unnoticed is the wide and almost identical use of the

⁷ Giorgio Agamben rightly wonders: „If the state of exception’s characteristic property is a (total or partial) suspension of the juridical order, how can such a suspension still be contained within it? How can an anomic be inscribed within the juridical order?“, G. Agamben, *State of Exception* (translated by K. Attell), Chicago–London, University of Chicago Press, 2005, p. 23.

⁸ European Commission of Human Rights in a Greek case set out the characteristics of a situation that could be named “public emergency”: „(1) It must be actual or imminent; (2) Its effects must involve the whole nation; (3) The continuance of the organised life of the community must be threatened; (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, *health* (emphasised by the author) and order, are plainly inadequate“, see *Greek case*, para. 113.

⁹ „Underneath this umbrella there is a core meaning of ‘emergency’, encompassing phenomena (and consequently the necessity for an exceptional response) that undisputedly come under this term. Thus a war or armed insurrection may meet this threshold of magnitude and urgency, as would a serious natural disaster or the outbreak of disease, despite the substantive differences between these phenomena“, A. Green, „Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights“, *German Law Journal*, Vol. 12, 10/2011, 1767.

¹⁰ See more in: Д. Аврамовић, „Када ванредно стање постаје редовно: Америка после 11. септембра 2001. као парадигма“ [When State of Emergency Becomes Regular – USA after 9/11 as a Paradigm], *Правни живот*, 14/2008, pp. 509-529; D. Avramović, „Religious Profiling – the Way of *de facto* Limitation of Religious Freedom during the War on Terrorism“, *Archibald Reiss*

colloquial platitude, now reworded into “war against the virus”.¹¹ It is reasonable to fear that this is another reason for imposing a state of emergency (whether due to virus endurance or the fact that state governments can get to like this regime) that can easily pull the states into a permanent state of emergency, that is, a dictatorship.

In light of current developments worldwide, with the states’ fight against the pandemic being in full swing and human rights left swinging in the wind, it appears useful to re-examine, and perhaps even revise the scope of the so-called absolute rights protected under international conventions, particularly taking into account the right to manifest one’s religion, that is, the *forum externum* of the freedom of religion.

Article 4 of the International Covenant on Civil and Political Rights of 1966 allows for derogation from certain human rights in extraordinary circumstances:

„1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.“

As evident from paragraph 2 of the quoted Article, the freedom of thought, conscience, and religion guaranteed in Article 18 of the mentioned act is not subject to any derogation. It consequently falls in the category of *non-derogable rights*, alongside the right to life, prohibition of torture, cruel, inhuman or degrading treatment or punishment, prohibition of slavery and servitude, prohibition of imprisonment on the ground of inability to fulfil a contractual obligation, prohibition of punishment without law, right to recognition as a person before the law.¹² In the General Comment No. 29 of 2001, the UN

Days, Vol. II (ed. B. Simeunović-Patić), Belgrade, The Academy of Criminalistic and Police Belgrade, 2017, pp. 321-329.

¹¹ See for example: P. Consorti, „Law, Religion and Covid 19 Emergency: Introduction“, *Law, Religion and Covid 19 Emergency* (ed. P. Consorti), DiReSoM, Pisa, 2020, p. 10.

¹² Second Optional Protocol to the International Covenant on Civil and Political Rights of 1989 in its Article 6 (2) adds to the list of non-derogable rights the abolition of the death penalty. Under

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Human Rights Committee warns that: „Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified. The reference in article 4, paragraph 2, to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one’s religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3¹³. Also, the Committee points out as obvious that some provisions of the Covenant are included in the list of non-derogable provisions just ‘because it can never become necessary to derogate from these rights during a state of emergency’, and provides as an example precisely the freedom of thought, conscience and religion.¹⁴

In this Comment it further states: „If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (art. 12) or freedom of assembly (art. 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation¹⁵. Hence, in the Committee’s view, limitations on certain rights (e.g. assembly and movement) would suffice even in case of natural disasters, which may also encompass pandemics. However, at the time it was written, this Comment certainly could not have predicted the emergence of a pandemic of such large

CCPR/C/21/Rev.1/Add.11, General Comment No. 29 of 2001, that list was additionally largely expanded by the prohibition of derogation from other rights as well, prohibition of discrimination (paragraph 8), rights of the child (guaranteed under the Convention on the Rights of the Child ratified by the majority of the States parties to this Covenant), because, as stated in paragraph 9, „no measure derogating from the provisions of the Covenant may be inconsistent with the State party’s other obligations under international law“, procedural guarantees (particularly those related to trial) – paragraphs 15-16. Also essential to note is that: „States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence“ (para. 11). Next, *General Comment No. 32 (CCPR/C/GC/32)* of 2007 in its paragraph 6 additionally reaffirms as non-derogable also the fundamental principles of a fair trial. Further, *General Comment No. 35* of 2014 complements the list of non-derogable rights with the prohibition of arbitrary detention (paragraph 66) and the procedural guarantees protecting liberty of person (para 67).

