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NOTTINGHAM LAW JOURNAL

VOL. 30 **2022**

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The citation for this issue is (2022) 30 Nott L J.
ISSN No. 0965–0660

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EDITORIAL

The Nottingham Law Journal has long been proud of its identity as a general journal spanning a wide breadth of disciplinary interests. The current edition is very much in keeping with this tradition of diversity and brings together an academic smorgasbord of stimulating contributions from a variety of legal fields and perspectives. Nevertheless, an overarching theme emerges, with all of the pieces in one way or another examining the nature and operation of the rule of law.

Azhin Omer, Austen Garwood-Gowers, and Nazar Shabila address the legal and practical challenges of reforming the health system governance of the Kurdistan region of Iraq, thrown into painfully sharp focus by the Covid-19 pandemic. A further article shaped by the global health crisis is offered by Alejandro Torres Gutiérrez, as he interrogates the relationship between anti-coronavirus measures and the fundamental right of religious freedom in Spain.

In addition to assessing what insights might be gleaned from governmental and legislative reactions to the pandemic, the world is now faced with confronting the social and economic aftermath of the devastation wrought. As such, David Cornwell's reflection on living rough in the 2020s, and lessons which might be learnt from England's historic poor law is a thought-provoking, if uncomfortable read.

In contrast, Helen O'Nions puts forward a very different discussion, but one with equally profound implications for fundamental rights and humanitarian issues, examining the phenomena of "Romaphobia" in the Strasbourg Court, and the reasons for the unsatisfactory judicial responses to this pernicious form of racism and social exclusion within many European societies.

Sophie Gallop also confronts questions around the role of judges in securing or jeopardising the protection of essential freedoms, and indeed the rule of law itself, in an examination of judicial independence, and the lessons that democratising states in the contemporary world might learn from the experience of the USSR.

Finally, Ryan Cushley-Spendiff keeps the flag of private law flying, with an examination of regulatory shopping for corporate governance regimes, using Japan and the United States to form the basis of two case studies. Although situated in a commercial context, in many respects, this analysis fits snugly within the broad topic of the rule of law, the golden thread which draws together the varying threads of this edition of the Nottingham Law Journal, and provides readers will plentiful fodder for reflection.

As always, I am deeply grateful to all of the contributing authors, without whose work ethic and creativity there would be no journal. I am also extremely appreciative of the editorial team, Daniel Gough as Deputy Editor, Linda Mururu as Postgraduate Associate Editor, and Ryan Cushley-Spendiff as Associate Editor. Furthermore, the administrative support of Kerri Gilbert has once again been invaluable. I am also thankful for the guidance and feedback offered by previous editors who remain colleagues (Tom Lewis, Helen O'Nions and Janice Denoncourt) as well as the necessarily unsung, but indefatigable and greatly valued team of anonymous peer reviewers.

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ARTICLES

The address for submission of articles is given at the beginning of this issue.

IMPACT OF COVID-19 PANDEMIC ON FUNDAMENTAL RIGHT OF RELIGIOUS FREEDOM IN SPAIN

ALEJANDRO TORRES GUTIÉRREZ[*]

1. THE PANDEMIC AND THE CONSTIUTIONAL MECHANISMS THAT PROTECT THE RULE OF LAW

1.1. Constitutional Provisions.

Article 116 of the Spanish Constitution, establishes that an *Organic Act shall make provision for the states of alarm, emergency and siege (martial law), and the powers and restrictions attached to each of them*.[1] This constitutional provision is developed by the Organic Act 4/1981, of 1 June 1981, of the states of alarm, emergency and siege,[2] of which Article 4 empowers the Government to declare the state of alarm, in all or in part, of the national territory when health crises occur, such as epidemics. Under these premises, the COVID-19 pandemic is a clear case in which the state of alarm may be declared.

Unlike what happens in the case of the declaration of the states of emergency and siege, in which, according to Article 55 of the Constitution it is possible to suspend some fundamental rights, this is not feasible during the state of alarm. In fact, regarding the particular fundamental right of religious freedom, it cannot be *suspended* in any of these three scenarios of constitutional exceptionality. But some fundamental rights may be *limited*. This doctrine has been affirmed by the Spanish Constitutional Court in the Sentence 83/2016, of 28 April 2016,[3] the court order 40/2020, of 30 April 2020,[4] and more recently by the Sentence 148/2021, of 14 July 2021[5] and the Sentence of 27 October 2021.[6]

*Full Professor of Constitutional Law, Institute for Advanced Social Research (I-COMMUNITAS) Public University of Navarre. The Research Project : "Estatuto Jurídico de las Confesiones Religiosas sin Acuerdo de Cooperación en España – Legal Statute of Religious Groups without Cooperation Agreement in Spain". PID2020-114825GB-I00. Co-Directed by Professors Alejandro Torres Gutiérrez and Óscar Celador Angón. Financed by Spanish Ministry of Science and Innovation, MCIN/ AEI/10.13039/501100011033.

[1] Official Bulletin of the State of 29 December 1978, <https://www.boe.es/buscar/act.php?id=BOE-A-1978–31229> There is an English version at: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>.

[2] Official Bulletin of the State of 5 June 1981, https://www.boe.es/eli/es/lo/1981/06/01/4/con.

[3] Legal Ground number 8. Official Bulletin of the State of 31 May 2016, <https://www.boe.es/boe/dias/2016/05/31/pdfs/BOE-A-2016–5195.pdf>.

[4] Legal Ground number 4, <https://hj.tribunalconstitucional.es/es/Resolucion/Show/26279>.

[5] Legal Ground number 10. Official Bulletin of the State of 31 July 2021, <https://www.boe.es/boe/dias/2021/07/31/pdfs/BOE-A-2021–13032.pdf>.

[6] Legal Ground number 7. <https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2021_107/2020-5342STC.pdf>.

The right of religious freedom, as we said, has the status of fundamental right in Spain, but, nevertheless, it is not an *unlimited* right. In fact, Article 16 of the Spanish Constitution recognizes the 'freedom of ideology, religion and worship to individuals and communities . . . with no other restriction on their expression than may be necessary to maintain public order as protected by law'.[7] It means that, constitutionally speaking, the *public order* may act like a *limit* of this right, because it is a *fundamental* right, but it is not *absolute*. This idea is confirmed by Article 3 of the Organic Law 7/1980, of 5 July 1980, of religious freedom, that specifically foresees the public health, within the limits of this fundamental right. The line of separation between *suspension* and *restriction* is too *narrow*, and it is not easy to define it *de facto*, and, by this reason, it is convenient to be conscious of the possible existence of hidden risks.[8]

1.2. The Declaration Of The State Of Alarm Of 14 March 2020 And The Immediate Exceptional Regulation Of Religious Freedom.

Using the habilitation recognized in Article 116.2 of the Spanish Constitution, the Government proclaimed the state of alarm by means of the Royal Decree 463/2020, of 14 March 2020[9] (modified by the Royal Decree 465/2020, of 17 March 2020[10]), for a period of 15 days, susceptible to additional extensions, covering all the national territory. Following the Article 116.2 of the Spanish Constitution, the Congress was immediately informed, on 20 March 2020.[11]

A new plenary session of Congress was celebrated on 25 March 2020, in which an extension of the state of alarm was approved for an additional period of 15 days (Article 116.2 of the Spanish Constitution and Article 6 of the Organic Act 4/1981, of 1 June 1981), by 321 votes in favour, 0 against, and 28 abstentions. The Congress passed 6 additional extensions.

EXTENSIONS OF THE STATE OF ALARM DECLARED ON 14 MARCH 2020[12]

Extension	Period	Plenary Session of Congress	Votes	YEA	NO	ABS	Royal Decree
1	Until 00:00 a.m. April 12, 2020	March 25, 2020	349	321	0	28	R.D. 476/2020, of 27 March 2020
2	Until 00:00 a.m. April 26, 2020	April 9, 2020	349	270	54	25	R.D. 487/2020, of 10 April 2020

[7] Official Bulletin of the State of 29 December 1978, <https://www.boe.es/buscar/act.php?id=BOE-A-1978–31229>

[8] Valerio d'Aló, 'Covid-19: Limitations to public worship in Italy, Spain and Poland' in: Pierluigi Consorti (Ed.), *Law, religion and Covid-19 Emergency* (Pisa, May 2020) 74–79. Sara Sieria Mucientes, 'Estado de alarma' (2020) 19 *Eunomía. Revista en Cultura de la legalidad* 275, 292–297. José Antonio Soler Martínez, 'Estado de alarma y libertad religiosa y de culto, in: Revista General de Derecho Canónico y Derecho Eclesiástico del Estado' n. 53, 2020, 6–7, 24. Belén Rodrigo Lara, '*La libertad religiosa en España durante la pandemia de COVID-19*' in Javier Martínez Torrón and Belén Rodrigo Lara (Eds.), *COVID-19 y Libertad Religiosa,* (Madrid, 2021) 125–126, 131. María José Parejo Guzmán, 'Los estados de alarma en España durante la pandemia del COVID-19 en relación al derecho a la libertad religiosa, a la religiosidad y a las religiones' in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, n. 55, 2021, 12–15, 40–44.

[9] Official Bulletin of the State of 14 March 2020, https://www.boe.es/boe/dias/2020/03/14/

[10] Official Bulletin of the State of 18 March 1920, https://www.boe.es/boe/dias/2020/03/18/pdfs/BOE-A-2020–3828.pdf.

[11] http://www.congreso.es/public_oficiales/L14/CONG/DS/PL/DSCD-14-PL-15.PDF.

[12] See: http://www.congreso.es.

Extension	Period	Plenary Session of Congress	Votes	YEA	NO	ABS	Royal Decree
3	Until 00:00 a.m. May 10, 2020	April 22, 2020	345	269	60	16	R.D. 492/2020, of 24 April 2020
4	Until 00:00 a.m. May 24, 2020	May 6, 2020	350	178	75	97	R.D. 514/2020, of 8 May 2020
5	Until 00:00 a.m. June 6, 2020	May 20, 2020	350	177	162	11	R.D. 537/2020, of 22 May 2020
6	Until 00:00 a.m. June 21, 2020	June 3, 2020	350	177	155	18	R.D. 555/2020, of 5 June 2020

Article 7 of the Royal Decree 463/2020, of 14 March 2020 (latterly modified by the Royal Decree 465/2020, of 17 March 2020), with a very *expansive* and *invasive* wording,[13] limited the freedom of movement of the citizens (a fundamental right recognized by Article 19 of the Spanish Constitution), that was only permitted for a very restricted list of activities:

a) Acquisition of food, pharmaceutical products, and other basic goods.
b) Displacement to hospitals and health services.
c) Displacement to the workplace to work or for professional purposes.
d) Return to the place of residence.
e) Assistance and care of elderly, minors, dependents, handicapped, or especially vulnerable people.
f) Displacement to financial and insurance entities.
g) Cases of force majeure, or situation of need.
h) *Any other activity of analogous nature.*

Article 11 of the Royal Decree 463/2020, of 14 March 2020, limited the maximum capacity of the places of worship and funerals, trying to avoid throngs of people, in civil and religious ceremonies. This article imposed the adoption of organizational measures, in order to guarantee a minimum distance of one meter, at least, between attendants, and was in force during all the state of alarm.

If we read carefully the former list of Article 7, of the Royal Decree 463/2020, of 14 March 2020, displacement to places of worship is not specifically included among the *permitted* activities. It should be practically impossible to make an inclusive list with every *essential* activity, and *justified* case. In fact, the initial wording of this article did not include subsection h). The legislature was aware of this mistake immediately, and for this reason modified the list of cases, through the Royal Decree 465/2020, of 17 March 2020, that added subsection h). Nevertheless, a teleological interpretation of

[13] Gerardo Ruiz Rico, *Las dimensiones constitucionales de la crisis sanitaria en España. Dudas e incertidumbres presentes y futuras* (2020) 2 DPCE online 1514.

both Royal Decrees[14] has the consequence that the limit to the freedom of movement does not affect the freedom of religion and all displacements to places of worship should be logically permitted because this last fundamental right, the freedom of religion, was not suspended, and the prohibition of these movements would be unconstitutional.

If we take into consideration the Articles 7 and 11 of the Royal Decree 463/2020, some conclusions are clear: worship is not suspended, places of worship remain open, it is not forbidden to go to these places, and attendance at religious ceremonies is allowed with social distancing of 1 meter.[15] In fact, the provisions on religious freedom of the Royal Decree 463/2020 were among the less limitative in all Europe.[16] In France, for instance, the places of worship were allowed to remain open by the article 8[17] of the Decree 2020–293 of 23 March 2020,[18] but any meeting inside of them was forbidden, with the only exception of funeral celebrations (and, in this case, the maximum attendance of 20 people).

The Order of the Ministry of Public Health SND/272/2020 of 21 March 2020[19] allowed in its Article 3.1 the inscription of deaths in the Civil Register, and the administrative issue of the burial license, without the previous delay of a period of 24 hours. The Article 3.2 of the cited Order permitted the burial, cremation, or donation of the corpse, for scientific or medical purposes, without a waiting period of 24 hours if it was not against the will of the person deceased, or their heirs.

At the end of March and the beginning of April the health crisis was in a serious situation, with almost one thousand deaths per day. In this particularly serious context, the provisions of the Royal Decree 463/2020 would become substantially more restrictive with respect to funeral ceremonies, by a new Order of the Ministry of Public Health, the Order SND/298/2020, of 29 March 2020,[20] that established exceptional measures over wakes and funeral ceremonies, to limit the spread and contagion of COVID-19. This new Order prohibited all type of wakes, both in public and private facilities, as well as in private homes.[21] In the case of deaths caused by COVID-19, it banned all types of *thanatoesthetic* and *thanatopraxia* practices, and all kinds of religious interventions that imply invasive procedures over the cadaver.[22] Similar regulations were passed, for instance, in Argentina by the *Recommendations* of the Minister of Health of 23 April 2020.[23] These regulations might raise conflicts with some Jewish and Muslim religious funerary prescriptions, but the Spanish or Argentinian restrictive funerary norms were

[14] This analogic interpretation was maintained also by Silva Sánchez, Soler Martínez and Parejo Guzmán: Manuel J Silva Sánchez 'Breve informe sobre la apertura y acceso a lugares de culto durante la epidemia del COVID19' (2020), 6. <https://e-cristians.cat/wp-content/uploads/2020/06/Breve-informe-sobre-la-apertura-y-acceso-a-lugares-de-culto-durante-la-epidemia-del-Covid19.pdf>; José Antonio Soler Martínez, 'Estado de alarma y libertad religiosa y de culto' (2020) 53 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado 27; María José Parejo Guzmán, 'Los estados de alarma en España durante la pandemia del COVID-19 en relación al derecho a la libertad religiosa, a la religiosidad y a las religiones, in: Revista General de Derecho Canónico y Derecho Eclesiástico del Estado, n. 55, (2021) 14.

[15] José Antonio Soler Martínez, 'Estado de alarma y libertad religiosa y de culto' (2020) 53 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado 25.

[16] It is particularly interesting the comparative table elaborated by Artaud de la Ferrière cited by Soler Martínez in: Soler Martínez, 'Estado de alarma . . . ' (n15) 39–40.

[17] *IV. - Les établissements de culte, relevant de la catégorie V, sont autorisés à rester ouverts. Tout rassemblement ou réunion en leur sein est interdit à l'exception des cérémonies funéraires dans la limite de 20 personnes.*

[18] Décret n0 2020–293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire.

[19] Official Bulletin of the State of 22 March 2020, <https://www.boe.es/boe/dias/2020/03/22/pdfs/BOE-A-2020–3974.pdf>

[20] Official Bulletin of the State of 30 March 2020, <https://www.boe.es/boe/dias/2020/03/30/pdfs/BOE-A-2020–4173.pdf>

[21] Article 3 of the Order SND/298/2020, of 29 March 2020.

[22] Article 4 of the Order SND/298/2020, of 29 March 2020.

[23] Juan Navarro Floria, 'La pandemia y la libertad religiosa en la Argentina: algunas reflexiones' in: Javier Martínez Torrón and Belén Rodrigo Lara (eds), *COVID-19 y Libertad Religiosa* (Madrid, 2021) 339–342.

not based on an irrational *Josephinism* because, in our opinion, they may be justified by reasons of public order, and the protection of public health.

The Order SND/298/2020 postponed[24] the celebration of religious, or civil, funeral ceremonies, until the end of the state of alarm,[25] but did not affect the rest of religious ceremonies.[26] Funeral corteges were limited to a maximum of 3 relatives or closest intimates, in addition to, eventually, the minister of worship, or assimilated person of the respective religious group, for the practice of the funeral rites of farewell to the deceased. In any case, the distance of one to two meters between them should always be respected.[27] But we must recognize also that this delicate regulation tried to be respectful of some funerary religious traditions, especially those of Buddhism.[28]

These regulations were particularly painful for the families because of their hard impact on social practices concerning grief and the rite of farewell. Only one and a half months later, the Order SND/386/2020, of 3 May 2020,[29] and the Order SND/399/2020, of 9 May 2020,[30] would start to relax these limitations and would authorize, in all territories in Phase 1 of the process of *de-escalation*, the celebration of wakes, still with many restrictions on attendance.

If we want to understand the reasons for such hard limitations, it should be useful to read the Preamble of this Order, in which it was expressly recognized that although in its Article 11, the aforementioned Royal Decree 463/2020, established that attendance at places of worship and civil and religious ceremonies, including funerals, was conditioned to the adoption of organizational measures avoiding crowds of people, and the maintenance of compulsory distance of at least one meter, however, *due to the special characteristics surrounding funeral ceremonies*, it was difficult to ensure the

[24] See the particularly critical paper: Dionisio Fernández de Gatta Sánchez, 'Los problemas de las medidas jurídicas contra el coronavirus: las dudas constitucionales sobre el Estado de Alarma y los excesos normativos' *La Ley* (6th May 2020).

[25] Article 5, first paragraph, of the Order SND/298/2020, of 29 March 2020.

[26] Manuel J Silva Sánchez, 'Breve informe sobre la apertura y acceso a lugares de culto durante la epidemia del COVID19' (2020) 8 <https://e-cristians.cat/wp-content/uploads/2020/06/Breve-informe-sobre-la-apertura-y-acceso-a-lugares-de-culto-durante-la-epidemia-del-Covid19.pdf>; Soler Martínez, 'Estado de alarma . . . ' (n15) 37.

[27] Article 5, second paragraph, of the Order SND/298/2020, of 29 March 2020.

[28] In this regard, it is particularly interesting the document: *Guía para la gestión de la diversidad religiosa en cementerios y servicios funerarios*, (Guide for the management of religious diversity in cemeteries and funeral services), prepared in 2013, by two Spanish anthropologists, Jordi Moreras, (University RoviraiVirgili), and Sol Tarrés, (University of Huelva). In its pages 32 and 33, it is included a reference to the Orthodox Christian religious tradition, in which, burial usually takes place on the third day after death, but, we add, in this case it is not a compulsory rule of *ius cogens*. More important is the peculiarity of the Buddhist funeral rite. Moreras and Tarrés affirm that, in Buddhism, all manipulation of the body is prohibited before the period of 72 hours. It may be taken into consideration: Jordi Moreras and Sol Tarrés, *Guía para la gestión de la diversidad religiosa en cementerios y servicios funerarios*, published by the Observatory of Religious Pluralism in Spain, Madrid, 2013. The content of this Guide was reviewed and validated by the Islamic Commission of Spain, the Federation of Jewish Communities of Spain, the Jehovah's Christian Witnesses, the Orthodox Episcopal Assembly of Spain and Portugal, the Church of Jesus Christ of Latter-day Saints, the Federation of Buddhist Communities of Spain, the Commission of the Observatory of Religious Pluralism in Spain, (Ministry of Justice and the Public Foundation *Pluralismo y Convivencia*), and the Advisory Council of the Public Foundation *Pluralismo y Convivencia*, (the regional Government of the Autonomous Community of Catalonia, -*Generalitat de Catalunya*- and the Government of the Autonomous City of Ceuta). The Guide is accessible online in a Spanish version at: <http://www.observatorioreligion.es/upload/28/95/Guia_Cementerios_y_Servicios_Funerarios.pdf>
Please, note that, on March 6, 2015, a funeral Protocol was signed at the headquarters of the Spanish Ministry of Justice, under its patronage, between the Buddhist Union of Spain and Parcesa Funeral Home, in which it was contemplated that the definitive death, (a concept equivalent to the end of inner breath), must be asserted by a Minister of Buddhist Worship. This can take up to 10 days.
It may be particularly interesting:
<https://www.ccebudistes.org/es/noticias/protocolo-funerario-para-budistas/> <http://www.federacionbudista.es/resumen-del-protocolo-funer.html> <https://www.revistafuneraria.com/noticias/protocolo-funerario-especifico-para-los-practicantes-del-budismo-vajrayana-en-espana> Further information over Buddhist funerary rites: Pablo Martinez de Villa de las Heras, Muerte, Budismo y Protocolo Funerario en España: Aproximación a algunos grupos budistas y a la FBE. This particularly detailed research was directed by Franciso Díez de Velasco accessible at: <https://eprints.ucm.es/39043/1/%5BTFM%5D%20Muerte%20y%20Budismo%20Pablo%20Mart%C3%ADnez%20de%20Villa.pdf> Additional documentation: <http://www.redfuneraria.com/funeral-budista>

[29] Official Bulletin of the State of 3 May 2020, <https://www.boe.es/boe/dias/2020/05/03/pdfs/BOE-A-2020–4791.pdf>

[30] Official Bulletin of the State of 9 May 2020, <https://boe.es/boe/dias/2020/05/09/pdfs/BOE-A-2020–4911.pdf>

application of these distancing measures with the interpersonal separation of more than one meter, that were necessary to limit the spread of the virus. On the other hand, the family members and friends of the deceased could have been close contacts, and it was especially important to observe the quarantine and distance rules.

In fact, one of the most important outbreaks of the pandemic was a burial ceremony celebrated in the city of Vitoria, on 23 February 2020 that immediately spread the disease in the Autonomous Communities of Basque Country and La Rioja, with more than fifty people affected.[31]

Silva Sánchez and Solar Martínez[32] consider that the Order of the Minister of Public Health SND/298/2020, of 29 March 2020, went further than the Royal Decree 463/2020 of 14 March 2020. According to these authors, the Order did not make an *interpretation*[33] of the Royal Decree, but rather *modified* it. The Order introduced *new* limitations and prohibitions that were *not included* in the Royal Decree. Therefore, there would be suspicions of a possible *excess* or *extra-limitation*.

During the most terrible days of the pandemic's first wave (at the end of March and the beginning of April 2020), an additional problem arose; the insufficiency of suitable places for the practice of burial of the cadavers of citizens belonging to some religious minorities, which was aggravated when Morocco prohibited the repatriation of corpses[34] and by the legal prohibition of embalming corpses. This practice is especially frequent among some Muslim communities, like the Moroccan-Muslim minority, who usually practice this technique that makes it possible to transfer the corpses to their country of origin.[35] A deep and serious reflection must be done by the Spanish administrative authorities, especially at a local level, to resolve the lack of adequate spaces in cemeteries destined for religious minorities.[36]

[31] <https://www.elcorreo.com/sociedad/salud/cementerio-salvador-vitoria-barbacoa-haro-foco-coronavirus-20200308093309-nt.html>; <https://elpais.com/sociedad/2020–03-06/mas-de-60-personas-se-contagiaron-a-la-vez-en-un-funeral-en-vitoria.html>

[32] Soler Martínez, 'Estado de alarma . . . ' (n15) 29–31.

[33] Article 4.3 of the Royal Decree 463/2020 only allows to the Minister of Health to make orders, resolutions, dispositions, and instructions with and *interpretative* character.

[34] <https://www.elconfidencialdigital.com/articulo/religion/mezquitas-espanolas-presionan-administracion-cumpla-ley-construya-cementerios-musulmanes/20210225181615217724.html>

[35] The edition of the on-line Spanish newspaper, *El Independiente*, echoed this serious problem, in its edition of 13 April 2020: Iva Anguera de Sojo, 'Los musulmanes, atrapados por el coronavirus sin opciones para enterrar a sus fallecidos' (13th April 2020) <https://www.elindependiente.com/espana/2020/04/13/los-musulmanes-atrapados-por-el-coronavirus-sin-opciones-para-enterrar-a-sus-fallecidos/>

[36] Juan José Guardia Hernández, 'El lugar de culto en el suelo de titularidad pública en España' (2009) 23 Cuadernos Doctorales 11, 23; José Luis Llaquet de Entrambasaguas, 'Normativa catalana sobre centros de culto' (2011) 27 Revista General de Derecho Canónico y Eclesiástico del Estado 1, 27; José Luis Llaquet de Entrambasaguas, *El régimen jurídico catalán de los centros de culto*' (Rasche 2013); José Luis Llaquet de Entrambasaguas, 'El particularismo normativo musulmán en materia funeraria y su relevancia en la reglamentación de policía sanitaria mortuoria española' in: Juan González Ayesta (ed), *Eficacia en el derecho estatal de normas o actos de las confesiones religiosas* (Comares 2015); José Luis Llaquet de Entrambasaguas, '*El marco jurídico de los centros de culto en Cataluña: 10 años de expectativas*, *Revista Religión y Derecho*, XIV, 2019, pp. 257–282. Agustín Montilla de la Calle, 'Ministros y lugares de culto' in Ivan C Ibán, Luis Prieto Sanchís and Agustín Montilla de la Calle, *Manual de Derecho Eclesiástico del Estado* (Madrid 2004); Agustín Montilla de la Calle, 'La protección de los lugares de culto islámicos' in Agustín Montilla de la Calle (Dir.), *Los musulmanes en España: libertad religiosa e identidad cultural*, (Trotta 2004); Miguel Rodríguez Blanco, *Libertad religiosa y confesiones: el régimen jurídico de los lugares de culto* (Centro de Estudios Políticos y Constitucionales/Boletín Oficial del Estado 2000); Miguel Rodríguez Blanco, 'Libertad religiosa y cementerios (primeras aproximaciones)' in: Rafael Navarro Valls, Joaquín Mantecón Sancho and Javier Martínez Torrón (eds), *La libertad religiosa y su regulación legal: La Ley Orgánica de la Libertad Religiosa* (Iustel 2009). Miguel Rodríguez Blanco, *Régimen jurídico de cementerios y sepulturas* (Comares 2015); José Antonio Rodríguez García, *Urbanismo y confesiones religiosas*. (Montecorvo 2003) 110. José Antonio Rodríguez García, 'A vueltas con Urbanismo y confesiones religiosas' in *Estudios jurídicos de Derecho urbanístico y medioambiental. Libro-Homenaje al Profesor Joaquín Mª Peñarrubia Iza*, (Montecorvo 2007) 151; José Antonio Rodríguez García, '*Los problemas urbanísticos derivados del establecimiento de lugares de culto y la realización de ritos funerarios de las minorías religiosas en cementerios municipales*' in Igor Minteguia Arregui (ed.), *Derechos humanos en la ciudad* (University of the Basque Country 2009); José Antonio Rodríguez García, 'Lugares de culto y planificación urbanística. (Con especial mención a algunos de los problemas de los lugares de culto de las iglesias ortodoxas en relación con el urbanismo)' in Alejandro Torres Gutiérrez (ed), *Estatuto jurídico de las Iglesias Ortodoxas en España. Autonomía, límites y propuestas de lege ferenda*, (Dykinson 2020).

The Royal Decrees 463/2020 of 14 March 2020 and 465/2020 of 17 March 2020, did not include any specific provision about weddings, and other religious ceremonies, like baptisms and communions. Theoretically speaking, the express wording of these regulations did not forbid them expressly, and formally it was possible to understand that they were included within article 7, subsection h), of the Royal Decree 463/2020, as *other activity of analogous nature* directly connected with the exercise of the fundamental right of religious freedom, inside the limits of article 11 of that Royal Decree. Nevertheless, these ceremonies *de facto* were postponed, because the health conditions were not conducive to their celebration, and restaurants, hotels, and other similar facilities were closed.[37]

The mobility restrictions, the limits to the maximum capacity in places of worship, and the circumstances connected *de facto* with the health crisis had the *collateral* consequence of a deep reduction in the attendance of believers at the places of worship, and subsequently a drop in the collected incomes during religious ceremonies. According to *Europa Press,*[38] the Catholic Church lost 38.4 million Euros in collections during the 2 initial pandemic months. The Spanish Episcopal Conference faced this challenge and updated in mid-April its *virtual collection plate*[39] which, although it was formally active since 2016, barely collected average amounts between 70,000 and 80,000 Euros per month because of its low visibility. The awareness campaign had consequences quickly. In April 2020, 412,000 Euros were collected, and in the first half of May the global amount was 1,100,000 Euros, according to these sources. The conclusions cannot be more evident: the awareness of the faithful about their economical commitments to the Church was a necessity.

At that time, the Final Disposition n. 2 of the Royal Decree-Law 17/2020 of 5 May 2020,[40] increased the percentage of deduction in the Income Tax for donations up to 150 Euros up to 80%,[41] (and up to 35%[42] for the donations of more of 150 Euros[43] with a limit of 10% of the taxable income), in favor of religious groups with an Agreement of Cooperation with the State, (Catholics, Evangelicals,[44] Muslims, and Jews). This measure was *clever*, but very *limited*. It may be considered *clever* because it tries to make the faithful aware of their *moral* and *economical* commitments to the religious group of belonging, but nevertheless it is not ambitious at all, because it only benefits the religious groups with an Agreement of Cooperation, and discriminates against all the other religious groups without Agreement, such as the Church of Jesus Christ of Latter-day Saints, Jehovah´s Witnesses, Buddhists, and most of Christian Orthodox Churches (they enjoy the *mere* administrative declaration of *notorious presence* in Spain but they did not sign an Agreement of Cooperation), and other religious groups such as Hindus, Sikhs, or Scientologists, (merely inscribed in the Register of Religious Groups of the Ministry of Justice).

[37] Lara, 'La libertad' (n8) 138–139.

[38] 'La Iglesia española dejó de ingresar unos 38 millones de euros en colectas durante dos meses de pandemia' *Europa Press* (18th April 2020) <https://www.europapress.es/sociedad/noticia-iglesia-espanola-dejo-ingresar-38-millones-euros-colectas-dos-meses-pandemia-20200518144435.html>
La noticia aparecida en *La Vanguardia* puede verse en: <https://www.lavanguardia.com/vida/20200518/481253748250/conferencia-episcopal-donaciones-catolicos-pagar-sueldo-cura.html>

[39] <www.donoamiiglesia.es>

[40] Official Bulletin of the State of 6 May 2020, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020–4832.

[41] The previous percentage was 75%.

[42] The previous percentage was 30%,

[43] This percentage will be 40%, per periodical donations during 3 years, (previously it was 35%).

[44] It is important to know that Greek and Serbian Christian Orthodox are covered by the Agreement with the Evangelical Federation, because they enjoy its *legal hospitality*.

The financial problems were deeper in the case of all the minority religious groups that are excluded in the tax assignment of 0.7% of Income Tax (an exclusive Catholic privilege that provided 301,07 million Euros in 2020[45]). Some minority religious groups, such as Evangelicals[46] and Orthodox Christians, wanted to include their ministers of worship in the *Records of Temporary Employment Regulation*[47] *because of the dramatic income reduction during the lockdown and the serious difficulties in the payments of rents, salaries, and social security contributions. This possibility was rejected by the Public Administration due to the particular nature of the link between the ministers of worship and their religious group and because, theoretically speaking from a legal point of view, the religious activities had not been suspended during the national lockdown.*

The ultraconservative party VOX, on 28 April 2020, filed an appeal of unconstitutionality against the Royal Decrees 463/2020, 465/2020, 476/2020, 487/2020, 492/2020, and the Order SND/298/2020, considering that they violated, among other fundamental rights, the freedom of religion consecrated in article 16 of the Spanish Constitution.

The Sentence of the Spanish Constitutional Court 148/2021, of 14 July 2021,[48] in a narrow margin of 6 votes to 5, declared the unconstitutionality of the restrictions to the freedom of movement during the declaration of the *first* state of alarm[49] from 14 March 2020 until 21 June 2020, (the majority of the Court considered that it was not a case of *limitation* of this right, but rather a case of *suspension*, and it was not possible during the state of alarm), nevertheless, the Constitutional Court considered that the limits imposed on the fundamental right of religious freedom were *constitutional*,[50] because it was always allowed the freedom of movement to attend places of worship, and the limits were *rational*, *justified*, and *proportional*.

1.3. Looking For A New Normality, The Process Of De-Escalation.

The strict citizens' confinement during the second half of March and April 2020, produced positive effects on the pandemic's evolution. Nevertheless, these positive consequences were not homogeneous in all the national territory. For this reason, the Minister of Public Health elaborated a series of Orders that gradually attenuated the initially severe restrictions over citizen mobility, or the right of assembly, and in parallel, the exercise of various collective manifestations of the right of religious freedom within the framework of the so-called Transition Plan to the *new normality*. These Ministerial Orders affected the exercise of the right to freedom of conscience and religion, modulating the restrictions initially imposed on the exercise thereof.

This *graduality* had a double projection[51]:

1) Firstly, from a *territorial* perspective, distinguishing between different parts of the national territory, depending on the degree of incidence of the pandemic. Different areas were delimited, in which the national Government was simultaneously calibrating and adapting the legal limitations in the exercise of rights. A new *national map* was defined with territories in Phase 0, 1, 2 and 3, until the return to the so-called *new normality*. This map would be periodically readjusted during the months of May and June 2020.

[45] <https://www.conferenciaepiscopal.es/financiacion-de-la-iglesia/>.

[46] <https://www.infolibre.es/noticias/politica/2020/04/17/el_gobierno_rechaza_erte_pastores_iglesia_evangelica_105964_1012.html>.

[47] *Expedientes de regulación temporal de empleo*, (ERTE), sic.

[48] <https://www.boe.es/buscar/doc.php?id=BOE-A-2021–13032>

[49] Legal Ground number 5.

[50] Legal Ground number 10.

[51] <https://www.olir.it/focus/alejandro-torres-gutierrez-medidas-adoptadas-en-espana-con-motivo-del-plan-de-transicion-hacia-la-nueva-normalidad/>

When the state of alarm was declared on 14 March 2020, all the restrictive regulations were of general homogeneous application in all the national territory. It had two strands of logic:[52]

a) Politically speaking, the normative structure of the state of alarm encourages the concentration of power in the central Government and does not stimulate the enactment of a legislation adapted to each particular region or territory.

b) Technically, during the first weeks of the state of alarm, the scientific and health uncertainty about COVID-19 was very high because of the imprecise knowledge on the sources and routes of contagion. This scenario required a more flexible interpretation of the principle of *precaution*, and for this reason, stricter and more homogeneous regulations were passed. Some initial restrictions proved to be too severe in some territories.

Nevertheless, at the end of April and the beginning of May 2020, it was evident that the epidemiological situation in the country was not homogeneous. For this reason, the *de-escalation* was done gradually, *step by step*, and distinguishing between territories. In many Autonomous Communities the territorial unit was the *province*, while in other cases it was the most precise concept of the *health area*, (for instance, in Castile and Leon).

2) Secondly, from a *material* point of view, the new administrative regulations defined different areas of activity, in which the restrictions were gradually attenuated. It was possible to classify these areas in 3 categories:

a) Wakes and funeral ceremonies:

Aforementioned, the Minister of Public Health, in his Order SND/298/2020 of 29 March 2020, prohibited all type of wakes in public and private facilities, as well as in private homes, and postponed the celebration of religious services or civil funeral ceremonies until the end of the state of alarm, and reduced the attendance at burial ceremonies to a maximum of 3 family members or close intimates; later allowing the minister of worship or assimilated person of the respective religious group for the practice of the funeral rites of farewell.

Article 5 of the Order SND/386/2020, of 3 May 2020,[53] and article 8 of the Order SND/399/2020 of 9 May 2020,[54] authorized in all territories in Phase 1 the celebration of wakes, in all kind of facilities, with a maximum limit of 15 people in outdoor spaces and 10 people in closed ones. They also authorized entourages for burial or cremation up to a maximum of 15 individuals, plus the minister of worship or assimilated person. The Supreme Court, on 27 May 2020, denied the precautionary suspension of the Order SND/399/2020.[55]

A new Order SND/414/2020, of 16 May 2020,[56] permitted in territories in Phase 2 a maximum limit of 25 individuals in the case of open-air wakes and 15 in closed spaces. The maximum attendance of entourages for burial or cremation was increased to 25.

Finally, the Order SND/458/2020 of 30 May 2020,[57] in the case of the new territories in Phase 3, increased the attendance at wakes up to 50 individuals (open air facilities) or 25 (closed facilities) and 50 people in the case of entourages for burial or cremation.

[52] Francisco Velasco Caballero, 'Libertad, Covid-19 y proporcionalidad (II): indicadores para el control de constitucionalidad' (31 May 2020) <https://franciscovelascocaballeroblog.wordpress.com/2020/05/31/libertad-covid-19-y-principio-de-proporcionalidad-ii-indicadores-para-el-control-de-constitucionalidad/>.

[53] Official Bulletin of the State of 3 May 2020, https://www.boe.es/boe/dias/2020/05/03/pdfs/BOE-A-2020–4791.pdf.

[54] Official Bulletin of the State of 9 May 2020, https://boe.es/boe/dias/2020/05/09/pdfs/BOE-A-2020–4911.pdf.

[55] Roj: ATS 2629/2020 – ECLI: ES:TS:2020:2629A Id Cendoj: 28079130042020200049, <https://www.poderjudicial.es/search/TS/openDocument/a58012dc6fd4954b/20200403>

[56] Official Bulletin of the State of 16 May 2020, <https://www.boe.es/boe/dias/2020/05/16/pdfs/BOE-A-2020–5088.pdf>

[57] Official Bulletin of the State of 30 May 2020, <https://www.boe.es/boe/dias/2020/05/30/pdfs/BOE-A-2020–5469.pdf>

b) In the case of attendance in places of worship, the new limitations were the follows:

ATTENDANCE IN PLACES OF WORSHIP – TRANSITION PLAN TO THE *NEW* NORMALITY

Order	Territorial Phase	Ratio of maximum capacity
Order SND/386/2020, 3 May 2020, (art. 6).	Phase 1	1/3
Order SND/399/2020, 9 May 2020, (art. 9).	Phase 1	1/3
Order SND/414/2020, 16 May 2020, (art. 9).	Phase 2	1/2
Order SND/458/2020, 30 May 2020, (art. 9).	Phase 3	3/4

A very detailed regulation introduced by Order SND/399/2020 established the criteria for the calculation of the maximum capacity of places of worship; trying to guarantee a minimum distance of 1 meter between attendants excluding corridors, lobbies, patios, and, if any, toilets. This Order made compulsory the visible publication of the maximum number of attendants and forbade the religious celebrations outside of the buildings of worship[58] as to avoid agglomerations of believers. This last limitation was criticized, but we think that it was justified because it was necessary to prevent possible spontaneous and uncontrolled concentrations of people, as already had happened, which in a situation of serious health crisis may have a *collateral* consequence: the spread of the disease. For this reason, we think that it was not an *arbitrary* or *capricious* limit and it was justified by reasons of public health.

González de Lara[59] considered that the limit of 1/3 of the maximum capacity of the places of worship established by the Orders of the Minister of Public Health SND/386/2020 of 3 May 2020, and SND/399/2020 of 9 May 2020, violated the principle of regulatory hierarchy because they introduced a more restrictive regulation than article 11 of the Royal Decree 463/2020 (passed by the Council of Ministers on 14 March 2020) in which only the limit of 1 meter of interpersonal distance was foreseen. We do not agree with this point of view because, *de facto*, there is not a great difference between both norms; the maximum capacity of a place of worship with 1/3 of attendants is very similar to this second case of a compulsory distance of 1 meter between individuals. The Orders SND/386/2020 and SND/399/2020 were a consequence not only of the general activation of the Minister of Public Health as *delegated authority* (and his consequent interpretative regulatory power), but a result of their own plan of de-escalation adopted by the Council of Ministers on 28 April 2020.

Additional administrative *recommendations* included:[60]

1. – The use of a mask.

2. – Before each meeting or celebration, disinfection tasks must be carried out in all the spaces and, during the activities, the disinfection of the objects that are most frequently touched will be repeated.

3. – The entrances and exits will be organized to avoid groups of people in the entrances and surroundings of the places of worship.

[58] Article 9.2 of Order SND/399/2020.

[59] Sandra González de Lara Mingo, 'Hacia la era de la «nueva anormalidad» jurídica instaurada por la vía del uso de los Reales Decretos y las Órdenes Ministeriales' *La Ley* (21 May 2020).

[60] Article 9.3 of Order SND/399/2020.

4. – Dispensers of hydroalcoholic gels or disinfectants with virucidal activity authorized and registered by the Ministry of Health will be made available to the public at the entrance of the place of worship which must always be in conditions of use.

5. – The use of holy water will not be allowed and ritual ablutions must be performed at home.

6. – The distribution of the attendees will be facilitated inside the places of worship. If it is necessary, free seats available will be indicated depending on the capacity allowed in each case.

7. – In cases in which the attendants stand directly on the ground and take off their shoes before entering the place of worship, personal rugs will be used and the footwear will be placed in the stipulated places, bagged and separated.

8. – The duration of the meetings or celebrations will be limited to the shortest possible time.

9. – During the development of meetings or celebrations the following will be avoided:

a. – Personal contact, maintaining a safe distance at all times.

b. – The distribution of any type of objects, books or brochures.

c. – Touching or kissing objects of devotion or other objects that are habitually handled.

d. – The performance of choirs.

c) Wedding ceremonies were allowed by Order SND/414/2020 of 16 May 2020 and Order SND/458/2020 of 30 May 2020 only in the case of territories in Phases 2 and 3 under these limitations:

WEDDING CEREMONIES – TRANSITION PLAN TO THE *NEW* NORMALITY

Order	Territorial Phase	Ratio of maximum capacity
Order SND/414/2020, 16 May 2020, (art. 10).	Phase 2	1/2, and: ≤ 100 people in open door facilities ≤ 50 people in closed spaces.
Order SND/458/2020, 30 May 2020, (art. 10).	Phase 3	3/4, and: ≤ 150 people in open door facilities ≤ 75 people in closed spaces.

