The COVID-19 Crisis and Religious Freedom

The Interaction between State and Church Norms in Germany, Especially in Bavaria

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Abstract

The article provides an overview of anti-COVID-19 measures in Germany, especially in Bavaria. Public worship services were banned for seven weeks, but have been permitted again since the 4th of May, 2020, under safeguards. By comparing state law and Catholic canon law, the article investigates whether church norms merely “react” to state norms or are independent of them. Do they correspond to them or even go beyond them in their content? The article also examines whether state orders violate religious freedom. To this end, the relevant case law in Germany is analyzed. Since church and state have coordinated their actions, believers find it more difficult to exercise religious freedom.

Keywords

religious freedom – epidemic – cooperation between church and state

1 The Situation in Germany

Germany is a federal republic located in Central Europe consisting of 16 federal states. It has about 83 million inhabitants, of whom about 28% are Catholic, 26% Protestant, 6% Muslim, 0.2% Jewish and 38% non-denominational individuals. The first corona infection was reported on the 27th of January, 2020, in the German federal state of Bavaria. Of the 16 German federal states, Bavaria had the highest number of cases per 100,000 inhabitants during the peak phase

of the crisis.¹ Until the 13th of May,² 7,634 deaths occurred in Germany as a result of COVID-19, 2,209 of which were in Bavaria.³ According to an analysis of nations worldwide by the Deep Knowledge Group, of the 12th of April, 2020, Germany ranks second after Israel in international safety ranking, and first in the ranking of the “Most supportive governments.”⁴

“Under the Church-State systems of Europe, Germany takes a middle of the road approach between that of having a State Church and having a strict separation between Church and State. The Basic Law lays down a system under which there is a separation of Church and State while at the same time a constitutionally secured form of co-operation exists between the two institutions. This is done in order to care cooperatively for the needs of the people.”⁵ “The religious communities with large memberships in Germany, and also a considerable number of the smaller religious communities, have the status of public law corporations.”⁶

The legal measures adopted by the civil authorities to fight the COVID-19 pandemic have also affected the practice of religion. The religious communities reacted by issuing their own norms regarding their internal affairs. The present article seeks to enrich the discourse on the question: Does the interaction between state and church norms in the COVID-19 crisis make it more difficult for individuals to exercise religious freedom? The relevance of this question becomes clear when we consider the argument of a court that lifting the state ban on religious services would in any case be of no use to the petitioner because his religious community had already stopped religious services of its own accord.⁷ In the present article, first state law then church law are presented to finally demonstrate the interaction between the two.

This study focuses on Bavaria because this is where the highest infection and mortality rates were found during the peak phase of the pandemic. At the

1 Namely, 247 compared to 145 for Germany as a whole; see Robert-Koch-Institut, COVID-19 Situation Report on the 12th of April 2020.

2 The present article was completed on the 13th of May, 2020. Later developments could not be considered.

3 Daily Situation Report of the Robert Koch Institute, 13/05/2020 – Updated Status For Germany. Retrieved 13 May 2020, https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Corona_virus/Situationsberichte/2020-05-13-en.pdf?__blob=publicationFile.

4 Deep Knowledge Group Rankings. Retrieved 13 May 2020, <https://www.dkvglobal/covid>.

5 Gerhard Robbers, “State and Church in Germany”, in G. Robbers (ed.), *State and Church in the European Union* (3rd ed., 2019), 109, 111.

6 Ibid. 113.

7 Bavarian Administrative Court, 20 NE 20.704 (09/04/2020), recital 12f.; idem, 20 NE 20.738 (09/04/2020), recital 11f.

same time, Bavaria was known for imposing particularly strict measures. It is also the largest German state by land area (70,550 square kilometres) and the second most populous state in Germany (13 million inhabitants). In the aftermath of World War I, Bavaria adopted the name “Free State,” which means that it is not ruled by any monarch (in other words, it is a republic). Nevertheless, Bavarian state law, including the Bavarian constitution, is subordinate to German federal law. Almost half the population of Bavaria is Catholic, about 18% Protestant, and 4% Muslim. The present study focuses on the Catholic Church and its legal system. On the universal level of the Catholic Church, the Code of Canon Law of 1983 (CIC) is the most important source of law. In addition, there is legislation at the regional level by the Episcopal Conferences and the diocesan Bishops.

2 German Federal and Bavarian State Law

2.1 *Freedom of Religion*

National legislation contains several legal norms that guarantee the freedom of individual believers and religious communities to practice religion through collective worship. These norms are presented below with reference to the measures restricting such worship in the light of the COVID-19 pandemic.

Article 4⁸ of the German Basic Law (in German: Grundgesetz, GG) guarantees the freedom of religion, including its undisturbed practice. An authoritative definition of religion would restrict the fundamental right itself. For this reason, the Federal Constitutional Court does not define religion, but takes as its starting point the self-understanding of the holder of a fundamental right, and limits itself to a plausibility test.⁹ The wording of Article 4 does not include a legal reservation. This characteristic distinguishes freedom of religion from other fundamental rights. There are, however, immanent limits, inherent in the constitution, which result primarily from the fundamental rights of other persons.¹⁰ In the case of an epidemic, the fundamental right to life and physical integrity is particularly pertinent (Article 2 para. 2 of the Basic

8 “(1) Freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable. (2) The undisturbed practice of religion shall be guaranteed.”

9 See Roman Herzog, “Article 4”, in Th. Maunz, G. Dürig (ed.), *Grundgesetz – Kommentar* (2020), recitals 102 and 113; Martin Morlok, „Article 4“, in H. Dreier (ed.), *Grundgesetz-Kommentar* (2018), recital 92; Michael Germann, „Article 4“, in V. Epping, Ch. Hillgruber (ed.), *Grundgesetz-Kommentar* (2020), recital 18.1.

10 See Herzog, *supra* note 9, recital 112.

Law¹¹).¹² To determine whether an interference with fundamental rights is justified, a proportionality test is performed. If a case can be based on several fundamental rights, the more specific fundamental right, or that which offers the stronger protection, ultimately prevails. In the case of the right to religious assembly, which could be based on freedom of religion or freedom of assembly (Article 8 of the Basic Law), freedom of religion takes precedence.¹³ This must be taken into account when it comes to restricting religious assemblies through COVID-19 prevention measures.

The Bavarian constitution also guarantees freedom of religion in Article 107.¹⁴ In addition, it expressly enshrines the freedom to engage in public ritual acts in Article 142 para. 2.¹⁵ The acts are public if access is not restricted to certain persons.¹⁶ Finally, Article 144 para. 1 of the Constitution also guarantees the protection of clergy in the performance of their official duties. The official duties of Catholic clergymen include not only the celebration of religious services, but also the pastoral care of individual faithful, especially the elderly and the sick. Yet, bans on visiting hospitals and old people's homes hinder the free exercise of this office.