¹³ *CCPR/C/21/Rev.1/Add.11, General Comment No. 29*, para. 7.

¹⁴ *CCPR/C/21/Rev.1/Add.11, General Comment No. 29*, para. 11.

¹⁵ *CCPR/C/21/Rev.1/Add.11, General Comment No. 29*, para. 5.

scale as that caused by the coronavirus (or a situation where “a state of emergency” caused by terrorist attacks is excessively prolonged and turned into a “normal” state).¹⁶ If drafters of the Covenant had been aware of that and able to anticipate all the challenges that would be facing the world in the 21st century, it is quite likely that they would have revised their attitude that there can be no necessity for derogation from rights (not only the freedom of assembly and movement but also the freedom of religion-the *forum externum*) during the state of emergency caused by a natural catastrophe (or the widespread terrorist activities).

The European Convention on Human Rights of 1950, as a regional document, approaches this issue with more care and caution. Specifically, in Article 15 relating to derogation from human rights in exceptional circumstances, the Convention makers failed to include among non-derogable rights the freedom of religion.¹⁷ The scope of the so-called *non-derogable rights* features merely the right to life (except in respect of deaths resulting from lawful acts of war), the prohibition of torture, the prohibition of slavery and forced labour, and the rule of „no punishment without law“ (the principle *nullum crimen, nulla poena sine lege*). With the adoption of Protocols to the European Convention, the list of non-derogable rights was expanding, but never to make way for religious freedom. Thus, Protocol No. 6 complements the category of non-derogable rights with the abolition of the death penalty in time of peace, the limiting of the death penalty in time of war, Protocol No. 13 introduces the complete abolition of the death penalty, while Protocol No. 7 adds to this category the principle of *ne bis in idem* (Art. 4, para 3).

The fact that religious freedom did not find its way into the list of non-derogable rights is often explained by the time of enactment of the European Convention, which was sixteen years before the International Covenant on Civil and Political Rights.¹⁸ Nevertheless, it is crucial to keep in mind that protocols to

¹⁶ S. Joseph, „Human Rights Comitee: General Comment 29“, *Human Rights Law Review*, Vol. 2, 1/2002, p. 82.

¹⁷ „1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 14 15

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.“

¹⁸ H. Bielefeldt, N. Ghanea, M. Wiener, *Freedom of Religion or Belief – An International Law Commentary*, Oxford, Oxford University Press, 2016, p. 545. This claim is further supported by the fact that the American Convention on Human Rights, enacted three years after the International Covenant on Civil and Political Rights, in its Article 27(2), follows the idea of the

the Convention were enacted much later, after the adoption of the International Covenant on Civil and Political Rights. Protocol No. 6 to the ECHR was thus adopted in 1983, Protocol No. 7 in 1984, in Strasbourg, and Protocol No. 13 in 2002, in Vilnius. This fact strongly refutes the argument about the obsolescence of the European Convention.

Drawing on the analysis of crucial international documents regulating the issue of derogation from religious freedom in a state of emergency, it is concluded that European Convention is alone among this group in allowing the suspension of this human right in exceptional circumstances. The case-law of the European Court of Human Rights made a clear distinction between the internal (*forum internum*) and external (*forum externum*) aspects of religious freedom. The former refers to the right to choose or change one's religion, or the internal, personal relation to religion, while the latter involves freedom to practice one's religion and beliefs. While the internal dimension is absolute, by rule, the external one, by its nature, is relative. The European Convention made it clear that limitations on religious freedom relate exclusively to the *forum externum* (Art. 9, para 2), while the issue of the degree of interference with various aspects of this right in exceptional circumstances remains quite questionable.¹⁹

This explicit choice of the Convention to make religious freedom derogable has in literature usually been explained by the fact of obsolescence, and therefore inconsistency of this regional document with other international conventions. However, although much criticised, the European Convention solution can quite likely become the main lifeline to the European states and a possibility for them to respond to the crisis situations caused by the pandemic in an appropriate and lawful manner. Alternatively, literature also offers strong legal arguments that exclude the European Convention solution in this respect, which appear rather convincing. Specifically, some authors argue that this issue has no particular practical significance at all, given that States signatories to the

Covenant, including thus the freedom of religion (Art. 12) amongst the rights which cannot be suspended even in extraordinary circumstances.