In our opinion, all these sets of norms tried to make the exercise of the right to religious freedom and worship more flexible at the moment in which the pandemic tended to show the first symptoms of gradual decrease. All these limits were compatible with article 16.1 of the Spanish Constitution, because they were justified by reasons of public order, and protection of the public interest, and social health, in a very complicated epidemic scenario, due to COVID-19.

Article 6.2 of the R.D. 555/2020 of 5 June 2020[61] gave the Autonomous Communities, according to medical and epidemiological criteria, the capacity to decide to overcome

[61] Official Bulletin of the State of 6 June 2020 <https://www.boe.es/buscar/act.php?id=BOE-A-2020–5767>

of phase III in the different provinces, islands, or territorial units of their Community and, therefore, their entry in the so called "new normality".

When the *first* state of alarm finished, on 21 June 2020, the restrictions to the citizens' mobility, and the adoption of measures of pandemic control, will have to be adopted according to the Organic Law 3/1986, of 14 April 1986, of special measures on public health,[62] and the Royal Decree-Law 21/2020, of 9 June 2020.[63] The Autonomous Communities assumed special prominence and some decisions were particularly controversial.

For instance, because of the epidemic outbreak in the district area of Segrià,[64] in the province of Lleida at the beginning of July 2020, the Counselors of Health and Home Affairs of the regional Government of Catalonia passed article 6 of the Resolution SLT/1671/2020 of 12 July 2020[65] to limit the maximum number of attendants at private and public meetings, including weddings, religious services and funeral ceremonies and celebrations to 10. This Resolution was not initially ratified by the Judge of first instance because he considered that there was an excess of jurisdiction. The quick answer of the regional Government was to pass the regional Decree-Law 27/2020 of 13 July 2020 that modified the regional Law 18/2009 of 22 October 2009 of public health[66] and allowed the health authorities to adopt measures limiting the activity and mobility of people in case of pandemic. In this second opportunity, the Judge of first instance ratified the limitative measures, (with the only exception of the small town of Massalcoreig, where only one case had been detected on 1 July 2020 and the Judge considered that the measures adopted were not proportional).[67] The central Government understood that this regional Decree Law did not invade State´s competences.[68]

Three Resolutions of 15 September 2020, of the Counselor of Public Health of the Autonomous Community of Balearic Islands, ordered extraordinary measures for the pandemic containment in the health areas of Eixample and Es Viver,[69] and Sant Antoni de Portmany[70] in Ibiza, and the health area of Arquitecto Bennàzar in the city of Palma.[71] These restrictions prohibited meetings of more than 5 people, including weddings and religious services, limited the attendance at wakes to a maximum of 33% of their capacity and only 15 people, and *suspended* the *activity in places of worship* with the only exception of funerals (with a maximum of 15 attendants). Some of these limitations were of dubious constitutionality. The Catholic authorities immediately announced an appeal[72] because of the clear infringement of the fundamental right of

[62] Official Bulletin of the State of 29 April 1986, <https://www.boe.es/eli/es/lo/1986/04/14/3/con>

[63] Official Bulletin of the State of 11 June 2020 <https://www.boe.es/eli/es/rdl/2020/06/09/21/con>

[64] The affected municipalities were: the city of Lleida, and the localities of Alcarràs, Aitona, La Granja d´Escarp, Massalcoreig, Seròs, Soses and Torres de Segre, and the decentralized municipalities of Sucs and Raimat.

[65] Official Bulletin of the *Generalitat* of Catalonia, of 13 July 2020 <https://dogc.gencat.cat/es/document-del-dogc/?documentId=877748>

[66] Official Bulletin of the *Generalitat* of Catalonia, of 14 July 2020 <https://dogc.gencat.cat/es/document-del-dogc/?documentId=877834>

[67] <https://www.pimec.org/es/institucion/actualidad/noticias/informacion-sobre-confinamiento-lleida-segria>

[68] <https://www.rtve.es/noticias/20200714/gobierno-avala-decreto-del-govern-para-confinar-lleida-no-parece-invada-competencias/2027993.shtml>

[69] Official Bulletin of Balearic Islands of 16 September 2020 <http://www.caib.es/eboibfront/es/2020/11262/638857/resolucion-de-la-consejera-de-salud-y-consumo-de-1>

[70] Official Bulletin of Balearic Islands of 16 September 2020 <http://www.caib.es/eboibfront/es/2020/11262/638856/resolucio-de-la-consellera-de-salut-i-consum-de-15>

[71] Official Bulletin of Balearic Islands of 16 September 2020 <http://www.caib.es/eboibfront/es/2020/11262/638847/resolucio-de-la-consellera-de-salut-i-consum-de-15>

[72] <https://www.diariodeibiza.es/pitiuses-balears/2020/09/22/obispado-lleva-tribunales-orden-prohibe-31075542.html.

religious freedom by these administrative resolutions.[73] The consequences were imminent. A new Resolution of 25 September of 2020, of the Counselor of Public Health of this Autonomous Community, permitted *again* the *activity in places of worship* in these health areas with the limit of 25% of their maximum capacity, and allowed wakes with a maximum of 15 attendants.[74]

An Order of 16 August 2020 of the Provincial Delegate of Health of Albacete prohibited religious activities in the town of Villamalea, in the context of a COVID-19 outbreak. The courts suspended this Order because it was not adequately justified, damaging irremediably the fundamental right of religious freedom.[75] Subsequent restrictions passed by regional authorities *recommended* a limit of 20% of the maximum capacity of places of worship, in religious ceremonies.[76]

1.4. The New Declarations Of The State Of Alarm On October 2020 And The Novel Principle Of Co-Governance Between State and Autonomous Communities.

1.4.1. The Second State Of Alarm Declared On 9 October 2020 With Limited Effects In Some Municipalities Of The Autonomous Community of Madrid.

At the end of spring and the beginning of summer on 19 June 2020, Spain had a national cumulative incidence rate of diagnosed cases of COVID19 over 14 days per 100,000 inhabitants of 8.44.[77] The health crisis looked to be under control. But during this summer, the rise of mobility, among another factors, like a certain relaxation in the citizens' behavior, provoked a gradual deterioration in the national health indicators.

The situation became critical in October in certain cities of some Autonomous Communities, especially in Madrid; a region with a high density of population and a very complex system of public transport and mobility. On 7 October 2020, 11 municipalities with more than 100.000 inhabitants had a cumulative incidence rate of diagnosed cases in 14 days per 100.000 inhabitants higher than 500 cases. The average rate in these 11 municipalities was 662 cases per 100,000 in the fourteen days assessed, more than twice the national incidence, although the situation in these territories was not homogeneous in terms of diagnostic and care capacity. This incidence represented a total of 32,530 cases reported in these eleven municipalities in a period of fourteen days, approximately 25% of the total cases reported throughout Spain in that period.[78]

[73] https://www.diariodeibiza.es/pitiuses-balears/2020/09/23/salud-revisara-medida-obliga-cierre-31075569.html> <https://www.periodicodeibiza.es/pitiusas/ibiza/2020/09/23/1199143/salud-revisara-medidas-obligan-cerrar-dos-iglesias-zona-confinada-vila.html>

[74] Official Bulletin of Balearic Islands of 26 September 2020, http://www.caib.es/eboibfront/es/2020/11266/639267/resolucio-de-la-consellera-de-salut-i-consum-de-25 http://www.caib.es/eboibfront/es/2020/11266/639266/resolucion-de-la-consejera-de-salud-y-consumo-de-2.

[75] Lara, 'La libertad' (n8) 142.
See also: <https://abogadoscristianos.es/el-juez-da-la-razon-a-abogados-cristianos-y-suspende-la-orden-que-prohibia-cualquier-actividad-religiosa-en-el-municipio-de-villamalea-albacete/>
<https://www.cmmedia.es/noticias/castilla-la-mancha/juzgado-suspende-prohibicion-de-actividad-religiosa-en-villamalea-albacete-confinada/>
<https://www.latribunadealbacete.es/noticia/ZB3BCFC2C-EA51-7689-0898BA17C8BEAF18/202008/el-juez-reabre-la-actividad-religiosa-en-villamalea>
<https://www.periodicoclm.es/articulo/albacete/juzgado-suspende-prohibicion-actividad-religiosa-villamalea-decretada-junta/20200826173740011303.html>

[76] See for instance: Resolution of 28 October 2020 of the Provincial Delegate of Health in Albacete, published at the Official Bulletin of Castile – La Mancha of 6 November 2020 <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2020/11/06/pdf/2020_8819.pdf&tipo=rutaDocm>
With the specific limit for wakes of 10/15 attendants in closed/open air spaces, and 25 people for weddings and baptisms.

[77] <https://www.mscbs.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov/documentos/Actualizacion_141_COVID-19.pdf>

[78] Expositive Part III, of the Royal Decree 900/2020, of 9 October 2020.

The public health authorities established 3 criteria, for the implementation of additional restrictions, in these municipalities:[79]

1) To have a cumulative incidence rate of diagnosed cases in 14 days per 100.000 inhabitants higher than 500 cases.

2) A percentage of positivity in the results of the diagnostic tests of active infection by COVID-19 carried out in the municipality in the previous two weeks higher than 10%.

3) An occupation of beds by COVID-19 patients in intensive care units higher than 35% of the usual capacity, in the whole of the Autonomous Community to which the municipality belongs.

At the beginning of October, 9 municipalities with more than 100,000 inhabitants met the 3 requirements and all of them were in the Autonomous Community of Madrid: Alcobendas, Alcorcón, Fuenlabrada, Getafe, Leganés, Madrid, Móstoles, Parla and Torrejón de Ardoz. Their average cumulative incidence rate of diagnosed cases in 14 days was 679.61 cases, their percentage of positivity was 10.1% (twice the national average, in both cases), and the occupation of intensive care units was 39.81% in the Autonomous Community of Madrid (the national average at that time was only 18.04%). All these cities have a high density of population, are interconnected and present a high mobility. Those characteristics made the pandemic´s control more difficult.[80]

For all these reasons, the national Government, through the Royal Decree 900/2020 of 9 October 2020,[81] declared again a state of alarm for a period of 15 days, but in this second occasion limited to the territorial area of the aforementioned 9 municipalities. The main consequence was their perimeter confinement, consisting of a restriction in the entries and exits from the affected localities that was only allowed for justified reasons[82].

1.4.3. The Third State Of Alarm Declared On 25 October 2020, Co-Governance And Delegation In The Autonomous Communities

1.4.3.1. Development.

During the month of October all the national health indicators were showing that the situation was going from bad to worse. For this reason, the national Government declared, again, a *new* state of alarm for the *third* time through the Royal Decree 926/2020 of 25 October 2020.[83] The initial declaration was for 15 days until 00:00 a.m. 9 November 2020 *without prejudice to the extensions that may be established*.[84] But now, on this occasion, the ambit would be all the national territory.[85] The Royal Decree stated that the *competent authority* will be the national Government, but it also included a *delegation* in the Presidency of the Autonomous Communities or cities with Statute of Autonomy (the cities of Ceuta and Melilla, in Northern Africa). That meant that the regional authorities were allowed, by Government´s delegation, to elaborate norms developing the Royal Decree provisions, in their particular regional ambit[86].

[79] Expositive Part III, of the Royal Decree 900/2020, of 9 October 2020.

[80] Expositive Part III, of the Royal Decree 900/2020, of 9 October 2020.

[81] Official Bulletin of the State of 9 October 2020 <https://www.boe.es/eli/es/rd/2020/10/09/900/con>

[82] Such as to go to health centers and hospitals, compliance with labor obligations, attendance at university and educational centers, return to the place of habitual residence, assistance and care for the elderly, minors, or people with disabilities, attendance to exams, financial entities, courts or notarial bodies, renewal of permits and official documentation, cases of force majeure, and any other activity of similar nature, duly accredited. Article 5 of the Royal Decree 900/2020, of 9 October 2020.

[83] Official Bulletin of the State of 25 October 2020 <https://www.boe.es/eli/es/rd/2020/10/25/926>

[84] Article 4 of the Royal Decree 926/2020 of 25 October 2020.

[85] Article 3 of the Royal Decree 926/2020 of 25 October 2020.

[86] Article 2 of the Royal Decree 926/2020 of 25 October 2020.

The Royal Decree 926/2020 included:

1) A curfew from 11:00 p.m. to 6:00 a.m. During this period of time, the circulation on the roads or public spaces was allowed only in a very limited list of activities.[87] The so-called *delegated competent authority* (the regional authorities) were allowed to modulate, in their territorial ambit, the curfew´s initial moment between 10:00 p.m. and 12:00 p.m., and its end, between 5:00 a.m. and 7:00 a.m.[88]

2) A perimeter confinement, that included a restriction in the entries and exits in the territory of the Autonomous Communities, that only will be allowed for justified reasons.[89] The regional authorities were allowed to establish additional *confinements* in restricted areas or cities included in their territorial ambit.[90]

3) The permanence of groups of people in spaces of public use, both closed or outdoors, was limited to a maximum number of 6 people except in the case of cohabitants and without prejudice to the exceptions established in relation to dependencies, facilities, and establishments open to the public.[91] The regional authorities were allowed to reduce this maximum limit of 6 people, considering the pandemic evolution, and with previous communication to the Ministry of Public Health.[92] Meetings in places of public traffic and demonstrations might be limited, conditioned, or forbidden, if promoters could not guarantee a safe personal distance.[93] These limitations did not affect labor or institutional activities.[94]

4) The corresponding *delegated competent authorities* (the regional authorities) were allowed to establish a maximum limit of capacity in the religious meetings, celebrations, and encounters taking into account the risk of transmission that could result from collective gatherings. This limitation might not affect in any case the private and individual exercise of religious freedom.[95]

The Spanish Congress of Deputies, in a Resolution of 29 October 2020, ordered the publication of the permit for the extension of the state of alarm, during a period of 6 months from 00.00 a.m. 9 November, until 00.00 a.m. 9 May 2021.[96] The political agreement for the extension included the President of the Government´s commitment to appear before the Plenary of the Congress every 2 months, and the monthly appearance of the Minister of Public Health before the Commission of Health of the Congress of Deputies. The Conference of Presidents of Autonomous Communities, 4 months after the extension, could submit to the Government a proposal to lift the state of alarm, with the prior favorable agreement of the Interterritorial Council of the National Health

[87] Such as acquisition of medicines, assistance to health and veterinary centers, compliance with labor, professional, institutional or legal obligations, return to the place of habitual residence after carrying out some of the activities foreseen in this section, assistance and care for the elderly, minors, dependents o disables, cases of force majeure, and any other activity of a similar nature, duly accredited, and refueling at gas stations, when necessary to carry out the activities foreseen in the preceding cases. Article 5, paragraph 1, of the Royal Decree 926/2020 of 25 October 2020.

[88] Article 5, paragraph 2, of the Royal Decree 926/2020 of 25 October 2020.

[89] Attendance to health centers and hospitals, compliance with labor obligations, attendance at university and educational centers, return to the place of habitual residence, assistance and care for the elderly, minors, or people with disabilities, attendance to exams, financial entities, gas stations, courts or notarial bodies, renewal of permits and official documentation, to make exams, cases of force majeure, and any other activity of similar nature, duly accredited. Article 6, paragraph 1, of the Royal Decree 926/2020, of 25 October 2020.

[90] Article 6, paragraph 2, of the Royal Decree 926/2020 of 25 October 2020.

[91] Article 7, paragraph 1, of the Royal Decree 926/2020 of 25 October 2020.

[92] Article 7, paragraph 2, of the Royal Decree 926/2020 of 25 October 2020.

[93] Article 7, paragraph 3, of the Royal Decree 926/2020 of 25 October 2020.

[94] Article 7, paragraph 4, of the Royal Decree 926/2020 of 25 October 2020.

[95] Article 8 of the Royal Decree 926/2020 of 25 October 2020.

[96] Official Bulletin of the State of 4 November 2020 <https://www.boe.es/buscar/doc.php?id=BOE-A-2020–13492>

System in view of the evolution of the health, epidemiological, social and economic indicators[97].

Gradually, each Autonomous Community started to legislate about the maximum number of people that might be present in the religious meetings and celebrations held in their territorial ambit of competence. And we attended to a quick diversification of limits and regulations that was not always easy to know and compile, in a new scenario of 19 possible different and alternative *states of alarm*.[98] Was the *legal security* at risk? Were all these limitations *justified*?

An interesting article published in the Catholic Review, *Ecclesia*,[99] in its 25 January 2021 edition, compiled the capacity limitations imposed by the Autonomous Communities over the places of worship, showing the differences between the regional legislations. At that time, the pandemic indicators were perhaps the worst of the 3rd wave.

RESTRICTIONS IN THE ATTENDANCE AT RELIGIOUS MEETINGS AND CEREMONIES, IN FORCE ON JANUARY 2021[100]

Autonomous Community/City	Limit in the maximum capacity of places of worship.
Andalusia	Municipalities with a Level of Alert 4: 30% – Rest of cases: 50%[101] Places of worship must be closed at 10:00 p.m.
Aragon	25%[102] – Prohibition of canticles.
Principality Asturias	50%[103]

[97] New redaction given to Article 14 of the Royal Decree 926/2020 of 25 October 2020, by the Agreement permitting the extension of the state of alarm.

[98] Spain is territorially structured in 17 Autonomous Communities, and the 2 Autonomous Cities of Ceuta and Melilla.

[99] <https://www.revistaecclesia.com/limitaciones-de-aforo-a-los-templos-en-espana-radiografia-de-las-diocesis-en-tiempos-de-pandemia/>
The same information was reproduced by the Spanish on-line newspaper, *eldiario.es* at: <https://www.eldiario.es/sociedad/misa-espana-radiografia-restricciones-iglesias-catolicas_1_7177964.html>

[100] Original source: On-line edition of *Ecclesia*, 25 January 2021, and the own author's elaboration.

[101] Article 7 of the Decree of the President of the Autonomous Community of Andalusia 2/2021 of 8 January 2021. Official Bulletin of Andalusia, Extraordinary Number 3 of 8 January 2021 <https://www.juntadeandalucia.es/boja/2021/503/BOJA21-503–00005-206-01_00184168.pdf>

[102] From 00:00 a.m. 24 December 2020, to 12:00 p.m., 6 January 2021, the maximum capacity should be 50%, according to article 2.1.c) of the regional Order SAN/1256/2020, of 14 December 2020, declaring the Level of Alert 3. Official Bulletin of Aragon 14 December 2020, <http://www.boa.aragon.es/cgi-bin/EBOA/BRSCGI?CMD=VEROBJ&MLKOB=1140750063838&type=pdf>
The Level of Alert 3, *with aggravation* was declared by the regional Decree-Law 1/2021, of 4 January 2021, Official Bulletin of Aragon of 14 December 2020 <http://www.boa.aragon.es/cgi-bin/EBOA/BRSCGI?CMD=VEROBJ&MLKOB=1143561800404&type=pdf>
Article 32, h), of the regional Law of Aragón 3/2020, of 3 December, foresees a maximum capacity of 25%, during the Level of Alert 3, with aggravation. Official Bulletin of Aragon of 4 December 2020 <http://www.boa.aragon.es/cgi-bin/EBOA/BRSCGI?CMD=VEROBJ&MLKOB=1139832800303&type=pdf>
See also: <https://www.aragon.es/-/alerta-sanitaria-derivada-de-la-covid-19-en-aragon-medidas-nivel-3>

[103] Article 8 of the Decree 27/2020 of 26 October 2020, of the President of Principality of Asturias. Official Bulletin of the Principality of Asturias, Supplement of the number 207, of 26 October 2020 <https://sede.asturias.es/bopa/2020/10/26/20201026Su1.pdf>

Autonomous Community/City	Limit in the maximum capacity of places of worship.
Balearic Islands	30% for places of worship in Areas with Level of Alert 3 or 4.[104] All the territory of the Balearic Islands was in a Level of Alert 4 at the end of January 2021, and it was *recommended* a maximum attendance of 15 people.[105]
Canary Islands[106]	Restrictions in the maximum capacity of places of worship:[107] 1) Places of worship located in geographical Areas with Level of Alert 1: 75% 2) Places of worship located in geographical Areas with Level of Alert 2: 50%. It is recommended to use on-line and televised services. 3) Places of worship located in geographical Areas with Level of Alert 3: 33%. It is recommended to use on-line and televised services.
Cantabria	1) General limit: 33%[108] 2) 10 people in certain municipalities with a high rate on incidence, such us Laredo, Polanco, Colindres and Santa María de Cayón.[109]

[104] Article 6 of the Decree 18/2020 of 27 November 2020, of the President of the Balearic Islands. Bulletin of the Balearic Islands of 28 November 2020 <https://www.caib.es/eboibfront/es/2020/11302/642143/decreto-18–2020-de-27-de-noviembre-de-la-president>
And Epigraph II, Paragraph 6, of the Annex of the Agreement of the Council of Government of the Balearic Islands, of 27 November 2020. Official Bulletin of the Balearic Islands of 28 November 2020
<https://www.caib.es/eboibfront/es/2020/11302/seccion-iii-otras-disposiciones-y-actos-administra/472>
<https://www.caib.es/eboibfront/es/2020/11302/642142/acuerdo-del-consejo-de-gobierno-de-27-de-noviembre>

[105] Agreement of the Council of Government of the Balearic Islands, of 29 January 2021. Official Bulletin of the Balearic Islands of 30 January 2021 <https://www.caib.es/eboibfront/es/2021/11331/seccion-iii-otras-disposiciones-y-actos-administra/472>
<https://www.caib.es/eboibfront/es/2021/11331/644376/acuerdo-del-consejo-de-gobierno-de-29-de-enero-de->
These restrictions were gradually adapted, for instance, the article 4 of the Decree 27/2021, of 12 March 2021, of the President of the Balearic Islands established the limit of 30% in Ibiza, and 50% in Mallorca, Menorca and Formentera, and the social distance of 1.5 meters between non co-habitants. Official Bulletin of the Balearic Islands of 13 March 2021 <http://www.caib.es/eboibfront/ES/2021/11353/646322/decret-27–2021-de-12-de-marc-de-la-presidenta-de-l>

[106] Resolution of 23 December 2020, ordering the publication of the Agreement of the Government of Canary Islands of that date, that actualizes the measures against the health crisis caused by COVID-19. Official Bulletin of Canary Islands of 24 December 2020 <http://www.gobiernodecanarias.org/boc/2020/266/009.html>

[107] Agreement of the Government of Canary Islands of 23 December 2020, Annex I, paragraph 3.16.
Additional restrictions:
1) In the practice of worship, physical contact between attendees, and singing, will be avoided.
2) The temple or place of worship must remain with the doors and windows open, before and after the celebration, the time necessary to guarantee its ventilation. Doors will be open during the celebration, if this does not prevent the practice of it.
3) The use of the exterior areas of the places of worship, will need the previous permit by municipal authorities, for the celebration of acts of worship. It must be guaranteed the maintenance of interpersonal safety distance. These celebrations may not be performed during the level of alert 3.

[108] Article 1 of the Decree 7/2020 of 7 November 2020, of the President President of the Autonomous Community of Cantabria. Official Bulletin of Cantabria of 7 November 2020, extraordinary issue number 100 <https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=355318>
A new percentage of 50% was established by the article 1 of the Decree 7/2021, of 2 March 2021, of the President of the Autonomous Community of Cantabria. This new percentage entered into force on 2 March 2021, with indefinite validity, but being susceptible of continuous evaluation. Official Bulletin of Cantabria of 2 March 2021, extraordinary issue number 14, <https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=359136>

[109] Article 3 of the Decree 5/2021 of 27 January 2021, of the President of the Autonomous Community of Cantabria. Official Bulletin of Cantabria of 27 January 2021, extraordinary issue, <https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=357887>

Autonomous Community/City	Limit in the maximum capacity of places of worship.
Castile – La Mancha	40% in closed places or 100 people in open air spaces[110]
Castile and Leon	33% and never more than 25 people.[111]
Catalonia	From 23 December 2020 to 6 January 2021:[112] 30% of the maximum capacity and a maximum of 100 people. From 7 January 2021, and during all the rest of this month:[113] 30% of the maximum capacity and 1) 1,000 people in open door spaces. 2) 500 people in closed places.

[110] Article 4 of the Decree 66/2020, of 29 October 2020, of the President of Castile – La Mancha. Official Journal of Castile – La Mancha of 29 October 2020
<https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=1603885240656750526.doc&tipo=rutaCodigoLegislativo>
These restrictions were in force on March, 2021. See: Article 1, paragraph 5 of the Resolution of 11 March of 2021 of the Counselor of Health of Castile – La Mancha. Bulletin of Castile – La Mancha of 12 March 2021
<https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/03/12/pdf/2021_2909.pdf&tipo=rutaDocm>.

[111] Article 3 of the Agreement 3/2021, of 15 January 2021, of the President of the Regional Government of Castile and Leon. Official Journal of Castile and Leon of 16 January 2021
<http://bocyl.jcyl.es/boletin.do?fechaBoletin=16/01/2021>.
This limit of 25 people was very controversial. The Agreement 7/2021, of 18 February 2021, of the President of Castile and Leon, established the limit of attendance in 1/3 of the maximum capacity of the places of worship in this Autonomous Community. (Official Journal of Castile and Leon of 16 January 2021
<https://bocyl.jcyl.es/boletines/2021/02/19/pdf/BOCYL-D-19022021–1.pdf)>.

[112] Paragraph 6 of the Resolution SLT 3397/2020, of 22 December 2020, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 23 December 2020,
<https://portaldogc.gencat.cat/utilsEADOP/PDF/8302/1828461.pdf>
The initial validity of these measures was for a period of 15 days, but it was modified by Resolution SLT 1/2021, of 4 January of 2021, of the Counselor of Health of the regional Government of Catalonia, that entry into force on 7 January 2021.
This normative was updated regularly. For instance, the Resolution of 12 March 2021, established the limit of 33% in the islands of Tenerife, Gran Canaria, and Fuerteventura. Official Bulletin of Canary Islands of 13 March 2021, accessible at.
<http://www.gobiernodecanarias.org/boc/2021/051/002.html>

[113] Paragraph 10 Resolution SLT 1/2021, of 4 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 5 January 2021, in force until 18 January 2021, and latterly extended
<https://www.diba.cat/documents/713456/344101719/RESOLUCIO+SLT_1_2021+de+4+de+gener+per+la+qual+es+prorroguen+i+es+modifiquen+les+mesures+en+mat%C3%A8ria+de+salut+p%C3%BAblica+.._.pdf/11c2d562-4964-9ee5-2a3e-159ad5a7f0aa?t=1609835423958>
Extended until 25 January 2021 by Resolution SLT 67/2021 of 16 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 17 January 2021
<https://www.diba.cat/documents/713456/344101719/RESOLUCI%C3%93+SLT_67_2021%2C+de+16+de+gener%2C+per+la+qual+es+prorroguen+les+mesures+en+mat%C3%A8ria+de+salut+p%C3%BAblica+....pdf/16dcc27b-08e3-2952-b79a-a8e71c92301d?t=1610959559812>
Extended until 8 February 2021, by Resolution SLT 133/2021 of 22 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 23 January 2021
<https://www.diba.cat/documents/713456/344101719/RESOLUCIO_SLT_133_2021_de+22+de+gener.pdf/4a72360b-59c6-9c19-84aa-85d9b1d3b0c1?t=1611562672762>.
Extended until 22 February 2021, by Resolution SLT 275/2021 of 5 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 6 February 2021
<https://portaldogc.gencat.cat/utilsEADOP/PDF/8335/1834594.pdf>.
Extended until 1 March 2021, by Resolution SLT 436/2021 of 19 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 20 February 2021
<https://portaldogc.gencat.cat/utilsEADOP/PDF/8346/1837041.pdf>.
Extended until 8 March 2021, by Resolution SLT 516/2021 of 26 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 27 February 2021
< https://portaldogc.gencat.cat/utilsEADOP/PDF/8352/1838141.pdf>.

Autonomous Community/City	Limit in the maximum capacity of places of worship.
Madrid	Limitations of the maximum capacity in places of worship:[114] 1) 33% in case of places of worship in confined Basic Health Zones. 2) 50% in case of places of worship located in the rest of the territory of the Autonomous Community.
Valencia	30%[115]
Extremadura	40%[116]
Galicia[117]	1) 50%, in case of places of worship located in municipalities without administrative restrictions. 2) 30%, in case of places of worship located in municipalities with administrative restrictions.
La Rioja	33%[118]
Navarre	30% and ≤ 150 people, canticles are not recommended[119]

[114] Article 4 of the Decree 29/2020 of 26 October 2020, of the President of the Autonomous Community of Madrid. Official Bulletin of Madrid of 26 October 2020 <http://www.bocm.es/boletin/CM_Orden_BOCM/2020/10/26/BOCM-20201026–206.PDF>.

[115] Article 3 of the Decree 16/2020 of 5 November 2020, of the President of the Generality of Valencia. Official Bulletin of the Autonomous Community of Valencia of 6 November 2020 <http://www.dogv.gva.es/datos/2020/11/06/pdf/2020_9359.pdf>.
And article 1.5 of the Decree 5/2021, of 12 February 2021, of the President of the Generality of Valencia. Official Bulletin of the Autonomous Community of Valencia of 12 February 2021 <http://www.dogv.gva.es/datos/2021/02/12/pdf/2021_1348.pdf>.
When the epidemiological conditions improved, this limit was enlarged to 50% of the maximum capacity, (and 1.5 meters of interpersonal distance), by article 1.5, of the Decree 7/2021, of 25 February 2021, of the President of the Generality of Valencia, (In force from 1 March 2021 to 14 March 2021). Official Bulletin of the Autonomous Community of Valencia of 26 February 2021 <http://www.dogv.gva.es/datos/2021/02/26/pdf/2021_1853.pdf>.
This new limit of 50% of the maximum capacity, was confirmed by article 1.5 of the Decree 8/2021, of 11 March 2021. In force from 15 March 2021 to 12 April 2021. Official Bulletin of the Autonomous Community of Valencia of 12 March <http://www.dogv.gva.es/datos/2021/03/12/pdf/2021_2675.pdf>.

[116] Article 1 of the Decree 21/2020, of 25 November 2020, of the President of Extremadura. Official Bulletin of Extremadura of 27 November 2020, http://doe.gobex.es/pdfs/doe/2020/2301o/2301o.pdf
Article 1 of the of the Decree 4/2021, of 8 January 2021, of the President of Extremadura. Official Bulletin of Extremadura of 8 January 2021 <http://doe.gobex.es/pdfs/doe/2021/41o/41o.pdf>.
Paragraph 2 of the Annex of the Agreement of 8 January 2021 of the Council of Government of Extremadura, Bulletin of Extremadura of 8 January 2021 <http://doe.gobex.es/pdfs/doe/2021/41o/41o.pdf>.

[117] Article 1 of the Decree 181/2020, of 9 November 2020, of the President of Galicia. Official Bulletin of Galicia of 10 November 2020 <https://www.xunta.gal/dog/Publicados/2020/20201110/AnuncioC3B0-091120-1_gl.html>.

[118] Article 3 of the Decree 16/2020, of 4 November 2020, of the President of La Rioja. Official Bulletin of La Rioja of 5 November 2020 <https://ias1.larioja.org/boletin/Bor_Boletin_visor_Servlet?referencia=14407641–1-PDF-534432-X>.
It is also particular interesting the Resolution 6/2021 of 17 February, of the General Technical Secretary of the Counselor of Health of La Rioja. This document developed a regional Plan with gradual interventions. Official Bulletin of La Rioja of 18 February 2021 <https://ias1.larioja.org/boletin/Bor_Boletin_visor_Servlet?referencia=15569798–1-PDF-536757-X>.

[119] Article 1, paragraph 7, of the Order 63/2020 of 14 December 2020, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 16 December 2020, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2020/290/1>.
Extended until 14 January 2021, by the Order 64/2020, of 28 December 2020, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 30 December 2020, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2020/303/0>.
Extended until 28 January 2021, by the Order 1/2021, of 13 January 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 14 January 2021, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/9/1>.
Extended until 11 February 2021, by the Order 3/2021, of 26 January 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 28 January 2021, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/21/0>.
Extended until 25 February 2021, by the Order 4/2021, of 9 February 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 11 February 2021 (n.32) extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/33/1>.

Autonomous Community/City	Limit in the maximum capacity of places of worship.
Basque Country	35%[120]
Murcia	50% and it is recommended the use of telematic applications and TV[121]
Autonomous City of Ceuta	33% or 75 people[122]
Autonomous City of Melilla	25%[123] The places of worship must be closed, in case of:[124] a) Muslim worship: Fridays from 8:00 a.m. to 12:00 p.m. a) Jewish worship: Saturdays from 8:00 a.m. to 12:00 p.m. c) Catholic worship: Sundays from 8:00 a.m. to 12:00 p.m.

The final consequence in Spain was a very *diverse* and *dispersed* regulation, with too many *differences* between Autonomous Communities, trying to find a supposedly *coherent* and *efficient* solution for the problems caused by a virus that knows nothing about territorial borders, and legislative jurisdictions of regional parliaments. A legislation written in form of *macchie di leopardo*, that is, *leopard spots*, adopting the particularly accurate metaphoric figure used by Pierluigi Consorti[125] for the Italian case. The regulations passed by the Autonomous Communities were *dissimilar*. The Autonomous Community of Madrid, one of the regions with the worst pandemic indicators, established the most

Extended until 11 March 2021, by the Order 5/2021, of 23 February 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 February 2021, n. 44, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/44/1>.
Extended until 25 March 2021, by the Order 6/2021, of 9 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 February 2021, n. 44, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/57/1>.
Extended until 8 April 2021, by the Orders 7/2021, and 8/2021, of 23 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 March 2021, n. 68, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/68/2> and: <https://bon.navarra.es/es/anuncio/-/texto/2021/68/3>.
Extended until 22 April 2021, by the Order 11/2021 of 6 April 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 8 April 2021, n. 78, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/78/3>.
From 1 April to 9 April 2021, (during the Easter celebrations), it was recommended to finish all religious celebrations before 9:00 p.m. Article 6 of the Order 10/2021 of 29 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 31 March 2021, n. 73, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/73/0>.

[120] Paragraph 5 of the Annex of the Decree 44/2020,of 10 December 2020, of the Lehendakari (President) of the Basque Country. Official Bulletin of the Basque Country of 11 December 2020, <https://www.euskadi.eus/y22-bopv/es/bopv2/datos/2020/12/2005319a.pdf>.
See also: Paragraph 5 of the Annex, of the Decree 13/2021, of 6 March 2021, of the Lehendakari (President) of the Basque Country. Official Bulletin of the Basque Country of 8 March 2021 <https://www.euskadi.eus/bopv2/datos/2021/03/2101349a.pdf>.

[121] Article 5 of the Decree 11/2020, of 22 December 2020, of the President of Murcia, Official Bulletin of Murcia of 23 December 2020 <https://www.borm.es/services/anuncio/ano/2020/numero/7470/pdf?id=790195>.

[122] Paragraph e) of the Annex of the Decree of the President of the City of Ceuta of 28 October 2020. Official Bulletin of the City of Ceuta of 28 October 2020 <https://www.ceuta.es/ceuta/component/jdownloads/finish/1835-octubre/20439-bocce-extra83-28–10-2020?Itemid=0>.
Paragraph 5, of the Annex of the Decree of the President of the City of Ceuta of 5 November 2020. Official Bulletin of the City of Ceuta of 5 November 2020 <https://www.ceuta.es/ceuta/component/jdownloads/finish/1837-noviembre/20448-bocce-extra86-05–11-2020?Itemid=534>.

[123] Article 5 of the Decree n. 110 of 26 January 2021 of the President of Melilla. Official Bulletin of Melilla of 28 January 2021 <https://www.melilla.es/mandar.php/n/12/9683/Extra7.pdf>.

[124] Article 6 of the Order n. 341 of 26 January 2021 of the Counselor of Economy and Social Policies of Melilla. Official Bulletin of Melilla of 28 January 2021 <https://www.melilla.es/mandar.php/n/12/9683/Extra7.pdf>.

[125] Pierluigi Consorti, 'Emergenza e libertà religiosa in Italia davanti alla paura della COVID-19' (2020) 54 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado, 5.

flexible percentage in the maximum attendance at places of worship. And Castile and Leon approved an absolute limit of 25 attendants, for all the regional temples, that will be revoked by the Supreme Court. An additional and significant example is the case of the diverse regional legislation about canticles in religious ceremonies. Aragon directly forbade hymns, canticles and sacred songs, and some Autonomous Communities like Navarre did not recommend them, but the rest of regional legislations allowed these practices. What was the reason for this diverse and disperse legislation on this topic? Does the virus use diverse systems of dispersion in each region? Is it risky to sing in religious celebrations? If it is risky, why was it allowed in most of the places of worship of the Spanish regions? If it is not dangerous, why was it forbidden in Aragon?

RESTRICTIONS IN THE ATTENDANCE AT WAKES AND BURIALS, IN FORCE ON JANUARY 2021

Autonomous Community/City	Limits in the attendance.
Andalusia[126]	Level of Alert 2: 1) Wakes: 25/10 people in open air/closed spaces. 2) Corteges of burial or cremation: 25 people + celebrant. Level of Alert 3: 1) Wakes: 20/10 people in open air/closed spaces. 2) Corteges of burial or cremation: 20 people + celebrant. Level of Alert 4: 1) Wakes: 15/6 people in open air/closed spaces. 2) Corteges of burial or cremation: 15 people + celebrant.
Aragon[127]	Wakes and burials: A maximum of 15 people in open air spaces, and 10 people in closed facilities.
Principality of Asturias[128]	Wakes: 25/15 people in open air/closed spaces. Corteges of burial or cremation: 25 people + celebrant.
Balearic Islands	All the territory of the Balearic Islands was in a Level of Alert 4 at the end of January 2021, and a maximum attendance in wakes and burials of 15 people was allowed, with a limit of 30% of the maximum capacity of the facility.[129]

[126] Article 13 of the Order 29 October 2020, of the Counselor of Health and Families of the Autonomous Community of Andalusia. Official Bulletin of Andalusia, Extraordinary Number 73 of 30 October 2020 <https://www.juntadeandalucia.es/boja/2020/573/BOJA20-573–00081.pdf>.

[127] <https://www.aragon.es/-/alerta-sanitaria-derivada-de-la-covid-19-en-aragon-medidas-nivel-3>.

[128] Article 8 of the Decree 27/2020 of 26 October 2020, of the President of Principality of Asturias. Official Bulletin of the Principality of Asturias, Supplement of the number 207, of 26 October 2020, <https://sede.asturias.es/bopa/2020/10/26/20201026Su1.pdf>.

[129] Agreement of the Council of Government of the Balearic Islands, of 29 January 2021. Official Bulletin of the Balearic Islands of 30 January 2021 <https://www.caib.es/eboibfront/es/2021/11331/seccion-iii-otras-disposiciones-y-actos-administra/472>; <https://www.caib.es/eboibfront/es/2021/11331/644376/acuerdo-del-consejo-de-gobierno-de-29-de-enero-de->. See also: Epigraph II, Paragraph 5, of the Annex of the Agreement of the Council of Government of the Balearic Islands of 27 November 2020. Official Bulletin of the Balearic Islands of 28 November 2020 <https://www.caib.es/eboibfront/es/2020/11302/seccion-iii-otras-disposiciones-y-actos-administra/472>; <https://www.caib.es/eboibfront/es/2020/11302/642142/acuerdo-del-consejo-de-gobierno-de-27-de-noviembre>

Autonomous Community/City	Limits in the attendance.
Canary Islands	It will be allowed a maximum attendance of 20 people in open air facilities, and 10 people in closed spaces, and a maximum capacity of[130]: 1) Facilities in Areas with Level of Alert 1: 75% 2) Facilities in Areas with Level of Alert 2: 50%. 3) Facilities in Areas with Level of Alert 3: 33%. Participation in the entourage for the burial or farewell of the person deceased, is restricted to a maximum of 50 people, including relatives and close friends, until the alert level 1, and 25 people in alert levels 2 and 3, in addition to the minister of worship or person assimilated of the respective confession for the practice of the funeral rites of farewell to the deceased, not exceeding the capacity limits of 75%, 50% and 33% of the capacity authorized, respectively. At the moment of incineration or cremation, a maximum of 5 people may be present.
Cantabria[131]	Wakes: A maximum of 20/10 people in open air/closed spaces, with a maximum of 33% of the maximum capacity of the facility. Corteges of burial or cremation: 20/10 people in open air/closed spaces and the celebrant.
Castile – La Mancha	Funeral celebrations in closed places of worship: 40% of maximum capacity of closed spaces. Wakes and funeral corteges: 6 people.[132]

[130] Agreement of the Government of Canary Islands of 23 December 2020, Annex I, paragraph 3.17, <http://www.gobiernodecanarias.org/boc/2020/266/009.html>.
This normative was updated regularly. For instance, the Resolution of 12 March 2021, established the limit of 33% in the islands of Tenerife, Gran Canaria, and Fuerteventura. Official Bulletin of Canary Islands of 13 March 2021, accessible at.
<http://www.gobiernodecanarias.org/boc/2021/051/002.html>.

[131] Article 3 of the Resolution of the Counselor of Health, of the Government of Cantabria of 6 November 2020. Official Bulletin of Cantabria of 6 November 2020, extraordinary issue number 9
<https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=355329>.
New limits were established by Resolution of 2 March 2021, of the Counselor of Health of Cantabria, in force from 00.00 a.m. 3 March 2021:
1) Wakes: A maximum of 50/30 people in open air/closed spaces, with a maximum of 50% of the maximum capacity of closed facilities.
2) Corteges of burial or cremation: 50/30 people in open air/closed spaces and the celebrant.
Official Bulletin of Cantabria of 2 March 2021 extraordinary issue number 14,
<https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=359137>.