Finally, a characteristic of the German system is the right of self-determination of religious communities. According to Article 140 GG, in conjunction with Article 137 para. 3 WRV¹⁷ and Article 142 para. 3 of the Bavarian constitution, religious communities autonomously regulate and govern their own affairs. Without doubt, this fact implies the right to regulate worship services, including the question whether, when, and in what form they take place. A restriction of the right of self-determination is the "law that applies to all."

11 "Every person shall have the right to life and physical integrity."

12 Cf. Hans Michael Heinig, "Gottesdienstverbot" (17/03/2020). Retrieved 13 May 2020, <https://verfassungsblog.de/gottesdienstverbot-auf-grundlage-des-infektionsschutzgesetzes/>. The corresponding Article 135 WRV, however, which contained a legal reservation, is no longer in force.

13 Cf. Morlok, *supra* note 9, recitals 87 and 190; different view Herzog, *supra* note 9, recital 95.

14 "(1) The freedom of religion and conscience shall be guaranteed. (2) The undisturbed practice of religion shall be protected by the state."

15 "The freedom of assembly for domestic worship, public rituals and religious communities and their association within Bavaria shall not be subject to any restrictions within the framework of the generally applicable laws."

16 Cf. Heiner De Wall, "Article 142", in J. F. Lindner, M. Möstl, H. A. Wolff (ed.), *Verfassung des Freistaates Bayern – Kommentar* (2017), recital 8.

17 Constitution of the Weimar Republic: "Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community."

2.2 *Legal Norms Concerning the Coronavirus Pandemic*

In the event of epidemics, the law for the prevention and control of infectious diseases (Infektionsschutzgesetz, IfSG)¹⁸ applies. Section 28 of this law permits the competent authority to restrict or prohibit events or other gatherings of people under certain conditions. Although the term “gathering” (“Ansammlung”) is not defined, it is likely to refer to close contact with several persons at the same time, in groups of more than four people.¹⁹ A criminal offence, as opposed to an administrative one, takes shape only if the number of persons is higher, depending on the standards of each federal state.²⁰

As a federal law, the Infektionsschutzgesetz applies throughout Germany,²¹ but individual federal states are responsible for implementing it. Therefore, the administrative acts differ from state to state. To ensure a certain uniformity, on 16th of March, 2020, the federal government and the prime ministers of the federal states agreed on guidelines to slow down the spread of the coronavirus. Guideline No III states: “Gatherings in clubs and other sporting and leisure facilities, lessons and courses in adult education centres, music schools and other public and private educational establishments in the non-formal education sphere and coach tours – gatherings in churches, mosques, synagogues as well as gatherings of other religious communities are to be banned.”²²

The free state of Bavaria took several legal measures in the course of the coronavirus crisis. In the initial phase of the crisis, only large events, with more than 1,000 or 500 participants, were prohibited, and visiting rights in hospitals and nursing homes were restricted.²³ A drastic step was the declaration of a “disaster situation” by the Ministry of the Interior, on 16th March, 2020,²⁴ which enabled the application of the Bavarian Disaster Control Act

18 Of 20.07.2000 (BGBl. I p. 1045), as amended on 27/03/2020 (BGBl. I p. 587).

19 Peter Häberle, Hans Joachim Lutz, *Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen – Kommentar* (2020), Section 28, recital 6.

20 Cf. Jens Peglau, “Coronaschutzverordnung NW und Infektionsschutzgesetz – eine erste Betrachtung aus straf- bzw. bußgeldrechtlicher Sicht”, 7 *jurisPR-StrafR* (2020), Note 1. Peglau is judge at the Higher Regional Court in Hamm.

21 On 25th March, 2020, however, Bavaria also enacted its own infection protection law: Bavarian Infection Protection Act (BayIfSG) of 25/03/2020 (GVBl. p. 174, BayRS 212-3-G).

22 Guidelinestoslowthespreadofthecoronavirus. Retrieved 13 May 2020, <https://www.bundesregierung.de/breg-en/news/guidelines-to-slow-the-spread-of-the-coronavirus-1731708>.

23 Cf. general ruling on the restriction of visiting rights for hospitals, care and disabled facilities of 13th March, 2020, Ref. G51b-G8000-2020/122-56.

24 Announcement of the Bavarian State Ministry of the Interior, Sports and Integration about the Coronavirus Pandemic: Ausrufung des Katastrophenfalls on 16/03/2020 (BayM-Bl. No. 115).

(BayKSG).²⁵ It was decided to prohibit events and assemblies throughout the state.²⁶ On 20th March, a general ruling was issued prohibiting visits to hospitals, old people's homes, and similar facilities, allowing people to leave their homes only if there were good reasons for doing so.²⁷ One such reason was to accompany the dying and to hold funerals for the closest family circle. On 27th March, the (first) Bavarian Infection Control Regulation (BayIfSMV)²⁸ was issued instead of the general ruling. Section 1 included a ban relevant to religion: "Events and assemblies are prohibited throughout the state. This also applies to meetings in churches, mosques and synagogues as well as meetings of other religious communities." Whether "gathering" means something different from "assembly" is not clear. Given that the regulation may not exceed its legal basis, it may not refer to anything that is smaller in scope than the "gathering" as defined in Section 28 IfSG. Because the regulation was valid only until 19th April, a second regulation had to be issued for the subsequent period, which comprised the same provision with regard to meetings in cult buildings.²⁹ That was valid until the 3rd of May. On 4th May, the third Infection Control Regulation³⁰ came into force, which contained a notable relaxation with regard to religious assemblies. It was replaced a few days later by the fourth Infection Control Regulation,³¹ which introduced medically justified exceptions to the obligation to wear face masks. Section 6 allows church services and meetings of religious communities with certain safety measures, such as minimum distances, face masks, maximum number of participants and a time limit of 60 minutes. In addition, an infection protection concept must be in place.

25 Bavarian Disaster Control Act (BayKSG) of 24.07.1996 (GVBl. p. 282, BayRS 215-4-1-1), as amended on 26.03.2019 (GVBl. p. 98).

26 Corona-Pandemie / Bayern ruft den Katastrophenfall aus. Retrieved 13 May 2020, <https://www.bayern.de/corona-pandemie-bayern-ruft-den-katastrophenfall-aus-veranstaltungen-verbote-und-betriebsuntersagungen>.

27 Announcement of the Bavarian State Ministry for Health and Care of 20/03/2020, ref. Z6a-G8000-2020/122-98.

28 Bavarian Regulation on Infection Control Measures on the Occasion of the Coronavirus Pandemic (27/03/2020), in: BayMBL. No. 158, BayRS 2126-1-5-G.