¹⁹ For this reason, Javier Martínez-Torrón was very cautious to point out: „Freedom to believe, on the contrary, may not be restricted, probably not even in the exceptional circumstances that, according to Article 15, permit the States to derogate some of their obligations under the ECHR“, J. Martínez-Torrón, „Limitations on Religious Freedom in the Case Law of the European Court of Human Rights“, *Emory International Law Review*, Vol. 19, 2/2005, p. 590. Therefore, J. Martínez-Torrón remains hedgy by using the term 'probably'. In contrast, there are authors who completely freely interpret the strict letter of the Convention, using *contra legem* approach to this delicate matter: “However in both human rights documents the freedom of belief is listed as non-derogable right, therefore derogation clauses are exempted for the scope of the Article 4 of the International Covenant on Civil and Political Rights and relevant provisions in the European Convention of Human Rights”, D. Vitkauskaitė-Meurice, „The Scope and Limits of the Freedom of Religion in International Human Rights Law“, *Jurisprudence*, Vol. 18, 3/2011, p. 847. The wrongful claim of this author about religious freedom being included in international conventions (among others, also in the European Convention) among absolutely non-derogable rights recurs on page 855.

European Convention are concurrently the signatories to the International Covenant on Civil and Political Rights. Since the International Covenant was adopted 16 years later, all States signatories to both documents must observe the provisions of the subsequently ratified convention, including those on human rights derogation in exceptional circumstances, following the principle *lex posterior derogat legi priori*.²⁰ In line with that perception, religious freedom can be treated as an internationally non-derogable right. However, as will be shown, this strictly positivist view proves to be not only illegitimate in this particular case, but also, and as it will be seen in the light of modern challenges, inappropriate.

It stands as a fact that all major international documents guaranteeing the freedom of thought, conscience and religion allow limitations on certain grounds of this human right in ordinary circumstances. Thus, International Covenant on Civil and Political Rights, in its Article 18 (3), although not allowing derogation from religious freedom in a state of emergency, permits the limitation of this freedom to a certain extent: „Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others“. It would mean that ordinarily permissible limitations of religious freedom leave sufficient room for the states to deal with all exceptional situations. Notably, permissible limitations on religious freedom, that is, on the *forum externum* of religious freedom, are almost completely identical (public safety, order, health, or morals or the fundamental rights and freedoms of others) to those applicable to the right to liberty of movement (Art. 12), freedom of expression (Art. 19), the right of peaceful assembly (Art. 21), and the right to freedom of association (Art. 22). Therefore, following the line of reasoning of the Covenant drafters, even in case of pandemics, when the health of all citizens is at risk, limitation on religious freedom would suffice as a measure also in a declared state of emergency. This point is further confirmed in the interpretative provision of The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights adopted by the UN Economic and Social Council in 1984, which more specifically determines the meaning of the term „public health“ as a ground for applying limitations on human rights: „Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured“.²¹

²⁰ See: M. Nowak, T. Vospernik, „Permissible Restrictions on Freedom of Religion or Belief“, *Facilitating Freedom of Religion or Belief: A Deskbook* (ed. T. Lindholm, W. C. Durham, B. G. Tahzib-Lie), Leiden, Martinus Nijhoff Publishers, 2004, p. 148.

²¹ Available at: <https://www.refworld.org/pdfid/4672bc122.pdf>, accessed: November 17, 2020.

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A key question is: why is the freedom of thought, conscience, and religion (Art. 18) singled out as a liberty that cannot be derogated from in states of emergency? The reason, as also explained by the Committee in the General Comment No. 29 mentioned earlier, lies in that the freedom of thought, conscience, as well as affiliation with and choice of religion constitute passive doings, a personal and internal act, which cannot pose a severe threat even during a state of emergency (nor can be identified objectively). However, the right to manifest one's religion and beliefs from Article 18 (3) entails active doing, which can be good or bad, less or more dangerous, and which is publicly expressed, which explains its being subject to certain limitations. Also, it is not entirely certain that this limitation of religious freedom would be a sufficient measure in case of the pandemics like the one caused by the unknown virus Covid-19. The practice seems to show that it is not true.

European Convention on Human Rights also includes health as a permissible ground for limiting religious freedom. As evident from Article 9 (2), potential grounds for limitation that are prescribed by law and necessary in a democratic society (protection of public order, health or morals, or for the protection of the rights and freedoms of others) relate in this Convention, too, exclusively to the *forum externum* of religious freedom.²² However, the European Convention leaves open another possibility that would be available to the states in case of pandemics – derogation from religious freedom in a state of emergency.