[132] Paragraph 1.6, of the Resolution of 18 January 2021 of the Counselor of Health of the Autonomous Community of Castile – La Mancha. Official Bulletin of Castile – La Mancha of 19 January 2021,
<https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/01/19/pdf/2021_527.pdf&tipo=rutaDocm>;
Initially, this Resolution of 18 January 2021 of the Counselor of Health, established that the said 6 participants in wakes and funeral corteges must remain always the same, during all the wake or cortege. This last condition, (*to remain always the same individuals*), was disallowed by the Superior Court of Justice of Castile – La Mancha, in a Judicial Order of 20 January 2021, considering that it supposed a null restriction of the fundamental right of assembly by an incompetent organ. Roj: ATSJ CLM 1/2021 – ECLI: ES:TSJCLM:2021:1AId Cendoj:02003300220212000001,
<https://www.poderjudicial.es/search/documento/AN/9384805/Real%20Decreto%20alarma%20sanitaria%20Covid-19/20210125>.

Autonomous Community/City	Limits in the attendance.
Castile and Leon[133]	1) Facilities in Areas with Level of Alert 1: 75%, and 75 people in the cortege, plus the celebrant. 2) Facilities in Areas with Level of Alert 2: 50%, and 50 people in the cortege, plus the celebrant. 3) Facilities in Areas with Level of Alert 3: a) Wakes: 33% and a maximum of 15 people in open air spaces and 10 people in closed facilities. b) Funerals: a cortege with a maximum of 15 people plus the celebrant. 3) Facilities in Areas with Level of Alert 4: The same that in 3), but it will be possible to establish additional limitation, like the suspension of wakes, and the reduction of the participants in the cortege.
Catalonia	From 23 December 2020 to 6 January 2021:[134] Funerals 30% of the maximum capacity and a maximum of 100 people From 7 January 2021, and during all the rest of this month:[135] Funerals: 30% of the maximum capacity and 1) 1,000 people in open door spaces. 2) 500 people in closed places.

A new Resolution of 22 January 2021 of the Counselor of Health of Castile – La Mancha, abolished that additional requirement. Official Bulletin of Castile – La Mancha of 25 January 2021, <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/01/25/pdf/2021_700.pdf&tipo=rutaDocm>;
See also the Resolutions of 28 January 2021 and 6 February 2021, <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/01/29/pdf/2021_903.pdf&tipo=rutaDocm>;
<https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/02/07-ext-2/pdf/2021_1254.pdf&tipo=rutaDocm>;
And article 1, paragraph 6, of the Resolution of 11 February 2021, of the Counselor of Health, of Castile – La Mancha. Official Journal of Castile – La Mancha, of 12 February 2021, extraordinary issue <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/02/12-ext-3/pdf/2021_1457.pdf&tipo=rutaDocm>;
And article 1, paragraph 5, of the Resolution of 20 February 2021, of the Counselor of Health, of Castile – La Mancha. Official Journal of Castile – La Mancha, of 21 February 2021, extraordinary issue, <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/02/21-ext-5/pdf/2021_1852.pdf&tipo=rutaDocm>;
A new limit of 10 people was established for all the municipalities with the Level II of alert, (for municipalities with a level of Alert III, the limit was 6 people), by article 1, paragraph 5, of the Resolution of 2 March 2021, of the Counselor of Health of Castile – La Mancha. Official Bulletin of Castile – La Mancha of 3 March 2021 <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/03/03/pdf/2021_2397.pdf&tipo=rutaDocm>;
This limit of 10 attendants to wakes and funeral corteges, for municipalities in Level II of alert, was extended 10 days more by Article 1, paragraph 5 of the Resolution of 11 March of 2021 of the Counselor of Health of Castile – La Mancha. Bulletin of Castile – La Mancha of 12 March 2021, <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/03/12/pdf/2021_2909.pdf&tipo=rutaDocm>.

[133] Paragraph 3.3. of the Annex of the Agreement 76/2020, of 3 November 2020, of the President of the Regional Government of Castile and Leon. Official Journal of Castile and Leon <http://bocyl.jcyl.es/boletines/2020/11/04/pdf/BOCYL-D-04112020–9.pdf>.

[134] Paragraph 6 of the Resolution SLT 3397/2020, of 22 December 2020, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 23 December 2020 <https://portaldogc.gencat.cat/utilsEADOP/PDF/8302/1828461.pdf>;
The initial validity of these measures was for a period of 15 days, but it was modified by Resolution SLT 1/2021, of 4 January of 2021, of the Counselor of Health of the regional Government of Catalonia, that entry into force on 7 January 2021.

[135] Paragraph 10 Resolution SLT 1/2021, of 4 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 5 January 2021, in force until 18 January 2021, and latterly extended, <https://www.diba.cat/documents/713456/344101719/RESOLUCIO+SLT_1_2021+de+4+de+gener+per+la+qual+es+prorroguen+i+es+modifiquen+les+mesures+en+mat%C3%A8ria+de+salut+p%C3%BAblica+…pdf/11c2d562-4964-9ee5-2a3e-159ad5a7f0aa?t=1609835423958>;

Autonomous Community/City	Limits in the attendance.
Madrid	Limitations of maximum attendance to:[136] 1) Wakes: a) Confined Basic Health Zones: A maximum of 15/10 people in open door/closed spaces. b) Rest of the territory of the Autonomous Community: A maximum of 50/25 people in open door/closed spaces. 2) Corteges of burial or cremation: a) Confined Basic Health Zones: A maximum of 15 people and the celebrant. b) Rest of the territory of the Autonomous Community: A maximum of 50 people and the celebrant.

Extended until 25 January 2021, by Resolution SLT 67/2021, of 16 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 17 January 2021, <https://www.diba.cat/documents/713456/344101719/RESOLUCI%C3%93+SLT_67_2021%2C+de+16+de+gener%2C+per+la+qual+es+prorroguen+les+mesures+en+mat%C3%A8ria+de+salut+p%C3%BAblica+....pdf/16dcc27b-08e3-2952-b79a-a8e71c92301d?t=1610959559812>;
Extended until 8 February 2021, by Resolution SLT 133/2021, of 22 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 23 January 2021, <https://www.diba.cat/documents/713456/344101719/RESOLUCIO_SLT_133_2021_de+22+de+gener.pdf/4a72360b-59c6-9c19-84aa-85d9b1d3b0c1?t=1611562672762>;
Extended until 22 February 2021, by Resolution SLT 275/2021, of 5 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 6 February 2021, <https://portaldogc.gencat.cat/utilsEADOP/PDF/8335/1834594.pdf>;
Extended until 1 March 2021, by Resolution SLT 436/2021, of 19 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 20 February 2021, <https://portaldogc.gencat.cat/utilsEADOP/PDF/8346/1837041.pdf>;
Extended until 8 March 2021, by Resolution SLT 516/2021, of 26 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 27 February 2021, <https://portaldogc.gencat.cat/utilsEADOP/PDF/8352/1838141.pdf>.

[136] Article 13 of the Order 668/2020, of 19 June, of the Counselor of Health of Madrid, Official Journal of Madrid of 20 June 2020, <http://www.madrid.org/wleg_pub/secure/normativas/contenidoNormativa.jsf?opcion=VerHtml&nmnorma=11297#no-back-button>;
Article 2 of the Order 1405/2020, of 22 October 2020, of the Counselor of Health of Madrid, Official Journal of Madrid of 24 October 2020,
<http://www.bocm.es/boletin/CM_Orden_BOCM/2020/10/24/BOCM-20201024–2.PDF>;
The list restricted areas have been periodically updated.
The last update of this list, made on January 2021, was made by the Order 79/2021 of 29 January 2021, of the Counselor of Health of Madrid, Official Journal of Madrid of 30 January 2021,
<http://www.bocm.es/boletin/CM_Orden_BOCM/2021/01/30/BOCM-20210130–1.PDF>.

Autonomous Community/City	Limits in the attendance.
Valencia	1) Initial general provisions:[137] Wakes: 30% and 25/15 people in open door/closed spaces. Corteges of burial or cremation: 25/15 people in open door/closed spaces 2) In certain municipalities[138] with higher rates of incidence, from 7 January to 20 January 2021,[139] and in all the region for a period of 14 days, from 21 January 2021[140] that was latterly extended:[141] Wakes: 30% and 25/10 people in open door/closed spaces. Corteges of burial or cremation: 15/10 people in open door/closed spaces
Extremadura[142]	Wakes: 10 people in open door and closed spaces. Corteges of burial or cremation: 15 people and the celebrant.
Galicia[143]	Wakes: 25/10 people in open door/closed spaces. Corteges of burial or cremation: 25 people and the celebrant.

[137] Article 1 of the Resolution of 5 December 2020, of the Counselor of Health of Valencia. Official Bulletin of the Autonomous Community of Valencia of 5 December 2020, <https://www.dogv.gva.es/datos/2020/12/05/pdf/2020_10582.pdf>.

[138] Borriol, Atzeneta del Maestrat, Soneja, Jérica, Alcoy, Castalla, Polop, Llíria, Ayora, Utiel, Sollana, Guadassuar, Oliva, Daimús, Canals, Benigànim, Xàtiva, Moixent, Ontinyent, Cheste, Sinarcas, Anna, Quatretonda, Bonrepósi, Mirambell, and the municipalities of Alfafar, Benetusser, Massanassa, Sedaví and Llocnou de la Corona.

[139] Article 1.2 of the Resolution of the Counselor of Health of Valencia of 5 January 2021. Official Bulletin of the Autonomous Community of Valencia of 6 January 2021, <http://www.dogv.gva.es/datos/2021/01/06/pdf/2021_78.pdf>.

[140] Article 1.5 of the Resolution of the Counselor of Health of Valencia of 19 January 2021. Official Bulletin of the Autonomous Community of Valencia of 20 January 2021, <http://www.dogv.gva.es/datos/2021/01/20/pdf/2021_530.pdf>.

[141] These provisions were extended:
1) Until 23:59 hours of 15 February 2021, by article 3.1 of the Resolution of the Counselor of Health of Valencia of 29 January 2021. Official Bulletin of the Autonomous Community of Valencia of 30 January 2021, <http://www.dogv.gva.es/datos/2021/01/30/pdf/2021_888.pdf>.
2) Until 23:59 hours of 1 March 2021, by the Resolution of the Counselor of Health of Valencia of 12 February 2021. Official Bulletin of the Autonomous Community of Valencia of 12 February 2021, <http://www.dogv.gva.es/datos/2021/02/12/pdf/2021_1346.pdf>.
3) Until 23:59 hours of 14 March 2021, by article 2 of the Resolution of the Counselor of Health of Valencia of 25 February 2021. Official Bulletin of the Autonomous Community of Valencia of 26 February 2021, <http://www.dogv.gva.es/datos/2021/02/26/pdf/2021_1854.pdf>.

[142] Paragraph 1 of the Annex of the Agreement of 6 November 2020 of the Council of Government of Extremadura, Bulletin of Extremadura of 7 November 2020 <http://doe.gobex.es/pdfs/doe/2020/110e/20062380.pdf>.
Paragraph 1 of the Annex of the Agreement of 8 January 2021 of the Council of Government of Extremadura, Bulletin of Extremadura of 8 January 2021 <http://doe.gobex.es/pdfs/doe/2021/41o/41o.pdf>.

[143] Paragraph 3.1. of the Annex of the Order of 4 November 2020, of the Counselor of Health of Galicia. Official Bulletin of Galicia of 4 November 2020 <https://www.xunta.gal/dog/Publicados/excepcional/2020/20201104/2476/AnuncioC3K1-041120-2_gl.pdf>.

Autonomous Community/City	Limits in the attendance.
La Rioja[144]	Wakes: 10 people in closed spaces, all of them members of same the group of cohabitants. Corteges of burial or cremation: 15 people and the celebrant. Funerals in closed spaces: Limited to ascendants and descendants in 1st and 2nd degree, and collaterals in 2nd degree, (brothers and sisters), with a maximum limit of 50% of the maximum capacity.
Navarre[145]	Wakes: 25/10 people in open door/closed spaces. Corteges of burial or cremation: 25 people.
Basque Country[146]	Wakes: 50% and 30/6 people in open door/closed spaces. Corteges of burial or cremation: 30/10 people in open door/closed spaces, and the celebrant

[144] Paragraph h) of the Annex I, of the Resolution 4/2021, of 27 January 2021, of the Technical General Secretary of the Board of Health of La Rioja. Official Bulletin of La Rioja of 28 January 2021, <https://ias1.larioja.org/boletin/Bor_Boletin_visor_Servlet?referencia=15259807–1-PDF-536181-X>.
See also the Resolution 6/2021 of 17 February, of the General Technical Secretary of the Counselor of Health of La Rioja. Official Bulletin of La Rioja of 18 February 2021 <https://ias1.larioja.org/boletin/Bor_Boletin_visor_Servlet?referencia=15569798–1-PDF-536757-X>.

[145] Article 1, paragraph 6, of the Order 63/2020 of 14 December 2020, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 16 December 2020, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2020/290/1>;
Extended until 14 January 2021, by the Order 64/2020 of 28 December 2020, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 30 December 2020, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2020/303/0>;
Extended until 28 January 2021, by the Order 1/2021 of 13 January 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 14 January 2021, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/9/1>;
Extended until 11 February 2021, by the Order 3/2021 of 26 January 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 28 January 2021, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/21/0>;
Extended until 25 February 2021, by the Order 4/2021, of 9 February 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 11 February 2021, n. 33, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/33/1>;
The Order 5/2021, of 23 February 2021, of the Counselor of Health of Navarre, allowed the attendance in wakes of 50/10 people in open door/closed spaces. In case of corteges of burial or cremation the new limit was established in 50 people. In force from 26 February 2021 until 11 March 2021. Official Bulletin of Navarre of 25 February 2021, n. 44, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/44/1>;
The Order 5/2021, was extended:
1) Until 25 March 2021, by Order 6/2021, of 9 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 February 2021, n. 44, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/57/1>;
2) Until 8 April 2021, by the Orders 7/2021, and 8/2021, of 23 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 March 2021, n. 68, extraordinary issue, https://bon.navarra.es/es/anuncio/-/texto/2021/68/2 and: <https://bon.navarra.es/es/anuncio/-/texto/2021/68/3>;
3) Until 22 April 2021, by the Order 11/2021, of 6 April 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 8 April 2021, n. 78, extraordinary issue <https://bon.navarra.es/es/anuncio/-/texto/2021/78/3>.

[146] Paragraph 4 of the Annex of the Decree 44/2020, of 10 December 2020, of the Lehendakari (President)of the Basque Country. Official Bulletin of the Basque Country of 11 December 2020, <https://www.euskadi.eus/y22-bopv/es/bopv2/datos/2020/12/2005319a.pdf>;
See also: Paragraph 4 of the Annex, of the Decree 13/2021, of 6 March 2021, of the Lehendakari (President) of the Basque Country. Official Bulletin of the Basque Country of 8 March 2021 <https://www.euskadi.eus/bopv2/datos/2021/03/2101349a.pdf>.

Autonomous Community/City	Limits in the attendance.
Murcia[147]	Wakes, and corteges of burial or cremation: 1) Areas with a Level of Alert low: a) Closed spaces: 75% or 50 people b) Open spaces: 100 people. 2) Areas with a Level of Alert medium/high: a) Closed spaces: 50% or 15 people b) Open spaces: 25 people. 3) Areas with a Level of Alert very high: a) Closed spaces: 50% or 15 people b) Open spaces: 25 people. 4) Areas with a Level of Alert extreme: It is recommended the postponement of civil and religious celebrations, if it is not possible: a) Closed spaces: 50% or 15 people b) Open spaces: 25 people.
Autonomous City of Ceuta[148]	Wakes: The presence of a maximum of 8 people at the entry of the mortuary facilities, and in the rooms 1 and 4, and a maximum of 4 people in the rooms 2 and 3 is allowed. Corteges of burial or cremation: 10 people in open air spaces.
Autonomous City of Melilla[149]	Wakes, and funerary corteges: 1) In open air spaces: 25 people. 2) In closed facilities: 1/3 of the maximum capacity, or a maximum of 10 people, respecting a safe distance of 2 meters.

Article 16 of the Law 2/2021 of 29 March 2021,[150] of urgent measures for the prevention, contention, and coordination against the COVID-19 pandemic established a minimum distance of 1.5 meters between individuals in all type of public places; places of worship included. This provision will be in force until the formal declaration of the health crisis's end by the national Government.[151]

2. THE RESPONSE AND ATTITUDE OF RELIGIOUS GROUPS.

The response of the religious groups, during the declaration of the state of alarm, can be qualified as exemplary and inspired by a clear sense of loyalty towards public authorities. They gave a model exhibition of responsibility, capacity of self-limitation, and civic sense, which are expected in a democratic society. All the main religious groups

[147] Article 13 of the Order of 13 December 2020, of the Counselor of Health of Murcia. Official Bulletin of Murcia of 14 December 2020 <https://www.borm.es/services/anuncio/ano/2020/numero/7173/pdf?id=789878>.

[148] Paragraph 5 of the Decree of the Counselor of Health of the City of Ceuta, of 15 October 2020. Official Bulletin of the City of Ceuta of 19 October 2020 <https://www.ceuta.es/ceuta/component/jdownloads/finish/1835-octubre/20421-bocce-extra80-19–10-2020?Itemid=534>.

[149] Article 7 of the Order n. 341 of 26 January 2021 of the Counselor of Economy and Social Policies of Melilla. Official Bulletin of Melilla of 28 January 2021 <https://www.melilla.es/mandar.php/n/12/9683/Extra7.pdf>.

[150] Official Bulletin of the State of 30 March 2021 <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021–4908>.

[151] Article 2.3 of the Law 2/2021, of 29 March 2021.

present in Spain immediately addressed instructions to their members, fully aware of the difficult health circumstances, in a clear evidence of a responsible exercise of their fundamental right of religious freedom.[152]

Mark Hill pointed out that *traditional religious organisations have embraced modern technology, and it is anticipated that hybrid acts of worship will persist, incorporating the old-style liturgies with the virtual*.[153]

2.1. The Catholic Church.

The declaration of the state of alarm in March 2020 was accompanied by a responsible answer from all religious groups.[154] We can assert that this has been a constant during all the pandemic´s evolution. The Spanish Catholic Episcopal Conference on 13 March 2020, one day before of the official declaration of the state of alarm, published its *Orientations to the current situation*,[155] expressing the maximum concern of the Spanish Catholic hierarchy due to the seriousness of the new health crisis, and adopting a series of extraordinary measures, following the advice and decisions issued by the Government, the Ministry of Public Health and the Autonomous Communities. These opportune *Orientations* included an appeal to the civic responsibility and solidarity of Catholics. The measures adopted included the suspension of face-to-face catechesis, talks, formative meetings, acts of devotion, concerts, conferences, or events of a similar nature in temples and diocesan offices. The Spanish Catholic Bishops recommendations followed the celebrations of the Eucharist by the media. And due to their vulnerability, it was advised that people with chronic illnesses, elderly, debilitated or at potential risk, and those who live with them, also refrain from attending the celebration of the Eucharistic sacrament. The *Orientations* of the Episcopal Conference included that the usual celebrations of the Eucharist could be maintained with the sole presence of the priest and a small group called by the celebrant. In the case of celebrations open to the people, it was recommended to avoid the concentration of people. In addition, during this time each Bishop might dispense from the Sunday precept to those who do not participate in person in the Eucharist for these reasons. The document recommended also receiving the communion in the hand. Celebrants, and those who distribute communion and prepare liturgical objects, were urged to have extreme care in disinfecting their hands. It was also requested that the rite of peace must be omitted or, alternatively, it must be expressed with a gesture avoiding physical contact. It was also advised to attend the Eucharist on television, instead of in person, especially in the case of the elderly and people with previous chronic illness. The text expressed the disposition of the Catholic Episcopal Conference to collaborate responsibly in everything necessary for the control of the pandemic, while attending to the indications of the health authorities.

The archdiocese of Madrid had already issued a series of recommendations on 10th March, due to the rise in coronavirus cases, calling to follow the guidelines dictated by the health authorities, ordering the closure of the Saint Damaso Ecclesiastical University, and planning the daily broadcast of the Eucharist from the cathedral through the diocese's YouTube channel.[156] On 13th March, the diocese of Madrid published on its website a series of instructions, calling for civic responsibility, to limit all kind of group

[152] <https://www.olir.it/focus/alejandro-torres-gutierrez-las-medidas-tomadas-por-las-las-confesiones-religiosas-en-espana-ante-el-estado-de-alarma-decretado-el-14-de-marzo-de-2020-por-la-epidemia-de-coronavirus-covid-19/>.

[153] Mark Hill, 'Coronavirus and the Curtailment of Religious Liberty'(2020) 9(4) Laws 27, 44.

[154] Jesús Sánchez-Camacho and Julio Matínez, 'The preference for cooperation over the vindication of religious freedom: The response of the Spanish Catholic Church to the COVID-19 crisis' (2021) Practical Theology 1.

[155] <https://conferenciaepiscopal.es/orientaciones-ante-la-situacion-actual/>.

[156] <https://www.archimadrid.org/index.php/oficina/madrid/2-madrid/9036278-recomendaciones-del-arzobispado-ante-el-aumento-de-casos-de-coronavirus>.

activity as much as possible, and the faithful were dispensed of the attendance at the Sunday celebration, recommending the transmission of the mass by audio-visual means, such as radio, television and internet. And priests were urged to celebrate the Eucharist daily, with a very limited number of believers, or even without them.[157]

During the strict days of national *lockdown* (during the second half of March, and the month of April, 2020) the religious programs broadcasting the Holy Mass achieved historic audiences. The Second Channel of the Spanish Broadcasting Corporation doubled their regular audience indicators, and the private Television *Trece TV*, owned by the Spanish Bishops Conference, tripled them.[158]

The same attitude of prudence and social responsibility was maintained by the Spanish Episcopal Conference, at the beginning of the process of de-escalation. The Spanish Bishops maintained their proposal of exemption of the general precept of participation in Sunday Mass. They suggest to the elderly to consider the possibility of staying at home and following the celebrations through the media, and recommended observing all the organizational and hygienic measures established by public authorities. These episcopal instructions included to maintain the worship without the believers' attendance, in all territories in Phase 0, (with the worst health indicators). In case of territories in Phase 1, the limit of attendance would be 1/3 and in territories in Phase 2, 1/2, with full observance of the social distance of security in any case. Additional recommendations included to increase the number of Sunday Mass celebrations for a better redistribution of believers, the use of personal mask, to maintain the doors open at the entry and exit, and the holy water fonts would remain empty.[159]

2.2. Evangelical entities.

At the beginning of March, several focal points were detected in Torrejón de Ardoz and Leganés, in the province of Madrid. The evangelical representatives claimed because of certain information published in the press that pointed out the particular religious belief of the patients infected by COVID-19. Some statements made by the spokesperson of the Ministry of Health, involuntarily, stressed the evangelical belief of the infected citizens. The collateral risk of *stigmatization* was clear, but this was not the intention of public authorities, who immediately apologised for it. The incident was politely and elegantly resolved when the Spanish Federation of Evangelical Entities (FEREDE) accepted the apologies.[160]

A generous attitude of dialogue characterized the position of evangelical representatives. On 6 March 2020 the health authorities begged for a postponement of the Assemblies of God World Congress, which was to be held at the *Caja Mágica* in Madrid 19–21 March 2020, and mass events of any kind with a high presence of people until the control of the transmission of disease and associated risks. In fact, the *Mobile World Congress*, initially programmed in Barcelona from 24 to 27 February 2020, had been

[157] <https://www.archimadrid.org/index.php/arzobispo/cartas/332-otras-cartas/9036307-dios-es-nuestra-esperanza-el-coronavirus-en-madrid-protejamos-la-salud-de-todos>.

[158] <https://www.abc.es/play/series/noticias/abci-misa-logra-audiencias-historicas-durante-confinamiento-202003240129_noticia.html>.

[159] <https://www.conferenciaepiscopal.es/nota-de-la-comision-ejecutiva-ante-el-inicio-de-la-salida-del-confinamiento/>.

[160] <https://www.elespanol.com/ciencia/salud/20200302/grupo-religioso-evangelico-posible-casos-coronavirus-torrejon/471703438_0.html>;
<https://www.lavanguardia.com/vida/20200302/473919222229/coronavirus-grupo-evangelico-torrejon-de-ardoz-covid-19.html>;
<https://www.elespanol.com/reportajes/20200303/evangelicos-fernando-simon-nadie-resto-contagiados-catolicos/471704262_0.html>;
<https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12144:2020–03-02-19-44-39&catid=42:freed>;

suspended. Diligently, the Secretary of the Executive Council of the Spanish Federation of Assemblies of God ordered, on 8 March 2020, the suspension of said Congress and its postponement until November 2020 for reasons of force majeure in a clear example of responsibility and solidarity.[161] Unfortunately, the same public authorities permitted the massive national demonstrations commemoratives of the Women's Day on 8 March 2020 and the ultra-conservative party VOX celebrated a multitudinous meeting in Vistalegre with the attendance of 10,000 people[162] with disastrous consequences for the pandemic's control in both cases.

On 10 March 2020, the FEREDE´s authorities published a statement requesting the suspension or postponement of *special activities*, such as camps, retreats, regional meetings, religious visits, pastoral trips, etc. It also suggested the possibility of suspending Sunday services for at least 15 days and additional measures like: the limitation of the capacity of places of worship to a third, to limit the maximum attendance to 1,000 people, to reduce the frequency of services to one per week, and to broadcast the religious services via internet or streaming. They called to follow the instructions of public authorities, and to evaluate a possible suspension of religious services if necessary.[163]

A couple of days before the official declaration of the state of alarm, on 12 March 2020, FEREDE released a statement taking a step further, and requesting the suspension of all meetings and services for at least the next 15 days, avoiding displacements, trips, and advising to remain at home as much as possible, as requested by the public authorities, especially for those of advanced age or with severe previous pathologies. It was recommended to take advantage of the resources of new technologies to hold virtual or streaming meetings[164]. The Seventh-day Adventist Church echoed this call in a statement published the following day[165].

On 19 March 2020 the website *Actualidad Evangélica*[166] echoed how FEREDE had preventively withdrawn the credential of an evangelical minister of worship of Malaga who, in a video posted on YouTube, had addressed a defiant speech to the authorities.[167]

A few days later on 23 March 2020, FEREDE, at the request of the Unit for the Management of Diversity of the Madrid Local Police, reaffirmed the obligation to comply with the provisions of the Royal Decree 463/2020 of 14 March 2020, declaring the state of alarm. The response of FEREDE was of maximum collaboration with the municipal police authorities, insisting on its call to all federated entities, for the maximum social responsibility, and to the use of creative and telematic ways to continue with their acts of worship, activities, and community life.[168]

[161] <https://unlimited2020.com/wp-content/uploads/ESPA%c3%91OL.pdf>.

[162] <https://okdiario.com/espana/sanidad-pidio-suspender-congreso-evangelico-madrid-coronavirus-dos-dias-antes-del-8-m-5364824>.

[163] <https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12165:2020–03-10-17-07-17&catid=42:ferede>.

[164] <https://www.actualidadevangelica.es/2020/COMUNICADO-SUSPENSION-TEMPORAL-DE-CULTOS-DOMINICALES.pdf>;
<https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12169:ferede-impulsa-el-teletrabajo-y-restringe-las-visitas-a-sus-oficinas&catid=42:freed>;
<https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12171:2020–03-12-17-11-39&catid=42:freed>.

[165] <https://revista.adventista.es/actualizacion-coronavirus-13–3-2020-comunicado-y-alternativas>.

[166] <https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12195:2020–03-19-18-32-19&catid=42:freed>.

[167] <https://www.actualidadevangelica.es/2020/Comunidado-de-Prensa-Reiteracion-del-llamado-a-la-suspension-de-cultos.pdf>;
<https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12195:2020–03-19-18-32-19&catid=42:freed>.

[168] <https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12199:ferede-reitera-el-llamamiento-a-sus-iglesias-de-que-suspendan-los-cultos&catid=42:freed>.

2.3. Muslim Communities.
A similar attitude of cooperation was followed by the Islamic Commission of Spain. On 12 March 2020, This institution recommended the suspension of the *Salat* (the collective prayer of Friday) for the 13th and 20th of March, and the closure of mosques the following days while suggesting to pray at home, and to be attentive to the administrative instructions. Similar recommendations were provided by the Islamic Cultural Center of Madrid.[169]

2.4. Jewish Communities.
The Federation of Jewish Communities of Spain, on 13 March 2020, published a statement containing several important measures of safety and hygiene measures:[170]

> 1) Do not kiss people, Tefillah books (Siddur[171]), tallits[172], mezuzahs[173] and Sefer Torah[174].
> 2) Do not shake hands.
> 3) Stay home in case of cough, fever, or shortness of breath.
> 4) Wash your hands frequently with soap and water, or hydroalcoholic gel.
> 5) Refrain from visiting people in quarantine.
> 6) Do not go to the synagogue in case of previous contact with someone infected.
> 7) The elderly or sick people should refrain from going to the synagogue, if a large attendance of people is expected.
> 8) Do not share the same cup during the Kiddush.[175] Individual cups must be used.

Shortly after the declaration of the state of alarm, the President of the Federation of Jewish Communities of Spain, Isaac Querub, addressed a message of encouragement[176]. And on 22 March 2020, the media echoed the message of solidarity because of the coronavirus crisis in Spain, addressed to King Felipe VI, by the President of Israel, Reuven Rivlin[177].

2.5. Orthodox Churches.
In the specific case of the Romanian Orthodox Church, which is the one with the largest number of faithful within Orthodox churches rooted in Spain, the website of its Bishopric for Spain and Portugal published a statement, dated 19 March 2020, which included a series of recommendations such as:[178]

> 1) To hold the Holy Mass in private, with a limited participation in addition to the priest, of a very small number of believers.
> 2) At Sunday Mass, or during the week, the faithful could go to church only for needs that cannot be postponed with prior telephone request and within a time agreed with the parish priest, and strictly respecting the protection rules imposed by civil authorities, such as masks and gloves.

[169] <http://www.centro-islamico.com/reflexiones/aviso/>; <http://www.centro-islamico.com/reflexiones/es-una-buena-oportunidad/>.

[170] <http://jewishmarbella.org/fcje-comunicado-de-medidas-de-seguridad-e-higiene-ante-el-coronavirus/>.

[171] A *siddur* is a Jewish prayer book, containing a set order of daily prayers.

[172] A white shawl with fringed corners worn over the head and shoulders by Jewish males during religious services (Collins Dictionary).

[173] A piece of parchment inscribed with biblical passages and fixed to the doorpost of the rooms of a Jewish house (Collins Dictionary).

[174] The scrolls of the Law (Collins Dictionary).

[175] A special blessing said before a meal on sabbaths and festivals, usually including the blessing for wine or bread, (Collins Dictionary).

[176] <https://www.radiosefarad.com/que-nadie-se-sienta-solo-con-isaac-querub-presidente-de-la-fcje/>.

[177] <https://www.lavanguardia.com/politica/20200322/4830251364/rivlin-expresa-al-rey-de-espana-su-solidaridad-por-la-crisis-del-coronavirus.html>.

[178] <http://www.obispadoortodoxo.es/index.php/arhiva/evenimente-2019/194-mai-2020/2020-comunicat-de-presa>.

3) All other liturgical and public services and extra-liturgical activities were suspended in the meantime.
4) In addition, Romanian Orthodox priests were urged to use traditional and modern means of communication, such as the telephone, or social networks, in order to transmit the official religious services of the Church, and to be able to maintain contact with them.
5) The faithful were urged to pray as a family, and to exercise the spiritual reading, and internal reflection.

The COVID-19 crisis has provoked a serious economic problem for the Orthodox Churches, because they do not receive financial support from the State, like the Catholic Church. Orthodox parishes are maintained to a large extent with the contributions of the faithful, on the occasion of liturgical celebrations, and the acquisition by them of religious objects, such as candles or icons. Many Orthodox believers are immigrants with very modest incomes. The large period of confinement, and the limitations in the places of worship´s capacity have been a serious handicap for the worthy support of the clergy.

3. CONSTITUTIONAL CONTROVERSIES.

3.1. The Opportuneness Of The Declaration Of The State Of Alarm.

The first legal controversy is to determine the specific scenario of constitutional anomaly that must be declared. As we said, according to Article 116 of the Spanish Constitution, there are 3 different alternatives: *the states of alarm, emergency, and siege (martial law)*. Unlike what happens in case of declaration of the states of emergency and siege in which, according to Article 55 of the Constitution, it is possible to suspend some fundamental rights (such as the freedom of movement), this is not feasible during the state of alarm. Some authors have held the theory that in this particular context the state of emergency must have been declared, because according to Article 13 of the Organic Act 4/1981 of 1 June 1981, of the states of alarm, emergency, and siege, this special circumstance affected the free exercise of the right and freedoms of the citizens and the regular functioning of the essential public services, and the public order was affected.

We do not agree with this interpretation of the Constitution, and the Organic Act 4/1981 of 1 June 1981, because the crisis of COVID-19 was a *mere* health crisis, and in this case, the most *accurate* constitutional and legal solution is to activate the Article 4 of the Organic Law 4/1981, that empowers the Government to declare the state of alarm, in all, or part, of the national territory, *when health crises occur, such as epidemics*.

The rule of law rests over the full respect of procedures, and the spirit of our Constitution, and organic legislation, cannot be clearer, because this crisis has been an obvious case of *epidemic*.

Nevertheless some authors, such as Aragón Reyes,[179] pointed out that the declaration of the state of alarm does not allow a generalized suspension of the freedom of movement[180] because this is only possible during the state of *emergency.* For this reason some authors considered that the only constitutional alternative was to declare the state of emergency.[181] From a very different perspective, López Garrido [182] remarked that the only alternative constitutionally possible was to declare the state of alarm, because

[179] Manuel Aragón Reyes, 'Hay que tomarse la Constitución en serio' *El País* (10 April 2020) <https://elpais.com/elpais/2020/04/09/opinion/1586420090_736317.html>.

[180] Let us think in Article 7 of the Royal Decree 463/2020, of 14 March 2020, (latterly modified by the Royal Decree 465/2020, of 17 March 2020).

[181] Sieria Mucientes, 'Estado de alarma' (n8) 295.

[182] Diego López Garrido, 'Un estado de excepción sería inconstitucional' *elDiario.es* (11 April 2020) <https://www.eldiario.es/opinion/tribuna-abierta/excepcion-inconstitucional_129_2262738.html>.

the state of emergency would imply giving exceptional powers to the executive, which are not necessary for the fight against COVID-19 and the protection of the citizens' live and health.[183]

As mentioned, the Sentence of the Spanish Constitutional Court 148/2021 of 14 July 2021,[184] established the unconstitutionality of the restrictions to the freedom of movement during the declaration of the state of alarm[185] from 14 March 2020 until 21 June 2020. The Constitutional Court understood that what has happened was not a *mere* case of *limitation* of this right, but rather a *suspension*, and this *suspension* is not possible during the state of alarm. On the Court´s opinion, the state of *emergency* had to be declared. The point of view of the Constitutional Court has been criticized, because what really happened was a (*mere*) *epidemic*, it was not a *crisis of public order*, or a case of *abnormal functioning of public services*.

The Sentence 148/2021 of the Constitutional Court, on 14 July 2021, reasoned that the restrictions on the fundamental right of religious freedom during the *first* state of alarm were proportional. If we analyse the particular fundamental right of freedom of religion in the Spanish Constitution, we must remember that this right may not be suspended in Spain under any circumstance, even under the previous formal declaration of anyone of the three *abnormal* scenarios provided in Article 116 of the Spanish Constitution. The discussion will not reside in the *opportunity* of the declaration of the state of alarm but in the extension and *proportionality* of the limits over this fundamental right that cannot be suspended and yet is not absolute. This is the real *Gordian knot*.

3.2. The Length And Successive Extensions Of The State Of Alarm.

How many extensions of the state of alarm are possible and for how long? The Spanish, and the Organic Law 4/1981, do not establish a maximum number of extensions of the period of alarm, and both norms remain quiet about their specific length. In principle, our first consideration is that successive extensions will be possible if the *de facto situation* that provoked the health crisis remains present. But, how long may their duration be?

Viktor Orban proclaimed indefinitely the state of alarm in Hungary. This solution produces a certain legal concern because of the unlimited and extraordinary powers attributed to the executive power and the risk of a possible insufficiency of parliamentary controls. In fact, Article 116 of the Spanish Constitution only specifies the maximum length of the state of exception, a maximum of 30 days, extendable for another equal period. But, what happens with the state of alarm? Our Constitution only says that it may be declared by the Government for a maximum of 15 days, and that the Congress' permit for additional extensions is required. When a state of alarm was declared in 2010 by the Royal Decree 1673/2010 of 4 December 2010 as a result of the traffic air controllers strike, the initial period of 15 calendar days was extended by the Royal Decree 1717/2010 of 17 December 2010 until 15 January 2011, 12:00 p.m., that is, for 4 additional weeks. It was a *preventive* extension of the state of alarm, of dubious constitutionality, because the air traffic had been regularized several days before the approval of the extension by the Congress, and according to Article 1.2 of the Organic Law 4/1981, the adopted measures and the duration of the state of alarm must be strictly indispensable for the restoration of normality.[186]

[183] Ruiz Rico, 'Las dimensiones' (n13)

[184] Official Bulletin of the State of 31 July 2021, https://www.boe.es/boe/dias/2021/07/31/pdfs/BOE-A-2021–13032.pdf.

[185] Legal Ground number 5.

[186] Alejandro Torres Gutiérrez, 'Retos de la declaración del estado de alarma con motivo de la Covid-19 para el Estado de Derecho y el ejercicio de los derechos fundamentales' Raquel Luquin Bergareche (ed), *Covid-19: conflictos jurídicos actuales y desafíos*, Bosch – (Wolters Kluwer 2020) 488–489.

At the end of May 2020, during the 4th extension of the state of alarm declared on 14 March 2020, the Government suggested a hypothetical 5th extension for a term longer than 15 days. The antecedent of 2010, during the air controllers strike, was invoked. The minoritarian Spanish Government of coalition was in a position of weakness in Parliament, thus it was afraid of the *erosion* of its parliamentary support and the political *fatigue* caused by the necessity of periodic negotiations every two weeks with the political parties of the opposition represented in the Congress.

The Government was thinking of the disastrous consequences of a *hypothetical,* (and *probable*, or at least, very *possible*), defeat in Congress and its devastating political cost. But on the other hand, there was a clear and serious risk of a weaker oversight of the executive by Parliament because July and August are a period of parliamentary recess and at that time the oversight of executive is only possible by the Congress Standing Committee or through extraordinary plenary sessions of Congress.

Immediately, some prestigious authors like Banacloche[187] and Ruiz Robledo,[188] pointed out the necessity of a teleological and systematic interpretation of the legal system, detecting a *general rule of Law* establishing that *any extension may be longer that the initial term*, that directly inspired the drafting of Article 91.2 of the Spanish Congress Standing Orders, and the same logic deduced from Article 116.3 of the Spanish Constitution, which states that the declaration of a state of emergency may not exceed thirty days, subject to an extension for a further thirty-day period. As stated by this doctrinal position, it is logical that if the first declaration may be only made for a maximum period of 15 days, then any additional extensions should not be longer than this period of time and must be renewed every 15 days by the Congress.

In our mind was the risk of a possible, (and non desirable) *chronification* of the state of alarm, with a parallel debilitation of parliamentary controls. The solution given in 2010 would not have been a constitutional precedent, properly speaking, (in fact, the previous 4 extensions passed in March, April and May 2020, had only a length of 15 days, each of them). The final political solution was to allow 2 additional extensions of 2 weeks, until 21 June 2020. Was this solution the best? As maintained by Francesc de Carreras,[189] the successive extensions were adjusted to criteria of *accommodation* and *proportionality*, due to the serious danger for public health caused by COVID-19. This is also our opinion because we think that the final Government request of 2 extensions of 15 days each and the correlative Congress permits were compatible with the constitutional spirit.[190]

The sixth extension of the state of alarm was presented by the Government as the *last*. But what would have happened if another one had been necessary and if the Congress decided to refuse? The Spanish legislation remains quiet, but how long would it be necessary to extend the state of alarm in a context of economical and social crisis?[191]

We think that the constitutional and organic regulation of the state of alarm's extensions is too frugal and requires, at least, a teleological interpretation. An initial

[187] Julio Banacloche, 'El debate abierto por la prórroga' *El Mundo* (17 May 2020) 8–9 <https://www.elmundo.es/espana/2020/05/17/5ec01e93fc6c83883c8b4614.html>.

[188] Agustín Ruiz Robledo, 'Razones jurídicas para una prórroga corta' *El Español* (19 May 2020) <https://www.elespanol.com/opinion/tribunas/20200519/razones-juridicas-prorroga-corta/491320870_12.html>; <https://aruizrobledo.blogspot.com/2020/05/razones-juridicas-para-una-prorroga.html>.

[189] See: <https://www.larazon.es/espana/20200430/fzujvciw45fgjlfw6neoyqgfb4.html>.

[190] Alejandro Torres Gutiérrez , *The Spanish Parliament in the context of the Coronavirus pandemic, in: The impact of the health crisis on the functioning of Parliaments in Europe* Publication of the Robert Schuman Foundation, under the direction of Emmanuel Cartier, Basile Ridard, and Gilles Toulemonde. Rober Schuman Foundation (2020) 5 <https://www.robert-schuman.eu/en/doc/ouvrages/FRS_Parliament_Spain.pdf>.