29 Second Bavarian Infection Control Regulation (2. BayIfSMV) (16/04/2020), in: BayMBL. No. 205, BayRS 2126-1-5-G.

30 Third Bavarian Infection Control Regulation (3. BayIfSMV) (01/05/2020), in: BayMBL. Nr. 239, BayRS 2126-1-7-G.

31 Fourth Bavarian Infection Control Regulation (4. BayIfSMV) 2126-1-8-G of 05/05/2020. The English text is available at https://www.stmgp.bayern.de/wp-content/uploads/2020/06/fuenfte_baylfsmv_englisch.pdf.

Legal development up to this point can be divided into three phases: the initial phase, the peak phase starting at the time of the proclamation of the disaster situation (16th March), and the relaxation phase following the third Infection Control Regulation (4th May).

2.3 *Case Law on Religious Freedom under the Anti-COVID-19 Measures*

Throughout Germany, there have already been several decisions and judgments dealing with the question of whether the state measures violate religious freedom. On the one hand, the initiative for these proceedings was taken by individuals, Catholics, Protestants, and one person who referred to the Christian feast of Easter and the Jewish Passover feast, which “cannot be illegal for all Jews in Germany.”³² On the other hand, there are smaller communities, for example, an institute preserving traditional liturgy, an ecumenical monastery, and a mosque congregation. The large churches apparently did not take legal action.

Of the cases that have been decided to date, only that of an Islamic mosque association in Lower Saxony was successful. The Federal Constitutional Court overruled the relevant regulation in so far as it did not allow exceptions to be granted in individual cases.³³ The applicant wanted to hold Friday prayers in his mosque during the month of Ramadan. According to the assessment of the Constitutional Court, the competent authority must be given the power to examine, on a case-by-case basis, whether religious services can exceptionally be held under certain conditions appropriate to the situation.

Some other applications³⁴ were not successful for the time being simply because there were proceedings for interim relief, without a substantive examination. Given that the scant knowledge about the coronavirus did not allow making predictions, it was considered better to accept an infringement of religious freedom than to overburden the healthcare system. But the possibility was explicitly left open that a subsequent, detailed process would come to a different conclusion.

A question discussed in several decisions and judgments was: Is there any legal interest in initiating proceedings if the applicant, even in the event of an annulment of the regulation, could not attend worship services at all because the religious community had cancelled all services on its own accord?

32 Cf. Administrative Tribunal Hannover, 15 B 2112/20 (07/04/2020), recital 3.

33 Federal Constitutional Court, 1 BvQ 44/20 (29/04/2020).

34 Federal Constitutional Court, 1 BvQ 28/20 (10/04/2020), recital 9f; Thuringia Higher Administrative Court, 3 EN 238/20 (09/04/2020), recital 39; Administrative Tribunal Dresden, 3 L 182/20 (03/04/2020), recital 22.

The Hessian³⁵ and Bavarian³⁶ Administrative Courts answered this question in the negative. But the Hessian decision was challenged before the Federal Constitutional Court, which took the opposite view, that if the state ban was to fall, it would not be unlikely for worship services to be offered again on a larger scale.³⁷ Thus, the two Bavarian decisions issued one day before the decision of the Federal Constitutional Court are probably outdated in this respect.

Another issue that appears in several decisions and judgments is equal treatment. Some courts³⁸ argued that an exception cannot be allowed because otherwise it would have to be granted to other communities as well for reasons of equality, so that in the end the prevention of crowds would be thwarted. This argument would be obsolete by now because the Federal Constitutional Court, in the above-mentioned decision on the Lower Saxony Mosque Association, virtually demands exceptions for individual cases.

Judgments and decisions relating to measures taken during the relaxation phase do not differ significantly from those discussed above. Because worship services are now permitted with certain restrictions, the weighing of consequences continues to be in favour of the protection of health.³⁹ An applicant argued that people who cannot wear a face mask for medical reasons are being excluded from church services and everyday life.⁴⁰ However, since the fourth Bavarian Infection Control Regulation provides for exceptions in this respect, this objection is no longer relevant.⁴¹

2.4 *The Voices of Legal Scholars*

To the extent that legal experts have already commented on the topic discussed, two trends can be identified: One considers the state measures to be proportionate, at least for the time being, because of the uncertain state of knowledge and the lack of predictability regarding the coronavirus. The other considers them to be a priori disproportionate, because milder, equally effective means are available.

35 Hessian Administrative Court, 8 B 892/20.N (07/04/2020), recital 1 lit. d.

36 Bavarian Administrative Court, 20 NE 20.704 (09/04/2020), recital 12f.; ders., 20 NE 20.738 (09/04/2020), recital 11f.

37 Federal Constitutional Court, 1 BvQ 28/20 (10/04/2020), recital 6.

38 Federal Constitutional Court, 1 BvQ 31/20 (10/04/2020), recital 12; Thuringia Higher Administrative Court 3 EN 238/20 (09/04/2020), recital 61; Berlin-Brandenburg Higher Administrative Court OVG 11 S 21/20 (08/04/2020), recital 8.

39 Bavarian Constitutional Court, Vf. 34-VII-20 (11/05/2020), recital 28.

40 Bavarian Higher Administrative Court, 20 NE 20.955 (07/05/2020), recital 27 und 36.

41 Bavarian Constitutional Court, Vf. 34-VII-20 (08/05/2020), recital 40.

According to Papier, “no serious legal objections to the measures adopted” can currently be raised because “there is not yet a sufficient degree of certainty about the content and extent of the risks and about the suitability and necessity of the measures taken or alternative measures.”⁴² Schwarz considered it appropriate “to assume the proportionality of state measures because there is a risk of serious damage even if the probability of damage is uncertain.”⁴³ Heinig deemed the regulations to be proportionate, especially given that only meetings are prohibited, while the religious communities are free to “continue to work publicly, to provide pastoral care and also to carry out acts of worship.”⁴⁴

By contrast, Lepsius called for a strict limitation of measures, a duty to check them against growing knowledge of the facts, and a constant search for milder means.⁴⁵ In particular, he asked why worship services could not be organized in compliance with protective measures, and why there could be no exception on high holidays.⁴⁶ Peglau doubted whether the ban on religious gatherings was at all compatible with freedom of religion, since gatherings are essential for Christianity.⁴⁷ In Bender’s opinion, there is strong evidence that the prohibitions, given their rigidity, are unconstitutional in the light of Article 4 paras. 1–2 GG.⁴⁸

In addition to the issue of proportionality and milder means, the balancing of Article 4 and 2 GG was also discussed. Lepsius made clear that the purpose of interference cannot be health in general, but only preventing overloading the healthcare system.⁴⁹ Furthermore, he decried the fact that health and

42 Hans-Jürgen Papier, “Freiheitsrechte in Zeiten der Pandemie”, *DRiZ* (2020), 180, 181. Hans-Jürgen Papier is a German scholar of constitutional law and former President of the Federal Constitutional Court of Germany, from 2002 to 2010.

43 Kyrill-A. Schwarz, “Das Infektionsschutzgesetz und die Grundrechte – ein Lehrstück zum verfassungsrechtlichen Freiheitsverständnis bei drohenden Gefahren”, *JA* (2020), 321, 324. Schwarz is professor of public law at the University of Würzburg.