Arguments of faith vs. arguments of reason – a few examples from Orthodox countries

In Serbia, the state of emergency due to the COVID-19 virus epidemic was declared on 14 March 2020 and abolished on 6 May 2020. Orthodox Easter was celebrated on 19 April 2020, with previously imposed emergency measure prohibiting the freedom of movement during the Easter holidays for the duration of 84 hours (from Friday, 17 April, at 5 PM, to Tuesday, 21 April, at 5 AM). Believers who, after several weeks of Easter Lent, wanted to attend Easter service and receive Holy Communion were prevented in that intent. The Constitution of the Republic of Serbia of 2006 (Art. 202) was not so selective in determining the scope of non-derogable rights (as many as 17 human rights, including religious freedom). Despite the recognition of religious freedom as a right from which no derogation is allowed in states of emergency, citizens were practically prevented from its practicing, given the existence of the prohibition of free movement, a right derogated from during the state of emergency. „To achieve this social distancing, it was necessary to restrict many fundamental freedoms, mainly that

²² Art. 9, para 1: „Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance“.

of movement and reunion. Freedom of worship was necessarily limited too, and the world's religious authorities have had to cope with the contagion by changing millennial rules²³. Religious freedom was factually derogated from, which caused considerable resistance by the church. Almost identical situation occurred in other states in the region – Romania, Greece, North Macedonia, and Montenegro, where ban on movement made it impossible to attend Easter service. On 18 March 2020, ecumenical Patriarch Bartholomew „universally declared ecclesiastical resolution and mandate to cease all divine services, events, and rites, with the exception of private prayer in churches that will remain open“²⁴. Also, Russian Patriarch Kirill invited the believers already at the very outset of the pandemic to avoid going to church due to the potential spread of the virus. Churches in Bulgaria and Georgia, however, succeeded in their effort to remain open during the holidays, subject to certain restrictive measures concerning the number of gathered people and with the possibility to hold church service outdoors.²⁵

Despite an old saying to give God what is God's and the Caesar what is the Caesar's, this is the point at which the conflict of jurisdiction and divergence of opinion arise. An old question of the Christian philosophy, the relationship between faith and reason, is revived. While the Church advocates the primacy of religion, secular authority calls for the dictate of reason. Believers perceive the church as a salvation from the problems of this world, a place in which one can defeat isolation, solitude, and even the illness itself. In the case of coronavirus pandemic, reason also prevailed among the church dignitaries. Also worth noting is the view of the head of the External Relations Department of the Moscow Patriarchy, Metropolitan Hilarion, who made the following statement at the beginning of April: „You do not betray Christ by not visiting the church, you betray Christ only if someone falls ill because of you“. One factor that certainly contributed to this conciliatory attitude is that the power of the Patriarch within the Orthodox Church is considerably below that of the Pope of the Roman Catholic Church. On the other hand, such an outcome could have been expected given that the theory of symphony in the relations between the state and the church has largely prevailed within the Orthodox Church.²⁶ The fact that, amidst pandemics like this one, people do not know who may infect them and whom

²³ P. Consorti, „Law, Religion and Covid 19 Emergency: Introduction“, p. 10.

²⁴ Available at: <https://orthodoxtimes.com/ecumenical-patriarchate-all-religious-services-suspended-until-end-of-march/>, accessed: November 20, 2020.

²⁵ Available at: <https://www.dw.com/bs/vaskrs-u-znaku-korona-virusa/a-53163614>, accessed: November 18, 2020.

²⁶ See more: D. Đukić, „Izazovi regulisanja pravnog položaja verskih organizacija u Srbiji i okruženju“ [Challenges of Regulating the Legal Status of Religious Organizations in Serbia and the Region], *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3/2019, pp. 1099-1118.

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they may infect puts a modern man into the position of *homo homini lupus*.²⁷ Under these circumstances, the perception “God helps those who help themselves” gains in priority.

