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THE COVID-19 PANDEMIC  
AND THE FREEDOM TO EXERCISE RELIGION:  
THE DECISION OF THE FRENCH COUNCIL OF STATE

*ABSTRACT. With Decision no. 452144 of 6 May 2021, the Council of State rejected the preliminary application to suspend the curfew during the night between 7 and 8 May for the celebration of the “Night of the Destiny,” the most important Muslim occasion. The decision must balance the freedom to the exercise of religion with the fight against the COVID-19 pandemic.*

With an urgent application sought to the *Conseil D'Etat*, the *Grande Mosquée de Paris* and two religious associations asked for the authorization to suspend the curfew during the night between 7 and 8 May in order to celebrate the *Qadr Night*. The celebration, named also *the Night of Destiny*, is celebrated by praying all night long and is one of the most important events in the Islamic religion, one of the last nights of Ramadan in which, according to the Islam religion, the Koran was revealed.

A previous request of exception was sought by the applicants to the Ministry of the Interior on 21 April, asking for a suspension of the curfew in order to celebrate the occasion, as it was already decided for the Christmas celebration; unfortunately, the submission was denied due to the high risks related to the evolution of the COVID-19 pandemic. In April 2021, France was in fact facing the peak of the third wave with roughly 34,000 new cases,<sup>1</sup> a risk higher than the one at the end of the year.

Facing the first rejection, the *Grande Mosquée de Paris*, the *Société des Habous et Lieux Saints de l'Islam* and the *Fédération de la Grande Mosquée de Paris* released a preliminary injunction claiming a suspension of the curfew between 9 p.m. and 2 a.m. of the night between 7 and 8 May in order to participate in the ceremony for the Night of the Destiny, the Qdar Night. The request was based on two main arguments: the respect of the measures to avoid contagions and the principle of equality between religions.

The applicants asserted that they would have been able to respect the strict social distancing rules in order to prevent new cases, stressing the point that, despite the trend of the pandemic that had been perpetuating for months, there was no evidence of any outbreak in any Mosque, so the risk of new clusters would have been very low.

The second claim was related to the breach of the principle of equality between religions and specifically to the free exercise of religion, arguing that several exceptions of the restrictions in action had already been taken for the Christmas Eve and Easter celebrations, and there would not been any reason not to provide another suspension for the *Night of Destiny*.

With Decision no. 452144 of 6 May 2021, the Council of State followed Article

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<sup>1</sup> <<https://www.data.gouv.fr/fr/organizations/sante-publique-france/>>.

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1 of the French Constitution, Art. 9 of the European Convention on Human Rights, and Articles 1 and 25 of the law of separation between the State and Religion of 9 December 1905, according to which anyone has the right to manifest his/her religion in public, the only limitation permitted to the free exercise is the control of Public Authority, necessary to ensure public order.

The decision rejected the request with several arguments, firstly the Council stated that there was no reason to doubt that the exercise of religion is a fundamental right, but it must be reconciled with the protection of public health, so the respect of the freedom of exercise of religion must be balanced with the evolution of the pandemic. The Council also stated that that the trend of the pandemic was still very dangerous in the Country, decreasing but still higher than in December 2020, with an incidence rate of 279,1 cases every 1,000,000 people; they thus decided to reject the request.

As second argument, the decision provided the efficiency of the curfew measure, stressing the point that other Mosques already adopted strict measures to prevent the pandemic diffusion, also by using electronic devices that could transmit the ceremony so to allow people to take part in the ceremony.

At last, the lack of necessity of an exception was demonstrated also by the fact that the French Minister of the Interior had decided to anticipate the curfew from 7 a.m. to 6 a.m. to permit the first pray of the morning during Ramadan.

The decision of the Council of State is strongly related to the pandemic trend, but at a more accurate analysis the two celebrations might be very close one to another; in fact, it appears that France suspended the curfew for Christmas eve with more than 21,600 cases a day and more than 24,600 total hospitalizations, against the 21,700 new cases and 26,900<sup>2</sup> total hospitalization of 6 May, while France was exiting from the third wave of the pandemic.

Furthermore, the number of people who would benefit from the exception requested would have been very different, with a related different risk of new clusters. France in 2020 counted over 37,000 Catholics and over the 5,400 Muslims (statista.com) causing a noticeably lower movement of people with a consequent re-

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<sup>2</sup> <<https://www.data.gouv.fr/fr/organizations/sante-publique-france/>>.

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duction in the risk of new outbreaks compared to the Christmas celebrations.

The decision is also interesting in comparison to a similar case of the Supreme Court of the U.S.A., *The Roman Catholic Diocese of Brooklyn, New York, Applicant v. Andrew M. Cuomo*, which stated a suspension of the social distancing measure pursuant to the right to exercise religion. On 12 November 2020, The Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sought an application to block the impositions of the executive decree that imposed restrictions to indoor gatherings, including places of worship. The reasoning of the Supreme Court is based on the same principles: the freedom of exercise of religion, the right to health and the effectiveness of restrictions, but the conclusions are opposite. The Supreme Court enjoined the severe restrictions against the freedom of exercise religion, considering the right to exercise religion a fundamental right provided by the Constitution that cannot be restricted even temporarily and even with the use of technology, which was considered not sufficient.

It is interesting to underline that while in the fluctuating trend of the pandemic, the temporary of the restrictions are considered a right compromise between the right to exercise religion and the battle against COVID, in the French case, in the American case the uncertainty of the measure are considered a potential limit of the right to freely exercise religion, an unacceptable risk of breaching of the right of exercise religion.