44 Heinig, *supra* note 12. Heinig is director of the Institute for Ecclesiastical Law of the Evangelical Church in Germany and Professor for public law and ecclesiastical law at the Georg-August-University Göttingen.

45 Oliver Lepsius, “Vom Niedergang grundrechtlicher Denkkategorien in der Corona-Pandemie” (06/04/2020). Retrieved 13 May 2020, verfassungsblog.de/von-niedergang-grundrechtlicher-denkkategorien-in-der-corona-pandemie/. Lepsius is professor of public law at the University of Münster.

46 *Ibid.*

47 Peglau, *supra* note 20.

48 Philipp Bender, “Verwaltungsgerichtlicher Rechtsschutz gegen Gottesdienstverbote durch Maßnahmen zur Eindämmung des Corona-Virus”, 9b *NVwZ-Extra* (2020), 1, 4. Philipp Bender is Academic Councilor at the Institute for Ecclesiastical Law at the University of Bonn.

49 Lepsius, *supra* note 45.

systemic relevance were placed above individual freedoms.⁵⁰ As Bender noted, there is no predominance of Article 2 para. 2 over Article 4 paras. 1–2 GG, because the first-mentioned provision is subject to a simple legal reservation, whereas the second is unconditionally guaranteed.⁵¹ He wished the authorities were more freedom-oriented, recognizing “that religious acts like the Eucharistic sacrifice or the Friday prayer are part of the spiritual ‘basic supply’ and are definitely ‘systemically relevant’ for large sections of the population.”⁵²

The opinions of the legal scholars quoted above refer to the measures taken during the peak phase of the COVID-19 crisis. The demand for exceptional provisions was largely met by the new regulations during the relaxation phase.

3 Church Law

3.1 *Universal Church*

On the level of the universal church, legal norms were issued by two institutions of the Roman Curia: the Congregation for Divine Worship and the Apostolic Penitentiary. The Congregation for Divine Worship issued decrees on 19th March, 2020,⁵³ and on 25th March, 2020,⁵⁴ both entitled “In time of COVID-19.” Formally, these are general decrees in the sense of can. 29 CIC, thus equivalent to laws, and were enacted by mandate of the Supreme Pontiff (cf. Article 18 *Pastor Bonus*). The more recent one, according to its introduction, is an “update” of the older one. Although “update” is not a legal term, it seems to mean a derogation (cf. can. 20 CIC), as the entire matter is completely reordered. The subject of both decrees is above all the celebration of Holy Week from Palm Sunday to Easter Sunday while the decrees do not include any further provisions on the celebration of the Eucharist and other sacraments. Despite largely literal similarities, there are certain remarkable differences. According to the first decree “Bishops will give indications, which have been agreed with the Episcopal Conference.” This passage is missing in the update, which

⁵⁰ Ibid.

⁵¹ Bender, *supra* note 48, 4.

⁵² Ibid. 5.

⁵³ Congregation for Divine Worship and the Discipline of the Sacraments, Decree: In time of COVID-19, Prot. N. 153/20 (19/03/2020). Retrieved 13 May 2020, <http://www.cultodivino.va/content/cultodivino/it/documenti/decreti-generalisti/decreti-generalisti/2020/decreto-trid-uo-pasquale-2020.html>.

⁵⁴ Congregation for Divine Worship and the Discipline of the Sacraments, Decree: In time of COVID-19, Prot. N. 154/20 (25/03/2020), Retrieved 13 May 2020, https://www.vatican.va/roman_curia/congregations/ccdds/documents/rc_con_ccdds_doc_20200325_decreto-in-tempodicovid_en.html.

is regrettable in view of local adaptations that could be made by the Episcopal Conferences. Furthermore, an invitation to the diocesan bishops to make “decisions regarding monasteries, seminaries and religious communities” has been dropped. Instead, these institutions and communities are now directly obliged to comply with the second decree. This led to a ban on celebrating the Easter Vigil in monastic or seminary churches, unless they happen to be parish churches at the same time.⁵⁵

The most serious order, however, is the same in both decrees: “Given that the date of Easter cannot be transferred, in the countries which have been struck by the disease and where restrictions around the assembly and movement of people have been imposed, Bishops and priests may celebrate the rites of Holy Week without the presence of the people and in a suitable place, avoiding concelebration and omitting the sign of peace.” In other words, even if a state authority has not imposed a complete ban, but only certain restrictions concerning the gatherings and movements of people, the rites of Holy Week must not be celebrated in the presence of the people at all. This order reveals not only an attitude of adhering to state regulations, but goes beyond them by transforming mere restrictions into complete prohibitions. Such an attitude is reproduced in some German dioceses, as shown below.

In contrast, the note of the Apostolic Penitentiary proves to be an example of gradual adjustments and contextuality.⁵⁶ It concerns the Sacrament of Reconciliation.⁵⁷ Depending on the gravity of the epidemic and the local situation, the document provides for different instruments: collective absolution, individual confession under certain safeguards, appointment of extraordinary hospital chaplains, and perfect contrition accompanied by *votum confessionis*. The specification is left to the diocesan Bishops, who can better assess local needs and possibilities. The salvation of souls and the effort to guarantee spiritual assistance to as many people as possible, especially the sick and dying, are emphasized as goals. The same attitude of doing what is possible despite adverse

55 No. 5: “The Easter Vigil: Is to be celebrated only in Cathedral and parish churches. [...] Seminaries, houses of clergy, monasteries and religious communities shall follow the indications of this decree.”

56 See Vincenzo Pacillo, *Il diritto di ricevere i sacramenti di fronte alla pandemia. Ovvero, l'emergenza da COVID-19 e la struttura teologico-giuridica della relazione tra il fedele e la rivelazione della Grazia* (06/04/2020). Retrieved 13 May 2020, <https://www.olir.it/focus/vincenzo-pacillo-il-diritto-di-ricevere-i-sacramenti-di-fronte-alla-pandemia-ovvero-l'emergenza-da-covid-19-e-la-struttura-teologico-giuridica-della-relazione-tra-il-fedele-e-la-rivelazione/>.

57 Apostolic Penitentiary, *Note on the Sacrament of Reconciliation in the current pandemic* (19/03/2020). Retrieved 13 May 2020, <http://www.penitenzieria.va/content/dam/penitenzieriaapostolica/magistero-e-biblioteca-di-testi/nota2/NOTA%20English.pdf>.

circumstances is also expressed in a decree of the Apostolic Penitentiary concerning indulgences.⁵⁸ These are granted, among others, to those who, following the example of the Good Samaritan, expose themselves to the risk of infection, and to those who, at the moment of death, are unable to receive the sacrament of the anointing of the sick and of the viaticum.