Nevertheless, the general prevalence in practice this time of arguments of reason and consensus (rarely also of force) does not change the fact that normative solutions concerning the status of religious freedom in a state of emergency are deficient, nor the one that, as a result, states have often resorted to bypassing the law (primarily the Constitution, but also the dominant international regulative act - International Covenant on Civil and Political Rights).²⁸

Possible exit – towards the European Convention on Human Rights

The words of L. M. Guzzo in this battle of the entire humanity sound rather convincing: „We keep on adapting our life to the rules, but Sars-Cov-2 forces us to adapt the rules to our life instead“.²⁹ However, this disease presents, at the same time, the right opportunity to undertake a critical review of the existing normative solutions. As could be seen from the above examples, limitations on human rights in ordinary circumstances in case of coronavirus pandemic are measures that are inadequate to combat this kind of disease. It was often necessary to suspend the full enjoyment of freedoms of movement and assembly for purposes of ‘war against the virus’, which was impossible to do by just limiting human rights, and outside of the state of emergency regime. The coronavirus pandemic is precisely the proof that during a state of emergency states were often left lacking legal authority or duty to protect the lives of the population without thereby suspending, even indirectly, the freedom of religion. All solutions from the European constitutions analysed in this paper that envisage the scope of rights non-derogable even in states of emergency include in this scope the freedom of religion.³⁰

²⁷ New plague which endangers all the world, demands of us, today more than ever, interreligious tolerance and solidarity, see more: P. Darmoris, „Is the Interreligious Dialogue Possible? Reflections on Religion in the Public Sphere on the Basis of David Hollenbach’s Writings“, *Astra Salvensis*, 2/2014, pp. 136-158.

²⁸ Another issue raised by the COVID-19 pandemic is one of using digital technologies for the celebration of religious rites. It is rightly pointed to the shortcomings of that solution given that religious freedom in cyberspace falls into the hands not even of the states, international entities, or laws, but of owners of digital platforms and social networks, see more: F. Balsamo, „The loyal collaboration between State and religions at the testing bench of the Covid-19 pandemic. A perspective from Italy“, *Law, Religion and Covid 19 Emergency* (ed. P. Consorti), DiReSoM, Pisa, 2020, pp. 54, 55.

²⁹ L. M. Guzzo, „Law and Religion during (and after) Covid-19 Emergency: the Law is Made for Man not Man for Law“, *Law, Religion and Covid 19 Emergency* (ed. P. Consorti), DiReSoM, Pisa, 2020, p. 21.

³⁰ See fn. 1.

It is essentially an issue of higher value, which right to protect and which one to sacrifice, a choice of lesser of two evils. International human rights law leaves to a particular state the balancing of conflicting values. States were thus forced into legal gymnastics, using illegitimate approaches to indirectly also derogate from the right to manifest one's religion during the pandemic by suspending the right to liberty of movement or right of peaceful assembly. The freedom of movement and the right of peaceful assembly are, by their very nature, the rights becoming first affected in exceptional circumstances and ones never included in the scope of non-derogable rights. A much more elegant solution than indirect derogation from religious freedom would be to follow the concept of the European Convention and rule out of the scope of absolutely protected human rights the *forum externum* of religious freedom.

The solution offered by the European Convention that makes it permissible to derogate from religious freedom in exceptional circumstances is not a bad and 'obsolete' one. On the contrary, that solution should be followed not only by other international conventions but also the intrastate normative solutions because it can substantially respond to modern challenges like pandemics (and also more and more frequent terrorist attacks inspired by religious fundamentalism) and who knows what other temptations of the future.³¹ The mentioned solution contributes to the compliance with norms of international law and reduces its conscious violation by states. Against such a background, the states would not need to contrive and create *ad hoc* norms to bypass international law to resolve a specific crisis situation caused by pandemics or other risks threatening the lives of many people. Finally, the right to life is inherent to every human being, presenting as such a foundation and a prerequisite for the enjoyment of all other rights, including religious freedom. Cicero's maxim *Salus populi suprema lex esto* remains, even after so many centuries of history, an inevitable and unquestionable guiding principle that should never be subject to more or less successful legal equilibristic.

Montesquieu used to say: „I must own, notwithstanding, that the practice of the freest nation that ever existed induces me to think that there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods“.³² The state of public emergency is precisely the occasion when for a moment a veil must be drawn over the face of liberty, and limitations on liberties accepted for the greater good – the survival of the society. Already Tacitus seems to have been aware of that when he stated: „Every great example

³¹ D. Avramović, S. Jugović, „Ograničenja slobode veroispovesti u `ratu protiv terorizma`“ [Limitations of Religious Freedom during 'the war against terrorism'], *Pravni život*, 12/2016, pp. 535-546.

³² C. Montesquieu, *The Spirit of the Laws, The Complete Works of M. de Montesquieu*, T. Evans, London, 1777, Vol. I, Book XII, chap. XIX.

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has in it some injustice, but the suffering individual is compensated by the public good“.³³

³³ Tacitus, *Annals*, 14, 42-45.