[191] Valeria Piergigli, 'L´emergenza Covid-19 in Spagna e la dichiarazione dell´estado de alarma. Ripercussioni sul sistema istituzionale e sul sistenma dei diritti' (2020) (2) DPCE online 1561.

declaration for a period of 15 days may be clearly insufficient in order to give an adequate and accurate medical, political, and legal answer to a huge and serious crisis like a pandemic of this type. On the other hand, the executive cannot receive a blank check because parliamentary democracy rests over a delicate set of checks and balances and executive must be controlled by the Parliament. This makes our parliamentary democracies stronger and more reliable. For this reason, we think that any extension of the period of the state of alarm must be accompanied by the correspondent tools of parliamentary control.

The problem reappeared again during the *third* declaration of the state of alarm by the Royal Decree 926/2020 of 25 October 2020,[192] during the emergence of *the second wave*, initially for a period of 15 days, *without prejudice to the extensions that may be established*.[193] Article 14 of this Royal Decree, initially foresaw, in case of extension, the mere appearance of the Ministry of Health in the Commission of Health of the Congress of Deputies every 15 days. This was considered insufficient by the political parties represented in this camera. Finally, the Spanish Congress permitted the extension of the state of alarm, during a period of 6 months, from 00.00 a.m. 9 November, until 00.00 a.m. 9 May 2021.[194] The political parliamentary agreement included three commitments:

> 1) The President of the Government would appear in the Plenary of the Congress every 2 months to account for the pandemic evolution and the Government decisions. This point included a greater political profile than that initially wanted by the Government (the mere appearance of the Ministry of Public Health, in the Commission of Health).
> 2) The monthly appearance of the Minister of Public Health in the Commission of Health of the Congress of Deputies.
> 3) And the Conference of Presidents of Autonomous Communities, 4 months after the entry into force of the extension, could request a proposal in order to lift the state of alarm, with the prior favorable agreement of the Interterritorial Council of the National Health System, considering the evolution of the health, epidemiological, social and economic indicators.[195] This was a particular exigence of ERC (*Esquerra Republicana de Catalunya* -Republican Left of Catalonia-)

This political solution was looking for a flexible answer to the health crisis, with a *medium term* perspective (something that is not possible with a *short termism* of 15 days, because the COVID-19 pandemic has a projection with longer term implications), and without the *perennial Damocles sword* of biweekly votes in the Congress (with uncertain and unpredictable result) but at the same time, provided of political controls by the Congress over the Government action.

The Sentence of 27 October 2021 of the Constitutional Court, declared:[196]

> 1) *A priori*, the *mere* hypothetical possibility of introduction of limits in the maximum attendance to places of worship by the Autonomous Communities (in their condition of *delegated authority*) was not unconstitutional. It should be necessary a casuistic analysis case by case of *each* particular limit fixed by *each* Autonomous Community, from a *proportional* point of view.[197]

[192] Official Bulletin of the State of 25 October 2020 <https://www.boe.es/eli/es/rd/2020/10/25/926>.

[193] Article 4 of the Royal Decree 926/2020, of 25 October 2020.

[194] Official Bulletin of the State of 4 November 2020 <https://www.boe.es/buscar/doc.php?id=BOE-A-2020–13492>.

[195] New redaction given to article 14 of the Royal Decree 926/2020 of 25 October 2020, by the Agreement permitting the extension of the state of alarm.

[196] <https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2021_107/2020-5342STC.pdf>.

[197] Sentence of the Spanish Constitutional Court of 27 October 2021, Legal Ground number 7.

2) The unconstitutionality of the state of alarm extension for a period of 6 months. The reason was not the *long* period of time but the indeterminacy of the measures susceptible of adoption (their content, and temporary and geographical ambits) and the lack of parliamentary control.[198]
3) That the delegation in the Autonomous Communities of the capacity of decision over the particular measures to be adopted in their territories was unconstitutional, because the Spanish Congress of Deputies could not check and control politically these measures.[199]

3.3. The Procedure In The Adoption Of The New Limitative Regulations On Religious Freedom: The Lack Of Consultation With The Advisory Commission On Religious Freedom.

García García[200] criticized that the Spanish Advisory Commission on Religious Freedom was not consulted by the Spanish Government during the state of alarm. This author affirms that this advisory Commission *must* be consulted and *must* pronounce its opinion on any legal project or provision relating to the fundamental right of religious freedom.

This doctrinal position is laid down in a double *misunderstanding*. The first error consists in a full ignorance of the constitutional architecture of the state of alarm, and its serious factual context and grave circumstances, which requires a quick public answer. The State, and the Spanish society, cannot be waiting one or two weeks to the summons, meeting, and pronouncement of any advisory committee. The Fathers of the Constitution were fully aware of this foreseeable scenario and, for this reason, the national Government is authorised by Article 116.2 of the Spanish Constitution to legislate with a very flexible instrument: the Royal Decree. The legislative process followed for the declaration of the state of alarm and the consequent limitation of the fundamental rights, such as the religious freedom or the freedom of movement, has all the political, legal, and constitutional guarantees, because the Congress of Deputies must be immediately convened and informed, and the extension of the initial declaration for a period of 15 days is not possible, without the previous permit of the Congress.

The second mistake consists in the unawareness of the mechanisms of relation between Church and State in a country in which *there shall be no State religion*,[201] and consequently the State may legislate on religious freedom without the *patronage* or *supervision* of religious groups, the Catholic Church included. This is the teleological orientation of the Royal Decree 932/2013 of 29 November 2013, which regulates the Spanish Advisory Commission on Religious Freedom. This is evidently clear if we read carefully the Article 3 of the own Royal Decree 932/2013[202] in which it is *mandatory* to ask for a previous report of this Commission, (that is not binding in any case), only in the specific hypothesis regulated in its letter a): the drafts or projects of agreements of cooperation between the State and religious groups. In all the other cases, to require the previous opinion of this Advisory Commission is only *optional*, and *never binding*.

On the other hand, it is not true that the public administration was not in contact with the religious authorities at the beginning of March 2020. We must remember that, the day before the official declaration of the state of alarm, the Spanish Catholic Episcopal

[198] Sentence of the Spanish Constitutional Court of 27 October 2021, Legal Ground number 8.
[199] Sentence of the Spanish Constitutional Court of 27 October 2021, Legal Ground number 10.
[200] <http://www.blog.fder.uam.es/2020/06/18/libertad-religiosa-en-tiempo-de-coronavirus/>.
[201] Article 16.3 of the Spanish Constitution <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>.
[202] Official Bulletin of the State of 16 December 2013 <https://www.boe.es/boe/dias/2013/12/16/pdfs/BOE-A-2013–13069.pdf>.

Conference had published its *Orientations to the current situation*,[203] which included an appeal to the responsibility of Catholics. This document is clear evidence that informal contacts existed. In many Catholic dioceses, like Asturias, their own Catholic bishops recognized the existence of informal contacts with the regional political authorities.[204]

The attitude of the Ministry of Health with respect to the evangelical representatives was very similar, because both of them were open to dialogue from the very beginning of the crisis. On 5th and 6th March 2020, the legal representatives of FEREDE, the authorities of the Ministry of Public Health, and the regional Government of Madrid met in the main building of the Ministry of Health, Consumption and Welfare, trying to find a coordinated solution.[205] On 9 March 2020, the FEREDE recommended the postponement of great encounters of believers already programmed.[206]

For all these reasons, it is difficult to understand the attitude of García García, who made these assertions being a member of the Spanish Advisory Commission on Religious Freedom at the proposal of the Catholic Church. Our perplexity is higher when we remember that he was a former Deputy Director of Relations with the Religious Groups, and for that reason, a greater high-mindedness could be expected.

3.4. Limitations and Extra-Limitations.

Some isolated incidents occurred. The most important perhaps was during the Catholic celebrations of Good Friday on 10 April 2020 at the Cathedral of Granada, with the attendance of twenty believers. The police requested to finish the religious celebration, something that happened after the communion of the attendants. In our opinion, the entry of policemen was not justified, because the minimum distance between attendants was widely respected, in this spacious cathedral with capacity for almost 900 people.[207]

Additional incidents happened in other places of worship. Some religious ceremonies were interrupted during the state of alarm. In many cases, the social distance of security was being observed. These interventions of public authorities were not proportional, and clearly illegal, in several cases.[208]

On 30 April of 2020, a Criminal Judge of A Coruña, absolved a citizen, who after visiting a church, immediately later went to a supermarket for shopping.[209]

3.5. The Opportunity Of The Limitations Introduced In The Exercise Of The Fundamental Right Of Religious Freedom: Limit Or Suspension?

3.5.1. Restrictions Introduced By The Central Government During The First Declaration Of The State Of Alarm.

As we told, Article 11 of the Royal Decree 463/2020, of 14 March 2020, introduced a limit of at least one meter between attendants in places of worship.

[203] <https://conferenciaepiscopal.es/orientaciones-ante-la-situacion-actual/>.

[204] This assertion may be checked at: <https://www.iglesiadeasturias.org/disposiciones-urgencia-del-arzobispo-oviedo-ante-agravamiento-del-coronavirus-covid-19/>.

[205] <https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12151:2020–03-05-22-13-32&catid=42:freed>.

[206] <https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12150:2020–03-05-19-39-47&catid=46:actualidad>;
<https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12155:2020–03-06-19-58-47&catid=42:freed>.

[207] <https://www.20minutos.es/noticia/4223298/0/policia-desaloja-catedral-granada-arzobispo-fieles-oficios-viernes-santo-estado-alarma-coronavirus/>;
<https://www.elmundo.es/andalucia/2020/04/11/5e91ecfffc6c833b538b457e.html>;
A different perspective of the same events: <https://www.eldiario.es/sociedad/portavoz-desmedida-intervencion-policial-granada_1_2259738.html>

[208] Soler Martínez, 'Estado de alarma y libertad religiosa y de culto'(n8) 28.

[209] Roj: SJP 13/2020 – ECLI: ES:JP:2020:1 Id Cendoj:15030510012020100001.

On 28 April 2020, the ultra-conservative party VOX filed an appeal of unconstitutionality against the Royal Decrees 463/2020, 465/2020, 476/2020, 487/2020, 492/2020, and the Order SND/298/2020, considering that these dispositions violated the freedom of religion consecrated in Article 16 of the Spanish Constitution.[210] It was certainly a *surprise* because none of the 349 deputies who participated in the parliamentary vote allowing the first extension of the state of alarm[211]on 25 March 2020 had voted against this extension, formalized by the Royal Decree 476/2020 of 27 March 2020; a Royal Decree that was now appealed before the Constitutional Court. It is convenient to remember that, from Roman Law times, *venire contra factum proprium non licet.*

The appellants claimed that Article 7 of the Royal Decree 463/2020 of 14 March 2020 (latter modified by the Royal Decree 465/2020 of 17 March 2020) limited the freedom of circulation of the citizens, which was only permitted for a very restricted list of activities and did not include the attendance at places of worship, and for this reason, also violated the fundamental right of freedom of religion recognized by Article 16 Spanish Constitution. But the appellants forgot that it was perfectly possible to understand that it was included within Article 7, letter h, of the Royal Decree 463/2020, as *other activity of analogous nature* directly connected with the exercise of a fundamental right, in this case, religious freedom.

The appeal of unconstitutionality also questioned the prohibition of wakes, and the postponement of religious and civil funerals, by Articles 3 and 5 of the Order SND/298/2020, of 29 March 2020.[212] These limits were particularly painful for families but we consider that they were justified by the Preamble of the Order, in which it was expressly recognized that *due to the special characteristics surrounding funeral ceremonies*, it was difficult to ensure the application of the distancing measures with the interpersonal separation of more than one meter. And because family members and friends of the deceased could have been close contacts, it was especially important to observe the quarantine and distance rules. One of the most important outbreaks of the pandemic was a burial ceremony celebrated in the city of Vitoria at the end of February 2020.

The exigencies of this appeal of unconstitutionality went further than the official position of the Catholic hierarchy at that time. The Catholic Spanish Episcopal Conference had recommended a month prior, on 13 March 2020, to limit the attendance at funerals only to the closest family and friends, and had suggested the celebration of Eucharist with only the presence of the celebrant and a very reduced group of people, previously called *ad hoc* by the minister of worship.[213] Many Catholic dioceses had followed this attitude. For instance, the edition of the regional journal, *Diario de Navarra*, of 14 March 2020, published the *instructions* of the archbishop of Pamplona and Tudela, Monsignor Francisco Pérez, ordering the postponement of all kinds of celebrations, such as weddings, baptisms, communions and confirmations, and the suspension of the public celebration of funerals, suggesting the celebration in private, with a limited number of close relatives and friends.[214] The same instructions were given in other Catholic

[210] <https://www.voxespana.es/wp-content/uploads/2020/04/recurso-inconstitucionalidad-estado-alarma-VOX.pdf>; <https://www.congreso.es/web/guest/busqueda-de-iniciativas?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_iniciativas_mode=mostrarDetalle&_iniciativas_legislatura=XIV&_iniciativas_id=232/000016>; <https://www.boe.es/boe/dias/2020/05/08/pdfs/BOE-A-2020–4875.pdf>.

[211] Until 00:00 a.m. 12 April 2020.

[212] Official Bulletin of the State of 30 March 2020 <https://www.boe.es/boe/dias/2020/03/30/pdfs/BOE-A-2020–4173.pdf>.

[213] <https://conferenciaepiscopal.es/orientaciones-ante-la-situacion-actual/>

[214] <https://www.diariodenavarra.es/noticias/navarra/2020/03/14/el-arzobispado-pamplona-pospone-bodas-bautizos-confirmaciones-suspende-funerales-684181–300.html>.

dioceses, such as Asturias.[215] With this *clever* behavior, the Catholic hierarchy gave evidence of a great *common sense*, inexistent in certain sectors of the political *elite*. We must remember that at that time one of the most important outbreaks of the pandemic had recently occurred, a burial ceremony celebrated in the city of Vitoria at the end of February, which immediately spread the disease in the neighboring Autonomous Communities of Basque Country and La Rioja.

The Sentence of the Spanish Constitutional Court 148/2021 of 14 July 2021 considered that the limits imposed on the fundamental right of religious freedom by Article 11 of the Royal Decree 463/2020 of 14 March 2020, were *constitutional*, and *proportional*, and because it was always allowed the freedom of attendance to places of worship.[216]

3.5.2. Restrictions Introduced By The Autonomous Communities During The Third Declaration Of The State Of Alarm.

Were the limitations introduced by the Autonomous Communities *justified* and *proportional*? Let's see for instance one of the most restrictive regulations: the legislation passed by the regional Government of Castile and Leon, formed by a coalition of parties: the conservative Popular Party, and the centre liberal Party, *Ciudadanos*.[217] A coalition of parties which are not *suspicious* of *anticlericalism*:

Article 1.1 of the Agreement 2/2021 of 15 January 2021 of the President of Castile and Leon[218], anticipated the curfew in this region at 8.00 p.m. (instead of 10.00 p.m. the earlier hour, in the interval between 10:00 p.m. and 12:00 p.m. established by article 5 of the Royal Decree 926/2020,of 25 October 2020).[219] The Supreme Court in a court order of 16 February 2021,[220] suspended the enforcement of this regional provision, considering that it overreached the competences of the regional President as *delegated authority* of the national government.[221] Automatically, that same day the Agreement 6/2021 of 16 February 2021[222] postponed the curfew to 10:00 p.m. in this Autonomous Community.

Another very problematic regional disposition was Article 3 of the Agreement 3/2021 of 15 January 2021, of the President of the Regional Government of Castile and Leon,[223] which limited the maximum attendance at places of worship to 1/3 of their maximum capacity, and never more than 25 people. The Catholic bishops affected protested against this restrictive measure on 16 January 2020, considering that it was *unfair and disproportionate* and asked for its revision, but at the same time, they made a public call to respect the regulations by their parishioners.[224]

Before the evaluation of this restrictive regulation, we think that it would be convenient to know how the health situation in this region was. For instance, on 2 February 2021, the city of Palencia, had a tragic cumulative incidence rate of diagnosed cases in

[215] <https://www.iglesiadeasturias.org/disposiciones-urgencia-del-arzobispo-oviedo-ante-agravamiento-del-coronavirus-covid-19/>

[216] Legal Ground number 10.

[217] *Citizens*, sic.

[218] Official Bulletin of Castile and Leon of 16 January 2021 <https://bocyl.jcyl.es/boletines/2021/01/16/pdf/BOCYL-D-16012021–1.pdf>.

[219] Official Bulletin of the State of 25 October 2020 <https://www.boe.es/eli/es/rd/2020/10/25/926>.

[220] Roj: ATS 1156/2021 – ECLI: ES:TS:2021:1156A Id Cendoj:28079130042021200020.

[221] <https://www.tribunasalamanca.com/noticias/duro-auto-del-supremo-contra-el-toque-de-queda-de-castilla-y-leon-restriccion-ilegitima-e-irreparable/1613486388>.

[222] Official Journal of Castile and Leon of 17 February 2021 <https://bocyl.jcyl.es/boletines/2021/02/17/pdf/BOCYL-D-17022021–1.pdf>.

[223] Official Journal of Castile and Leon of 16 January 2021 <http://bocyl.jcyl.es/boletin.do?fechaBoletin=16/01/2021>.

[224] <https://www.revistaecclesia.com/un-criterio-ni-razonado-ni-aceptable-los-obispos-de-castilla-y-leon-piden-al-gobierno-una-limitacion-de-aforo-proporcional/>.

14 days per 100,000 inhabitants of 2,283.54 cases. This day, the average of this rate in the Autonomous Community of Castile and Leon was of 1,295.91 cases. And the serious rate of occupation by patients of COVID-19 in the Intensive Care Units of the hospitals of this city was 67.50%, and the regional average: 57.87%. One third of all the hospital beds of the region were occupied by patients of COVID-19.[225]

In our opinion, it is remarkably important to know that the public health indicators of this region were extremely risky, and, for this reason, we think that many of the hard restrictions passed by the regional authorities were justified. Nevertheless, to establish the sole limit of 25 people for all the regional places of worship was not perhaps the best solution because of the differing capacities. The *risk* entailed by a concentration of 25 people in the spacious cathedrals of the cities of Palencia, Leon, Burgos or Salamanca, is much lower than in a very small church or chapel of a remote town. It has no sense to allow a theatrical presentation in Valladolid with 100 attendants in a small theatre yet to limit the celebration of the mass with only 25 believers in the spacious cathedral.[226] The graduation of the limit *could* (and *should*) have been done *better*, in a more *accurate* way. A limit of 25 people is very strict in the case of a big cathedral, mosque or synagogue, and it is not proportionate to any health or epidemiological criterion or standard, and *de facto* it may be equivalent to a full and direct attack against the content of the right of religious freedom.[227]

Martínez López-Muñiz[228] pointed out that many places of worship of this region have an area and volume which allow the attendance of more than 25 people with a secure interpersonal distance. This author also remarked that the regional legislation allowed the agglomeration of people in public transportation, terraces, schools, and other educational centers.

This author also indicated that the general and absolute limit of 30 attendants in places of worship, established in France by Article 47 of the Decree 2020–1310 of 29 October 2020,[229] was voided by the Council of State in France through its *Ordonnance* of 29 November 2020.[230] The Council of State considered this limit abusive because the religious meetings and celebrations were the only activities affected by this general limit, and gave a term of 3 days to the First Minister for the drafting of a new legislation with a more proportional criterion. Article 2 of the Decree 2020–1505 of 2 December 2020[231] annulled the general limit of 30 attendants, and established a new one based on a ratio of proportionality, and susceptible to variation, according to the real dimensions of the place of worship. The new legislation ordered a minimum distance of two places between those occupied by each person or group of persons sharing the same domicile, and every second row must remain unoccupied.[232]

Initially, the Spanish Supreme Court, in a court order of 19 January 2021,[233] denied the request for precautionary measures without the previous audience of the regional

[225] <https://analisis.datosabiertos.jcyl.es/pages/coronavirus/>.

[226] <https://www.abc.es/espana/castilla-leon/abci-abogados-cristianos-lleva-supremo-limite-aforo-25-personas-templos-castilla-y-leon-202101181220_noticia.html>.

[227] This was also the opinion of the Bishops of this region. See: https://diariodecastillayleon.elmundo.es/articulo/castilla-y-leon/obispos-ven-injusto-limitar-25-personas-aforo-templos-piden-sea-proporcional/20210116175815022263.html.

[228] José Luis Martínez López-Muñiz, '*La Francia laica protege la libertad religiosa*' *El Imparcial*, (14 February 2021) < https://www.elimparcial.es/noticia/222016/la-francia-laica-protege-la-libertad-religiosa.html>.

[229] <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042475143?r=9BtQcTAF3G>.

[230] <https://www.conseil-etat.fr/actualites/actualites/limite-de-30-personnes-dans-les-etablissements-de-culte-decision-en-refere-du-29-novembre>; <https://juricaf.org/arret/FRANCE-CONSEILDETAT-20201129–446930>.

[231] <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042602178>.

[232] <https://www.leparisien.fr/societe/jauge-dans-les-lieux-de-culte-la-proposition-des-6-m2-par-fidele-ne-fait-pas-l-unanimite-02–12-2020-8411921.php>

[233] Roj: ATS 16/2021 – ECLI: ES:TS:2021:16A Id Cendoj:28079130042021200002.

Government of Castile and Leon, requested in the Appeal number 13/2021 by the association *Abogados Cristianos,*[234] and dismissed the suspension of the Agreement 3/2021 of 15 January 2021 of the President of the Regional Government of Castile and Leon[235] that established the limit of 25 attendants in the regional places of worship. The Supreme Court considered that the appellant did not prove the *special urgency* of the precautionary measures of suspension of this limitation in the number of attendants.

Nevertheless, in a later court order of 18 February 2021[236] (appeal number 19/2021) the Spanish Supreme Court invalidated the maximum limit of 25 attendants, established by the regional legislation of Castile and Leon, leaving only the general limitation of a maximum percentage of 33% of the maximum capacity, of the places of worship.[237]

The regional government of Castile and Leon argued two main ideas:[238]

> 1) The previous precedent of the Article 3 of the Agreement 13/2020 of 12 November 2020 of the President of Castile and Leon,[239] that established a general limit of attendance at the places of worship of 1/3 of their maximum capacity or 15 people.

But, in our opinion, there were two significant differences:

> a) The Agreement 13/2020 of 12 November 2020 only affected a very limited territory, only the city of Burgos, in the specific context of a very critical health situation.
> b) This Agreement had a very limited validity, of initially 1 week, that latterly was extended until 3 December 2020.[240]
>
> 2) The particular emotional circumstances concurring in a funeral or burial ceremony, and the festive environment of a wedding, first communion ceremony, or baptism.
>
> 3) The existence of many elements of physical contact such as doorknobs, benches, kneelers, confessionals, or holy water fonts.
>
> 4) The agglomeration of people at the entry and exit of these activities makes difficult the maintenance of the interpersonal distance of security.
>
> 5) The important attendance of old people at these ceremonies. It is well known that the age and the presence of people with certain diseases are risk factors or elements that predispose to greater severity, higher frequency of hospitalization, and higher risk of complications and mortality.

The Supreme Court considered that the general limit of 25 attendants was not proportional for these reasons:[241]

> 1) Its extension was uncertain from two important perspectives:
> a) Territorially speaking it covered all the regional territory without taking into account possible different health situations in each province.
> b) From a temporal point of view, it was indefinite, covering the entire period of the state of alarm (several months) theoretically until the 9 of May 2021.
>
> 2) It did not consider the existence of places of worship of very different sizes, dimensions, and characteristics. In many places of worship, a limit of 25 attendants was a ridiculous percentage of its maximum capacity. Twenty-five or thirty people *can easily be too many*

[234] *Christian lawyers*, sic.

[235] Official Journal of Castile and Leon of 16 January 2021 <http://bocyl.jcyl.es/boletin.do?fechaBoletin=16/01/2021>

[236] <https://www.revistaecclesia.com/wp-content/uploads/2021/02/4_5882058935661234002.pdf>.

[237] Lourdes Ruano Espina, 'Las restricciones impuestas al culto para contener la pandemia causada por la Covid-19. Comentario al Auto del TS 1822/2021, de 18 febrero que deja sin efecto la limitación de 25 personas en actos de culto en Castilla y León' (2021) 56 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado 1, 1–14.

[238] Court order of the Spanish Supreme Court of 18 February 2021, Legal Ground number 4.

[239] Official Bulletin of Castile and Leon of 13 November 2020 <https://bocyl.jcyl.es/boletines/2020/11/13/pdf/BOCYL-D-13112020–1.pdf>.

[240] Official Bulletin of Castile and Leon of 19 November 2020 <https://bocyl.jcyl.es/boletines/2020/11/19/pdf/BOCYL-D-19112020–1.pdf>

[241] Court order of the Spanish Supreme Court of 18 February 2021, Legal Ground number 5.

> *for a small chapel or meeting-house if proper social distancing is to be observed,* but *the same thirty people would be lost inside the vastness of a cathedral.*[242]
> 3) It did not distinguish between religious ceremonies in closed spaces, and open-air celebrations. All of them were affected by the same absolute limitation of only 25 attendants, while the health risks and health conditions are very different in each case.

For all these reasons, the Supreme Court considered that the general limitation of 1/3 of the maximum capacity, was a *sufficient safeguard*, and voided the strict and generic limit of 25 attendants.

The Agreement 7/2021 of 18 February 2021 of the President of Castile and Leon[243] (based on an epidemiological report of the regional Counselor of Public Health of that day), and *coincidentally* dated the *same day* as the court order of the Spanish Supreme Court (which is not cited in the Agreement 7/2021), established the *only* limit of attendance in 1/3 of the maximum capacity of the places of worship in this Autonomous Community.

A similar strict legislation was passed in Cantabria. In this region a general limit of 33% of the maximum capacity of places of worship was approved,[244] but at the end of January a limitation of only 10 people in certain municipalities with a high rate on incidence was established for towns with 34.500 inhabitants,[245] such us Laredo, Polanco, Colindres and Santa María de Cayón.[246] At that time the local hospital of Laredo had begun to transfer patients to the hospital of Valdecilla, in Santander, and the pressure over the local hospitals was really high[247]. In fact, in Laredo and Colindres, at the end of January, the cumulative incidence rate of diagnosed cases in 14 days per 100,000 inhabitants exceeded 1,000 cases.[248] The Catholic bishop of Cantabria, Mgr. Manuel Sánchez Monge, was conscious of the difficult health situation, but manifested his opposition to this restrictive measure because he thought that the measure was not adequately proportional as the capacity of the places of worship located in these municipalities was very diverse and, according to his opinion, it was adequately safe to celebrate the religious services with a greater number of attendants in certain temples with a greater capacity. In his opinion, the solution should be based on an *ad hoc* case by case perspective.[249]

It is important to remark that the limit of 10 attendants, in the regional legislation of Cantabria, only affected 4 specific cities, and there was an additional difference with the case of Castile and Leon: the *temporal* limit of validity, because it was foreseen for the reduced period of 2 weeks, between 28 January and 11 February 2021.[250]

[242] Frank Cranmer and David Pocklinton, 'The impact of the COVID-19 pandemic on the exercise of religion in the United Kingdom' (2020) 54 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado 29.

[243] Official Journal of Castile and Leon of 19 February 2021, https://bocyl.jcyl.es/boletines/2021/02/19/pdf/BOCYL-D-19022021–1.pdf.

[244] Article 1 of the Decree 7/2020, of 7 November 2020, of the President President of the Autonomous Community of Cantabria. Official Bulletin of Cantabria of 7 November 2020, extraordinary issue number 100 <https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=355318>.

[245] <https://www.eldiariomontanes.es/cantabria/34500-cantabros-nuevo-20210128231107-nt.html>.

[246] Article 3 of the Decree 5/2021, of 27 January 2021, of the President of the Autonomous Community of Cantabria. Official Bulletin of Cantabria of 27 January 2021, extraordinary issue, <https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=357887>.

[247] <http://www.transparencia.cantabria.es/web/gobierno/detalle/-/journal_content/56_INSTANCE_DETALLE/16413/12644602>.

[248] <https://www.europapress.es/cantabria/noticia-cantabria-cerrara-manana-laredo-colindres-polanco-santa-maria-cayon-20210126121207.html>.

[249] <https://www.eldiariomontanes.es/cantabria/obispo-propone-limite-20210128164101-nt.html>.

[250] Court order of the Spanish Supreme Court of 18 February 2021, Legal Ground number 5.

The Spanish Supreme Court, in a court order of 4 February 2021,[251] denied the request for precautionary measures, by the association *Abogados Cristianos* against the regional Decree of Cantabria 5/2021 of 27 January 2021. The Supreme Court argued that the petitioners did not prove the existence of a *pressing urgency*, the *irreparable damage,* and its *imminence*. The petitioners only pleaded the Canon 1247, which establishes the duty to attend mass on Sundays and holy days. According to the Spanish Supreme Court, these arguments were not enough in order to prove the urgency of the requested measures, because *the mere invocation of the duty of attendance (to the religious celebrations) that Catholics have is far from being enough, in a situation like the current one of a very serious health crisis.* The Supreme Court criticized the apodictic asseveration by the petitioners, when they affirm that the precautionary measures could not impact against the general interest. The Supreme Court emphasised that temples were open in these municipalities, and religious ceremonies could be celebrated, *with the only limit of a maximum attendance of 10 people, at the same time*.[252]

Another very restrictive legislation was passed by the local authorities of Melilla, the Spanish Autonomous city in Northern Africa, a city with a very serious health situation in January and February 2021. Article 5 of the Decree n. 110 of 26 January 2021 of the President of Melilla,[253] reduced the maximum capacity of places of worship to 1/4 in this city, the lowest ratio in all the national territory. And article 6 of the Order n. 341 of 26 January 2021[254] of the Counselor of Economy and Social Policies of Melilla, ordered the closure of the places of worship from 8:00 a.m. to 12:00 p.m., during the days of greatest attendance, on Fridays, in case of Muslim mosques, Saturdays, for Jewish synagogues, and Sundays, for Catholic churches. The initial validity period for these limitations was 20 days, from 27 January to 15 February 2021. The protests came especially from the Catholic[255] and Muslim[256] local authorities. The Counselor of Economy and Social Policies, Mohamed Mohand, justified the *Solomonic* decision, in the high incidence of around 1,000 cases per 100,000 inhabitants, and the difficulties for the control of the limits of attendance, especially amongthe Muslim community, (recognized by its own President of the Muslim Community of Melilla).[257] The reaction of the Catholic Community was to celebrate the Holy Mass on Sundays at 7:00 a.m., respecting the maximum capacity limit of 25%.[258] The local press echoed the aroused controversy.[259]

The court order 29/2021 of 4 February 2021, of the Superior Court of Justice of Andalusia, based in Malaga, considered that the restrictive measures of the Order n. 341 of 26 January 2021 of the Counselor of Economy and Social Policies of Melilla were specifically contemplated in the Articles 7 and 8 of the Royal Decree 926/2020 of 25 October 2020, of the national Government.[260] For this reason, the Articles 6, 11 and 11, of Order n. 846 of the Counselor of Economy and Social Policies of Melilla of 16

[251] Roj: ATS 886/2021 – ECLI: ES:TS:2021:886 Id Cendoj:28079130042021200015.

[252] Legal foundations 3 and 4 of the Spanish Supreme Court order of 4 February 2021.

[253] Official Bulletin of Melilla of 28 January 2021 <https://www.melilla.es/mandar.php/n/12/9683/Extra7.pdf>.

[254] Official Bulletin of Melilla of 28 January 2021, <https://www.melilla.es/mandar.php/n/12/9683/Extra7.pdf>.

[255] <https://www.diocesismalaga.es/pagina-de-inicio/2014053637/comunicado-sobre-el-cierre-de-las-iglesias-en-melilla/>.

[256] <https://www.melillahoy.es/noticia/138929/religion/la-comision-islamica-presenta-un-recurso-contra-la-orden-de-cierre-de-las-mezquitas-los-viernes-en-melilla.html>.

[257] <https://elfarodemelilla.es/mohand-senala-que-la-libertad-de-culto-tiene-dos-limites-la-seguridad-ciudadana-y-la-salud-publica/>.

[258] <https://www.melillahoy.es/noticia/138866/religion/la-vicaria-de-melilla-logra-celebrar-el-principal-oficio-religioso-de-la-semana-con-una-misa-madrugadora.html>.

[259] <https://elfarodemelilla.es/polemica-cierre-lugares-culto/>.

[260] Antecedent VIII of the Order n. 846 of the Counselor of Economy and Social Policies of Melilla, of 16 February 2021.

February 2021, extended the restrictions in the opening of places of worship, and their maximum capacity, without a specific temporal limit, and depending on the evolution of epidemiological indicators.[261] Melilla had the worst national ratios of COVID-19 of incidence per 100,000 inhabitants at the end of February 2021.[262] These Orders of the Melilla's authorities limited only religious activities, and their proportionality was *very dubious*.

The restrictions introduced by the regional Governments of the Autonomous Communities were modulated during the pandemic evolution. The regional legislative changes were very frequent and it was not always easy to know the exact limit in force in each case, place and moment.

4. ELEMENTS FOR A BALANCE OF PROPORTIONALITY.

Article 1 of the Organic Law 4/1981, of 1 June 1981,[263] points out that all the measures adopted with occasion of the state of alarm, and its temporal dimension must be the strictly indispensable, and its application must be proportional to the circumstances of each case.

This reinforced legal mandate of proportionality is a consequence of the wide capacity of limitation of rights conferred to the public authorities. Each measure must be *suitable*, *necessary,* and *balanced*. This test must be done for each particular case, not only from an abstract perspective. The text of *suitability* and *necessity* had been done in a context of *medical* and *scientific uncertainty*, especially at the beginning of the COVID-19 pandemic. According to Velasco Caballero, the balance of *suitability* is *approximate*, a *prognosis*. It cannot be based on non-existent *causal certainties*, but on the scientific and medical *probability* that certain *measures* could lead to certain *effects*. In a context of scientific and medical uncertainty, it is not possible to determine with *absolute precision* if some governmental measure can be better than another. For these reasons, the governmental authorities had a wider margin of appreciation, especially at the pandemic's beginning. This *margin of appreciation* must be developed always inside the limits of so-called technical discretion. In this context, it is particularly important to develop an accurate administrative organization, and to make a precise evaluation of epidemiological data. This will be helpful for the reduction of the scientific and medical uncertainty. The public authorities have a wide margin of appreciation, but this margin is variable. The health is a *value*, with different powers of *assessment* depending on each particular context. For instance, in a particular scenario of critical epidemiological data, and saturated intensive care units, the health may justify the adoption of very restrictive measures, and serious limitations in public freedoms. The *principle of precaution* is another factor of particular importance. According to this principle, it is justified to legislate trying to reduce aggravated risks, in these contexts in which the scientific or technical information is very limited, and it is not enough in order to exclude some eventual serious consequences, that cannot be socially and legally assumed. The principle of precaution operates in those spaces in which there is not scientific certitude. The lack of scientific certainty justifies some decisions whose suitability and necessity are not sure. In these contexts of scientific or medical uncertainty, the texts of suitability

[261] Official Bulletin of Melilla of 17 February 2021, extraordinary issue n. 10, <https://www.melilla.es/melillaPortal/RecursosWeb/DOCUMENTOS/1/0_24508_1.pdf>

[262] <https://www.mscbs.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov/documentos/Actualizacion_313_COVID-19.pdf>.

[263] Official Bulletin of the State of 5 June 1981 <https://www.boe.es/buscar/act.php?id=BOE-A-1981–12774>

and necessity may justify the adoption of severe measures, whose efficacy is not fully demonstrated.[264]

The pandemic crisis has pointed out the constitutional importance of the right to health, recognized in Article 43 of the Spanish Constitution, and its *fundamental* character, even if it is not included inside the strict catalogue of *fundamental rights* (the First Section of the Chapter One of the Part I, of the Spanish Constitution, articles 15 to 29). There is a clear and direct connection between the right to health (Article 43 of the Spanish Constitution), and the right to life and to physical and moral integrity, (Article 15 of the Spanish Constitution). The main consequence is a constitutional revaluation of the right to health, even if it is excluded from the formal statutory condition of *fundamental right*, because the health crisis has underlined the importance of its adequate protection. From this new perspective, the protection of health is no longer just a *constitutional indication*, in the form of a *mandate* that *guides* the action of the public powers; it becomes an *actionable right*.[265]

The jurisprudence of the Spanish Constitutional Court, foresees that the limits imposed to fundamental rights, must be justified by the necessity of preservation of other rights constitutionally protected,[266] cannot obstruct the right *beyond what is reasonable*.[267] The limitations must be *necessary to achieve the desired purpose,*[268] and there must exist a relation of *proportionality between the sacrifice of the right and the situation of the citizen that must support it*.[269] In any case, these limits must be respectful and compatible with the essential content of the affected fundamental rights.[270]

The restrictions in the freedom of religion must be:[271]

> 1) *Established in a Law*. The Spanish Constitution recognizes, in its Article 16, the *fundamental* right of religious freedom, but it is not *absolute*, because it has the limit of the *public order*, which is expressly provided by the own constitutional precept. The Spanish Constitutional Court in the Sentence 46/2001 of 15 February 2001[272] understands that *only when the existence of a certain danger to "public safety, health and morality" has been proven in court . . . it is pertinent to invoke public order as a limit to the exercise of the right to freedom of religion and worship.*
> 2) *Necessary in a democratic society*. The necessity must be of such gravity as to trump the exercise of religious liberty.[273]
> 3) Proportional to the purpose pursued.

[264] Francisco Velasco Caballero, *Libertad, Covid-19 y proporcionalidad (I): fundamentos para un control de constitucionalidad* <https://franciscovelascocaballeroblog.wordpress.com/2020/05/30/libertad-covid-19-y-proporcionalidad-i-fundamentos-para-un-control-de-constitucionalidad/>

[265] Ruiz Rico, 'Las dimensiones' (n13).

[266] Sentence of the SCC 11/1981, of 8 April 1981, Legal Basis 7, Sentence of the SCC 2/1982, of 29 January 1982, Legal Basis 5, Sentence of the SCC 110/1984, of 26 November 1984, Legal Basis 5, and Sentence of the SCC 120/1990, of 27 June 1990, Legal Basis 8.

[267] Sentence of the SCC 53/1986, of 5 May 1990, Legal Basis 3, and Sentence of the SCC 120/1990, of 27 June 1990, Legal Basis 8.

[268] Sentence of the SCC 62/1982, of 15 October 1982, Legal Basis 5, Sentence of the SCC 13/1985, of 31 January 1985, Legal Basis 2, and Sentence of the SCC 120/1990, of 27 June 1990, Legal Basis 8.

[269] Sentence of the SCC 37/1989, of 15 February 1989, Legal Basis 7, and Sentence of the SCC 120/1990, of 27 June 1990, Legal Basis 8.

[270] Sentence of the SCC 11/1981, of 8 April 1981, Legal Basis 10, and Sentence of the SCC 196/1987, of 11 December 1987, Legal Basis 4, 5, and 6, and Sentence of the SCC 120/1990, of 27 June 1990, Legal Basis 8.

[271] Javier Martínez Torrón, 'Los límites a la libertad de religión y de creencia en el Convenio Europeo de Derechos Humanos' (2003) 2 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado1, 1–46. Soler Martínez, 'Estado de alarma' (n8) 16.

[272] Legal Ground number 11. Official Bulletin of the State of 16 March 2001 < https://www.boe.es/boe/dias/2001/03/16/pdfs/T00083-00094.pdf>

[273] Hill (n153) 3.

The principle of proportionality has many dimensions and projections. One of them is its *territorial nature*. At the beginning of the COVID-19 pandemic, on March 2020, the limitative regulation on fundamental rights was homogeneous in all the national territory. As we said, it was not *surprising*, because the activation of the constitutional mechanism of the state of alarm stimulated the initial concentration of power in the central Government, and because it was not easy to establish technical criteria of differentiation between Autonomous Communities. One and a half months later, at the beginning of the process of de-escalation, it was clear that the health situation was not homogeneous in all the country, and the restrictions in the maximum capacity of the places of worship were graduated attending to the particular circumstances of each territory.

The principle of proportionality has also a *quantitative* projection. The Council of State in France, developed this crucial perspective of the principle of proportionality in two important *Ordonnances*:

> a) At the beginning of the confinement´s end,[274] in France, the *Ordonnance* of 18 May 2020,[275] gave a term of 8 days, in which the First Minister should change the prohibition of meetings inside the places of worship, established by the article 8 of the Decree 2020–548, of 11 May 2020,[276] and adopt *les mesures strictement proportionnées aux risques sanitaires encourus*[277] *et appropriées aux circonstances de temps et de lieu applicables en ce début de "déconfinement", pour encadrer les rassemblements et réunions dans les établissements de culte*. The article 1 of the Decree 2020–618, of 22 May 2020,[278] abolished that *anomalous* prohibition of collective religious celebrations.
> b) The *Ordonnance* of 29 November 2020,[279] revoked the abusive limit of 30 attendants in places of worship, established in France by article 47 of the Decree 2020–1310, of 29 October 2020,[280] and gave a term of 3 days to the First Minister for the drafting of a new legislation with a more proportional criterion.

This doctrine will project its effects in a near future, preventing eventual temptations of abuses by the legislature and its own administration.[281]

The balance of proportionality makes necessary a fair evaluation of the *adequacy* of the measures adopted from a triple perspective: *temporal*, *spatial* and *material*, taking

[274] Vincent Fortier, 'La libertad de religión, en Francia, en tiempos de coronavirus' in: Javier Martínez Torrón and Belén Rodrigo Lara (Eds.), *COVID-19 y Libertad Religiosa* (Madrid 2021) 145–166; Gérard Gonzalez 'La liberté de religion en France au temps de la Pandémie' intervention in the Webminar of 24 June 2020, *La liberté de religion aus temps du* coronavirus, <https://dres.misha.cnrs.fr/IMG/pdf/france_gonzalez-1.pdf>.