3.2 *Catholic Church in Germany*

The German Bishops' Conference has only few legislative competencies, but it plays an important role in the coordination of the German dioceses by publishing guidelines and recommendations. The Conference issued a document in the initial phase of the crisis.⁵⁹ At that time, it was sufficient to take minor measures, such as caution when handling holy water and during concelebration, washing of hands during liturgical services, avoiding communion on the tongue, physical contact during the rite of peace, and participation in worship in case of suspected infection. The document concluded by stating: "In the ecclesial sphere, responsible action should be taken with regard to the new virus, but excessive anxiety should be avoided."

During the peak phase of the crisis, the Bishops' Conference formulated a special Good Friday intercession for those affected by the crisis.⁶⁰ Ecumenism is of great importance in Germany, therefore the Catholic, Protestant, and Orthodox churches issued a common word,⁶¹ declaring that they wish to adhere consistently to the state guidelines. They conceded that they found it difficult to suspend all public services. By stating this, however, they admitted that it was they themselves who suspended the services. They also balanced the

58 Apostolic Penitentiary, Decree on the granting of special Indulgences to the faithful in the current pandemic (19/03/2020). Retrieved 13 May 2020, <http://www.penitenzieria.va/content/dam/penitenzieriaapostolica/indulgenze/Decree%20of%20the%20Apostolic%20Penitentiary%20on%20the%20granting%20of%20special%20Indulgences%20to%20the%20faithful%20in%20the%20current%20pandemic.pdf>.

59 German Bishop's Conference, Hinweise zur Vermeidung von Ansteckungen mit dem Coronavirus in Gottesdiensten und Kirchenräumen (26/02/2020). Retrieved 13 May 2020, <https://www.dbk.de/nc/presse/aktuelles/meldung/hinweise-zur-vermeidung-von-ansteckungen-mit-dem-coronavirus-sars-cov-2-in-gottesdiensten-und-kirc/detail/>.

60 German Bishop's Conference, Besondere Fürbitte am Karfreitag 2020 (25/03/2020). Retrieved 13 May 2020, https://www.dbk.de/fileadmin/redaktion/diverse_downloads/presse_2020/2020-048a-Besondere-Fuerbitte-Karfreitag-2020.pdf.

61 German Bishop's Conference, Evangelical Church in Germany, Orthodox Bishop's Conference in Germany, "Beistand, Trost und Hoffnung". Ein Wort der katholischen, evangelischen und orthodoxen Kirche in Deutschland (20/03/2020). Retrieved 13 May 2020, https://www.dbk.de/fileadmin/redaktion/diverse_downloads/presse_2020/2020-046a-Gemeinsames-Wort-der-Kirchen-zur-Corona-Krise.pdf.

benefits of the “indispensable” common prayers and services and the necessary renunciation of them in order to contain the pandemic.

With regard to the relaxation phase, the Bishops’ Conference recorded its position in a document⁶² that served as a basis for a discussion with the Federal Ministry of the Interior on 17th April 2020. The Conference expressed its expectation that public worship will soon be made possible again in a step-by-step process, rejecting the exclusion of elderly persons. The Conference gave first priority to the Sunday service, and noted that the prohibition of public worship services, especially at Easter, deeply infringed religious freedom. On 24th April, the Bishops’ Conference made recommendations to the dioceses on liturgical celebrations in the event that state regulations allowed it again.⁶³

3.3 *Bavarian Dioceses*

The Free State of Bavaria covers two ecclesiastical provinces with a total of seven dioceses. For reasons of space, only the two archdioceses (Bamberg and Munich/Freising) and one suffragan diocese each (Augsburg and Würzburg) can be examined below. This is sufficient to show the variety of possible responses to the virus.

3.3.1 Initial Phase

The initial phase was characterized by cancelling primarily non-liturgical events,⁶⁴ while maintaining liturgical celebrations as far as possible, with modifications and restrictions.⁶⁵ Sunday masses were limited to 100 participants,⁶⁶ baptisms and weddings were postponed.⁶⁷ The sacrament of penance was

62 German Bishop’s Conference, Überlegungen aus dem Bereich der Deutschen Bischofskonferenz zur Möglichkeit religiöser Versammlungen. Briefing für ein Gespräch des Bundesministeriums des Inneren am 17. April 2020 (15/04/2020). Retrieved 13 May 2020, https://dbk.de/fileadmin/redaktion/diverse_downloads/presse_2020/2020-068a-Ueberlegungen-zur-Moeglichkeit-religioeser-Versammlungen-Arbeitspapier.pdf.

63 German Bishop’s Conference, Empfehlungen zur Feier der Liturgie in Zeiten der Corona-Krise (24/04/2020). Retrieved 13 May 2020, https://www.dbk.de/fileadmin/redaktion/diverse_downloads/dossiers_2020/2020-04-24-Empfehlungen-zur-Feier-der-Liturgie-in-Zeiten-der-Corona-Krise.pdf.

64 E.g. Augsburg: Arbeitsgruppe, Weisungen (12/03/2020). Retrieved 13 May 2020, <https://bistum-augsburg.de/Generalvikariat-Zentrale-Dienste/Corona-Virus-Weisungen-fuer-Veranstaltungen>.

65 Ibid.

66 Augsburg: Anweisungen (13/03/2020). Retrieved 13 May 2020, <https://bistum-augsburg.de/Generalvikariat-Zentrale-Dienste/Corona-Virus-Weisungen-fuer-Veranstaltungen>. The author of the instructions is not mentioned on the website.

67 Augsburg: *ibid.* Munich and Freising: Archbishop, Allgemeines Dekret gemäß can. 29 CIC (13/03/2020), No. 2. Both regulations provide exceptions for baptism if conducted in the closest family circle.

moved from the confessional to larger rooms to maintain greater distance between confessor and penitent.⁶⁸ At the same time, the obligation to attend Sunday mass (can. 1247 CIC) was dispensed from,⁶⁹ so that nobody would feel obliged to expose oneself to the risk of infection. It was explicitly stated that these instructions were the consequence of government regulations, and would be amended as soon as these regulations change.⁷⁰

The archdiocese of Munich and Freising, however, went beyond these measures. Already on 13th March, the archbishop issued a general decree cancelling all public services.⁷¹ This happened before the state authority issued a corresponding ban, as the declaration of the “disaster situation” occurred only on 16th March. The question arises whether this decree can still be construed as a response to state measures, or whether it should be seen as an independent order by the church authority, exceeding state measures. The first hypothesis is supported by the wording: “I cancel (ich sage ab).” Cancelling is not a sovereign act. Every private organizer can and must cancel events as a result of legal prohibitions. Furthermore, the introduction of the decree states that actions were taken “in the light of further measures of the Bavarian state government.” This suggests that the decree was prompted by state measures, merely responding to them, insinuating that state measures go further than those of the church. On 13th March, however, there were no such measures in place. The second hypothesis is supported by the legal form of a general decree in the sense of can. 29 CIC, which is equivalent to a law. This legal form would not have been necessary for a simple cancellation, but it may have been chosen because the decree contained other, genuinely legal provisions. The second hypothesis is

68 Augsburg: Anordnung zum Empfang des Bußsakraments (March 2020). Retrieved 13 May 2020, [https://bistum-augsburg.de/Media/Files/03_20-Anordnung-zum-Empfang-des-Bu](https://bistum-augsburg.de/Media/Files/03_20-Anordnung-zum-Empfang-des-Bu%C3%9Fsakraments) ssakraments.

69 Bamberg: Vicar General, Hinweise zum Umgang mit dem Sars-CoV-2 (Coronavirus) hinsichtlich liturgischer Feiern und Veranstaltungen in den Seelsorgebereichen (13/03/2020).

Munich and Freising: Archbishop, Munich and Freising: Archbishop, Allgemeines Dekret gemäß can. 29 CIC (13/03/2020).

Würzburg: Press Office, Bischof setzt Sonntagspflicht bis auf Weiteres aus (13/03/2020). Retrieved 13 May 2020, <https://pow.bistum-wuerzburg.de/aktuelle-meldungen/detailansicht/ansicht/bischof-setzt-sonntagspflicht-bis-auf-weiteres-aus>.

70 Augsburg: *supra* notes 64 and 66: “With regard to the further extension of this order in time, a decision will again be taken when corresponding government/official instructions are available.”

Bamberg: Vicar General, Hinweise (13/03/2020): “Due to the Sars-CoV-2 virus (Corona virus), in accordance with the orders of the State Government of 13th March, 2020, and the decrees of the local authorities, which are expected to be valid until 19th April, 2020, all events where more than 100 people are expected to attend may be cancelled.”

71 Archbishop, *supra* note 69, No. 1.

supported mainly by the issuing date. The decree was not contingent upon subsequent state measures, which were perhaps foreseeable at the time. On the contrary, in accordance with its final provision, it entered into force on the day of its publication on the website of the archdiocese. For these reasons, the Bavarian Administrative Court interpreted the decree as “autonomous legislation in the internal area of the church,” which was issued “of its own free will, and thus independently” of the state regulation.⁷²

3.3.2 Peak Phase

During the peak phase, the Free State of Bavaria issued a ban on assembly, which applied equally to places of worship. As far as canon law is concerned, two questions are of particular interest, one formal, the other substantive: (a) Did the diocesan authorities issue independent church prohibitions, or did they order only the inner-church measures when faced with the state prohibitions? (b) Does the content of the church measures go beyond what was required by the state regulations?

In the Diocese of Augsburg, the Permanent Representative of the Apostolic Administrator issued an order on 16th March, the day the “disaster situation” was declared.⁷³ According to this order, the diocese would cease all public services, a formulation that can be understood as a response to government directives. In contrast to Munich and Freising, communion for the sick and anointing of the sick were to be continued. Until that time, the regulations of the Diocese of Augsburg had been limited to the bare essentials, but extremely detailed instructions were given in two letters dated 31st March,⁷⁴ whose necessity for the protection of health was not clear. The letters addressed even church decoration and Holy Sepulchres.

The Archdiocese of Bamberg was reticent about regulations during the peak phase. Government announcements concerning funerals, childcare facilities, etc. were available for download on its website. This method prevented church authorities from greatly restricting fundamental rights of their own accord, or even giving the impression of adopting and affirming the state regulations. It also allowed more leeway for parishes to adapt measures to the local situation.

72 Bavarian Administrative Court, NE 20.704 (09/04/2020), recital 24; Idem, 20 NE 20.738 (09/04/2020), recital 23.

73 Permanent Representative of the Apostolic Administrator, Anordnung GV/he 2399 (16/03/2020).

74 Permanent Representative of the Diocesan Administrator, Die Feier der Heiligen Woche (31/03/2020); ders., Hinweise zu Palmbuschen/Osterkerzen/Segnung von Speisen in der Osterzeit etc. Ref: GV/he 2992 (31/03/2020).

The Bishop of Würzburg issued a decree on 16th March with the following content: "All public services are prohibited" and "The liturgies of the holy triduum as public celebrations are prohibited."⁷⁵ Again, the question arises whether this was an independent order by the church authority. The indicative mood suggests that the decree merely reproduced the state ban, but the preamble makes no reference at all to state regulations.⁷⁶ Instead, it emphasized that these were orders of the bishop, which must be obeyed. The legal form of the decree, which, as in Munich, was probably intended to be a general decree according to can. 29 CIC, also indicates the legislative intention of the bishop. The restrictive tone of the decree was softened by further statements of the bishop. In a message of 16th March, he presented the suspension of religious services not as the content of his own decree, but merely as a consequence of more stringent state measures.⁷⁷ In a letter of 26th March, he even recommended that the faithful contact pastors for individual reception of the sacraments of Penance and Communion, "even though we cannot offer public schedules."⁷⁸

3.3.3 Relaxation Phase

As the relaxation phase appeared to near, guidelines were initially issued at three supra-diocesan levels, which may seem slightly exaggerated. We already mentioned the recommendations of the German Bishops' Conference, of 24th April. As a sign of ecumenism, the Catholic (arch)dioceses of Bavaria and the Evangelical Church of Bavaria undertook a joint commitment.⁷⁹ Finally, on

⁷⁵ Diocesan Bishop, Dekret (16/03/2020).

⁷⁶ They are mentioned in the extension decree of 17th April.

⁷⁷ Diocesan Bishop, Botschaft (Videoansprache) (16/03/2020) Videoansprache von Bischof Dr. Franz Jung vom 16. März 2020, <https://bischof.bistum-wuerzburg.de/detailansicht/ansicht/auf-das-wesentliche-im-leben-besinnen/> "At the weekend, the Federal Government and the Bavarian State Government have drastically tightened the protective measures against the corona virus. [...] For our diocese of Würzburg this means that we now also have to suspend all public church services until 19th April".

⁷⁸ Diocesan bishop, Letter: Die Kar- und Osterwoche 2020 im Bistum Würzburg im Zeichen des Coronavirus (26/03/2020). Retrieved 13 May 2020, https://www.bistum-wuerzburg.de/fileadmin/Bistum/Coronavirus/2020-03-26_Schreiben_des_Bischofs_Kar_und_Osterwoche_2020.pdf.

⁷⁹ Gemeinsame Verpflichtung der katholischen (Erz-) Diözesen Bayerns und der Evangelischen Landeskirche Bayern im Hinblick auf eine Erlaubnis von gottesdienstlichen Versammlungen in Kirchen (undated). Retrieved 13 May 2020, [https://corona.bayern-evangelisch.de/downloads/Anlage%2002%20Gemeinsame%20Verpflichtung%20der%20katholischen%20Di%20c3%20b6zesen%20und%20der%20ELKB\(4\).pdf](https://corona.bayern-evangelisch.de/downloads/Anlage%2002%20Gemeinsame%20Verpflichtung%20der%20katholischen%20Di%20c3%20b6zesen%20und%20der%20ELKB(4).pdf).