[275] <https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-18-mai-2020-rassemblements-dans-les-lieux-de-culte>.

[276] <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041865329>.

[277] The own Council of State was aware of these risks, because of the relevant temporal extension of some religious ceremonies, the closed character of the places of worship, the canticles, the attendance of an important number of people, the existence of rituals with personal interaction and contact, the displacement of individuals, etc., in § 27: *Par suite, les cérémonies de culte qui constituent des rassemblements ou des réunions au sens des dispositions contestées, exposent les participants à un risque de contamination, lequel est d'autant plus élevé qu'elles ont lieu dans un espace clos, de taille restreinte, pendant une durée importante, avec un grand nombre de personnes, qu'elles s'accompagnent de prières récitées à haute voix ou de chants, de gestes rituels impliquant des contacts, de déplacements, ou encore d'échanges entre les participants, y compris en marge des cérémonies elles-mêmes et, enfin, que les règles de sécurité appliquées sont insuffisantes.*

[278] <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041903745/>.

[279] <https://www.conseil-etat.fr/actualites/actualites/limite-de-30-personnes-dans-les-etablissements-de-culte-decision-en-refere-du-29-novembre>; <https://juricaf.org/arret/FRANCE-CONSEILDETAT-20201129–446930>.

[280] <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042475143?r=9BtQcTAF3G>.

[281] In France, the Prefect of the Department of Alpes-Maritimes, ordered the partial confinement of certain cities in the littoral area during two weekends, from 6:00 p.m., 26 February 2021 to 6.00 a.m., 1 March 2021, and from 6:00 p.m., 5 March 2021 to 6.00 a.m., 8 March 2021. The list of permitted displacements did not include initially the attendance to religious ceremonies. The Catholic organization Civitas, interposed an appeal to the Administrative Court of Nice. Several minutes before the hearing, the Prefect modified the list including these displacements by religious reasons, avoiding a judicial defeat. <https://medias-presse.info/messe-a-nice-civitas-fait-reculer-letat/140342/>.

in account the particular *situation of risk*, and the *constitutional purpose* pursued, and trying to produce the lowest possible restriction in the fundamental rights, and interests affected[282]:

> 1) Some of the most intensive restrictions in the collective exercise of the fundamental right of religious freedom had a very limited *temporal* and *spatial* impact:
> a) The Agreement 13/2020 of 12 November 2020 of the President of Castile and Leon,[283] that established a general limit of attendance at the places of worship of 1/3 of their maximum capacity or 15 people, had an evident *surgical* nature:
> 1.- It only affected a very limited territory, the municipality of Burgos, in the specific context of a very critical health situation in this city, in November 2020.
> 2.- It had a very limited validity, of initially 1 week, that latterly was extended until 3 December 2020.[284]
>
> b) The similar strict legislation passed in Cantabria, at the end of January limiting the maximum attendance to 10 people in the 4 specific municipalities of Laredo, Polanco, Colindres and Santa María de Cayón[285], was justified by its critical health conditions, and it was not extended to the rest of the regional territory of Cantabria, with better medical indicators. It had also a temporal vocation of validity, as we said, because it was foreseen for the reduced period of 2 weeks, between 28 January and 11 February 2021. This was a circumstance that was particularly pointed out by the court order of the Spanish Supreme Court of 18 February 2021.[286]
>
> 2) This was not the case of the Agreement 3/2021 of 15 January 2021, of the President of the Regional Government of Castile and Leon,[287] that limited the maximum assistance to places of worship to 1/3 of their maximum capacity, and no more than 25 people. This restriction covered all the regional territory and was temporally unlimited.

The gravity of the health indicators in several provinces of this region, like Palencia, for instance, in January 2021was undeniable. But the regional health indicators did not justify one uniform limit of 25 people for all the regional places of worship, and without a previous temporal limit clearly fixed by the norm.

The Spanish Supreme Court remarked the lack of proportionality of the general limit of 25 attendants, for 3 important reasons:[288]

> a) Its extension was uncertain from a territorial and temporal perspective. It affected all the regional territory, forgetting the possible different health indicators of each province in this region, and with indefinite temporal projection, because it covered all the period of the state of alarm, several months, until 9 May 2021. The restrictive measures must be *gradual*, *flexible*, and *adaptable* to different *temporal* and *spatial* scenarios.[289]
>
> b) It did not consider the different sizes, dimensions, and characteristics, of the places of worship of this region.
>
> c) It did not distinguish between religious ceremonies in closed spaces, and open air celebrations. All of them were affected by a common and absolute limitation of only 25 attendants, but the risks and health conditions are very different in each case.

[282] Piergigli, 'L'emergenza Covid-19' (n191) 1555.

[283] Official Bulletin of Castile and Leon of 13 November 2020 <https://bocyl.jcyl.es/boletines/2020/11/13/pdf/BOCYL-D-13112020–1.pdf>.

[284] Official Bulletin of Castile and Leon of 19 November 2020 <https://bocyl.jcyl.es/boletines/2020/11/19/pdf/BOCYL-D-19112020–1.pdf>.

[285] Article 3 of the Decree 5/2021, of 27 January 2021, of the President of the Autonomous Community of Cantabria. Official Bulletin of Cantabria of 27 January 2021, extraordinary issue, <https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=357887>.

[286] Legal Ground number 5.

[287] Official Journal of Castile and Leon of 16 January 2021 <http://bocyl.jcyl.es/boletin.do?fechaBoletin=16/01/2021>.

[288] Court order of the Spanish Supreme Court of 18 February 2021, Legal Founding number 5.

[289] See for instance the already cited Resolution 6/2021, of 17 February, of the General Technical Secretary of the Counselor of Health of La Rioja. This document developed a regional Plan with gradual interventions. Official Bulletin of La Rioja of 18 February 2021 <https://ias1.larioja.org/boletin/Bor_Boletin_visor_Servlet?referencia=15569798–1-PDF-536757-X>.

Restrictions in the exercise of fundamental rights must be *necessary*, and not only *convenient* or *useful*. For this reason, it is particularly important to make a judgment of proportionality, between the *restriction* and the *legal purpose*. According to Martínez Torrón, it is possible to find at least these two criteria:[290]

> 1) The length of the restriction. It´s necessary to determine not only the *opportunity* of the restriction, but also its *duration* or *temporal projection*.
> 2) The compared legislative solution given with respect to another fundamental rights and public freedoms. It should be illogical to establish a different distance of safety in a museum, or supermarket, than in a place of worship.

Nevertheless, in our opinion, it may be convenient and justified to foresee specific additional rules of *control* or *containment* in certain circumstances, such as wakes or funerals. In these particular contexts, a more limited maximum number of attendants is necessary, because it is more difficult to maintain the social distance, due to the emergence of emotions. Also, a possible previous close contact with the deceased of the closest family members and friends may hide latent infections, which can be spread during these social events. We must remember the burial ceremony celebrated in Vitoria, on February 2020, that immediately spread the disease in the adjacent Autonomous Communities, with catastrophic consequences, already cited. For these reasons, it may be wise to foresee different limits in these ceremonies, in open air facilities and closed spaces.

5. CONCLUSIONS AND PROPOSALS.

Cicero coined the aphorism *Salus populi suprema lex esto,*[291] (*De Legibus*, book III, part III, sub. VIII). Roman Law established a detailed regulation of the powers of the dictatorship during the so-called *dictadura comisoria*, in order to face specific situations of crisis, with a special and detailed regulation in the Roman Constitutional Law. Fortunately, this *Constitutional Law of emergency* has *evolved* during many centuries, and it has been perfected.[292]

This will not be perhaps the last crisis that we will live or know, and for this reason it is convenient to learn some lessons from it, in order to be able to elaborate *de lege ferenda* some new proposals for the improvement of our institutions, and the rule of law.[293] The distance between the *Law of crisis*, and the *crisis of Law*, is too narrow.[294]

One year later, some conclusions may be done. The public authorities have been forced to deal with a situation of unprecedented gravity, with the limited arsenal of some unsuitable ordinary legal instruments. Even the most extraordinary tools,[295] (abstractly *best designed* for *emergency* situations), have revealed their weaknesses. This unknown scenario was not easily foreseeable in 1981, and it makes necessary a deep reflection on the adequacy of the existing regulatory arsenal, and a clarification over the proportionality and legitimacy of the restrictions imposed for public health reasons to the rights and freedoms of citizens.[296]

[290] Javier Martínez Torrón, 'COVID-19 y libertad religiosa: ¿problemas nuevos o soluciones antiguas?' in: Javier Martínez Torrón and Belén Rodrigo Lara (Eds.), *COVID-19 y Libertad Religiosa,* (Madrid, 2021) 26.

[291] *The welfare of the people shall be the supreme law.*

[292] Joaquín Urías, 'Estado de alarma y limitación de derechos: ni excepción, ni suspensión' *Infolibre* (14 April 2020).

[293] Vincente Álvarez García, 'El coronavirus (COVID-19): Respuestas jurídicas frente a una situación de emergencia sanitaria' (2020) 86 El Cronista del Estado Social y Democrático de Derecho 20–21.

[294] Sieria Mucientes, 'Estado de alarma' (n8) 302.

[295] Such as the declaration of the state of alarm.

[296] Valeria Piergigli, 'L´emergenza Covid-19' (n191) 1559, 1563.

In this context, the new and unexpected crisis had underlined the importance of political dialogue, between political parties and administrative authorities, from a national and regional perspective. Many aspects must be improved. During the last year, it was used recurrently the *legislation of urgency*, the so-called *Royal Decrees-Laws*. The use of this *legislative tool* was justified from a theoretical point of view by reasons of *extraordinary and urgent necessity*, but, at the same time, it is a juridical phenomenon that sometimes seems to put in serious risk the principle of separation of powers, and the central position that Parliament must have during these circumstances of serious social and health crises.[297] Additionally, some provisions included in these *Royal Decrees-Laws* were of very dubious[298] *extraordinary and urgent necessity*, for instance the inclusion of the Vice-President of the Government in the Delegated Commission of the Government on Intelligence Affairs, by the Final Disposition number 2, of the Royal Decree Law 8/2020, of 17 March 2020.[299] This unconstitutionality was finally declared by the Sentence of the Constitutional Court 110/2021 of 13 May 2021.[300]

The fundamental right to the freedom of religion is not absolute, but the capacity of the State to establish possible restrictions, is not completely discretionary, and must be subject to a judgment of proportionality. As stated by Cole Durham, *the state does not have unlimited authority to define or assess the balance of harms.*[301] The responsible role played by religious groups has been exemplary, during this year of a health crisis. This *prudent* attitude of *contention* was particularly valuable during some excessive interventions by the police.

Martínez Torrón thinks that it is necessary to detect the strengths and weaknesses of the recent waterfall of legislation on this matter, in order to be able to distinguish what could be *conserved*, *improved*, *forgotten* and *rejected*. In several countries, the legislation has not been always clear, and has resulted frequently in internal contradictions, presenting strong symptoms of *improvisation* and *amateurism*.[302] The different Autonomous Communities have legislated in Spain, with a great *disparity* of solutions and regulations.

Dialogue between public authorities and representatives of religious groups may be an important and useful tool of work. Some Autonomous Communities, such as Madrid[303] gave a clear evidence of it. Nevertheless, the State, (or the Autonomous Communities, like delegated authority), may legislate without the previous consent of religious groups. The request of the previous opinion of the Advisory Commission of Religious Freedom is only optional, and never binding, especially in this particular context of health crisis.

[297] Ruiz Rico, 'Las dimensiones' (n13).

[298] Manuel Aragón Reyes, '*COVID-19: Aproximación constitucional a una crisis*' (2020) 32 *Revista General de Derecho Constitucional*; Dionisio Fernández de Gatta, 'Los problemas de las medidas jurídicas contra el coronavirus: las dudas constitucionales sobre el Estado de Alarma y los excesos normativos' *La Ley* (6 May 2020); Agustín Ruiz Robledo, '*Debemos vigilar al Capitán Sánchez*' *El Español*, (25 March 2020) <https://www.elespanol.com/opinion/tribunas/20200325/debemos-vigilar-capitan-sanchez/477572242_12.html>; Alejandro Torres Gutiérrez, 'Retos de la declaración del estado de alarma con motivo de la COVID-19 para el estado de derecho y el ejercicio de los derechos fundamentales' Raquel Luquin Bergareche, *Covid-19: conflictos jurídicos actuales y desafíos* (Wolters Kluver 2020) 489–490.

[299] *Official Bulletin of the State* of 18 March 2020 <https://www.boe.es/buscar/act.php?id=BOE-A-2020–3824>

[300] *Official Bulletin of the State* of 15 June 2020 <https://www.boe.es/boe/dias/2021/06/15/pdfs/BOE-A-2021–10023.pdf>

[301] Cole Durham, 'The Coronavirus, the Compelling State Interest in Health, and Religious Autonomy' *Canopy Forum on the Interactions of Law & Religion* (2 October 2020) <https://canopyforum.org/2020/10/02/the-coronavirus-the-compelling-state-interest-in-health-and-religious-autonomy/>

[302] Javier Martínez Torrón, 'COVID-19 y libertad religiosa: ¿problemas nuevos o soluciones antiguas?' Javier Martínez Torrón and Belén Rodrigo Lara (Eds.), *COVID-19 y Libertad Religiosa,* (Madrid, 2021) 24–26.

[303] <https://www.comunidad.madrid/noticias/2020/09/05/impulsamos-junto-confesiones-religiosas-espacio-encuentro-frenar-covid-19/>

During the *third* declaration of the state of alarm, through the Royal Decree 926/2020, of 25 October 2020, the Presidents of the Autonomous Communities became the *delegated* authority. It was the *emergence* of the principle of *co-governance.* But it was not possible to establish a political control by the Congress of Deputies over these limitative norms fixed by the Autonomous Communities.

It has been possible to observe too many different regulations passed by the Autonomous Communities, and it is difficult to understand if there is a supposedly coherent and efficient solution for the problems caused by a virus that knows nothing about territorial borders, and the legislative jurisdictions of regional parliaments. These norms have been changing very quickly, and sometimes it has been quite difficult to know the specific regulation in force, in each territory. The problems from the point of view of the *legal security* are evident.

It is also very important to check the proportionality of these legislative limits. The doctrine of the French Council of State in its *Ordonnance* of 29 November 2020, and the court order of 18 February 2021 of the Spanish Supreme Court, is particularly useful. The limits in the maximum capacity of places of worship were not the same in the different Autonomous Communities, even if their health data were very similar. Some of these limits were too discretionary and arbitrary. A clear example of this last assertion was the case of the limit of 25 attendants established by the public authorities of Castile and Leon, a limitation that was finally voided by the Spanish Supreme Court. It is not *proportional* to establish a common limit for a wide territory with very different health indicators, and with an indefinite temporal vocation. It is necessary to recognize the existence of places of worship of very different sizes, dimensions and characteristics. A religious ceremony in a closed space is not the same as open air celebrations.

Each measure must be *suitable*, *necessary* and *balanced.* The limits imposed to fundamental rights, must be justified by the necessity of preservation of other rights constitutionally protected. The limitations cannot obstruct the right *beyond what is reasonable*, must be *necessary to achieve the desired purpose*, and there must be a relation of *proportionality between the sacrifice of the right and the situation of the citizen that must support it*. The legal solution must be respectful and compatible with the essential content of the affected fundamental rights. CRANMER and POCKLINGTON said that the *brutal reality* is that *once you are dead from COVID-19*, your freedom of religion *counts for precisely nothing.*[304]

According to Mark Hill*, public health emergencies must be handled with the framework of the rule of law*, and *any curtailment of religious liberty (as with civil rights, generally) should be the minimum possible, and consistent with the emergency faced*. The restrictions *need to the focused and time-limited.*[305] It is necessary to adapt our legal systems to the new context of health crises, and to give an adequate legal protection to our catalogue of fundamental rights, looking for a fair balance between the fundamental right of religious freedom and the rights to life and health. The World Health Organization already warned that the world will face another pandemic, and *the only thing we don't know is when it will hit, and how severe it will be.*[306]

[304] Frank Cranmer and David Pocklinton (n242). 31.

[305] Hill (n153) 18.

[306] CONSORTI, PIERLUIGI, *Law, religion and COVID-19 emergency. Introduction*, in: CONSORTI, PIERLUIGI, (Ed.), *Law, religion and Covid-19 Emergency*, Pisa, May 2020, p. 8.

THE PROBLEM WITH JUDICIAL INDEPENDENCE: WHAT LESSONS CAN BE LEARNT FROM THE USSR IN TODAY'S DEMOCRATISING STATES?

*SOPHIE GALLOP**

INTRODUCTION

Judicial independence benefits from both longstanding and widespread recognition.[1] This is in a large part down to the critical role it plays in promoting and securing of democratic principles in a State,[2] acting as a gatekeeper to *ultra vires* exercise of power by the executive and legislative branches of government.[3] Respectively, judicial independence plays an essential role in upholding human rights standards, providing a forum to hold 'deviant'[4] governments to account,[5] thereby upholding the rule of law for all citizens. Despite this recognition, judicial independence continues to be 'one of the least understood concepts in the fields of political science and law'.[6] The failure to properly understand judicial independence is largely owing to the complexities of the doctrine, both in its theory and its practical application.

The consequences of these intricacies are significant: primarily, the tortuousness of judicial independence invites the possibility of the standard being undermined in numerous different ways. This was evident in the Soviet Union where numerous aspects of both individual and institutional independence were eroded by the Communist regime.[7] Secondly, the intricacies inherent in its application makes monitoring the *de facto* standards achieved in a State a truly monumental, and nearly insurmountable, task. These components make it possible for States to undermine standards of judicial independence without attracting attention or criticism.

Similar problems with judicial independence have continued in the modern era. Since the 'third wave'[8] of democratisation began in the 1990s,[9] the governments of numerous

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1 Edward Hirsch Levi, 'Some Aspects of Separation of Powers' (1976) 76(3) Columbia Law Review 371–391; Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–1989) 12 Australian Yearbook of International Law 82, 102–107.

2 Archibald Cox, 'The Independence of the Judiciary: History and Purposes' (1995–1996) 21 The University of Dayton Law Review 566, 571; Thomas Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008), 9; International Commission of Jurists '*International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1*' (International Commission of Jurists 2007), 18; Peter H Russell, 'Towards a General Theory of Judicial Independence' in Peter H Russell and David M O'Brien (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives From around the World* (University of Virginia Press 2001) 2.

3 Christopher Forsyth 'Of Fig Leaves and Fairytales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial' (1996) 55(1) *Cambridge Law Journal* (C.L.J.) 122–140.

4 E.A. Howard, 'The Essence of Constitutionalism' in Kenneth W Thompson and Rett T Ludwikowski (eds), *Constitutionalism and Human Rights: America, Poland, and France* (University Press of America 1991) 3.

5 UNGA 'Human Rights in the Administration of Justice: UN Res 50/181' (28 February 1996) UN Doc A/Res/50/181.

6 Christopher Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 American Journal of Comparative Law 605, 607.

7 Alena Ledeneva, 'Telephone Justice in Russia' (2008) 24(4) Post-Soviet Affairs 324, 328–330; Peter Rutland, *The Politics of Economic Stagnation in the Soviet Union: The Role of Local Party Organs in Economic Management* (CUP 2009) 44–49.

8 Samuel P. Huntingdon, *The Third Wave: Democratisation in the Late Twentieth Century* (University of Oklahoma Press 1991).

9 Michael McFaul, 'The fourth wave of democracy and dictatorship: Noncooperative transitions in the postcommunist world' (2002) 2 *World Politics* 212, 212–214.

ex-Soviet States[10] have claimed to be moving towards democratic governance.[11] True democratisation is contingent on adequate standards of judicial independence being attained in a State.[12] However, the complexities of judicial independence continue to allow States to subvert those standards, and conceal the reality from the international community. This can result in a two-fold problem. Perceived standards of democratisation in a state may not be as extensive as those claimed. Additionally, without assurances as to the achieved standards of judicial independence, in reality human rights protection in those 'democratising' States may be under greater threat than apparent to the international community.

This article seeks to address these issues; first, by examining the complexities of the theory, and practical application, of judicial independence; secondly, by examining those complexities in the context of the Soviet Union; and finally, by exploring what ramifications these complexities can have in the context of the 'third wave' of democratisation in ex-Soviet States.

JUDICIAL INDEPENDENCE: IMPORTANCE AND COMPLEXITIES

'Judicial independence' is used to describe the relationships that the judicial branch has with other branches of government.[13] It is bound together with the separation of powers doctrine, which requires that the legislative, executive, and judicial branches each have distinct and exclusive authority,[14] thereby ensuring that there is no interference by any one branch in another's affairs.[15] Judicial independence more specifically demands that neither the legislative nor executive branch, or indeed any other source, wields influence over the judiciary or its decision making process, and that the branch is effectively insulated or protected from any attempts to do so.[16]

The beginnings of the doctrine of judicial independence were established as early as 1215, when judicial fidelity to the law was included as an article in the Magna Carta Liberatum.[17] Throughout the centuries, the standard of judicial independence has evolved and in 1948 it was included in the inaugural United Nations human rights document, the Universal Declaration on Human Rights.[18] Since then judicial independence

[10] Adam Bodnar and Eva Katinka Schmidt, 'Rule of Law and Judicial Independence in Eastern Europe, the South Caucasus, and Central Asia' in Institute for Peace Research and Security (ed) *Yearbook of the Organization for Security and Co-Operation in Europe 2011* (Baden-Baden 2012) 289; see also the statements of Mr Rakhmonov (delegate from Uzbekistan) where he concluded that the Government was working towards an independent judiciary, and that considerable progress had been made. Human Rights Committee, Human Rights Committee Concludes Consideration of Uzbekistan's Third Report, Poses Questions on Child Labour, Use of Torture, Judicial independence. Experts Stress Discussion with States Meant to be a Forum for Dialogue; Delegation Notes 'Moments of Tension', but Says Welcomed Constructive Exchange, UN Doc. HR/CT/719, 12 March 2010, §10, 11.

[11] David Held, 'Democracy: From City-States to a Cosmopolitan Order' (1992) Special Issue, Political Studies 10,10; Peter Calvert and Susan Calvert, *Politics and Society in the Developing World* (3rd edn, Routledge 2007), 10.

[12] Russell, 'Towards a General Theory of Judicial Independence' (n2) 2.

[13] Owen M Fiss, 'The Limits of Judicial Independence' (1993–1994) 25 University of Miami Inter-American Law Review 57, 57.

[14] See generally Levi (n1).

[15] International Commission of Jurists (n2), 4.

[16] Fiss (n13) 59.

[17] John A Vickers, '*Thomas Coke: Apostle of Methodism*' (Wipf and Stock, 2013) 21; Magna Carta Liberatum, Clause 45 states 'We will appoint as justices . . . only such as know the law of the realm and mean to observe it well'. In addition, Clause 40 states 'To no one will we sell, to no one will we deny or delay right to justice', and Clause 39 states 'No free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way, nor in any way proceeded against, except by lawful judgment of his peers and the law of the land'.

[18] Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A(II) (UDHR).

has been translated into numerous regional[19] and international human rights treaties,[20] and has been further incorporated into the majority of State constitutions.[21] The extensive acceptance of judicial independence is reflected in the fact that judicial independence, alongside other rights included in the Universal Declaration on Human Rights,[22] has become part of the general principles of international law.[23]

The integral nature of this judicial independence to the proper functioning of democracy has long been acknowledged, and its critical character has received widespread affirmation. In this respect the United Nations Special Rapporteur on the Independence of Judges and Lawyers has noted that

> ' . . . The judiciary must be independent from other branches of Government; only then can human rights be fully respected . . . [Furthermore] Judicial Independence is an indispensable element to respect due process of law, Rule of Law and democracy'.[24]

Other international organisations, including the World Bank,[25] the World Trade Organisation,[26] and the Inter-American Development Bank[27] COE and OSCE, have all echoed this sentiment and placed great emphasis on the importance of securing judicial independence, pledging resources to States to encourage them to adopt effective standards.[28]

The separation of powers doctrine has long been heralded as a cornerstone of a democratic society,[29] and judicial independence as an 'essential feature of liberal

[19] *Ibid*; UN Congress on the Prevention of Crime and the Treatment of Offenders 'Basic Principles on the Independence of the Judiciary: UNGA Res 40/32 and 40/146' (endorsed 29 November 1985) UN Doc A/CONF.121/22/Rev.1; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (Protocol 1) Article 75(4); International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 14(1).

[20] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 08/27/79 No. 17955, Article 8(1); African Charter on Human and Peoples' Rights (adopted 27 June 1982, entered into force 21 October 1986) (1982) 21 ILM 58, Articles 7(1) and 26; European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 6(1).

[21] Robert M Howard and Henry F Carey, 'Is an Independent Judiciary Necessary for Democracy?' (2003–2004) 87 Judicature 284, 286.

[22] UDHR (n18).

[23] Article 38(c) Statute of the International Court of Justice, (adopted 26 June 1945, entered into force 24 October 1945) 33 USTS 993, Article 38(c); Simma and Alston (n1), 104; OSCE Office for Democratic Institutions and Human Rights *Legal Digest of International Fair Trial Rights* (OSCE/ODHIR 2012). There remains some debate as to whether those rights have attained the status as part of customary international law (see generally Simma and Alston (n1)).

[24] United Nations Special Rapporteur on the Independence of Judges and Lawyers Diego García-Sayán 'Presentation of the Report of the Special Rapporteur of the United Nations on the Independence of Magistrates and Lawyers, Diego García-Sayán, before the General Assembly of the United Nations, at the seventy-fourth session, on October 16, 2019: Report on the Independence of Judges and Lawyers' (*United Nations,* 16 October 2019) <https://independence-judges-lawyers.org/supplementing-the-un-basic-principles-on-the-independence-of-the-judiciary/> accessed 30th April 2022.

[25] Linn Hammergren, 'Diagnosing Judicial Performance: Toward a Tool to Help Guide Judicial Reform Programs' (*World Bank,* 1999) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/hammergrenJudicialPerf.pdf> accessed 20 February 2021.

[26] The World Trade Organisation demands that all contracting parties 'maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts'. See World Trade Organisation 'General Agreement on Tariffs and Trade' (1986) 55 UNTS 194, Article X(3).

[27] Jeffrey M. Sharman, 'Judicial Ethics: Independence, Impartiality, and Integrity' (*Inter-American Development Bank,* May 19–22 1996) <https://publications.iadb.org/bitstream/handle/11319/2681/Judicial%20Ethics:%20Independence,%20Impartiality,%20and%20Integrity.pdf?sequence=1> accessed 19 February 2022.

[28] Ginsburg and Moustafa (n2) 9.

[29] International Commission of Jurists (n2) 18.

democracy'.[30] Judicial independence commands this status by protecting democratic principles in such a way that all citizens are held accountable only under the rule of law. This guarantees that all citizens, in particular individuals and minority groups,[31] are shielded from *ultra vires* abuses of power by the executive and legislative branches,[32] and are free from the whim or wrath of the legislative or executive branch.

The guarantee that all citizens will only be held accountable under the rule of law means that judicial independence holds 'the central role of the administration in the promotion and protection of human rights'.[33] By acting as a bulwark against tyranny[34] the judiciary ensures that the executive and legislative branches of government do not act *ultra vires* of their jurisdiction by violating the rights of disfavoured individuals or groups. In this respect the United Nations has repeatedly noted the link between the gravity and frequency of serious violations of human rights and the absence of a truly independent and impartial judiciary.[35] That conclusion was reiterated in the Vienna Declaration and Programme of Action:

> '(t)he administration of justice . . . especially an independent judiciary . . . are essential to the full and non-discriminatory realisation of human rights and indispensable to the processes of democracy.'[36]

The longevity of the recognition and acceptance of judicial independence and the widespread acknowledgment of its importance has not, however, been met with an extensive understanding of what this standard demands in practice. As Russell stated there is 'little agreement on just what this condition is or what kind or how much of it is required for a liberal democratic regime'.[37] Larkins echoed these sentiments, noting that judicial independence is 'one of the least understood concepts in the fields of political science and law'.[38]

In part this is owing to the inherent inconsistencies and contradictions that exist within the doctrine itself. On the one hand independence demands that there is no external interference or influence over the judicial decision-making process.[39] On the other hand, judicial independence relies on also ensuring judicial accountability for incidents of corruption.[40] To achieve this accountability there has to be legitimate oversight over judicial actions, which has the potential to undermine attempts to secure individual independence.[41] Moreover, absolute institutional independence is unobtainable. All branches of government are interdependent to some extent; whilst each branch has its own specific sphere of influence some functions require cooperation between

[30] Russell (n2) 2.

[31] Open Society Institute 'Monitoring the EU Accession Process: Judicial Independence' (*Open Society* 2001), <https://www.opensocietyfoundations.org/sites/default/files/judicialind_20011010.pdf> accessed 19 February 2022.

[32] See generally Forsyth (n3).

[33] UNGA Res 50/181 (n5).

[34] Vickers (n17) 213.

[35] UNHCR 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers' (4 March 1994) UN Doc. E/CN.4/1994/132; UNCHR 'Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers' (11 April 1997) UN Doc E/CN.4/1997/23 preamble, 1.

[36] World Conference on Human Rights 'Vienna Declaration and Programme of Action' (25 June 1993) A/CONF.157/23, §27, 10; UNGA 'High Commissioner for the Promotion and Protection of all Human Rights' (7 January 1994) UN Doc A/RES/48/141.

[37] Russell (n2) 1.

[38] Larkins (n6) 607.

[39] John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1998–1999) 72 Southern California Law Review 353, 355; Fiss (n13) 59.

[40] See generally Judge J Clifford Wallace 'Resolving Judicial Corruption while Preserving Judicial Independence: Comparative Perspectives' (1998) 28(2) California Western International Law Journal 341, 343.

[41] *Ibid*.

branches.[42] The legislature relies on the judiciary to apply the law in court proceedings; in turn the judiciary relies on the executive to respect the application of the law. Additionally, justifiable interference in the judicial branch is inevitable; as the judiciary polices the actions of the executive and legislative branches, the executive and legislative audit judicial actions, ensuring that it only acts *intra vires*.[43] The result is that neither institutional nor individual independence can be achieved absolutely.[44]

Functionally, judicial independence remains a relatively ambiguous standard owing to the intricacies of its practical application. Judicial independence can be broken down into two components: institutional independence and individual independence. Institutional independence requires the entire judicial branch remains free from interference in judicial decision-making. Institutional independence can be achieved in a number of ways, each of those ensuring that 'genuine threats'[45] are not able to 'diminish or regulate the powers of the judiciary as a whole'.[46] This can be achieved through insulating the judicial branch, ensuring that it is not reliant on other branches of government, which would otherwise compromise its ability to make completely independent judgments. To achieve institutional independence a number of different standards need to be attained, including assuring the judicial branch has financial autonomy,[47] and exclusive authority over legal matters.[48]

Individual independence demands that respective judges are able to conclude cases based solely on the facts, free from any extraneous influence.[49] If individual independence is effectively secured, judges should be able to undertake the decision-making process free from 'fear or anticipation of (illegitimate) punishments or rewards'.[50] This requires judges to be politically insulated,[51] ensuring they are free from illegitimate pressure, coercion, or threats from an external source,[52] designed to compel the judicial branch to adhere to the agenda of another group. To protect judges from external pressures, judges need to be assured of an objective selection and appointment process,[53]

[42] Ferejohn (n39) 357.

[43] *Ibid* 356.

[44] *Ibid* 357.

[45] *Ibid* 355.

[46] *Ibid* 360.

[47] Organization of American States (Inter-American Commission on Human Rights), 'Second Report on the Situation of Human Rights in Peru', (2 June 2000) OEA/Ser.L/V/II.106doc.59 rev 2000, §13, Chapter II; United Nations 'Basic Principles on the Independence of the Judiciary' (n19), Principle 7; European Association of Judges 'European Charter on the statute for judges' (8–10 July 1998), DAJ/DOC (98) 23, operative paragraph 1.6; Chief Justice of the LAWASIA region and other judges from Asia and the Pacific 'Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region' (19 August 1995), operative paragraph 41; See also Committee of Ministers of the Council of Europe, 'Recommendation No. R (94) 12' (*Council of Europe* 1994) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2> accessed 19 February 2022, para 16.

[48] United Nations 'Basic Principles on the Independence of the Judiciary' (n19), Principle 3; African Union, The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa DOC/OS/(XXX)247 (4–12 July 2003), Principle A, paragraph 4(c); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (n47), operative paragraph 33.

[49] United Nations Economic and Social Council 'Strengthening Basic Principles of Judicial Conduct (Bangalore Principles of Judicial Conduct)' (27 July 2006) ECOSOC Res. 2006/23, Value 1.1.

[50] Ferejohn (n39) 355.

[51] Fiss (n13) 58.

[52] Bangalore Principles of Judicial Conduct (n49) Value 1.1.

[53] UN Basic Principles on the Independence of the Judiciary (n19) Principle 10; International Association of Judges 'Universal Charter of the Judge' (adopted on 17 November 1999 and updated on 14 November 2017); Council of Europe Committee of Ministers of the Council of Europe 'Recommendation No. R (94) 12' (n47) Principle I.2; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (n48), Principle A, paragraphs 4 (i) and (k); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, (n47) operative paragraph 13; Commonwealth Secretary-General 'Commonwealth (Latimer House) Principles on the Three Branches of Government' (The Commonwealth 19 June 1998) <https://www.cmja.org/downloads/latimerhouse/commprinthree-arms.pdf> accessed 22 April 2022, Principle II.1.

adequate tenure,[54] objective dismissal proceedings,[55] and satisfactory pay and working conditions.[56] Individual independence also requires that judges do not participate in corrupt judicial practices, in particular ensuring that judges do not have 'inappropriate connections with . . . the executive and legislative branches of government',[57] or accept extraneous inducements.[58]

The fact that judicial independence is built on numerous foundations presents a two-fold problem. Primarily, each of those foundations needs to be adequately secured for true *de facto* judicial independence to be attained. If one of those elements is not realised then there is a real risk that the whole standard will be undermined, leaving judicial independence a right particularly vulnerable to weakening and erosion. Furthermore, the number of elements needed to secure judicial independence makes monitoring the level of judicial independence achieved a particularly cumbersome task. This is exemplified by the American Bar Association's Rule of Law Initiative, which monitors 30 different factors when determining the level of *de facto* judicial independence achieved in a State.[59]

Measuring those standards is further complicated by the secrecy that accompanies instances of compromised judicial independence, in particular where individual independence has been imperilled. Instances where judges experienced external influence are likely to remain inconspicuous, given that judges are unlikely to concede that they reached a particular judgment because of that pressure.[60] Instead judges are inclined to conceal 'their lack of autonomy'.[61] This may be in part be owing to the type of pressure exerted over members of the judiciary, which can vary from threats to a judges' employment[62] to death threats.[63] Those judges wishing to preserve their livelihood and lives are likely therefore to remain silent. Further, instances where judgments are reached due to external influence, rather than based on the rule of law, are likely to illicit feelings of shame and humiliation,[64] which judges presumably wish to keep from becoming public. These factors are likely to mean that instances where judges are faced with threats or other external pressures are likely to remain clandestine, preventing them from being brought to international attention. Moreover, instances where individuals

[54] UN Basic Principles on the Independence of the Judiciary (n19), Principle 11; Latimer House Guidelines (n53), Guideline II.1; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (n48) Principle A, paragraphs 4 (l) and (m); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (n47), operative paragraphs 18–20.

[55] UN Basic Principles on the Independence of the Judiciary (n19) Principles 18 and 19; Council of Europe Committee of Ministers of the Council of Europe 'Recommendation No. R (94) 12' (n47) Principles VI.2 and VI. 3; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (n48) Principle A, paragraphs (n), (p), (q) and (r); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (n47) operative paragraphs 22–26; Latimer House Guidelines (n53), Guideline VI.1, paragraphs (a) (i) and (a) (iii).

[56] Human Rights Committee, Concluding Observations of the Human Rights Committee on the Democratic Republic of The Congo, UN Doc. CCPR/C/COD/CO/3, 20 April 2006, [21],

[57] Bangalore Principles (n49) Value 1.3; see also ECtHR, *Indra v. Slovakia,* App No 46845/99 (ECtHR 1 February 2005) [49].

[58] United Nations Basic Principles on the Independence of the Judiciary (n19) Principle 2; Bangalore Principles (n49), Value 1.1; Council of Europe Committee of Ministers of the Council of Europe 'Recommendation No. R (94) 12' (n47) Principle I.2.d; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (n48), Principle A, paragraph 5 (a); Principle Q paragraph (d); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (n47) operative paragraph 39.

[59] American Bar Association Rule of Law Initiative 'Judicial Reform Index' (*American Bar Association*, 2016) <http://www.americanbar.org/advocacy/rule_of_law/publications/assessments/jri.html> accessed 19 February 2022.

[60] Albert P Melone, 'Legal Professionals and Judicial independence in Transitional Society: The Case of Bulgaria' (1994) (as cited in Larkins (n6) 616).

[61] *Ibid.*

[62] Larkins (n6) 622.

[63] See generally Amnesty International 'Guatemala: intimidation must not stop justice' (Amnesty International, 2001), <http://www.amnesty.org.uk/press-releases/guatemala-intimidation-must-not-stop-justice> accessed 19 February 2022.

[64] Tamar Frankel, 'Fiduciary Duties as Default Rules' (1995) 74 Oregon Law Review 1209, 1269.

are voluntary participants in activity compromising judicial independence are equally unlikely to become public. Judges involved in incidents of corruption and bribery are also likely to face shame and humiliation and be unwilling to allow their actions to become public knowledge. Additionally, incidents of bribery are likely to be of financial, social, or political benefit to participating judges, who may be unwilling to give up the advantages that engaging in such activity might bring.

THE SOVIET UNION AND THE COMPLEXITIES OF JUDICIAL INDEPENDENCE

The complexities of monitoring *de facto* levels of judicial independence are demonstrated by the experience of the judiciary in the former Soviet Union. The USSR provides a useful context in which to examine the complexities of judicial independence. The Soviet Union provides a rare opportunity for information about government policy from a 'deviant'[65] State to be made publicly available, where no surviving State government would be directly susceptible to diplomatic embarrassment for those decisions and undertakings. Additionally, the significant number of ways in which judicial independence was undermined by the Communist governments provides a particularly rich data set by which to assess the complexities of judicial independence. Finally, some members of the 'third wave'[66] of democratising countries are former Soviet States. In this context, the Communist legacy provides a useful framework to assess democratisation efforts in those States.

In tandem with expectations from the international community,[67] when the Communist Party came to power in 1922,[68] the Soviet government sought to establish that there had been a dramatic change from previous Tsarist policy.[69] Reforms pledged by the Communist party included assurances that the Soviet government would stringently adhere to international human rights standards,[70] including that of judicial independence.[71]

This illusion was achieved through the introduction of new legislation,[72] including extensive provisions in the Constitution of the Union of Soviet Socialist Republics that paid lip service to the protection of various human rights.[73] This included formal Soviet laws that established elements of the democratic model, including a clear separation

[65] Emilie Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) The American Journal of Sociology 1373, 1383.

[66] See generally Huntingdon (n8).

[67] Scott P Boylan, 'The Status of Judicial Reform in Russia' (1998) 13(5) *American University International Law Review* (Am.U.Int'l.L.Rev) 1327, 1330.

[68] The Communist government came to power in Soviet Russia in 1917, after October Revolution led by the Bolsheviks. Between 1917 and 1922 the Russian communist party, the Russian Soviet Federative Socialist Republic, entered several former Russian Empire territories and provided assistance to local Communist seeking to succeed power. In 1922 these efforts resulted in victory, and the Union of Soviet Socialist Republics (USSR or Soviet Union) was created, and the Communist party took control of the Soviet government. See generally Peter Kenez *A History of the Soviet Union from the Beginning to the End* (2nd edn, CUP 2006); Geoffrey Hosking *History of the Soviet Union: 1917–1991* (3rd edn, William The 4th 1992).

[69] The rule of law and the separation of powers were not respected under the Tsarist regime, and human rights abuses were commonplace. See Boylan (n67), 1330.

[70] *Ibid*.

[71] *Ibid*.

[72] *Ibid*; *see also* Fundamental Principles on Court Organization of the USSR and the Union Republics (1924), Article 10; Fundamental Principles on Court Organization, Articles 4 and 5; Law of the USSR: On the Status of Judges (1989), item 223, Article 5(2).

[73] Конститу́ция (Основно́й Зако́н) Сою́за Сове́тских Социалисти́ческих Респу́блик (Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (as amended 1991)), Article 153.

of powers and judicial independence.[74] According to the Constitution of the Union of Socialist Soviet Republics the Supreme Court of the USSR was the highest judicial organ of the USSR,[75] and the ultimate arbiter of the law.

These assurances however conflicted with Soviet doctrine. In practice, Marxist-Leninist theory sought to establish a one-party State led by the Communist party as a means to develop Socialism in the Soviet Union.[76] In particular the Soviet regime believed that the Communist vanguard party represented the 'will of the proletariat'.[77] Marxist-Leninist theory therefore demanded that the executive branch exert control over all aspects of society, including over legal and judicial matters,[78] undermining judicial independence and the separation of powers. Under Soviet rule the judiciary was seen as another branch of the Communist regime,[79] and was used as a means by which to advance the Soviet agenda through legal avenues.[80] This was exemplified by the Soviet doctrine of *pravo kontrolia,*[81] which granted the Party ultimate control over all matters, including control over the law, as the 'guardian of ideological truth'.[82] Judges frequently adjudicated a number of crimes, including offences such as 'infringing on the activities of the State',[83] acknowledged as a means by which the Communist Party repressed dissidents.[84] In this context the Constitution was 'not a living document',[85] and was rarely used as a means by which to challenge unconstitutional executive action or to protect human rights standards.[86] The result was that the judicial branch became a tool of the 'omnipotent'[87] regime, and it was perceived that the sole function of the judiciary was the protection of the totalitarian agenda[88] and of the individuals in power.[89]

Certain methods employed by the Communist government to undermine the legal provisions guaranteeing judicial independence were far from inconspicuous. Exclusive authority was provided for in the Soviet Constitution, and demanded that no person be convicted of a crime other than by judgment of a court, in accordance with the law.[90] These sentiments were reiterated in other Soviet legal instruments, which stressed that all State organs should 'be obliged to fulfil the demand and ordinances of judges[91]

[74] *Ibid*.