28th April, the Bavarian (arch)dioceses devised a common protection concept⁸⁰ in agreement with the Bavarian state government.

The protection concept contained regulations for the participants and for the performance of masses. The number of participants was already limited by the fact that a minimum distance of 2 meters had to be maintained inside the churches. This could be achieved by place markings, admission controls, or registration procedures. Various hygiene measures applied to the celebration, including disinfection, mandatory wearing of masks (except when speaking), prohibition of physical contact, and the cleaning of liturgical equipment. Communion was distributed without speaking, merely into the hand. Finally, the duration of the services was limited to 60 minutes.

This protection concept allows for adjustments in the individual dioceses. In this regard, the Archbishop of Munich and Freising issued a general decree on 29th April,⁸¹ which contains flanking measures that are useful and even necessary under canon law. The Vicar General and the head of office wrote a detailed letter⁸² to help parishes with the implementation. The parish priests were to consult with the parish committees. A solution appropriate to the local situation was to be found at each location. The letter expressly granted a wide scope of discretion to the parishes.

The implementation regulations of the diocese of Augsburg⁸³ are partly more restrictive and leave less room for local solutions. Sunday Eucharist celebrations were to be held only in the cathedral and larger churches. It was also recommended that communion be omitted. As in Munich, celebration was permitted three times on Sunday, in order to distribute attendants between several masses. By contrast, the Augsburg regulation was more generous with regard to confession, and public schedules for confession were not ruled out *a priori*.

80 Schutzkonzept der bayerischen (Erz-)Diözesen nach Abstimmung mit der Bayerischen Staatsregierung Rahmenbedingungen und möglicher Ablauf Gottesdienst mit beschränkter Teilnehmerzahl (28/04/2020).

81 Archbishop, General Decree according to can. 29 CIC, VZ 52.9-2020/1#001 (29/04/2020). Retrieved 13 May 2020, <https://www.erzbistum-muenchen.de/im-blick/coronavirus>.

82 Vicar General / Head of Office, Letter: Infektionsschutzkonzept für Gottesdienste und weitere Festlegungen für die Zeit ab 04.05.2020 (29/04/2020). Retrieved 13 May 2020, <https://www.erzbistum-muenchen.de/cms-media/media-50141320.pdf>.

83 Permanent Representative of the Apostolic Administrator, Diözesane Ausführungsbestimmungen / Erläuterungen zum Schutzkonzept der bayerischen (Erz-)Diözesen nach Abstimmung mit der Bayerischen Staatsregierung – gültig ab 04.05.2020 (29/04/2020). Retrieved 13 May 2020, https://bistum-augsburg.de/Nachrichten/Schutzkonzept-fuer-Gottesdienste_id_221508.

The Archdiocese of Bamberg postponed the resumption of public worship. In an email of 1st May, the Vicar General merely disseminated the protection concept of the Bavarian (arch)dioceses, noting that it should not apply in Bamberg until 10th May, while in the other dioceses it already applied from 4th May. The reason for the delay was said to be that more time was needed for preparation in the parishes.

The Bishop of Würzburg issued a decree on 28th April, which still severely limited the resumption of liturgical life.⁸⁴ In particular, public services were permitted only without Eucharistic celebration. This was justified by special features of the Diocese of Würzburg, which are popular piety and small churches in the countryside. These restrictions are surprising, especially given that the Diocese of Würzburg was involved in the drafting of the common protection concept of the Bavarian dioceses and in the ecumenical commitment, which states: "All forms of worship celebrations are permitted." The "special features" noted above were also present in other dioceses. The fact that the protection concept cannot be realized in certain places does not justify a ban extending to the entire diocese.

The protection concepts represent a special form of legal norms in the area of overlap between state and church. On one hand, they are canonical norms that adapt general canon law to the existing emergency situation. Some rights of the faithful, such as the right to receive communion on the tongue, are still restricted. At the same time, exception clauses of the CIC are applied, attesting to the flexibility of canon law. On the other hand, the protection concepts are a prerequisite for making use of the new permissions of the state regulation. Upon request, the concept must be submitted to the district authority, which means that the church does not execute a state regulation, but creates the conditions for its application.

It is thus clear that the decision-making authorities in the Church are found at various levels: the Roman Curia, the Episcopal Conferences, and the dioceses. The diocesan bishops also have legislative power, whereas the vicars general have only administrative power. There is no democratic legislative procedure in the Catholic Church, but the opinion of various councils, working groups, and medical experts was consulted when the norms mentioned above

84 Diocesan Bishop, Dekret (28/04/2020). Retrieved 13 May 2020, https://www.bistum-wuerzburg.de/fileadmin/Bistum/Coronavirus/2020-04-28_Dekret_Bischof.pdf Annex "General conditions and possible course of public services with a limited number of participants, from 4 May, 2020, in the Diocese of Würzburg". Retrieved 13 May 2020, https://www.bistum-wuerzburg.de/fileadmin/Bistum/Coronavirus/2020-04-29_Regelungen_zur_Feier_A__ffentlicher_Gottesdienste_ab_4.5.2020.pdf.

were issued. The agreement of the state governments was sought, as well as that of the authorities of other churches. At the parish implementation level, participation of bodies in which lay people are involved is encouraged.

4 State, Church, and Individual Believers

Initially, the question was asked in which way state and church interact with regard to the COVID-19 crisis, and to what extent the protection of the religious freedom of individuals suffers from this interaction. There is a triangular relationship between church, state, and individual believers. Below we examine the three sides of the triangle one after the other.

4.1 *Church-state Relationship*

The first side refers to the relationship between state and church. In Germany, this is a cooperative relationship. Although the measures to contain the coronavirus were not set down in a contract that would be legally binding for both parties, they were agreed upon in the course of dialogue.⁸⁵ In its briefing paper of 15th April, 2020, the German Bishops' Conference admitted that the churches consented to the prohibition of religious assemblies. On 16th March, the Federal Government and representatives of the federal states agreed on the directive that meetings in churches, mosques, and synagogues are to be banned. On the same day, the dioceses issued their instructions in this regard. One diocese was three days early. This may not be pure coincidence. The cooperation serves the religious peace in the country. The state could trust that the large churches would not take legal action to enforce the fundamental right of corporative religious freedom. In return, the churches were able to prevent through dialogue harsher measures, such as the closing of churches. After the crisis had passed its peak, the churches brought their demands for relaxation back into the dialogue with the state. In this way, protection concepts could be developed in mutual consultation, which serves both the protection of health and the requirements of the liturgy. Lepsius feared that the churches would lose their religious authority if they did not demand their basic rights.⁸⁶ Clearly, they are themselves subjects of corporative religious freedom, but holders of fundamental rights are free to waive their exercise. The problem, however, is

85 The Corona Protection Regulation of North Rhine-Westphalia points out that the churches have made corresponding declarations, cf. Peglau, *supra* note 20.

86 Cf. Lepsius, *supra* note 49.

that in the given case, renunciation can harm others in their assertion of religious freedom, namely the individual believers. Therefore, the discussion must not be restricted to the relationship between church and state, because it is a triangular relationship.

4.2 *State-individual Believers Relationship*

The second side of the triangle concerns the relationship between state and individual believers. The Mosque Association prevailed in its constitutional complaint because the Lower Saxony regulation lacked an exception provision for special cases.⁸⁷ The Free State of Bavaria avoided this mistake by inserting such a clause in its regulations, stating that exemptions can be granted by the district authority upon request. But what use is this clause to individual believers if their religious community does not make such requests because they have already cancelled public worship themselves? The Bavarian Administrative Court ruled against two petitioners that a repeal of the state provision would not benefit them because in any case the church does not hold public services of its own initiative.⁸⁸ These decisions did not look far enough ahead, and did not take into account the first side of the triangle, namely the state-church relationship. The diocesan decrees are not simply the result of autonomous legislation, but are based on coordination between state and church. Therefore, the Federal Constitutional Court shows a better grasp of the overall context when it recognizes that the church would offer more services if the state ban were to be lifted.⁸⁹

The problem outlined here is linked to the question whether members of a religious community can invoke their religious conviction before a state court even if the religious community declares this conviction not to be binding. In concrete terms: Can a Catholic assert his right to freedom of religion if he wants to attend Sunday mass even if the Church has exempted him from the obligation? The German courts have already dealt with similar cases. If individual believers want to practice their religion more intensely than their religious community considers necessary or appropriate, they can successfully invoke their freedom of religion in court. Individual freedom of religion is not bound by the community's collective determination of content.⁹⁰ This principle emerged from cases in which individuals wanted to wear a religious headgear that their religious community did not consider

87 Federal Constitutional Court, 1 BvQ 44/20 (29/04/2020).

88 Bavarian Administrative Court, NE 20.704 (09/04/2020), recital 24; Idem, 20 NE 20.738 (09/04/2020), recital 23.

89 Federal Constitutional Court, 1 BvQ 28/20 (10/04/2020), recital 6.

90 See Germann, *supra* note 9, recital 17.1.

obligatory.⁹¹ The case law of the European Court of Human Rights also follows this principle.⁹²

This does not mean, however, that the individual believer can use the state legal system to force the church to change its teachings or legal norms, or in the case at hand, to offer worship services. If it did so, the state would interfere with the right of self-determination of the church. The individual believer can demand only that the state remove the legal restrictions that prevent the church from holding public services. This alone, however, is of little use to individual believers if the church does not offer Sunday masses. Therefore, the third side of the triangle must also be taken into account, namely the relationship between the church and the individual believer.

4.3 Church-individual Believer Relationship

If individual believers want the ecclesiastical ministers to provide them with spiritual assistance by administering the sacraments, they must resort to the internal ecclesiastical legal process. The individual can invoke the fundamental right according to can. 213 CIC⁹³ and submit a recourse to the hierarchical superior of the one who issued the decree (can. 1737 CIC). In the case of liturgy, this is usually the Congregation for Divine Worship (Arts. 61–62 *Pastor Bonus*). On one occasion, this Congregation already ordered the celebration of Confirmation, which the bishop had initially refused.⁹⁴ But in the matter at hand, this authority issued the decree prohibiting liturgy during the Holy Week. Therefore, it cannot be expected to be impartial on this issue. In a similar situation, the ecclesiastical administrative court, the Apostolic Signatura, found that there was no recourse available to a superior who did not have a prejudicial opinion.⁹⁵ Thus, the only remaining option would be to bring an administrative court case before the Apostolic Signatura. It is not impossible that such a course of action will be successful, but it would take so long that the decision would no longer be of interest to the believer.

From a substantive point of view, the examination of fundamental rights would, similarly to national law, amount to determining whether the

91 Federal Constitutional Court, 2 BvR 1436/02 (24/09/2003), recital 40; Bavarian Constitutional Court, Vf. II-VII-05 (15/01/2007).

92 *İzzettin Doğan v. Turkey*, No. 62649/10 (26th April 2016) [Grand Chamber], § 134; *Hamidović v. Bosnia and Herzegovina*, No. 57792/15 (5th December 2017), § 30.

93 “The Christian faithful have the right to receive assistance from the sacred pastors out of the spiritual goods of the Church, especially the word of God and the sacraments.”

94 Congregation for Divine Worship, Prot. N. 2607/98/L (18.12.1999), 35 *Notitiae* (1999) 537.

95 Supreme Tribunal of the Apostolic Signatura, 10977/79 CA (27.10.1984), in W. Daniel (ed.), *Ministerium Iustitiae: jurisprudence of the Supreme Tribunal of the Apostolic Signatura* (2011), 535: “confusion of the offices of legislator and judge”.

infringement of the right under can. 213 CIC is justified by the protection of the health of third parties. Such justification is difficult if the diocesan decree goes beyond the state prohibition in time or content. The ecclesiastical authority would then have to justify why it placed health above the practice of religion, although the state did not do so in the same case. The ecclesiastical authority could also put forward spiritual reasons, for example that the Eucharist could not be celebrated with dignity under the protective measures. But this argument might not be valid either, because canon law and liturgical law allow such flexibility precisely to be able to deal with special situations. The reasoning that the implementation of safeguards is too difficult may be even less convincing, because the church authorities are obliged by can. 213 CIC to remove such difficulties to guarantee the fundamental right.

5 Concluding Remarks

In sum, in Germany, state and church coordinated their measures to protect the population against the COVID-19 pandemic. The church measures were not merely passive reactions, because in part they exceeded state regulations in both duration and content. Yet neither were they entirely independent, as religious gatherings were also prohibited by state regulations. According to current case law, interference with religious freedom can be justified to a large extent, but not in every individual case, by the protection of public health. Instead of complete bans, solutions could have been found that would have done greater justice to both conflicting fundamental rights.

In the future, more decisions and judgments on the subject of religious freedom and the COVID-19 crisis are to be expected, from both state courts and perhaps also from church authorities, affording further legal insights. It is now clear that the three-way relationship between church, state, and individual believers is a balanced one only if the church also guarantees effective protection of fundamental rights. In the interplay between state and church, individual believers must not be the losers. According to the teachings of the Second Vatican Council, the relationship between state and church should be such that it serves men.⁹⁶

96 Second Vatican Council, *Gaudium et spes*, Article 76: "The Church and the political community in their own fields are autonomous and independent from each other. Yet both, under different titles, are devoted to the personal and social vocation of the same men. The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all. For man's horizons are not limited only to the temporal order; while living in the context of human history, he preserves intact his eternal vocation."