[75] *Ibid*; Fundamental Principles on Court Organization of the USSR (n72), Article 10; Fundamental Principles on Court Organization (n72), additionally included articles protecting judges from 'interference in concrete cases' (Article 4) which would entail criminal responsibility (Article 5). These provisions were reiterated in Law of the USSR: On the Status of Judges (n72), item 223, Article 5(2) which prohibited 'influencing of any kind of judges . . . '.

[76] Aleksandras Shtromas, Robert Faulkner, and Daniel J Mahoney, *Totalitarianism and the Prospects for World Order: Closing the Door on the Twentieth Century* (Rowman & Littlefield 2013) 18.

[77] Michael Albert and Robin Hanel *Socialism Today and Tomorrow* (South End Press 1981) 24–25.

[78] *Ibid*.

[79] *Ibid*.

[80] *Ibid*.

[81] Mariusz Mark Dobek and Roy D Laird, 'Perestroika and a 'law-governed' Soviet State: Criminal Law' (1990) 16(2) Review of Socialist Law 135, 160.

[82] *Ibid* 150.

[83] Nina Berstein, 'Righting Wrongs, Case by Case' Newsday May 12 1991, (as cited in Randall T Shepard 'Telephone Justice, Pandering, and Judges Who Speak Out of School' (2001) 29(3) Fordham Urban Law Journal 811, 811).

[84] Stephen G Breyer, 'Comment: Liberty, Prosperity, and a Strong Judicial Institution' (1998) 61(3) Law and Contemporary Problems 3, 3

[85] Boylan (n67) 1339.

[86] *Ibid*.

[87] *Ibid*.

[88] Peter Costea, 'The Legal System and the Judiciary in the Marxist-Leninist Regimes of the Third World' (1990) 16(3) Review of Socialist Law 225, 253.

[89] *Ibid*.

[90] Constitution of the USSR (n73) Article 160.

[91] On the Status of Judges in the USSR (n72) Article 12(3).

including 'promptly answering . . . inquiries'.[92] Regardless, the Communist Party repeatedly intervened in the affairs of the judicial branch.[93] The Communist Party justified this interference due to the belief it had the 'leading role'[94] in society, and therefore placed itself above the law.[95] This philosophy gave the Communist Party the final say in any and all government business for the benefit of the State[96] and ensured that judges adhered to Communist values when passing judgments.[97] Frequently aspects of cases or entire trials, including questions of guilt or innocence, were decided prior to trial, and appearances in court were simply to determine appropriate sentences.[98]

Other methods of executive control over the institutional independence of the judiciary were far subtler. The judicial branch was consistently deprived of financial autonomy, by making the judiciary solely reliant on the executive branch for financial support.[99] Throughout the Soviet era the Ministry of Justice managed the judicial budget,[100] making members of the judicial branch reliant on the executive branch for their salary and for any other expenditures in the court systems.[101]

The Communist government also utilised a number of strategies to compromise the independence of individual members of the judiciary. The process of judicial selection and appointment lacked a formal procedure, allowing the Soviet government to violate standards of individual independence. The failure to secure a strictly regulated selection and appointment process permitted local Communist leaders or *apparatchik* to select judicial candidates in a process known as *podbor kadrov*[102] (selection of cadres); allowing the election of persons who adhered to and promoted Communist policies.[103] This was exacerbated by the fact that the law on the selection of judges did not require candidates to have a legal education,[104] dressing the judiciary with unqualified and inexperienced judges.[105]

Public violations of standards of judicial tenure further undermined judicial independence. The law ostensibly sought to secure adequate judicial tenure. Whilst other officials elected to public office were given a maximum tenure of two consecutive terms,[106] judges were exempted from this restriction.[107] The length of judicial tenure varied throughout the existence of the Soviet Union. Prior to 1989 the term of judicial tenure was five years,[108] but this was modified in December 1988 when the Constitution was amended: doubling the period of tenure to ten years.[109] The express intention of

[92] *Ibid*.

[93] Ledeneva, 'Telephone Justice in Russia' (n7) 328.

[94] *Ibid*.

[95] *Ibid*.

[96] *Ibid*.

[97] See generally Costea (n88).

[98] Peter H Solomon Jr,'The Role of the Defense in the USSR: The Politics of Judicial Reform under Gorbachev' (1988–1989) 31 Criminal Law Review Quarterly 76, 79; see generally N Dolapchiev, 'Law and Human Rights in Bulgaria' (1953) 29(1) International Affairs 59–68.

[99] Boylan (n67) 1334.

[100] *Ibid*.

[101] *Ibid*.

[102] *Ibid*.

[103] *Ibid*.

[104] Jane Henderson, 'Law of the USSR: On the Status of Judges in the USSR' (1990) 16(3) Review of Socialist Law 305, 320.

[105] *Ibid*.

[106] Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (n73) Article 91.

[107] *Ibid*.

[108] *Ibid* Article 152.

[109] *Ibid*.

this extension was to secure greater independence for judges.[110] Alongside this extension, legislation was rectified to limit instances where judges could be dismissed by the executive; further preserving judicial tenure.[111]

However, despite calls for lifelong tenure to be introduced during *perestroika* reforms, this was never achieved.[112] Consequently judicial tenure, whilst longer, remained temporary. Judicial tenure contingent on a temporal term, meant that judges had to seek reappointment at various intervals, leaving them susceptible to pressure from the appointing authorities, either because they were 'indebted'[113] to the those authorities, or because they wish to appease them to ensure re-election.[114] This was particularly true in the USSR, where judges were dependent on the local *apparatchik,* for re-election, and the approval of the Ministry of Justice to receive a nomination.[115] It was widely acknowledged by citizens throughout the Soviet era that regardless of judicial tenure, a judge could be 'dismissed, degraded, or transferred at will'[116] by the local *apparatchik*. Those who did not adhere to Communist 'guides'[117] were forced to retire.[118] In practice, therefore, judges were reliant on Communist party members both when being elected, but also in maintaining their office.

Another factor that compromised judicial independence was the wage awarded to those working within the judicial branch. Compared to their Western counterparts, Soviet judges were paid very inadequately.[119] There were repeated complaints from judicial advocates about the 'material distress'[120] of judges, who were often homeless and destitute.[121] Members of the court system averaged a wage that was a mere 63% of the national median,[122] and led to judges abandoning the judiciary in favour of higher paid employment.[123] Yet despite publicity, repeated calls for judicial wages to be increased, and official acknowledgment of these failures, nothing changed during the *perestroika* reforms.[124] This left judges reliant on the local *apparatchik* for provisions such as apartments and holidays,[125] and made them susceptible to bribery.

Regardless of *de jure* protections ostensibly provided to protect the independence of judges, this multiplicity of factors effectively undermined those legal safeguards. Instead, judges were dependent on the Communist party and local Communist *apparatchiks* when applying for office, when holding office, and to provide supplements for their otherwise meagre wage. This reliance meant that judges were susceptible to external pressures from the Communist party or local *apparatchiks* on the decision-making process. The

[110] Dobek and Laird (n81) 150.

[111] On the Status of Judges in the USSR (n72) Article 17(1).

[112] See generally Henderson (n104) 315.

[113] Institute for Democracy and Electoral Assistance (IDEA) 'Judicial Tenure, Removal, Immunity, and Accountability' (*International IDEA* August 2014) < https://constitutionnet.org/sites/default/files/2017–10/judicial-tenure-removal-immunity-and-accountability-primer.pdf > accessed 21 February 2022, 2.

[114] *Ibid*.

[115] Solomon (n98) 80.

[116] Dolapchiev (n98) 64.

[117] For example, the case of Judge Kudrin who was forced to retire after failing to adhere to the Communist *apparatchik* instructions, in Henderson (n104) 314–315.

[118] *Ibid*.

[119] Henderson (n104) 311–312.

[120] *Ibid* 311.

[121] *Ibid* 311–312.

[122] The average pay for employees of the Ministry of Justice was 137 roubles per calendar month, whilst the national average was 217 roubles per calendar month; see *Ibid* 312.

[123] Izvestiia 'The Judiciary' (CDSP 11 April 1989) 3 (as cited in Henderson (n104) 312).

[124] See generally Henderson (n104) 305–326.

[125] *Ibid*.

Soviet doctrine of *pravo kontrolia*[126] (the right of supervision)[127] effectively granted the party the right to intervene in any matter, thereby permitting 'the Party functionaries to dictate to the justices the desired verdict'.[128] The doctrine of *pravo kontrolia* permitted the practice of 'telephone justice'[129] (*telefonnoe pravo*)[130] to become commonplace in the Soviet Union. *Telefonnoe pravo* was used to refer to instances where a judge made a decision based on 'grounds external to the judge's own assessment of the law and the facts of a case'.[131] The phrase referred to a non-transparency in the legal system,[132] and was in fact an ironic term referring to the overruling of law so that Soviet 'justice' prevailed.[133] Telephone justice was achieved both through formal pressure to decide a case in a certain way,[134] and through informal pressure and subtler guises.[135] It allowed Communist members to pick up the phone and dictate to the judge how a particular case should be concluded,[136] including instances where judges were told to pursue cases with vigour or to drop them.[137] These decisions were often motivated for reasons entirely personal to the *apparatchik* dictating to the judge.[138] The problem was so extreme in some areas of the Soviet Union that in some instances judges wouldn't render a decision without consulting the local *apparatchik*,[139] and its widespread practice demonstrated that judges placed 'party loyalty (*partyinost)* above concerns for legality'.[140] It was therefore expected that judges would give any oral or written command from a member of the Communist Party precedence over written laws or decrees.[141] If there was a deviation between the written law and the oral instructions of the local *apparatchik*, then it was anticipated that the verbal instructions would hold.[142] This permitted unwritten rules to govern legal society, and allowed Party members to bend the law for friends and use it against enemies.[143]

Judges were also faced with significant informal pressure to make rulings in a particular way.[144] This pressure was communicated via various media outlets, which subjected judges to 'incessant . . . moral duress'.[145] These included:

> 'frenzied radio, press, and other propaganda but also by specially staged open 'people's meetings' which in fact passed the actual verdicts before the judicial decisions were determined'.[146]

[126] Dobek and Laird (n81) 150.

[127] Rutland (n7) 44.

[128] Dobek and Laird (n81) 150.

[129] Alena Ledeneva. 'Behind the Façade: Telephone Justice in Putin's Russia' in Mary McAulley, Alena Ledeneva, and Hugh Barnes (eds), *Dictatorship or Reform? The Rule of Law in Russia* (Foreign policy Centre 2006) 24, 30.

[130] *Ibid.*

[131] *Ibid.*

[132] *Ibid* 26.

[133] *Ibid.*

[134] See generally Shepard (n83) 811–825.

[135] *Ibid.*

[136] Ledeneva 'Behind the Façade' (n129) 25.

[137] Solomon (n98) 84.

[138] *Ibid.*

[139] Boylan (n67) 1327.

[140] Ledeneva 'Telephone Justice in Russia' (n7) 329.

[141] *Ibid.*

[142] Timothy J Colton, *Yeltsin: A Political Life* (Basic Books 2007) 325.

[143] Ledeneva, 'Telephone Justice in Russia' (n7) 330.

[144] *Ibid.*

[145] Dolapchiev (n98) 61.

[146] *Ibid.*

Threats to judicial independence in the Soviet Union did not solely emanate from the Communist government. Judicial corruption, where judges were voluntarily involved in the activity that compromised their independence, was also commonplace in the USSR.[147] The law of the Soviet Union expressly prohibited corruption in all spheres of government requiring that a judge should act in a way that was just and humane,[148] and that honoured and dignified their profession.[149]

One of the factors that permitted judicial corruption to thrive in the USSR was the legal culture of the Soviet Union. The judicial branch was the least well-regarded branch of government in the Soviet Union,[150] and commanded little respect.[151] As a consequence there was little prestige or pride attached to holding the position of a judge. As Kurkchiyan noted:

> 'the perspective of legal culture shows us the importance of self-identity; the feelings of honour and pride that come with group membership.'[152]

The low esteem judges in the Soviet Union held their own profession in resulted in a failure to secure a legal culture that frowned upon or prohibited judicial corruption.[153] This problem was exacerbated by the propensity of the Soviet judiciary to hold 'closed ranks'[154] and protect those guilty members from any legal consequences.[155]

Furthermore, a spiral of corruption existed whereby enough individuals were involved in the culture of corruption that continued compliance with the culture could be secured through political blackmail.[156] The culture of corruption was a self-perpetuating one and spread from one governmental sphere to another;[157] given that no individual could come forward to expose the reality unless they were prepared to risk exposure of their own misconduct.[158]

Lenin acknowledged the problem of corruption in 1921 in Soviet Russia, when he stated that bribery was one of the 'three main enemies'[159] of Communism. This statement did not, however, acknowledge the factors, such as inadequate wages and poverty,[160] which had caused corruption to become so prevalent in the USSR; instead the problem of bribery was blamed on the vestiges of capitalist ideals.[161] The Russian Supreme Court reiterated this sentiment, noting that bribery was 'the most shameful

[147] James Heinzen, 'The Art of the Bribe: Corruption and Everyday Practice in the Late Stalinist USSR' (2007) 66(3) Slavic Review 389, 407.

[148] On the Status of Judges in the USSR (n72) Article 13(1).

[149] *Ibid*.

[150] Boylan (n67) 1327.

[151] *Ibid*.

[152] Marina Kurkchiyan, 'Judicial Corruption in the Context of Legal Culture' in Transparency International (ed) in *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007) 100.

[153] *Ibid*.

[154] See generally, Geoffrey Robertson QC 'The Media and Judicial Corruption' in Transparency International (ed) in *Global Corruption Report 2007* (Cambridge University Press 2007) 108, 109.

[155] *Ibid*.

[156] *Ibid*.

[157] Larkins (n6) 30.

[158] *Ibid*.

[159] Alongside Communist arrogance and illiteracy; *see* Vladimir Lenin (translated by Kharms D) *Polnoe sobranie sochinenii* [Full Composition of Writing] (5th edn, Gumanitarnoe Agentstvo, 1964), 173–74; Christopher Read, *Lenin: A Revolutionary Life* (Routledge 2009) 271; Sheila Fitzpatrick *The Commissariat of Enlightenment: Soviet Organization of Education and the Arts under Lunacharsky* (Cambridge University Press 2002) 252.

[160] Heinzen (n147) 409.

[161] Lenin (n159) 173–74; Read (n159) 271; Fitzpatrick (n159) 252.

relics of the capitalist past'.[162] The visibility of government rhetoric on the causes of corruption meant that bribery could no longer be heralded as a problem, given that the executive claimed to have eradicated capitalism from Soviet society.[163] Instead corruption was seen as a problem that could only affect bourgeois Western capitalist States.[164] This allowed activities such as bribery to pervade the Soviet judiciary and other branches of the Communist government, leading to a culture of corruption known as 'stealing the State'[165] or 'State capture'.[166] This situation was so extreme that it was an 'open secret'[167] in Soviet society, and in some instances unofficial 'price lists'[168] for justice were made available.

Bribery was one of the more common methods of corruption utilised in the USSR; in fact it was a 'phenomenon of everyday life'.[169] The RSFSR Criminal Code prohibited any 'inducements that improperly influenced the performance of an official's public function'.[170] Additionally the Criminal Code made both the offering[171] and acceptance[172] of a bribe unlawful, and punishable by up to fifteen years for repeat offenders.[173] Nonetheless, in practice prosecutions under the RSFSR Criminal Code for bribery were exceptional.[174] The fact that incidents of bribery were so common in the Soviet Union was in part due to factors outside of the control of judges that affected their susceptibility to bribery, including the inadequacy of their wage.[175] In the USSR members of the judiciary lived in 'material deprivation',[176] making it particularly tempting for judges to sell access to 'justice' in order to escape poverty.[177] This was particularly true in the Stalinist post-war era, which witnessed an upsurge in incidents of bribery[178] due to a shortage of rations[179] and a prevalence of poverty.[180] The result was that bribe taking in the Soviet Union became an enticing alternative method to help judges survive,[181] and drastically increasing their quality of life.[182] Despite the commonplace nature of bribe taking in the Soviet Union there was little official acknowledgment of it. This was in large part due to the fact that people would rarely admit to either paying or accepting a bribe,[183] in part due to the feeling that accepting such payment was not immoral

[162] Supreme Court of the USSR *Postanovlenie* (meaning 'decree of the Supreme Court) (1949) (F Chernov 'Bourgeois Cosmopolitanism and its Reactionary Role' in Bolshevik (ed) *Bolshevik: Theoretical and Political Magazine of the Central Committee of the All-Union Communist Party* (Communist Party of the Soviet Union 1949) 30–41).

[163] See generally Heinzen (n147).

[164] *Ibid*.

[165] See generally Steven L. Solnick, *Stealing the State: Control and Collapse in Soviet Institutions* (Harvard University Press 1999).

[166] Ledeneva 'Behind the Façade' (n129) 25.

[167] *Ibid* 24.

[168] *Ibid* 23.

[169] Heinzen (n147), 393.

[170] The Criminal Code of the Russian Soviet Federative Socialist Republic 27 October 1960 (as amended), Chapter VII Official Crimes, Article 174.

[171] *Ibid*.

[172] *Ibid* Article 173.

[173] *Ibid* Article 173.

[174] Heinzen (n147) 407.

[175] Henderson (n104) 311–312.

[176] Heinzen (n147) 409.

[177] *Ibid* 400–401.

[178] *Ibid* 401.

[179] *Ibid* 400.

[180] *Ibid* 400.

[181] *Ibid* 400–401.

[182] *Ibid* 400–401.

[183] *Ibid* 395.

given the poverty suffered by the Soviet population,[184] and therefore something that an individual should not have to admit to.

Whilst *de jure* provisions provided for the separation of powers in the Soviet Union,[185] in reality this was compromised through numerous guises. The Communist government undermined both institutional and individual independence in the Soviet Union, thoroughly eroding *de facto* judicial independence. Nonetheless, the Communist government repeatedly claimed that the judiciary was an independent and separate branch of government from the executive and legislative.[186] The executive was able to make these claims in part thanks to the plethora of ways in which the standard was compromised, which made demonstrating the nonexistence of judicial independence a near futile task.

The failure to secure judicial independence in the USSR had serious repercussions. Of all the government branches, the judiciary commanded the least respect,[187] and the public was very suspicious of the judiciary and the motives behind their judgments.[188] The rule of law was completely undermined, and cases before the courts were most often decided either by the local *apparatchik*,[189] by the Communist government,[190] or through the paying of bribes.[191] Furthermore, the judiciary was unable, or unwilling, to act as a safeguard against *ultra vires* executive action. This allowed the Communist government to take unilateral action without challenge or consequence, allowing human rights abuses in the Soviet Union to become prevalent.[192]

CONTINUING CHALLENGES: JUDICIAL INDEPENDENCE IN CIS STATES

The fall of the Soviet Union in 1991 revived focus and interest in judicial independence, in part due to the 'renewed emphasis on constitutionalism in the democratising world of the post-Cold war era'.[193] This interest coincided with a 'growing gap between promise and practice'[194] of judicial independence standards.[195] Less than two and a half years after the dissolution of the Soviet Union in 1991[196] concern about judicial independence around the world led to the creation of a UN Special Rapporteur on the Independence of Judges and Lawyers.[197] That mandate emphasised that judicial independence is an 'essential prerequisite for the protection of human rights and ensuring . . . justice',[198] and was created because that fundamental right continued to be frequently violated[199] and in need of specific protection.[200]

[184] *Ibid* 404.

[185] See generally Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (n73) Article 153; Fundamental Principles on Court Organization of the USSR (n72) Article 10; Law of the USSR: On the Status of Judges (1989) (n72) item 223, Article 5(2).

[186] See Boylan (n67) 1330.

[187] *Ibid* 1327.

[188] *Ibid* 1343.

[189] Solomon (n98) 78.

[190] *Ibid*.

[191] *See generally* Heinzen (n147) 407.

[192] Boylan (n67) 1339.

[193] Linda Camp Keith *Political Repression* (University of Pennsylvania Press 2012) 114.

[194] *Ibid* 155.

[195] *Ibid*.

[196] *Декларация Совета Республик ВС СССР от 26.12.1991 № 142-Н* [Declaration no 142-N of the Soviet of the Republics of the Supreme Soviet of the USSR No 142-N] 26 December 1991.

[197] UNHCR, 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers' (n35).

[198] *Ibid*.

[199] *Ibid*.

[200] *Ibid*.

Today the 'overwhelming majority of modern States claim to be democratic',[201] a claim contingent on adequate standards of judicial independence being attained in that State.[202] The desire to be seen as a 'democratising' or democratic state is based in part on the increased globalisation of the modern era, which created a greater interweaving of national and international politics.[203] This puts additional pressure on governments to be seen to be adhering to the global *status quo.* This is particularly true for newly independent States which may be anxious to be a credible member of the 'democratic community', given that '[d]emocracy bestows an aura of legitimacy on modern political life'.[204]

Emphasis from international organisations bestowing development funds, such as the World Trade Organisation[205] and the World Bank,[206] also encourages States to claim that those standards are being achieved regardless of the reality. Regardless of these claims,[207] over ten years after the creation of the Special Rapporteur on the Independence of Judges and Lawyers, problems securing judicial independence persist. In practice many States still fail to uphold standards of judicial independence,[208] correspondingly the mandate of the Special Rapporteur has been extended on a number of occasions.[209]

One of the purported aims of the Commonwealth of Independent States was the achievement of greater levels of democracy in its member states. Democratisation efforts of CIS through the 'deepening of democratic reforms'[210] include assurances that 'all persons shall be equal before the judicial system'.[211] Importantly this demands that 'everyone shall be entitled to a fair hearing within a reasonable time by an independent and impartial court'.[212]

Echoing the Soviet experience, however, in practice these aims have not been realised, and many principles providing for judicial independence have not been effectively executed. In fact, judicial reform has proven 'severely problematic in almost all post-Soviet countries'.[213] To this end, delegates at the Human Rights Committee have noted that that priority should be given to enforcing laws, not just writing them.[214] Similarly, as part of the attempt to achieve higher standards of judicial independence across Europe, the Organization for Security and Cooperation in Europe created the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus, and Central Asia.[215]

[201] Calvert and Calvert (n11) 357; *see also* David Held, 'Democracy: From City-States to a Cosmopolitan Order' (1992) Special Issue, Political Studies 10, 10.

[202] Russell (n2) 2.

[203] Held (n201) 22.

[204] *Ibid* 10.

[205] WTO 'GATT' (n26), Article X (3).

[206] See Hammergren (n25).

[207] Calvert and Calvert (n11) 10.

[208] Howard and Carey (n21) 286.

[209] UN Human Rights Council, 'Mandate of the Special Rapporteur on the Independence of Judges and Lawyers' (18 June 2008) UN Doc A/HRC/8/52, §2, [29]; UNHRC 'Mandate of the Special Rapporteur on the Independence of Judges and Lawyers' (10 July 2014) UN Doc A/HRC/Res/26/7 [2].

[210] Commonwealth of Independent States' Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms' (1995) preamble.

[211] *Ibid* Article 6.

[212] *Ibid*.

[213] International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform. Asia Report No 150' (*International Crisis Group,* 2008) <https://d207landvip0wj.cloudfront.net/150-kyrgyzstan-the-challenge-of-judicial-reform.pdf> accessed 21 February 2022, 1

[214] Human Rights Committee, Human Rights Committee Concludes Consideration of Uzbekistan's Third Report (n10) §10, 11.

[215] OSCE Office for the Democratic Institutions and Human Rights 'Judicial Independence in Eastern Europe, South Caucasus, and Central Asia: Challenges, Reforms and Ways Forward. Expert Meeting in Kyiv, 23–25 June 2010' (*OSCE,* 23–25 June 2010), <http://www.osce.org/odihr/71178?download=true> accessed 21 February 2022.

In several CIS member states the exclusive authority of the judiciary has not been adequately secured. In recent years, legislative amendments to secure the *de jure* exclusive authority of the Kazakh judiciary have been introduced. In particular, legislative amendments have moved the power to grant search and arrest away from the executive branch and to the judicial branch.[216] In addition, the Criminal Procedure Code was further amended to remove the power to grant extensions of custody from the Prosecutor's Office, and instead vest that power with the judiciary.[217] Similarly, in 2017, significant constitutional amendments meant that the President of Kazakhstan no longer had the power to veto decisions of the Constitutional Council.[218] However, significant problems remain. In particular, the Constitutional Council, the body which ensures the supremacy of the Kazakh constitution,[219] remains subject to significant influence from the President. The President retains the power to appoint three members of the seven members of the Council and has the power to appoint and dismiss the President of the Constitutional Council,[220] which commentators have noted gives President Nazarbayev the ability to 'significantly influence the work'[221] of the Council. In addition, even where domestic law has granted judiciaries exclusive authority in practice, those judiciaries are reluctant to challenge executive decisions and actions. In Tajikistan and Azerbaijan for example, both judiciaries have proven unwilling to exercise their exclusive authority over issues of civil liberties to challenge executive violations of human rights standards.[222]

In comparison, relatively great strides have been made securing the financial autonomy of CIS judiciaries. Generally, judicial branches are awarded an amount adequate enough to permit the completion of the day-to-day activities of the judiciary,[223] although in practice most remain dependent on the executive in this respect.[224] Both the Azerbaijani and Tajik judiciaries remain susceptible to the whim of the executive branch. The Azerbaijani judiciary has no guaranteed percentage of the government

[216] Criminal Procedure Code of the Republic of Kazakhstan (The Code of the Republic of Kazakhstan dated July 4 2014 No. 231) Article 53 (5–1)(8); Article 147(1).

[217] *Ibid* Article 55(1); Article 53(5).

[218] On Introducing Amendments and Additions to the Constitution of the Republic of Kazakhstan, The Law of the Republic of Kazakhstan dated March 10 2017 no. 51-VI 3PK, Article 1(18)

[219] Constitution of the Republic of Kazakhstan (1995, as amended 2017), Section VI. Constitutional Council, Article 72(1)(4).

[220] Government of the Republic of Kazakhstan 'Constitutional Council of the Republic of Kazakhstan: Answers to FAQs' (*Gov.KZ* 2022) <https://www.gov.kz/memleket/entities/ksrk/press/article/details/73223?lang=en> accessed 14 April 2022.

[221] Zhenis Kambayev, 'Recent Constitutional Reforms in Kazakhstan: A move towards Democratic Transition?' (2017) 42(4) Review of Central and East European law 294, 324–325; see also Nora Webb Williams and Margaret Hanson 'Captured Courts and Legitimized Autocrats: Transforming Kazakhstan's Constitutional Court' (2022) Law and Social Inquiry, 1–33.

[222] Freedom House 'Tajikistan: Nations in Transit 2021' (*Freedom House,* 2021) <https://freedomhouse.org/country/tajikistan/freedom-world/2021> accessed 21 February 2022; Fabio Belafatti 'The judicial system of Tajikistan and the situation of the opposition movement "Group 24": an assessment' (*Vilnius University,* 14 October 2015) <https://www.fairtrials.org/wp-content/uploads/TJK-judicial-Group-24-Final.pdf> accessed 21 February 2022, 8; International Bar Association's Human Rights Institute 'Azerbaijan: Freedom of Expression on Trial' (*International Bar Association,* 2014)<https://www.ibanet.org/Document/Default.aspx?DocumentUid=D168B0B4-C377-4EC7-A0B9-D029EF09A39C> accessed 21 February 2022, 50; Freedom House 'Azerbaijan: Nations in Transit 2021' (Freedom House, 2021) <https://freedomhouse.org/country/azerbaijan/freedom-world/2021> accessed 22 April 2022.

[223] Statement of Petr. P. Miklashevich, Chairman of the Constitutional Court of the Republic of Belarus 'Separation of powers and independence of Constitutional Court of Republic of Belarus' (*Council of Europe,* 2011) <http://www.venice.coe.int/WCCJ/Rio/Papers/BLR_Miklashevich_E.pdf> accessed 22 February 2022; American Bar Association Rule of Law Initiative 'Judicial Reform Index for Armenia: December 2012' (*American Bar Association*, December 2012) <https://www.americanbar.org/content/dam/aba/directories/roli/armenia/armenia_jri_vol_iv_english_12_2012.authcheckdam.pdf> accessed 24 April 2022, 39.

[224] International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213); Transparency Azerbaijan Advocacy and Legal Advice Center 'The Azerbaijani Judiciary' (*Transparency International,* 2014) <http://transparency.az/alac/files/JUDICIARY.pdf> accessed 22 February 2022; Dr Julinda Beqiraj and the European Commission for the Efficiency of Justice 'Access to Justice for Vulnerable Groups: Strengthening the efficiency and quality of the judicial system in Azerbaijan' (*Council of Europe* 2020) < https://rm.coe.int/access-to-justice-for-vulnerable-groups-in-azerbaijan-eng/1680a31544> accessed 13 April 2022.

budget,[225] and the Tajik judiciary has limited influence over the budget.[226] Whilst the Tajik judicial budget is based on proposals given by the Presidents of the Supreme Court and High Economic Court, they have no say in the ultimate figure awarded, and final budget is approved solely by the Government.[227] In this respect, problems have arisen in particular in Kyrgyzstan. Here in the 2006 and 2007 financial years, the Kyrgyz judiciary received less than fifty per cent of the allocated judicial budget.[228] In Kazakhstan, the Kazakh judiciary the judicial budget has not kept pace with the increased workload of the Kazakh judiciary and in 2020 the judicial budget accounted for a mere 0.47% of the Kazakh State expenses.[229]

Similarly, issues undermining judicial independence continue in CIS member states. In Kazakhstan,[230] Armenia,[231] Uzbekistan,[232] Azerbaijan,[233] Belarus,[234]

[225] Transparency Azerbaijan 'The Azerbaijani Judiciary' (n224); Transparency Azerbaijan 'National Integrity System Assessment: Azerbaijan' (*European Commission* 2014) <https://images.transparencycdn.org/images/2014_NISAzerbaijan_EN.pdf> accessed 13 April 2022, 12.

[226] ICJ 'Neither Check nor Balance: The Judiciary in Tajikistan' (*International Commission of Jurists* December 2020) <https://www.icj.org/wp-content/uploads/2020/12/Neither-Check-nor-Balance_Tajikisan_MR_ENG.pdf> accessed 13 April 2022.

[227] *Ibid*.

[228] International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213).

[229] Mark Beer 'Realities, Trends, and Prospects of an Improving Justice System: A Kazakhstan Case Study' (*Council of Europe,* January 2020) <https://rm.coe.int/supreme-court-of-kazakhstan-reforms-final-june1/16809ea631> accessed 13th April 2022.

[230] The President of the Republic of Kazakhstan appoints Judges and the Chairperson of the Supreme Court, Judges and the Chairpersons of the oblast courts, and Judges and Chairpersons of all other courts. See Constitution of the Republic of Kazakhstan (n219), Article 82(1)-(3); see also The Law of the Republic of Kazakhstan dated 4 December 2015 No 436-IV LRK, Article 3(2)-(3). This fact has attracted condemnation from the Special Rapporteur on the independence of judges and lawyers who noted that the 'President of the Republic retains crucial influence over the nomination process' see UNCHR 'Civil and Political Rights, including the questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy: Addendum: Mission to Kazakhstan' (11 January 2005) UN Doc E/CN.4/2005/60/Add.2, para 11.

[231] Upon the recommendation of the Council of Justice, the President appoints judges to the appeal courts, and first instance courts, and upon the recommendation of the National Assembly appoints judges to the Court of Cassation. See, The Constitution of the Republic of Armenia (1995), Chapter 3 'The President of the Republic of Armenia', Article 55(10)-(11). See also OSCE ODIHR 'Comparative Note on International Standards for Selection, Competencies, and Skills for Judges in Administrative Justice' (*OSCE* 4 December 2020) <https://www.legislationline.org/download/id/8944/file/04.12.20%20NOTE%20Kazakhstan%20Admin%20Justice%20FINAL%20for%20publication_eng.pdf> accessed 13 April 2022.

[232] Members of the judiciary are appointed by the Supreme Judicial Council of the Republic of Uzbekistan. However, the membership of the Supreme Judicial Council is largely controlled by the President, who proposes the Chairman on the Council (Law of the Republic of Uzbekistan 'About the Supreme Judicial Council of the Republic of Uzbekistan' 6 April 2017 Law No ZRU-427, Article 5(1)), the Deputy Chairman of the Council is appointed by the President ('On Amendments and Additions to the Law of the Republic of Uzbekistan: On the Supreme Council of the Republic of Uzbekistan' 20 September 2021 Law No ZRU-717), and the eleven members of the Council are proposed by the Chairman, who is proposed by the President ('On Amendments and Additions to the Law of the Republic of Uzbekistan 'On the Supreme Judicial Council of the Republic of Uzbekistan' 24 July 2021 Law No ZRU-717).

[233] Judges are appointed to the Constitutional Court by the Milli Majilis of Azerbaijan on the proposal of the President of Azerbaijan (The Law of Azerbaijan Republic on Constitution Court, Chapter III Status of Judges of Constitutional Court, Article 12.1; The Constitution of the Republic of Azerbaijan (1995), Chapter VI, Article 109(9)). The President also submits proposals for the appointment of judges to the Supreme Court of the Azerbaijan Republic, and the Courts of Appeal of the Azerbaijan Republic (The Constitution of the Republic of Azerbaijan (1995), Chapter VI: Article 109(9)). Finally, the President appoints judges to the other courts of the Azerbaijan Republic, including first instance courts (The Constitution of the Republic of Azerbaijan, Chapter VI, Article 109(9)).

[234] The President of Belarus appoints judges to the Supreme Court, (Constitution of the Republic of Belarus (1994), Article 84(10)) upon the recommendation of the Minister of Justice and the Chief Justice of the Supreme Court. However, after the Constitutional Referendum of 2022, the power to appoint members of the Supreme Court will instead be given to the All-Belarusian People's Assembly (under Article 112 of the Proposed Constitution). In practice, however, the All-Belarusian People's Assembly will remain under the influence of the President, who will be the primary member of the Assembly (under Article 89 of the Proposed Constitution). The President also appoints judges of other courts (Constitution of the Republic of Belarus, Article 84(10)). This fact has attracted condemnation from the Special Rapporteur on the independence of judges and lawyers who noted that 'The Special Rapporteur considers that the placing of absolute discretion in the President to appoint and remove judges is not consistent with judicial independence'. See UNCHR 'Civil and Political Rights, Including The Questions Of Independence Of The Judiciary, Administration Of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers Dato: Mission to Belarus' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42' (1 February 2001) UN Doc E/CN.4/2001/65, 4.

Tajikistan,[235] and Kyrgyzstan[236] the President of the respective State has significant powers in the selection and appointment of members of the judiciary. Additionally in many States the process of selection and appointment continues to lack transparency. Issues are apparent in the selection and appointment process in Tajikistan[237] and Azerbaijan,[238] where the opaque nature of the judicial selection and appointment process has raised concerns. Both the Human Rights Committee and the International Commission of Jurists have noted that the executive branch in Tajikistan clearly exerts significant pressure over the selection process at different key stages of the process, such that the President can overrule a judicial selection decision without any reasoning.[239] In Azerbaijan, there have been reports that the subjective aspect of the appointment process permitted the rejection of 'high-scoring' candidates because of political factors.[240]

Standards of judicial tenure across CIS member states are also very variable. In Armenia,[241] Azerbaijan,[242] Kazakhstan,[243] and Kyrgyzstan[244] tenure for judges until a specific retirement age has been introduced.[245] Nonetheless, some concerns about the security of that tenure remain. In Azerbaijan,[246] Belarus,[247] and

[235] The President of Tajikistan presents the Majlisi Milli with candidates for the Constitutional Court, the Supreme Court, and High Economic Court (Constitution of Republic of Tajikistan (1994) with Amendments through 2016, Chapter Four: The President, Article 69(8)). The President appoints the judges of military courts, the court of the Gorno-Badakhshan Autonomous Oblast, oblasts (regional courts), the city of Dushanbe, the city, and rayon courts, judges of the economic court of Gorno-Badakhshan Autonomous Oblast, oblasts, and the city of Dushanbe (Constitution of Republic of Tajikistan 1994, Chapter Four: The President, Article 69(12)).

[236] The President of Kyrgyzstan submits to the Jogorku Kenesh (the Supreme Council of Kyrgyzstan) candidates for election as judges of the Supreme Court at the proposal of the Council of the Selection of Judges (Constitution of the Kyrgyz Republic, Section III: The President of the Kyrgyz Republic, Article 64(3)(1)). The President also appoints local court judges at the proposal of the Council on the Selection of Judges (Constitution of the Kyrgyz Republic, Section III: The President of the Kyrgyz Republic, Article 64(3)(3)). Under proposed Constitutional changes the Council on the Selection of Judges is being replaced by the Council of Judges, but the President will continue to submit candidates for the Supreme Court and the Constitutional Council of the Supreme Court to the Jogorku Kenesh (Draft Law 'On the Constitution of the Kyrgyz Republic', Article 70(4)(1)), and will appoint local court judges (Draft Law 'On the Constitution of the Kyrgyz Republic', Article 70(4)(3)). The Draft Constitution is available via the European Commission for Democracy through Law 'Kyrgyzstan: Draft Law 'On the Constitution of the Kyrgyz Republic' (*Council of Europe*, 23 February 2021) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)017-e> accessed 13 April 2022.

[237] American Bar Association Rule of Law Initiative 'Judicial Reform Index for Tajikistan: December 2008' (*American Bar Association* December 2008) <https://www.americanbar.org/content/dam/aba/directories/roli/tajikistan/tajikistan_jri_12_2008_en.authcheckdam.pdf> accessed 27 April 2022, 18.

[238] International Bar Association Human Rights Institute 'Azerbaijan: Freedom of Expression on Trial' (n222) 45.

[239] ICJ 'Neither Check nor Balance' (n226), 39; UNHRC 'Concluding Observations on the Third Periodic Report of Tajikistan' (22 August 2019) UN Doc CCPR/C/TJK/CO/3, para 37.

[240] International Bar Association Human Rights Institute 'Azerbaijan: Freedom of Expression on Trial' (n222), 18.

[241] Constitution of the Republic of Armenia (n231) Article 116(8) - Judges shall serve in office until reaching the age of 65 and judges of the Constitutional Court shall serve in office until reaching the age of 70.

[242] Law on Courts and Judges (1997 as amended 2021), Chapter XVII Authorities of Judges, Article 96 (Aze).

[243] On Judicial System and Status of Judges in the Republic of Kazakhstan N132 (2000) as amended by the Constitutional Law of the Republic of Kazakhstan N559-IV, Article 24(1); Constitution of the Republic of Kazakhstan (n230), Article 79; see also The European Commission for the Efficiency of Justice 'Evaluation of the judicial systems (2018–2020): Kazakhstan' (*The Council of Europe* 24 September 2020) <https://rm.coe.int/en-kazakhstan-2018/16809fe312> accessed 16 April 2022, 81–82.

[244] Constitution of the Kyrgyz Republic (n236), Section VI: Judicial Power in the Kyrgyz Republic, Articles 94(6) and 94(8)); it is worth noting that the Kyrgyz Constitution is currently under review. However, under the new Constitution there remains tenure until the retirement age of 70 years old, see European Commission for Democracy through Law 'Opinion No 1021/2021 Kyrgyzstan: Draft Law on the Constitution of the Kyrgyz Republic' (*Council of Europe* 23 February 2021) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)017-e> accessed 16 April 2022, Article 95(5), (6), and (8).

[245] The law on judicial tenure is currently in a state of flux in Uzbekistan and lifetime tenure is being introduced as part of a number of judicial reform initiatives. See generally International Crisis Group 'Uzbekistan: In Transition. Briefing No. 82' (*International Crisis Group*, 29 September 2016) <https://www.crisisgroup.org/europe-central-asia/central-asia/uzbekistan/uzbekistan-transition> accessed 22 February 2022.

[246] Law of the Azerbaijan Republic 'About Courts and Judges' 10 June 1997, Law No 310-IQ, Article 96.

[247] Code of the Republic of Belarus on Judicial Systems and the Status of Judges No. 139-Z (June 29 2006 as amended December 12 2020), Article 99.

Kyrgyzstan[248] a probationary system is in place that means that new judges have a primary tenure of five years. In Belarus in particular, the probationary process has come under criticism from the Organization for Security and Co-operation in Europe, which notes this mechanism creates a loophole leaving the career of probationary judges 'effectively at the discretion of the executive'.[249] In fact, in recent changes to the Belarusian Code on the Judiciary, the tenure of judges was amended so that life tenure would not automatically be afforded after the initial five-year probation. Instead, Article 81(3) states that after the five-year probation judges '*may* be reappointed for a new term or for life' (emphasis added),[250] which leaves judges dependent on reappointing authorities and may create a subservient judiciary.[251] Comparatively in Uzbekistan, judges are appointed for an initial term of five years, reappointed for a second term of ten years, before finally being reappointed until the mandatory retirement age.[252] This reliance on the executive for reappointment has left judges feeling vulnerable, with a significant number reporting their belief that reaching a lawful decision in a case, in spite of external pressure, might negatively impact their chances of re-election.[253]

In Belarus, the tenure of judges is further undermined by the Judicial Code, which permits the President to open disciplinary proceedings against any judge[254] and to impose 'any disciplinary measure on any judge without instituting disciplinary proceedings'.[255] According to the Organization for Security and Co-operation in Europe disciplinary measures can include dismissal, giving the President '*carte blanche*'[256] powers to remove judges. Similarly, historically in Armenia tenure has been comparatively undermined by executive influence, and numerous reports of politically motivated dismissals of judges from office have been reported.[257] This legacy has caused significant concern in recent months when, following a decision to release an opposition figure from detention, the Armenian Minister of Justice called for a mass dismissal of judges.[258]

[248] Constitution of the Kyrgyz Republic (n236), Section VI: Judicial Power in the Kyrgyz Republic, Articles 94(6) and 94(8)).

[249] Office for Democratic Institutions and Human Rights 'Report Trial Monitoring in Belarus (March-July 2011)' (*Organisation for Security and Cooperation in Europe*, 2011) <http://www.osce.org/odihr/84873?download=true> accessed 22 February 2022, 34.

[250] Judicial Code of Belarus (n247) Article 81(3).

[251] Elliot Bulmer 'Judicial Tenure, Removability, Immunity, and Accountability' (*International Institute for Democracy and Electoral Assistance*, 2017) <https://www.idea.int/sites/default/files/publications/judicial-tenure-removal-immunity-and-accountability-primer.pdf> accessed 14 April 2021, 8.

[252] Law of the Republic of Uzbekistan 'About Courts' (28 July 2021) No. RK-703, Article 71.

[253] Botirjon Kosimov 'Judicial Tenure and its role in securing Judicial Independence: Practices from Uzbekistan and the United States' (2021) 3(4) The American Journal of Political Science Law and Criminology 125, 128.

[254] Judicial Code of Belarus (n247) Chapter 12: Suspension, Renewal, and Termination of Powers of Judges, Article 115.

[255] *Ibid* Article 112; for more detail on this see UNGA 'Situation of human rights in Belarus: Note by the Secretary General' (17 July 2020) UN Doc A/75/173, para 21

[256] Office for Democratic Institutions and Human Rights 'Report Trial Monitoring in Belarus' (n249) 36.

[257] American Bar Association Rule of Law Initiative 'Judicial Reform Index for Armenia: December 2012' (n223) 45–46; Transparency International Anti-Corruption Center 'European Neighbourhood Policy: Monitoring Armenia's Anti-Corruption Commitments 2010' (*Transparency International,* 2011) <https://issuu.com/transparencyinternational/docs/2010_enparmenia_en?mode=window&backgroundColor=%23222222> accessed 22 February 2022, 9; see also generally Grigor Mouradian 'Independence of the Judiciary in Armenia' in Anja Seibert-Fohr (ed) Judicial independence in Transition (springer-Verlag Berlin and Heidelberg GmbH & Co. K 2012), 1197–1253.

[258] Lillian Avedian 'The ruling party is restricting judicial independence, critics warn' (*The Armenian* Weekly, 16 February 2022) <https://armenianweekly.com/2022/02/16/the-ruling-party-is-restricting-judicial-independence-critics-warn/> accessed 16 April 2022.

On the other hand, the salaries of judges in CIS member states have drastically improved since the Soviet era.[259] Whilst there are still complaints that salaries are low, especially in comparison to their Western counterparts,[260] generally judges are now paid comparably to, or higher than, other public sector employees. Nonetheless, in Azerbaijan,[261] Kyrgyzstan,[262] Tajikistan,[263] and Uzbekistan[264] the relatively low salaries have been cited as a factor in the continued corruption in the respective judicial branches. The U.N. Special Rapporteur has also raised concerns that judicial salaries of Kazakh judges remain a 'quasi exclusive domain of the President of the Republic',[265] and the OECD has recommended that salary rates be specified in law to help ensure the independence of judges.[266] Nonetheless, in general, steps have been taken to secure judicial independence through the provision of adequate judicial salaries across CIS member states.

Unfortunately, the same progress has not been made in precluding executive interference in judicial decision-making. In fact, this element of individual independence has shown little improvement. In this respect, with respect to the Azerbaijani judiciary, US AID concluded 'although the Constitution provides for an independent judiciary, judges were not functionally independent of the executive branch'.[267] Similarly Freedom House noted that the Kazakh judiciary continues to be 'instrumentalized to persecute and intimidate dissent'.[268] A number of themes are apparent across CIS member states in this regard.

The misuse of the judiciary by the executive branch as a political weapon continues across a number of CIS States. In Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, and Tajikistan the courts have repeatedly been used as a tool to suppress political opposition figures.[269] In Kazakhstan, Freedom House noted that in 2012 all cases

[259] *See generally* American Bar Association Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (*American Bar Association*, December 2008) <https://www.americanbar.org/content/dam/aba/directories/roli/kazakhstan/kazahstan-jri-2004.authcheckdam.pdf> accessed 27 April 2022, 25; American Bar Association Rule of Law Initiative 'Judicial Reform Index for Armenia: December 2012' (n223), 41–42; Courts and Judges Act (Aze) (n242), Chapter XVII Authorities of Judges, Articles 106–107; Office for Democratic Institutions and Human Rights 'Report Trial Monitoring in Belarus' (n249), 36; ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n237), 40–41; International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213), 10.

[260] ABA Rule of Law Initiative 'Judicial Reform Index for Kazakhstan' (n259), 24.

[261] EMDS et al 'Azerbaijan: Universal Periodic Review – Third Cycle: Submission on Corruption and Human Rights in Azerbaijan' (*United Nations*, October 2017) <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=5182&file=CoverPage> accessed 10 April 2022.

[262] Jasmine Cameron 'Kyrgyzstan: Why human rights have been declining over the last 20 years and what happened to the 'Switzerland' of Central Asia?' (*The Foreign Policy Centre* 1 March 2021) <https://fpc.org.uk/kyrgyzstan-why-human-rights-have-been-declining-over-the-last-20-years-and-what-happened-to-the-switzerland-of-central-asia/> accessed 20 April 2022; International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213), 9.

[263] ICJ 'Neither Check nor Balance' (n226), 60; ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n237), 41.

[264] American Bar Association Rule of Law Initiative 'Judicial Reform Index for Uzbekistan: 2002' (*American Bar Association* 2002) <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan017570.pdf> accessed 22 February 2022, 27.

[265] UN ECOSOC 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy: Mission to Kazakhstan' (n230) 11.

[266] OECD 'Istanbul Anti-Corruption Action Plan, Fourth Round of Monitoring: Kazakhstan Progress Update (*OECD* 2019) <https://www.oecd.org/corruption/acn/OECD-ACN-Kazakhstan-Progress-Update-2019-ENG.pdf> accessed 20 April 2022.

[267] US Department of State '2020 Country Reports on Human Rights Practices: Azerbaijan' (*US Department of State,* 30 March 2021) < https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/azerbaijan/> accessed 24 April 2022.

[268] Freedom House 'Kazakhstan: Nations in Transit 2021' (*Freedom House*, 2021) <https://freedomhouse.org/country/kazakhstan/nations-transit/2021> accessed 24 April 2022.

[269] US Department of State '2020 Country Reports: Azerbaijan' (n267); UNHRC 'Situation of human rights in Belarus: Report of the Special Rapporteur on the situation of human rights in Belarus, Anaïs Marin' (2020) UN Doc A/75/173; Annette Bohr et al *Kazakhstan: Tested by Transition* (Chatham House, 2019), vi; International Federation for Human Rights 'Kyrgyzstan: Arrest and judicial harassment of three anti-war protesters and their lawyer' (*FIDH* 2022)

involving politically motivated charges resulted in a conviction by the courts.[270] In Tajikistan the courts have been used to silence political opponents of the executive regime,[271] to suppress leaders and advocates of various religious minorities,[272] and to pressure human rights lawyers.[273] Similarly, the Special Rapporteur for the Situation in Belarus has highlighted the judicial harassment of human rights defenders, journalists, and bloggers in the country.[274] Recently, in Kyrgyzstan the courts have been weaponised to arrest and prosecute human rights defenders who were peacefully protesting the Russian invasion of Ukraine.[275] The prevalence of executive misuse of judicial power is reflected in the Freedom House scores assigned to these States for judicial freedom, which range from between 1[276] and 1.5[277] (1.00 representing the lowest level of judicial independence possible), with Armenia being the only State to break the threshold of 2, with a score of 2.5.[278]

The influence of the executive over the judicial branch is also apparent in respect to acquittal rates. In all States in this study the acquittal rates are extremely low,[279] but in Azerbaijan,[280] Belarus,[281] and Tajikistan[282] the acquittal rates of those accused of a criminal offence fall below 1%. In particular, the acquittal rates in Belarus fell to 0.3% in 2019.[283] In most instances the reluctance to acquit is due to fear of retaliation for unfavourable verdicts.[284] In particular, judges fear summary dismissals, discipline, and the removal of opportunities for promotion. In this respect the International Commission of Jurists has criticised the Kazakh judiciary for the use of disciplinary sanctions and

<https://www.fidh.org/en/issues/human-rights-defenders/kyrgyzstan-arrest-and-judicial-harassment-of-three-anti-war> accessed 24 April 2022; US Department of State '2020 Country Reports on Human Rights Practices: Tajikistan' (*US Department of State*, 2020) <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/tajikistan/> accessed 24 April 2022.

270 Freedom House 'Kazakhstan: Nations in Transit 2021' (n268).

271 Government critics have been prosecuted for crimes including fraud and extremist activity. See Freedom House 'Tajikistan: Nations in Transit 2022' (*Freedom House*, 2022) <https://freedomhouse.org/country/tajikistan/nations-transit/2022> accessed 22 February 2022; see generally Belafatti 'The Judicial System of Tajikistan' (n222).

272 In particular Muslims and Jehovah's Witnesses have been prosecuted by the Tajik courts see Freedom House 'Tajikistan: Nations in Transit 2022' (n271).

273 Human Rights Lawyers have been arrested for a number of crimes including fraud, terrorism, corruption, and bribery. See Freedom House 'Tajikistan: Nations in Transit 2022' (n271271).

274 UNHRC 'Situation of human rights in Belarus: Report of the Special Rapporteur on the situation of human rights in Belarus, Anaïs Marin' (2020) UN Doc A/75/173

275 FIDH 'Kyrgyzstan: Arrest and Judicial Harassment' (n269).

276 See Freedom House 'Azerbaijan: Nations in Transit 2021' (n222). Azerbaijan scored the lowest possible score of 1 out of 7; Freedom House 'Belarus: Nations in Transit 2022' (*Freedom House*, 2022) <https://freedomhouse.org/country/belarus/nations-transit/2022> accessed 24 April 2022. Belarus scored 1 out of 7; Freedom House 'Tajikistan: Nations in Transit 2022' (n222). Tajikistan scored 1 out of 7.

277 See Freedom House 'Kazakhstan: Nations in Transit 2021' (n268). Kazakhstan scored 1.25 out of 7; Freedom House 'Uzbekistan: Nations in Transit 2021' (*Freedom House,* 2021) <https://freedomhouse.org/country/uzbekistan/nations-transit/2021> accessed 24 April 2022. Uzbekistan scored 1.25 out of 7; Freedom House 'Kyrgyzstan: Nations in Transit 2021' (*Freedom House,* 2021) <https://freedomhouse.org/country/kyrgyzstan/nations-transit/2021> accessed 24 April 2022. Kyrgyzstan scored 1.50 out of 7.

278 Freedom House 'Armenia: Nations in Transit 2021' (*Freedom House,* 2021) <https://freedomhouse.org/country/armenia/nations-transit/2021> accessed 24 April 2022.

279 *Ibid*, acquittal rates in Armenia have been described as 'extremely low'; Alexei Trochev 'Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts' (2017) 50(1) Cornell International Law Journal 107, 127.

280 In 2018 the acquittal rate in Azerbaijan was 0.7% (in 89 cases out of 12,539), see Aytan Mammadova 'Why do the Azerbaijan Courts not acquit' (*Open Azerbaijan*, 12 July 2019) <http://openazerbaijan.org/en/blog/az-rbaycan-m-hk-m-l-ri-niy-b-ra-t-vermir/> accessed 24 April 2022.

281 In 2019 of approximately 39,000 cases, there were 114 acquittals giving an acquittal rate of circa 0.3%. See US Department of State '2021 Country Reports on Human Rights Practices: Belarus' (*US Department of State,* 2021) <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/belarus> accessed 24 April 2022.

282 Whilst official statistics are not available, the ICJ has noted that the acquittal rate in Tajikistan appears to be close to zero, see ICJ 'Neither Check nor Balance' (n226), 63.

283 US Department of State '2021 Country Reports on Human Rights Practices: Belarus' (n281).

284 Trochev (n279) 122–123; ICJ 'Neither Check nor Balance' (n226), 64.

threats of criminal prosecution against a judge who refused to issue convictions in two cases despite demands from senior judges and the procuracy.[285] In Armenia, this pressure has led judges to work with prosecutors to convict defendants,[286] and in Tajikistan this pressure has led judges who fear they cannot return a guilty verdict to send back the case for additional investigation to avoid acquittal.[287]

In Belarus executive authority over the judiciary is particularly pronounced and includes both direct and indirect influence. Judges are pressured to reach 'correct decisions', knowing that where judicial decisions are considered 'too lenient' they may be sanctioned with a reduction of up to 50% of their salaries.[288] Additionally the consistent 'overt presence'[289] of members of the executive branch in courtrooms has been categorised by OSCE as amounting to at least intimidation, 'if not outright interference'.[290]

Influence on the judicial decision-making process is also apparent from within the judicial branch. In Tajikistan it is commonplace for court presidents to interfere with cases before ordinary judges.[291] Similarly, in Uzbekistan, the Court presidents have been described as having 'excessive influence' over the decisions of Uzbek judges.[292]

Finally, corruption also remains a significant factor undermining judicial independence in modern CIS States. Corruption remains a significant problem in the judicial systems in Kazakhstan,[293] Azerbaijan,[294] Tajikistan[295] and Kyrgyzstan.[296] The US Department of State has noted that in Kazakhstan 'corruption is evident at every stage of the judicial process'.[297] With respect to the Kyrgyz judiciary, the preponderance

[285] International Commission of Jurists 'Disciplinary Action against Judge Zhumasheva is an attack on Judicial Independence' (*ICJ,* 2012) <https://www.icj.org/kazakhstan-disciplinary-action-against-judge-zhumasheva-is-an-attack-on-judicial-independence/> accessed 22 February 2022.

[286] Freedom House 'Armenia: Nations in Transit 2021' (n278).

[287] ICJ 'Neither Check nor Balance' (n226), 65; ABA Rule of Law Initiative 'Judicial Reform Index for Tajikistan' (n237), 30.

[288] Rechters voor Rechters 'Judge in Exile: State of Judiciary in Belarus is 'Deplorable'' (*Rechters voor Rechters,* 10 August 2021) <https://www.rechtersvoorrechters.nl/judge-in-exile-state-of-judiciary-in-belarus-is-deplorable/> accessed 24 April 2022.

[289] Office for Democratic Institutions and Human Rights 'Report Trial Monitoring in Belarus' (n249), 39.

[290] *Ibid*, 38–39.

[291] ICJ 'Neither Check nor Balance' (n226), 33.

[292] United Nations Special Rapporteur on the independence of judges and lawyers, Mr Diego García-Sayán **'Preliminary Observations on the official visit to Uzbekistan (19–25 September 2019)' (United Nations 26 September 2019) <https://www.ohchr.org/en/statements/2019/09/preliminary-observations-official-visit-uzbekistan19-25-september-2019> accessed 24 April 2022.**

[293] USAID noted that the high-level corruption in the judiciary was one of the critical challenges the Kazakh judiciary faced when gaining public trust, see USAID 'Final Performance Evaluation of Kazakhstan Judicial Program' (*US Department of State,* 2019) <https://pdf.usaid.gov/pdf_docs/PA00WGCV.pdf> accessed 27 April 2022, 26; US Department of State '2020 Country Reports on Human Rights Practices: Kazakhstan' (*US Department of State,* 2020) <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kazakhstan/> accessed 24 April 2022; Diplomacy in Action 'Kazakhstan 2015 Human Rights Report' (United States Department of State, 18 May 2016) <http://www.state.gov/documents/organization/253177.pdf> accessed 22 February 2022; Richard A. Remias 'Judicial Reform Activities Evaluation for Kazakhstan' (*USAID,* April 2005) <http://pdf.usaid.gov/pdf_docs/Pdacf229.pdf> accessed 22 February 2022.

[294] Helsinki Foundation for Human Rights *The Functioning of the Judicial System in Azerbaijan and its Impact on the Right to a Fair Trial of Human Rights Defenders* (Netherlands Helsinki Committee 2016), 7; EMDS et al 'Azerbaijan: UPR' (n261) 16; International Bar Association's Human Rights Institute 'Azerbaijan: Freedom of Expression on Trial' (n222) 47.

[295] The ICJ noted that there is a 'significant gap between the official salaries of judges in Tajikistan and the actual cost of living . . . [which] are visibly out of step with the affluent lifestyles demonstrated by some of the judges'. See, ICJ 'Neither Checks nor Balances' (n226), 60; see also US Department of State '2021 Country Reports on Human Rights Practices: Tajikistan' (*US Department of State* 2021) <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/tajikistan/> accessed 27 April 2022; Belafatti 'The Judicial System of Tajikistan' (n222), 1.

[296] Freedom House has noted that 'Corruption among judges, who are generally underpaid, is already widespread'. See Freedom House 'Kyrgyzstan: Nations in Transit 2021' (n277). Guilherme France 'Kyrgyzstan: Overview of corruption and anti-corruption' (*Transparency International,* 2019) <https://www.jstor.org/stable/pdf/resrep20462.pdf?refreqid=excelsior%3Ad0666da0a6b5b6b3cd45aa8a86083f40&ab_segments=&origin=> accessed 24 April 2022, 7; International Crisis Group 'Kyrgyzstan: The Challenge of Judicial Reform' (n213) 9.

[297] US Department of State '2020 Country Reports: Kazakhstan' (n293).

of corruption is so great that 28% of the Kyrgyz population believes that *all* judges and magistrates are corrupt.[298] In respect of Azerbaijan, GRECO has suggested that priority should be given to establishing a format for judges to disclose their assets and ensure that judges are given regular anti-corruption training.[299]

CONCLUSION: THE CONTINUING PROBLEM WITH JUDICIAL INDEPENDENCE

In some respects, CIS member states have made great steps in securing judicial independence. In broad terms institutional independence is far more respected in CIS States than it was in the Soviet Union. Generally, the exclusive authority of judicial branch seems to be upheld to a far greater extent than under the Communist regime of the USSR. Additionally, the financial security of the judicial branches in CIS States seems to be adequately attained, notwithstanding the fact that this security has not been met with the required standard of autonomy.

Aspects of individual independence have also improved, and in particular judicial selection and appointment processes, judicial salaries, and to a lesser extent, standards of judicial tenure, are far more adequate than those under the Soviet government. Nonetheless, despite claims from CIS governments that standards of judicial independence are being realised in these States,[300] in practice areas of serious concern remain. In fact, over the last five years, Freedom House has concluded that Judicial Independence has only improved in one State in this study,[301] whereas it has remained the same in three States,[302] and has deteriorated in the remaining three States.[303] In particular, the repeated exertion of external influence over the judicial decision-making process remains a prevalent factor undermining judicial independence. Furthermore, incidents of corruption remain rife.[304]

There are a number of factors that have contributed to the failure to secure *de facto* judicial independence in CIS member states. The traditions of democracy, separation of powers, and judicial independence in these States are comparatively young.[305] There is no strong foundation on which to build these principles, and they are not ingrained in judicial or executive behaviour. Instead, these judiciaries are built on, and have

[298] France (n296) 7. In addition a further 34% believed that the majority of judges and magistrates are corrupt.

[299] Group of States against Corruption (GRECO) 'Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors. Compliance report: Azerbaijan' (*Council of Europe* 17 March 2017) <https://rm.coe.int/16806fe9f2> accessed 22 February 2022, 10.

[300] Bodnar and Schmidt (n10) 292–293; *see also* the statements of Mr Rakhmonov in Human Rights Committee Consideration of Uzbekistan's Third Report (n10).

[301] In Uzbekistan, between 2016–2021, the Freedom House score for Judicial Framework and Independence rose from 1.00 to 1.25. See Freedom House 'Uzbekistan: Nations in Transit 2021' (n277).

[302] In Belarus the Freedom House score for Judicial Framework and Independence remained at the lowest possible score of 1.00 between 2016–2022. See Freedom House 'Belarus: Nations in Transit 2022' (n276); In Azerbaijan the Freedom House score for Judicial Framework and Independence remained at the lowest possible score of 1.00 between 2016–2022. See Freedom House 'Azerbaijan: Nations in Transit 2022' (n222). In Armenia, the Freedom House score for Judicial Framework and Independence remained at 2.50 between 2016–2022. See Freedom House 'Armenia: Nations in Transit 2022' (n278).

[303] In Kazakhstan, the Freedom House score for Judicial Framework and Independence fell from 1.5 to 1.25 between 2016 and 2021. See Freedom House 'Kazakhstan: Nations in Transit 2021' (n268). In Kyrgyzstan, the Freedom House score for Judicial Framework and Independence fell from 1.75 to 1.5 between 2016 and 2021. See Freedom House 'Kyrgyzstan: Nations in Transit 2021' (n277). In Tajikistan, the Freedom House score for Judicial Framework and Independence fell from 1.25 to 1.00 between 2016 and 2021. See Freedom House 'Tajikistan: Nations in Transit 2021' (n222).

[304] See pages 33–34.

[305] Bodnar and Schmidt (n10), 291.

inherited,[306] the legacy of the USSR. Indeed, many aspects of the Soviet mentality are still visible as undercurrents in modern CIS judicial thinking. In particular, vestiges of deference to the procuracy[307] and executive,[308] and the idea that judges are 'public officials' of the government[309] remain apparent. It is unsurprising that many of the problems that afflicted the Soviet judiciary continue to impact judiciaries built upon that foundation. For judicial independence measures to be truly effective[310] there must be recognition from both the executive and the judiciary that an important role of the judicial branch is that of gatekeeper to *ultra vires* executive or legislative action.[311] This shift in attitude will inevitably take some time. As Bodnar and Schmidt concluded, 'rule of law and judicial independence are features of a democratic State that cannot be achieved all at once'.[312]

Long-term shifts in attitude will need to occur 'from the ground up'. This demands investment in the judicial branch. In several CIS member states, some judges still live in relative poverty,[313] and others are paid less than members of the procuracy and police.[314] Until judicial salaries and judicial buildings reflect the prestige of the judicial position, there will not be a culture that condemns behaviour that brings the judiciary into disrepute.[315] Additional investment in judicial education,[316] in particular ensuring that judges are effectively educated as to their role in the separation of powers and their responsibility to operate as an objective forum, will help to erode ingrained attitudes.

The problems securing an effective balance between judicial independence from the executive and judicial accountability for incidents of corruption were apparent in the Soviet judiciary. Those problems remain conspicuous in CIS States. On the one hand incidents of external influence and interference in the judiciary demonstrate that *de facto* judicial independence requires far greater protection. On the other hand, the pervasive nature of judicial corruption demonstrates that increased monitoring of the judicial branch is necessary to secure judicial accountability.

The Soviet judiciary undermined judicial independence in a variety of ways, eroding both institutional and individual independence. The CIS experience has not markedly improved. Whilst significant steps towards securing aspects of institutional and individual independence have been achieved, in practice the continued violations of individual independence, in particular incidents of external interference and corruption, completely undermine the entire standard. One cannot in good faith conclude that adequate steps towards judicial independence are being undertaken in a State where a judiciary has financial security, but the executive regularly dictates the outcome of cases. In this respect, governments that violate standards of judicial independence benefit from the failure of the international community to propose 'sufficiently detailed,

[306] USAID 'Kazakhstan Judicial Assistance Project: Annual Report 2006' (USAID 2006) <http://pdf.usaid.gov/pdf_docs/Pdacj359.pdf> accessed 22 February 2022, 29.

[307] ABA Rule of Law Initiative 'Judicial Reform Index in Armenia' (n223), 59.

[308] US AID 'Kazakhstan Judicial Assistance Project' (n306), 29.

[309] Marina Shin and others 'Implementation of judicial in Uzbekistan and Kazakhstan in the rule of law context' (2004) 46(6) Managerial Law 86, 95.

[310] UN ECOSOC 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy: Mission to Kazakhstan' (n230), 112.

[311] Forsyth (n3), 122–140.

[312] Bodnar and Schmidt (n10), 291.

[313] Shin and others (n309) 94; EMDS et al 'Azerbaijan: UPR' (n261); Cameron (n262); ICJ 'Neither Checks nor Balances' (n226) 60.

[314] *Ibid*.

[315] Robertson (n154) 107–110.

[316] Bodnar and Schmidt (n10) 293.

internationally recognized rules (sic)'[317] and the failure to recognise the intricacies of the doctrine.

Finally, both the CIS and Soviet experience demonstrate the culture of secrecy that surrounds incidents of non-independence. The executive branch of the USSR went to great pains to illustrate judicial independence, making statements regarding its implementation,[318] and enacting legislation that should have effectively protected that standard.[319] Similarly in CIS States there has been comprehensive enactment of legislation purportedly protecting judicial independence. Furthermore, members of various CIS governments have made numerous statements emphasising their respect for judicial independence.[320] Indeed, members of affected judiciaries deny the existence of problems undermining judicial independence.[321]

The experience of the Soviet judiciary demonstrates that *de jure* provisions are insufficient on their own to secure *de facto* judicial independence. It further demonstrates that judicial independence is a standard that is vulnerable to subversion in a plethora of ways. This remains true in CIS member states. There is room for the improvement of legislation providing for judicial independence in a number of CIS States,[322] including the provision of blanket lifetime tenure, adequate protection from executive dismissal or discipline, and true transparency in selection and appointment of judges.[323] The real task however is changing social, executive, and judicial attitudes to judicial independence, and ensuring any provisions are effective in practice.

[317] *Ibid* 298.

[318] Boylan (n67) 1330.

[319] Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (n73) Article 153; Fundamental Principles on Court Organization of the USSR (n72) Article 10; Fundamental Principles on Court Organization of the USSR (n72) Articles 4 and 5; Law of the USSR: On the Status of Judges (n72) Article 5(2).

[320] Bodnar and Schmidt (n10) 292–293; *see also* the statements of Mr Rakhmonov in Human Rights Committee Consideration of Uzbekistan's Third Report (n10).

[321] See ABA Rule of Law Initiative 'Judicial Reform in Tajikistan' (n237) 55.

[322] Bodnar and Schmidt (n10) 289.

[323] Shin and others (n309), 95.

THE PSEUDO-COMPETITION OF CORPORATE REGULATION

*RYAN CUSHLEY-SPENDIFF**

ABSTRACT

The competition of corporate regulation is often dominated by either the Race to the Top thesis or the Race to the Bottom thesis. Neither of these actually show the reality of how firms truly 'shop for law' when choosing what corporate governance regime is best for them. This paper will provide analysis using two case studies (The United States and Japan) in order to show that the view of competition is very different to what is normally imagined. In homogenous cultures, that is to say, where both competitors share the same culture, there is no true race anywhere, as brand loyalty, sunk costs, and multiplier benefits prevent any true competition to the dominate jurisdiction emerging. In heterogenous cultures, for example between two starkly different international countries with little history with one another, competition exists but in a nuanced fashion. States are not able to dominate a market with superior governance, but rather appeal to separate groups with their unique selling points.

INTRODUCTION

Regulatory competition is by no means a novel prospect. The basic premise is that states are producers, with regulations their product and companies their consumer.[1] Such an analogy is undeniably attractive to those seeking to cater to commercial expectations via good (which is often used as a synonym for efficient) regulation. In fact, such attitudes extend past the corporate world and into other commercial areas such as contract.[2] Yet, in the corporate law academia world, a rather mundane question is often overlooked: is such competition even possible? Much of the debate is dominated by the 'race to the top' or 'race to the bottom' debate which, almost uniformly, concentrates on the domestic competition within the United States (hereafter USA). In discussing the possibility of regulatory competition, this paper will analyse two jurisdictions: the USA and Japan.

While it might seem ironic include the United States in a paper that, from the outset, disparaged the American-centric view of the debate, there is one unique factor about the USA that allows it to present unparalleled insights to domestic competition: the internal affairs doctrine.[3] While remaining in the same country, corporations and their boards are able to choose whatever state law they desire to govern them merely by incorporating within that state, or to put it more colloquially 'go shopping' for law.[4] While state laws may differ substantially, the actual culture of the states' population is not nearly so divergent. While local traditions may be idiosyncratic, the USA's cultural values between states still demonstrate more relative homogeneity than between international

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[1] Roberta Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle' (1985) 1 Journal of Law, Economics and Organisation 225, 225.

[2] See Catherine Mitchell, Contract Law and Contract Practice (Hart Publishing 2013).

[3] Christian Kersting, 'Corporate Choice of Law: A Comparison of the United States and European Systems and a Proposal for a European Directive' (2002) 28(1) Brooklyn Journal of International Law 1, 3–11.

[4] *Ibid* 11.

states who diverge on issues of 'traditions, nationalism, and xenophobia'.[5] Of course, relative homogeneity does not mean symmetry or perfect interchangeability, merely that, there is substantially less risk of cultural obstacles getting in the way of firms relocating or of states changing their legal system (for example, the mixed civil-common law system of Louisiana) to either harmonise or outright compete with their fellow state. This is in direct contradiction with Japan, whose successive financial scandals forced the state to begin competition with Western standards in order to restore confidence in their equity markets.[6] Japan, on the other hand, was in competition with heterogeneous cultural value systems, testing its social capital doctrine with share capital.[7] Thusly, we have two extremes that we can utilise as case studies within the debate of regulatory competition: domestic homogeneity, and international heterogeneity.

Before we look at the practical effect that competition between corporate governance systems has had, we must recognise the objective of corporate governance competition. It should come to little surprise that economic stability and growth is top of the agenda here. Romano makes the point that the total tax revenue of state rise proportionately with corporate responsiveness to corporate law.[8] This view is shared internationally as the OECD explicitly recognises that companies are often a powerful engine for economic growth.[9] These are not merely empty words as, in the UK, corporation tax receipts totalled £52.1 billion in 2020/21.[10] Bearing in mind that this was within the era of COVID19, and therefore the figure is deflated due to extenuating circumstances. As such, there is a vested financial interest in being a renowned business friendly jurisdiction particularly as being seen as hostile to business creates an incentive for capital flight and dampens commercial activity.

USA

The USA has long adopted a system of corporate federalism, allowing for domestic state competition between jurisdictions within the same country.[11] Corporate federalism is so persuasive that it is described as a "genius" of American corporate law.[12] This is not a genius by design, as corporate legislation has always largely been a matter for the states in absence of federal statute thus making it federalist by default.[13] Of course, exceptional statutes exist such as the Sarbanes-Oxely Act[14] and the Dodd-Frank Act[15] which are mandatory for corporations to follow. These acts are largely reactive in nature and both were passed with a view for solving ongoing public scandals (The former regarding a series of accounting scandals and the latter in the wake of the financial crisis of 2007–2008) and while they are mandatory, anything which is left outside their remit

[5] John Coffee 'The Future as History: The prospects of Global Convergence in Corporate Governance' Columbia Law School Center for Law and Economic Studies Working Paper No.144, 31–33 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=142833> Last Accessed 07/12/2022.

[6] David Larcker, Brian Tayan, *Corporate Governance Matters: A Closer Look at Organisational Choices (*Pearson Education 2011) 46.

[7] Michael Rubach, Terrance Sebora 'Comparative Corporate Governance: Competitive implications of emerging convergence' (1998) Journal of World Business 167, 169.

[8] Roberta Romano, 'The State Competition Debate in Corporate Law' (1987) 8(4) Cardozo Law Review 709, 710.

[9] OECD, Principles Of Corporate Governance 14.

[10] HMRC, 'Corporation Tax Statistics Commentary 2021' (2021) < https://www.gov.uk/government/statistics/corporation-tax-statistics-2021/corporation-tax-statistics-commentary-2021> Accessed 07/09/2022.

[11] Geoffrey Miller 'Political Structure and Corporate Governance: Some Points of Contrast between the United States and England' (1998) 1 Columbia Business Law Review 51.

[12] Roberta Romano, *The Genuis of American Corporate Law* (AIE Press 1993).

[13] *Ibid* 1–10.

[14] Sarbanes-Oxley Act 2002.

[15] Dodd–Frank Wall Street Reform and Consumer Protection Act 2010.

of financial reporting, disclosure, and transparency is a matter for the states, and it is within this gap that there is allegedly a market for corporate regulation.

The current, and long time, winning jurisdiction within this competition has been Delaware, with around 68% of the Fortune 500 and 93% of all public offerings in 2021.[16] This Delaware effect has been subject to multiple discussion regarding if it is 'a race to the top' or a 'race to the bottom.'[17] It has been claimed that the success it has enjoyed has been due to the superior status of its law maximising shareholder wealth.[18] The emphasis on 'shareholder wealth' is certainly not a surprise, with the individualistic values of agency theory that the USA system embodies and reflects.[19] Here, each shareholder is viewed as an individual who makes agency contracts with managers to enhance their value.[20] This nexus of contract approach may have no empirical evidence[21] but it is still the prevailing theoretical lens in Western thought.[22] The shortcomings for agency theory are not the subject of this paper as, regardless of the theoretical bankruptcy of the concept, its values has still influenced the corporate zeitgeist to the point of creating demands on regulation. It has meant the USA encourages the maximisation of shareholder capital.[23] Since the competition between states is focused on the emphasis on shareholder wealth, this should be the lens that is used when discussing the case for competition.

Race to the Bottom or to the Top?

The argument of 'race to the bottom' begins with Cary and his attack on Delaware as being encouraging the destruction of governance standards through its suicidal drive to the lowest common denominator.[24] Cary's assertion, fuelled by the perceived injustice of there being 'no public policy left in Delaware except with the objective of raising revenue,'[25] is interesting because it is not merely just another addition to the argument of social corporate responsibility but claims that a race to the bottom would hurt shareholders in favour of management.[26] This argument rests firmly in the idea of agency theory[27] and strikes at the heart of USA corporate values of shareholder primacy. Even agency theory recognises that managers have self-interested incentives that might work to the detriment of shareholders, often coined agency costs.[28] If the maximisation of shareholder wealth is the set goalpost for a successful corporate governance regime, a system that encourages agency costs and managerial exploitation at the expense of the shareholders certainly cannot be said to be successful under this metric.

[16] Delaware Division of Corporations, 'Annual Report Statistics' (2021) <https://corp.delaware.gov/stats/> Accessed 07/09/2022.

[17] Zsuzsan Fluck, Colin Mayor, 'Race to the Top or Bottom? Corporate Governance, Freedom of incorporation and Competition in Law' (2005) 1(4) Annals of Finance 349, 350.

[18] Lucian Bebchuk, Alma Cohen, Allen Ferrell, 'Does Evidence Favour State Competition in Corporate Law' (2002) 90(6) Californian Law Review 1775, 1778.

[19] Daniel McCarthy, Shelia Puffer 'Corporate Governance in Russia: Towards a European, US or Russian Model'(2002) 20(6) European Management Journal 630, 636.

[20] David Campbell, 'The Role of Monitoring and Morality in Company Law: A Criticism of the Direction of Present Regulation'(1997) 7 Australian Journal of Corporate Law 1, 2.

[21] *Ibid* 18.

[22] Alfredo Enriane, Carmelo Mazza, Fernando Zerboni 'Institutionalising Codes of Governance' (2006) 49(7) American Behavioural Scientist 961, 961.

[23] Rubach, Terrance (n5) 169.

[24] William Cary, 'Federalism and Corporate law: Reflections upon Delaware' (1974) 83(4) The Yale Law Journal 663, 663.

[25] *Ibid* 684.

[26] *Ibid* 685.

[27] William Carney 'Explaining the Shape of Corporate Law: The Role of Competition' (1997) 18(7/8) Managerial and Decision Economics 611, 611.

[28] Ronald Gilson, Jeffery Gordan 'The Agency costs of Agency Capitalism: Activist Investors and the revaluation of governance rights' (2013) 113 Columbia Law Review 863, 865.

One may wonder how a system that proclaims its priority of shareholder primacy could become distorted in practice in favour of managers. The reason for this, ironically, is due to the division between ownership and control that makes a public corporation a corporation. Utilising the resources of the company, managers maintain political influence that shareholders do not have through the firm attaining 'influence rents'.[29] The incentive of a firm to do this is so strong that the management of many firms strategize the influence of policy makers.[30] The controllers of a company's assets utilising them as an organised lobbyist is a plausible explanation for legislative cognitive capture. Ramirez posits that any and all attempt to raise standards for shareholders will become a target for special interests.[31] This leads to his claim that corporate governance is merely just managerial political influence.[32] As shareholders do not have an internal defence for this other than protest at the AGM, which is unlikely to succeed due to the generally disorganised demographic of public shareholdings, there is little in the way of prevention of special interest capture of regulatory thought.

This argument, however, has significant problems when it is measured against the nature of the shareholder. If it is true that moving to Delaware increases the market value of the firm, then shareholder's equitable value will increase even if managers achieve a greater remit. It is the equity market rewarding the action, not the regulator. It cannot be said that all races to the bottom result in a sub-optimal result.[33] Afterall, it is always possible that a state's standards are too stringent towards CEO's and there is a business need for laxer standards. Regulations which are perceived as hostile to commercial interest impact managerial confidence in the system and can lead to a decrease in economic activity. It should be noted that this is an unconventional path of a race to the bottom.[34] However it is still an unwarranted assumption to believe that a race to the bottom will inherently create net-losses for shareholder and, in a system where shareholder primacy is the prevailing value, a race to the bottom may actually result in the optimal efficiency in achieving this goal.

Even if movement into Delaware ultimately poses a risk to shareholders due to an increase of managerial power, abuse will be curbed by reputational capital. In his attack on the race to the bottom thesis, Winter points out that 'investors must be attracted before they can be cheated.'[35] Investors are unlikely to invest in rogue states which allow abuses against them, especially in the presence of 49 other states who would happily take their equity. The nature of corporate federalism also means that Delaware would have no ability to prevent this,[36] since capital may move where it pleases. Winter's attack on the race to the bottom thesis is a highly plausible one, as it is difficult to see how any movement towards overt and mass abuse would not merely drive away the equity market.[37] Shareholders, through market signalling, can act on the accumulation of toxic reputational capital. This would be enough to frustrate the purpose of relaxing the standards in the first place, leaving no regulatory incentive for it.

[29] Seong-Jin Choi, 'The structure of Political Institutions and Effectiveness of Corporate Political Lobbying' (2015) 26(1) Organisation Science 158, 158.

[30] *Ibid* 174.

[31] Steven Ramirez 'The End of Corporate Governance Law: Optimizing regulatory structure for a race to the top' (2007) 24(2) Yale Law Journal of Regulation 314, 325.

[32] *Ibid* 314.

[33] Lincoln Davis 'State Renewable Portfolio Standards: Is There a Race and is it to the Top?' (2011–12) 3 San Diego Journal of Climate and Energy 3, 24–30.

[34] Davis (n27).

[35] Ralph Winter, 'State Law, Shareholder Protection and the Theory of the Corporation' (1977) 6(2) The Journal of Legal Studies 251, 275.

[36] *Ibid* 257–8.

[37] *Ibid* 289.

The existence of reputational capital naturally leads to the other end of the spectrum, the race to the top. Romano has put forward the view that the competition in corporate governance systems within the US has led to lower transaction costs as the incentive for corporate relocation.[38] This increases wealth maximisation of the firm and thus inflates the market price, increasing shareholder value.[39] This then creates a prisoners dilemma for states as in the race for the bottom.[40] The only difference here is that the incentives are reversed;[41] states that do not compete may be left with an outdated governance mechanism with unattractive transaction costs. If a simple cost-benefit analysis done by a large firm shows that relocation incurs a lower cost than the accumulated additional costs of inefficient governance, then the incentive for capital flight increases significantly. This provides an incentive to improve standards in what is called 'defensive competition.'[42] Therefore, there is a potential case that competition allows for an efficient lowering of transaction costs.

An alleged major problem with this analysis is that it is based too firmly in economics. Bebchuk argues that the real race to the bottom is not of shareholder value but of societal benefits.[43] Yet, simply because the debate has assumed shareholder value as the metric for desirability[44] it does not follow that externalities are ignored as Bebchuk suggests.[45] In fact, companies may move to jurisdictions simply to get favourable reputation for being in a state with good employee protection.[46] Witt points out that the point of systems competition is allowing private bodies to pick the system that suits their needs best.[47] States are aware of this and are equally aware of a business' need for positive publicity, or at the very least the need to avoid public scandal by entering or operating out of a perceived rogue state. It is this drive for favourable reputation that corporate innovations are often adopted by states and led to uniformity according to Carney.[48] The regulatory need for cognitive capture, both for a positive reputation and to avoid acclamation of toxic reputational capital, prevents any true 'market for lemons' scenario occurring for corporate governance regulation.

The fear of scandal is not confined purely to the corporate boardrooms, but also the state chamber of commerce as well. Roe makes this point abundantly clear when he points out that the competition of Delaware is not any other state, but Washington DC[49] as Delaware can easily find itself displaced by federal law should they ever provoke federal regulation.[50] This is not an idle threat, as Congress has intervened with corporate governance before in response to mass scandal in the form of the Sarbanes-Oxley Act[51] and the Dodd-Frank Act.[52] Delaware's legitimacy, and its future as the prominent

[38] Roberta Romano 'The State Competition debate in Corporate Law' (1987) 8(4) Cardozo Law Review 709, 719.

[39] *Ibid* 720.

[40] Davis (n27) 38.

[41] *Ibid*.

[42] Marcel Kahan, Ehud Kamar, 'The Myth Of state competition in Corporate Law' (2002) 55 Stanford Law Review 679, 699.

[43] Lucian Bebchuk, 'Federalism and the Corporation: The desirable limits on State competition in corporate law' (1991–1992) 105 Harvard Law Review 1435, 1494.

[44] *Ibid* 1455.

[45] *Ibid* 1483.

[46] Davis (n27).

[47] Peter Witt 'The Competition of International Corporate Governance Systems. A German Perspective' (2004) 44(3) Management International Review 309 311.

[48] Carney (n21) 616.

[49] Mark Roe, 'Delaware's Competition' (2003) 117(2) Harvard Law Review 588, 600.

[50] *Ibid* 601.

[51] Sarbanes Oxley Act 2002.

[52] Dodd–Frank Wall Street Reform and Consumer Protection Act 2010.

innovator of corporate law, rests on it having net positive outcomes and the absence of scandal. On an international level, this translates into market confidence; if the equity market is not confident in the regulatory system, it will be unlikely to invest. Market pressure can be enough to curb avenues of managerial abuse within the law.[53] No state will knowingly commit regulatory suicide by becoming scandal prone and so when it engages in competition, it will do so with care.

Or No Race At All?

One will note that the discussion on the race to the top and race to the bottom has been relatively brief considering the rigorous scholarship on the area, yet this is because the theoretical arguments of races from top to bottom do not reflect reality. There is no competition, but rather a market dominance that will be the result of any homogenous regulatory competition. To show this, we must look back at the legitimacy of the states. A fundamental reason for reincorporation is access to a specialised judiciary which is a 'global brand.'[54] This is the result of Delaware winning the competition, but this victory has made it impossible to challenge. There is no reason for a state to attempt to compete with Delaware as attempting to create an as-efficient judiciary would require too much sunk cost for little chance of success.[55] This accrued legitimacy is as an economic barrier of entry to the market[56] and the judicial aspect means that merely copying the law will not yield the same product.[57] This puts a large question mark over the reality of competition when the supposed market is nothing more than a monopoly of a historic player who won the game that is long-since over.

The hegemony of Delaware also acts as the reason for its dominance. This circular reasoning emanates from the fact that the vast majority of elite law schools now just teach Delaware's law in corporate law classes.[58] This means that every generation of company lawyers are only really familiar with Delaware company law, and thus will have significant bias towards it. This bias will generally go unchallenged by Delaware itself as lawyers will rarely have to contend with significant change to the corporate code which can only be constitutionally changed with a supermajority of both elected houses.[59] Romano has pointed out that the vast majority of firms that relocate to Delaware do so on the back of legal advice[60] with 73.5% of respondents choosing Delaware due to legal advice.[61] Of course, the abundance of legal expertise leads to significantly lower transaction costs,[62] but such savings are equal in a monopoly. Delaware is thus able to use its accumulated capital to distort the market to be permanently in its favour. Therefore, it cannot be said that competition meets the demands of values when the re-uptake of reputational capital promotes not a market but a monopoly.

This then raises the question of both Nevada and Maryland, the alleged competing states. Nevada, the 'poster child for those believing that states compete for incorporations',[63] is really a pseudo-competitor in a pseudo-competition. Instead

[53] Carney (n21) 613.
[54] Omari Scott Simmonds 'Delaware's Global Threat' (2015) 41(1) Journal of Corporation law 217, 220.
[55] Kahan and Kamar (n37) 725.
[56] *Ibid.*
[57] *Ibid* 726.
[58] Robert Anderson, Jeffrey Manns, 'The Delaware Delusion' (2015) 93(4) North Carolina Law Review 1049, 1088.
[59] Roberta Romano (n1) 241.
[60] *Ibid* 273.
[61] *Ibid* 274.
[62] *Ibid* 276.
[63] Kuhan and Kamar (n37) 716.

of attracting large public corporations, it attracts closely-held groups[64] through the implicit promise on the official state government website that piercing the corporate veil is heavily restricted.[65] This means that there is no competition between Nevada and Delaware for corporations anymore than there is between apples and oranges in the fruit market. Maryland falls into the same scenario, with the vast majority of its firms being investment companies.[66] This is highly damaging for the case for a competition of homogenous-value systems because none will exist. Different systems will merely dominate different sections of the market with no direct competition, forming a regulatory oligopoly.

This argument is not uncommon in recent years. Anderson and Manns have mocked the argument to the top as:

> 'If simply reincorporating in Delaware could significantly increase the value of the firm, it would seem on the verge of malpractice for corporate counsel not to push corporate managers to incorporate there.'[67]

The current push to Delaware is not due to benefits, but rather out of 'network benefits, herding behaviour and path dependency'.[68] While it might have been true that Delaware actually competed historically,[69] the same cannot be said now. It is highly damaging to a case for competition between systems when the USA, the symbol of regulatory competition evolved into a monopoly. Realistically, Delaware no longer has any domestic threats.[70] The brand power of a system deemed superior is enough for it to maintain its dominance via the accumulation of reputational capital creating a constant cycle of circular logic. In short, Delaware is dominate because it is dominate. As such, competition between corporate governance systems with homogenous cultural values, will not be one of efficacy, but of brand power and loyalty.

JAPAN

We then turn to Japan to examine competition within heterogenous systems. This could easily be cited as an exploration into international regulatory competition, however doing so would be deeply disingenuous. Culture norms can be similarly through different nations, see for example, the UK, Canada, and Australia, who share cultural norms and whose analysis would fit more into the USA debate metrics. Japan however is culturally different from the USA, who acted as a legal-transplant donor to Japan post the Asian Financial Crash, as it does not follow agency theory but rather a stakeholder model.[71] Due to this, it is often grouped with Germany, with whom it had a history of transplantation.[72] However, these close links should not make Japan look like a far-east Germany, as it needs to be looked at as a system in its own right.[73]

[64] *Ibid* 717.

[65] Nevada's Governor's Office Of Economic Development, 'Doing Business in Nevada' <https://goed.nv.gov/why-nevada/nevada-advantage/doing-business-in-nevada/> (Last Accessed 16/12/2022); SilverFlume, 'Why Nevada' <https://www.nvsilverflume.gov/whyNevada> (Last Accessed 16/12/2022).

[66] Kuhan and Kamar (n37) 721.

[67] Anderson and Manns (n51) 1058.

[68] *Ibid* 1087.

[69] *Ibid* 1091.

[70] Simmonds (n47) 222.

[71] David Larker, Brian Tayan, *Corporate Governance Matters: A Closer Look at Organisational Choices* (Pearson Education 2011) 46.

[72] Erik Grimmer-Solem, 'German Social Science, Meiji Conservatism and the Peculiarities of Japanese History' (2005) 16(2) Journal of World History 187, 190.

[73] *Ibid* 222.

Even with German influence, the Japanese infused their culture to create innovations of their own.[74] Focusing on social capital,[75] the Japanese business practice is one of close relations between companies which is known as keiretsu.[76] This practice includes owning significant shareholdings between all affiliated businesses such as suppliers and consumers.[77] Internally, the company is just as different from their American counterparts. Large boards are the norm,[78] with a heavy emphasis on inside directors.[79] This is fundamentally different from both the Anglo-American System and the German system and these divergences change the output expectation.

Legal Transplants From the Anglo-American Sphere

While, in the 1980s, Japan was seen with envy by the US for its efficiency,[80] this bubble burst during the Asian Financial Crisis.[81] During this period, the Nikki-Dow index plummeted 50%.[82] The Americans, having admired the Japanese system a decade prior, now played the role of paragon of corporate governance, criticising the Japanese for divergences from their system.[83] This was partly due to the underlying assumption that the US model can be universally applied and accepted.[84] What first may have been written off as hubris was justified by economic history, as the US served as a model post 1930s,[85] around the same time that it became the world's economic superpower. With a stock market worth $10.77 trillion in 1997[86] it is understandable why a system in an equity meltdown would see a lucrative prospect in convergence. Japan's traditionalist system was 'hard for outsiders to understand,'[87] which did not aide their position with American investors who would not be pleased with not having nearly the same status.[88] The message was clear to the Japanese, it would need to converge with the US system in order to compete in the market for capital and investment.

It is not an uncommon circumstance for nations to enhance regulatory legitimacy this way[89] Japan's move was first made in the Japanese Commercial Code 2001. This created the 'companies with committees' system, an optional alternative to the traditional system of governance.[90] This was put into statute form in 2005, again as an optional system.[91] This system, a compromise between the US system and the Japanese,[92]

[74] *Ibid* 200.

[75] Rubach and Sebora (n5) 169.

[76] Larcker and Tayan (n64).

[77] *Ibid.*

[78] Masaru Yoshimori, 'Does Corporate Governance Matter' (2005) 13(3) Corporate Governance and International Review 447, 451.

[79] *Ibid.*

[80] Bruce Aronson 'Changes in the Role of Lawyers and Corporate Governance in Japan' (2009) 8(2) Washington University Global Studies Law Review 223,223.

[81] Philip Phan, Toru Yoshikawa, 'Agency Theory and Japanese Corporate Governance' (2000) 17(1) Asian Pacific Journal of Management 1, 1.

[82] *Ibid.*

[83] Bruce Aronson, 'Fundamental Issues and Recent Trends in Japanese Corporate Governance Reform' (2014) Hastings Business Journal Forthcoming < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448076>, 7.

[84] *Ibid* 5.

[85] Klaus Hopt 'Comparative Company Law' (2006) ECGI – Law Working Paper No. 77/2006, 1179 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=980981> accessed 05/09/2022.

[86] World Bank <https://data.worldbank.org/indicator/CM.MKT.TRAD.CD> accessed 07/09/2022.

[87] Rubach and Sebora (n5) 173.

[88] *Ibid.*

[89] Enriane, Mazza, Zerboni (n16), 971.

[90] Amon Chizema 'The Company with Committees : Change or Continuity in Japanese Corporate Governance' (2012) 49(1) Journal of Management Studies 77, 80.

[91] Companies Act (Act No.86 of 2005), art 2(xii).

[92] Chizema (n83) 82.

suggests that the state was aware that they were dealing with an entirely new value, and so proceeded with caution. Larker and Tayan point out that the reason for the movement was explicitly one of competition of global financial markets.[93] A committee of auditors on Japanese boards would give them a more familiar feel, and so potentially add more reputational quality to the system that had just escaped a meltdown. If this were a successful move, it would be a strong case for competition on the international market.

This movement with caution meant very little. Traditional Japanese companies were openly hostile to the move to a US system, including Toyota and Cannon.[94] A strong reason for this was the introduction of the outside director as being the majority directors in the committee system.[95] This is compared with the much more favoured statutory auditor system[96] which requires two outside auditors.[97] By 2010, only 2.9% of firms had used the alternative.[98] Such a low faith in the new system meant that the old system just perpetuated itself. The Olympus scandal demonstrated that history was due to repeat itself. Like the Daiwa bank case in the 1990s, Olympus did not have a proper system of outside directors.[99] The outsider, called gaijin, was fired in order to cover up billions of dollars worth of losses.[100] The inability for the governance system to fix the exact same abuse undermines the case for legitimacy enhancing competition.

The rejection of legal transplants is not particularly shocking, and observations of this began with Legrand even prior to the crisis.[101] He has routinely said that transplants will never mimic their country of origin as the host country's moral system is still the viewing lens for the transplant.[102] This analysis fits well with the case of Japanese 'internalism,'[103] in which there is a priority of creating a 'community firm'[104]was not changed simply because of the transplant. In fact, Tetsuhiro writes that the reason for the abuse in Olympus was not due to a pursuit of personal profits but of managerial loyalty.[105] This seems alien to any discussion of the western corporate lawyer who cites agency costs as the reason for corporate regulation. Olympus' managers were not behaving like homo-economis, the self-serving utility-maximising individual often seen on the economist's blackboard. Rather they had been influenced by their culture, one not dominated by the neo-liberal individualist school. It has been observed that the old samurai code of Bushido still permeates the Japanese psyche.[106] This is not to say that a Meiji-era warrior code is the moral lynchpin of Japanese society, but rather

[93] Larker and Tayan (n64) 49.

[94] Yoshimori (n71) 447.

[95] Companies Act (Act No.86 of 2005) art 400 (3).

[96] KT Fung, ZY Gao, J Gonzalez, KL Alex Lau, 'Corporate Governance in Japan: The Case of Olympus' (2014) 35(2) The Company Lawyer 57, 85.

[97] Companies Act (Act No.86 of 2005) art 335(3).

[98] Bruce Aronson, 'Learning from Toyota's troubles: The debate n board oversight, Board structure and Director independence in Japan' (2010) 15(30) Journal of Japanese Law 67, 79.

[99] Fung, Gao, Gonzalez, Lau (n89) 57.

[100] *Ibid.*

[101] Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht journal of European and Comparative Law 111.

[102] *Ibid* 177.

[103] John Buchannan, 'Japanese Corporate Governance and the Principle of Internalism' (2007) 15(1) Corporate Governance: An International Review 27, 27.

[104] *Ibid.*

[105] Kishita Tetsuhiro 'Corporate Governance in Established Japanese firms: Will the Olympus scandal happen again' (2013) 21(4) Journal of Enterprising Culture 421, 423.

[106] KT Fung, ZY Gao, J Gonzalez, KL Alex Lau, 'How does Japanese Culture affect its corporate governance' (2014) 35 (4) The Company Lawyer 123, 124.

that cultural norms that permeated the code (also referred to as the eight virtues)[107] still have an influential, if indirect, impact upon modern cultural norms, expectations, and behaviour.[108] In the case of corporate governance, Satio has commented that this bushido influence created a management style that is similar to the concept of the 'Han' (clan).[109] An example of this is given as:[110]

> 'in the spirit of devotion shown by employees for the sake of the company culture while the company (the master) shows employees mercy and sympathy by means of life-time employment, the geniority-centered employment system and the "Tingi system" of decision-making. The latter is based on the rule of consensus, which encourages employee teamwork and a unity inspirit. Furthermore, it leads employees to share fundamental values of "mutual trust and mutual responsibility" as if the company were a feudal domain.'

Part of this entails loyalty to the leader, which here would mean the chairman and not the company.[111] This form of 'quasi-family' (in the psychological sense)[112] is not one that the Westernised system has ever had to deal with. Rather than being able to rely on the self-interest of whistle-blowers to act as a counterpoint to corporate failures, the Japanese system is contending with young business executives who grew up influenced on cultural axioms such as *hara-kiri* (Death before dishonour).[113] Again, no sensible claim can be made claiming that businesses CEOs will feel morally compelled to commit *Seppuku* in the aftermath of business failure, however the cultural norms that led to the development of Bushido did not merely vanish because feudalism did. The demands of international regulatory competition failed to understand this and lead to an imposition of shareholder-value concepts into a culture that does not inherently accept them.

The Hybrid System

The argument that systems are divergent because of their cultural background is very similar to the concept of path dependency. Here, it is claimed that the economic, political, technological and cultural aspects of a country will ultimately shape the behaviour of the firms within it.[114] Litch argues in this field that culture is the 'mother of all path dependencies.'[115] This idea comes from the observation that culture defines what is socially acceptable and desirable, thus influencing behaviour of all individuals.[116] This in-turn means that, in distinguishing between right and wrong, human get cues from their social environment, thus opening the way for social praise and social sanction to influence individual behaviour akin to moral duty. Stout points out that fiduciaries perform well because of the feeling on an internalised obligation towards their

[107] Inazō Nitobe, Bushido: The Soul of Japan (Originally Published 1899, Kodansha America Inc 2012).

[108] See Nozomu Sonda, 'Bushido (Chivalry) and the Traditional Japanese Moral Education' (2007) 1 Online Journal of Bahá's Studies 469; William Caudill, 'The Influence of Social Structure and the Culture on Human Behaviour in Modern Japan' (1973) 1(3) Ethos 343; Hiroshi Nishigori et al, 'Bushido and Medical Professionalism in Japan' (2014) 89(4) Academic Medicine 560.

[109] Akria Satio, 'The Japanese Model of Corporate Management' (2008) 15 Journal of Japan Society for Business Ethic Study 283, 289.

[110] *Ibid*.

[111] Fung (n106) 125.

[112] *Ibid.*

[113] *Ibid.*

[114] Amir Licht, 'The Mother of all Path Dependencies: Towards a cross-cultural theory of Corporate governance systems' (2001) 26 Delaware Journal of Corporate Law 147, 162.

[115] *Ibid* 149.

[116] *Ibid* 184.

beneficiaries.[117] Where cultures do not converge, then it is highly unlikely that the transplant will be used for its intended value output.

However, this does not mean that systems live in splendid isolation from one another. Japan, as a matter of historical fact, did adopt a number of practices from the German system. With regards to this seemingly impassable hurdle of the loyalty inducing culture, Tetsuhiro argues that this is not because of a strong deference to culture but is actually intrinsically attached to economic thought.[118] As such, it is not completely divergent an attitude of business efficacy in favour of a social status-quo as what could have been presumed from the collective industrial hostility to the US convergence. It must be remembered that the fundamental principle of path dependency is that conditions direct economic development down a route not easily reversed[119] While cultural influences ensure that the beaten path will always look more favourable, this does not prevent change. Rather, change must come as gradual, piecemeal and incremental.

Using this, it seems competition has actually taken a toll on Japanese corporate governance. While American investors would want a system that mirrors their own, this has not happened. However, despite traditional firms claiming reform was foreign imperialism and pressure,[120] Japanese corporations have permanently changed. They now represent a hybrid[121] of their traditional system of keiretsu and the more streamlined American system. The new firms now have significantly less members of the board,[122] less main bank investment[123] and significantly more dividends.[124] This is a fundamental change since the traditional Japanese firm used to consider shareholders as rudimentary with dividends being unheard of. This was through an incremental change within the system.[125] Thus, competition has actually fundamentally changed the Japanese system, though the revolution was more of evolution and adaptation.

But this competition is not how regulatory competition is imagined. There has been no real race to the top or the bottom, as was previously discussed with regards to the USA. There hasn't been any winner or loser here. The USA did not experience capital flight to Japan either before or post the crisis and subsequent reforms. Similarly, Japan did not take, wholesale, the US corporate governance regimes, despite the clear incentives to harmonise with a large equity market. Rather, the competition has rather reflected the divergence of state competition within the USA. Rather than trying to out-compete another state, the goal seems to be centred on marketing your own benefits to outsiders as to suit their particular tastes. Ironically, this competition is less like the stock market and more like the farmer's market, with everyone providing something unique and competition using their unique selling point. Thus, for the vast majority of business enterprises on an international level, their choice of governance is more of an inflexible demand than initially imagined.

[117] Lynn Stout, 'On the Export of US Style Fiduciary duties to other Cultures: can a transplant take?' (2002) UCLA, School of Law Working Paper No. 02–11, 10 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=313679> accessed 07/09/2022.

[118] Tetsuhiro (n98) 438.

[119] Coffee (n4) 41.

[120] Aronson, 'Fundamental Issues . . . ' (n76) 12.

[121] *Ibid* 20.

[122] *Ibid* 22.

[123] *Ibid* 21.

[124] Mitsuharu Miyamoto, 'Diversification of Japanese Firms: How Hybrid organisations evolved through corporate governance reform' (2016) 13(1) Evolutionary and Institutional Economics review 121, 130.

[125] *Ibid* 146.

Undoubtedly, Japan has met some of the competitive demands place on it through the Asian financial crisis, as foreign investor ownership has risen from 5% to 28%.[126] This would have been fundamentally impossible without a return of confidence from the capital market. However, over 98% of firms still reject the committee system due to the presence of the outside director.[127] The pressure has been on the firms to reform internally. Japanese firms, noticing the demise of the main bank, began to succumb to the pressure of foreign investors.[128] Chizema points out that it is Japanese firms that are facing the pressures to change.[129] The changes made by these firms are not uniform which is representative of the fact that each firm is still a social institution that is highly resistant to change.[130] This would then suggest that imposition of values do not work, but business adaptation and evolution as to meet needs is commonplace. Competition between heterogeneous systems may occur, but it will largely be unplanned and the output indeterminable just as business evolution is.

CONCLUSION

The case for competition between corporate governance systems is not the traditional variant. In culturally homogenous systems, one jurisdiction will achieve dominance and harness a reputational capital; essentially becoming monopolistic rent-seeking. As for Japan, the finding has been one that the business community has known for years, but legislators and academics have been slow to understand. In 1997, the US Business roundtable, made a statement which accurately summarises the authors findings:

> 'Good corporate governance is not a 'one size fits all' proposition, and a wide diversity of approaches to corporate governance should be expected and is entirely appropriate. Moreover, a corporation's practices will evolve as it adapts to changing situations'.[131]

It is perfectly possible for a nation to compete, but on its own value output. There is a balancing act: A nation will want to increase its effectiveness and reputation within the capital market yet also stay true to the fundamental values present within its system. This is the true case for competition. It is not a guide for a new world order, but a method for values to become more efficient in their outputs.

[126] Aronson, 'Fundamental issues . . . ' (n76) 21.
[127] *Ibid* 20.
[128] *Ibid* 27.
[129] Chizema (n83) 83.
[130] *Ibid* 79.
[131] Business Roundtable, Statement on Corporate Governance (1997).

ADDRESSING 'ROMAPHOBIA' IN THE STRASBOURG COURT: CHALLENGES TO THE REALISATION OF SUBSTANTIVE EQUALITY

*HELEN O'NIONS**

INTRODUCTION

It is now over twenty years since the UN Committee on the Elimination of Racial Discrimination issued its thematic Recommendation on Discrimination Against Roma.[1] Yet progress toward social inclusion and the eradication of discrimination has been glacial. There has been a notable increase in the number of Roma cases heard by the Strasbourg court, but the facts of these cases remain sadly predictable. The Court regularly finds breaches of Article 3 in police brutality cases, Articles 2 and 3 in state failures to investigate ill-treatment, Article 8 in home and family life cases, and Protocol 1 in segregated education cases. The margin of appreciation has been narrowed and, since the case of *Connors v UK*,[2] there has been recognition that the Gypsy way of life may require special measures from the state when assessing proportionality.

Consequently, the menace of anti-Gypsyism or Romaphobia,[3] which often lies at the root of the substantive breach, remains poorly understood despite being pervasive across Council of Europe states. McGarry defines Romaphobia as 'the hatred or fear of those individuals perceived as being Roma/Gypsy/Traveller. It involves the negative ascription of group identity and can result in marginalisation, persecution, and violence. Romaphobia is a form of racism, it is cut from the same cloth.'[4] There are three specific components of Romaphobia:

1. A homogenizing and essentializing perception and description of these groups.
2. The attribution of specific characteristics to them
3. Discriminating social structures and violent practices that emerge against that background, which have a degrading and ostracizing effect and which reproduce structural disadvantages.[5]

This article prefers the term 'Romaphobia' which McGarry describes as 'the last acceptable form of racism,' due to the pejorative implications of the Gypsy label in many European countries.[6] In considering whether the Court's jurisprudence is adequately addressing this problem, it will be important to avoid relying on familiar tropes that essentialize Roma as a disadvantaged socio-economic group. It is also important to consider whether, and to what extent, a Court whose focus has traditionally been on the application of individual rights, can address the complex, intersecting challenges experienced by members of minorities.

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[1] UN Committee on the Elimination of Racial Discrimination General Recommendation XXVII on Discrimination Against Roma Adopted at the Fifty-seventh session of the Committee on the Elimination of Racial Discrimination, on 16 August 2000, A/55/18, annex V.

[2] *Connors v United Kingdom, App 66746/01, 27th May 2004.*

[3] The term anti-Gypsyism is now recognised by European human rights institutions. However, the use of the Gypsy label is viewed as pejorative by many Romani people and has often been used to strip them off their cultural identity. Therefore, the term Romaphobia is preferred, described by Aidan McGarry as the last acceptable form of racism Romaphobia: 'The Last Acceptable Form of Racism' (2013) *Open Democracy.* <https://www.opendemocracy.net/en/can-europe-make-it/romaphobia-last-acceptable-form-of-Racism/>.

[4] Aidan McGarry, 'Romaphobia: A Legacy of Nation Building in Europe' (*Loughborough University London,* Dec 2018) <https://blog.lboro.ac.uk/london/diplomatic-studies/romaphobia-a-legacy-of-nation-building-in-europe>.

[5] Alliance Against anti-Gypsyism, (June 2016) <http://antigypsyism.eu>.

[6] McGarry (n 3).

There are three significant issues faced by applicants alleging racially motivated ill-treatment before the European Court of Human Rights (hereafter the 'Strasbourg Court'). In *Nachova*[7] the Chamber accepted that *prime facie* evidence of racial discrimination could result in a reversal of the burden of proof. This approach has been applied in the segregated education case of *DH*[8] and in the police brutality case of *Stoica*.[9] However, it is not consistently applied. Secondly, the standard of proof required for allegations of discrimination in police brutality cases before the Court ('beyond reasonable doubt') sets the bar far higher than the civil standard required in most member states. Whilst the Court may be prepared to find a procedural violation of Article 14 where an investigation into alleged racist motivations has not been undertaken, the challenge of proving a substantive violation is considerable. Finally, the Court remains too cautious by ignoring the broader context in which the ill-treatment has occurred. This is particularly surprising given the proactive decisions of the European Committee on Social Rights, and the growing consensus that social inclusion is thwarted by widespread anti-Gypsyism. It is argued that notwithstanding attempts to approach state responsibility through the vulnerable group concept, the Strasbourg Court has retained an individualistic, narrow understanding of non-discrimination which has done little to tackle Romaphobia or advance understandings of substantive Roma equality.

Whilst the finding of a substantive violation will provide a remedy for the applicant, the failure to address structural discrimination and to properly label hate crimes exempts states from addressing the root causes of breaches; condemning them to be repeated. Nowhere is this failure more apparent than in *Fogarasi* where a three-judge chamber, deciding on the basis 'well-established case law,' ruled that police brutality in Romania was not influenced by racial discrimination. This cautious approach can also be viewed in admissibility decisions where applicants are required to have exhausted domestic remedies. Had the Court called out pervasive discrimination in previous cases they would have had a legal base from which to moderate this expectation. Romani people have little faith in domestic legal institutions and actors, so the rigid application of admissibility criteria is just another hurdle in the realisation of their rights. Dembour argues that the rule of law has stalled the development of Article 14 as it requires Courts to focus only on the specific facts.[10] However the development of indirect discrimination in *DH* and a greater recognition of institutional discrimination in some signatory states (and recently in the Strasbourg Court) show that it is essential to understand the context in which a substantive violation takes place.[11]

To better understand the context in which the Court are adjudicating on discrimination against Roma, it is first necessary to consider some of the barriers to Roma inclusion across Europe. These barriers are local, regional, and national and they transcend the old vs new Europe divide.

THE ROOTS OF ROMAPHOBIA

Those identifying as Roma, Sinti, or Gypsy people form the largest minority group in Europe, estimated to constitute between 10 and 12 million people. A further one million Romani people live in the US, largely as descendants of European Roma who fled Nazi

[7] *Nachova and Others v Bulgaria* 43577.98 and 43579/98, 2005.

[8] *DH v Czech Republic* App. 57325/00 2007, 47 EHRR 59.

[9] *Stoica v Romania* App 42722/02 2008.

[10] Marie Dembour, 'Still Silencing the Racism Suffered by migrants . . . The Limits of Current Developments Under Article 14 ECHR' (2009) 11 European Journal of Migration and Law 221.

[11] *Lingurar v Romania* App 48474/14 2019.

persecution, and there is a significant Romani population in Brazil whose ancestors are believed to have fled persecution in Portugal. [12]

Precise numbers are notoriously difficult to reliably estimate. Whilst the number who identify as Roma or Gypsy-travellers in the UK is estimated to be around 0.5–0.7% of the population, Romani people make up 7–10% of the population in several European countries including Bulgaria, Macedonia, Slovakia, Spain, Romania, Serbia, and Hungary.[13] Whilst the collection of ethnically disaggregated census data is a relatively new practice in many European states, centuries of hostility and persecution make self-designation an unreliable measure.

Romani people are a heterogeneous, non-territorial minority with a shared historical origin which can be traced back to the Sindh area of Northern India (today Southern Pakistan) between the fifth and tenth century.[14] The Romani language which consists of more than fifty dialects, traces its origins to Punjabi.[15] The very survival of the Romani people is a complex story of migration, adaptation, and resilience. This is best be illustrated by the cultural practice of nomadism. Regarded as central to British Gypsy-traveller identity, it is rarely visible in post-Communist states where Romani people were forcibly settled during communist industrial drives.

Attempts at definitions typically result in arbitrary distinctions and exclusions so this article uses the term Romani people as an umbrella to include those identifying as Roma, Sinti, Gypsy-travellers, and associated tribes and clans. As a non-territorial minority, Romani people are a perfect scapegoat in times of social and economic instability.[16] Whilst their history of economic migration arguably makes them the original European citizens, their recent migration from central and Eastern Europe has been met with resistance and hostility, most recently evidenced by forced eviction and expulsions from France and Italy.

One common feature of the Romani experience is socio-economic disadvantage and civic marginalisation. Policies including segregated education, sterilisation, forced eviction, ghettoization, and the criminalisation of unauthorised encampments, have left Romani people at the margins of European society. This picture shows little sign of improving despite a raft of international and regional commitments to social inclusion and condemnation from European political and judicial bodies, including the European Court of Human Rights and the European Committee on Social Rights.

In 2005 a report for the World Bank concluded that successive policies had failed to address Roma exclusion as they were predominately fragmented and localised. The report demanded an inclusive approach involving government, civil society, and other partners which would 'make a difference through a comprehensive change of direction.'[17] The European Commission met these criticisms through the introduction of a European Roma Integration Framework which aimed at tackling socio-economic exclusion in four areas: education, health, housing, and employment. The Framework encouraged Member States and enlargement countries to adopt a comprehensive approach to Roma integration through the adoption of National Roma Integration Strategies. The framework prioritised four key objectives: ensuring that all Roma children complete primary

[12] Estimates now suggest that half of Europe's pre-war Roma population, an estimated 1.5 million, were killed in the *Porrajmos.* Ian Hancock, '*We are the Romani People* (University of Hertfordshire Press 2002) 48.

[13] Helen O'Nions, 'Roma and Sinti' in *Elgar Encyclopedia of Human Rights* (Edward Elgar 2022).

[14] Ian Hancock, *The Pariah Syndrome: An Account of Gypsy Slavery and Persecution* (Karoma 1987); *We are the Romani People* (Univ. of Hertfordshire Press 2002); Dominic Kenrick, Gypsies: From India to the Mediterranean (Univ. of Hertfordshire Press 1998).

[15] Yaron Matras, *Romani: A Linguistic Introduction* (Cambridge Univ. Press 2002).

[16] McGarry (n 3).

[17] D Ringold, M Orenstein and E Wilkins, *Roma in an Expanding Europe: Breaking the Poverty Cycle*, (World Bank 2005).

school and closing the gap between Roma and non-Roma in respect to employment, health status, and access to housing and public utilities.[18] EU Structural and investment funds and pre-accession funds were made available to support state initiatives.

The Framework attempted to better engage national governments allowing states discretion to identify local priorities, avoiding the much-criticised top-down European governance approach.[19] Yet subsequent evaluations show very little progress. Discrimination in education and employment remains significant resulting un unemployment levels that are two to five times higher than the national averages.[20] The gap in housing access has remained unchanged and a significant number of Romani families find themselves living without adequate sanitation and basic amenities.[21]

Fox and Vermeersch argue that the EUs' Roma integration discourse indirectly contributed to the rearticulation and revitalization of nationality, transforming rather than challenging East Central European nationalisms.[22] This seems to have been borne out by the recent rise and acceptability of a far-right narrative at the heart of European society, a narrative that typically centres on Roma and, to a lesser extent, Jews, and Muslims, as enemies of the state. Van Baar also argues that Roma programs have contributed to this narrative by marginalizing or de-humanizing their supposed beneficiaries.[23] In this respect the growth in Romani activism is very welcome as the paternalistic, marginalizing approach of old is being openly challenged. For example, Bulgarian Roma activists have asked the European Commission to avoid the Roma vulnerability trope in European documents as it 'contributes to their forced marginalisation.'[24] This is a point I will return to later when discussing the vulnerable groups concept in the Strasbourg court.

Institutional Failings on Romaphobia

It should be noted that the lack of success, whilst extremely disappointing, is not surprising to Romani campaigners and advocates. It has been repeatedly observed that the implementation of national commitments at the local level is hampered by a lack of political will and general indifference. In some cases, local mayors and councillors have sort to bolster public approval by publicly condemning their Roma community and sympathising with anti-Roma sentiment (as evidenced in many of the Court cases discussed below). At national level, there are parliamentarians across Europe with openly Romaphobic platforms. The power to suspend privileges of member states for violating the fundamental principles of European Union law, articulated in Article 2 of Treaty on the European Union as 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' lacks substance.[25] These values are openly challenged by the prominence of populist political parties across Europe.

[18] European Commission, *An EU Framework for National Roma Integration Strategies up to 2020* COM/2011/0173 final, Brussels 5th April 2011.

[19] Felix B Chang, 'Roma Integration 'all the way down': Lessons from Federalism and Civil rights' (2018) 1 Critical Romani Studies 1, 62–85.

[20] Ede Ijjasz-Vasquez 'Why We Need to Talk About Roma Inclusion' (World Bank Blog April 14, 2017) <https://blogs.worldbank.org/europeandcentralasia/why-we-need-talk-about-roma-inclusion>

[21] European Commission *Mid-term evaluation of the EU Framework for National Roma Integration Strategies up to 2020* (2018 Luxembourg: Publications Office of the European Union).

[22] Jone Fox and Peter Vermeersch, 'Backdoor Nationalism' (2010) 50 European Journal Of Sociology 325.

[23] Huub Van Baar, 'Europe's Romaphobia: Problematization, Securitisation, Nomadism' (2011) 29 Environment and Planning D: Society and Space 203, 208

[24] Orhan Tahir et al 'Appeal to European Commission', 1st Nov cited in Van Baar (n 24).

[25] Article 2, *Consolidated Version of the Treaty on European Union* OJ C326, 26.10.2012, 13–390.

Italian local authorities continue to use aggressive powers of eviction against nomad camp residents and there have been numerous incidents of racist abuse and violence towards Roma families.[26] In 2005 the European Committee of Social Rights found Italy in breach of their obligation to provide housing without discrimination under the European Social Charter. Yet forced evictions have continued and residents are either left homeless or relocated to camps without transport and basic amenities. For two and a half years a group of three hundred Roma including young children lived on a toxic landfill site in *Masseria del Pozzo, Campania before the domestic court ruled it was hazardous to human health. The families were then relocated without consultation to a new site on a piece of wasteland lacking any amenities, prompting Amnesty International to make a submission to the UN Committee on the Elimination of Racial Discrimination.*[27] *During recent elections which are expect to give the balance of power to the* far-right Brothers of Italy, a Lega councilor filmed a video of himself walking up to a Roma woman and, speaking to the camera, he promised voters 'Vote for the League on 25 September and you'll never see her again.'[28]

In Bulgaria, Romaphobia moved to the heart of government following elections in 2019 as the Deputy Prime Minister Krasamir Karakachanov, unveiled a new Roma strategy entitled: 'Concept for the Integration of the Unsocialised Gypsy (Roma) Ethnicity' which is replete with hate speech and anti-Roma stereotypes concerning Roma criminality and maladaptability. Karakachanov has publicly described Roma people as 'exceptionally insolent' and 'unsocial.'[29] The Bulgarian Supreme Court has found Karakachanov guilty of discrimination against Roma after public statements which linked the conviction of two Roma men to familiar Romani criminality tropes. His comments were widely reported and resulted in racial violence, threats, and the eventual forced eviction of Romani villagers.

The situation in Hungary is perhaps the most alarming of all. The Orban government and its far-right allies have made no secret of their position regarding Roma people. Hungary had been the most progressive of the former Communist states in recognising the Roma as a national minority with specific rights following the fall of Communism but there has been a significant growth in neo-fascism and far-right ideology over the last fifteen years. Groups including the new Hungarian Guard, Carpathian Brigade, and Mi Hazank Mozgalom (Our Homeland Movement) have supported and organised violent protests and attacks against Roma community members, collaborating with local vigilante organisations and paramilitary groups.[30] Over sixty attacks against Roma people were reported between 2008 and 2012 which included the use of grenades and Molotov cocktails. Those responsible for the racist murder of Roma including a five-year-old child, were convicted in 2013 but anti-Roma racism permeates Hungarian society. Zsolt Bayer, founding member of the ruling Fidesz party, has described Roma as animals who are 'not

[26] Rosi Mangiacavallo, 'Violent Anti-Roma Racism In Italy: A Tipping Point Or The Toxic 'New Normal'?' (*European Roma Rights Centre,* 21st May 2019) < http://www.errc.org/news/violent-anti-roma-racism-in-italy-a-tipping-point-or-the-toxic-new-normal>

[27] Amnesty International 'Submission to The United Nations Committee on The Elimination Of Racial Discrimination' 91st Session, 21 November – 9 December 2016.

[28] Angelina Giuffrida ,'Vote for us to never see her again': fury after Italy politician's video with Roma woman' *The Guardian* (6th Sept 2022) <https://www.theguardian.com/world/2022/sep/06/italian-far-right-politician-sparks-row-over-roma-comments>.

[29] Atanas Zahariev, 'Democracy Under Siege: Bulgaria's Parliament To Vote On Fascist Anti-Roma Strategy' (*European Roma Rights Centre Report*, 14th May 2019) <http://www.errc.org/news/democracy-under-siege-bulgarias-parliament-to-vote-on-fascist-anti-roma-strategy>; European Roma Rights Centre 'Open Letter To Boyko Borissov', <http://www.errc.org/uploads/upload_en/file/5150_file1_letter-of-concern-racist-concept-strategy-for-roma-integration-in-bulgaria-13-may-2019.pdf>

[30] Jacqueline Bhabha and Margareta Matache, 'Anti-Roma Hatred On The Streets Of Budapest' (*EU Observer*, 3rd Jun 2020) <https://euobserver.com/opinion/148532>.

fit to live among people' and Prime Minister Orban openly criticised a 2020 Debrecen Court decision awarding damages to Roma children illegitimately segregated in special schools as 'money for nothing,' stating 'we take the side of the 80 percent who are decent, working Hungarians who demand a suitable education for their child.'[31]

Polling by the PEW centre in 2019 found that 83% of Italians polled had unfavourable attitudes towards the Roma. The figure was 68% in Bulgaria, 76% in Slovakia, 66% in Czechia, and 61% in Hungary.[32] Those who express a preference for more right-wing politics were notably more likely to express unfavourable views, whereas extensive efforts to address Roma inclusion through education in Spain resulted in a 13% increase in favourability.[33]

At an institutional level, the European Commission has focussed attention on the newer member states where, with the exception of Spain, the highest numbers of Roma live and where non-discrimination norms have only recently been established. This distraction has allowed discrimination and social exclusion to continue relatively unnoticed in original member states.

Yet a recent European survey found that 45% of Roma in western Europe reported having experienced discrimination compared to 26% in Central and Eastern Europe.[34] Whilst this difference may in part be attributable to greater rights awareness in the West it suggests that Romaphobia is widespread and to a large extent socially acceptable. The European Committee on Social Rights has found violations of the right to housing under Article 31 of the European Social Charter by Italy, France, Greece, and Portugal.[35] The Committee confirmed that Article 30 of the Charter requires 'positive measures for groups generally recognised as excluded or disadvantaged, such as Roma, to ensure that they are able to access rights such as housing, which in turn will have an impact on access to other rights such as education, employment and health.'[36] Recently the Committee accepted a complaint against Belgium concerning a police operation which targeted numerous traveller sites with the aim of seizing caravans, cars, and other property.[37] Taking a proactive approach, the Committee unanimously required the immediate adoption of a series of measures with a view to avoiding serious, irreparable injury to the integrity of persons belonging to the Traveller community at immediate risk of being deprived of fundamental social rights.

In the UK, a statutory duty to provide adequate stopping sites for nomadic travellers was repealed in 1994 and new legislation passed this year significantly increases police powers to remove travelling people from unauthorised land with punishment for non-compliance of three months' imprisonment.[38] There is no obligation on the police or local authorities to identify an alternative site and police can seize the homes of occupiers if they do not leave without 'reasonable excuse'.

[31] Bernard Rorke,'Orbán Steps Up The Hate And Seeks A 'Robust Social Mandate' For Antigypysism' (European Roma Rights Centre, 14 February 2020) <http://www.errc.org/news/orban-steps-up-the-hate-and-seeks-a-robust-social-mandate-for-antigypysism>.

[32] Pew Research Center, *Global Attitudes Survey* (Q48b, Spring 2019) <https://www.pewresearch.org/global/2019/10/14/minority-groups/>

[33] *Ibid*.

[34] EU Fundamental Rights Agency *Roma and Travellers in Six Countries*, 2020 < https://fra.europa.eu/en/publication/2020/roma-travellers-survey>

[35] *European Roma Rights Centre v. Italy*, European Committee of Social Rights, Complaint No. 27/2004; *European Roma Rights Centre v Portugal* Application no. 61/2010 where violations of Article 16 and 30 were also found. *European Roma Rights Centre v Greece,* 8th Dec 2004 No 15/2003; *European Roma Rights Centre v France* 19th Oct 2009, No 51/2008.

[36] *Ibid.*

[37] *European Roma Rights Centre v. Belgium* No. 185/2019.

[38] Police, Crime, Sentencing and Courts Act 2022; Helen O'Nions, 'Criminalising trespass will hurt Travellers most – but government proposals fail on their own terms' *Policing Insight* (22nd February 2021).

The compulsory fingerprinting of Roma camp inhabitants in Italy following the imposition of a 'nomad emergency' in 2008 was initially condemned by the European Parliament and Commission.[39] Yet the Commission subsequently approved of the measures following assurances from the Italian government that they would be applied without racial motivation to enable registration of Roma migrants.[40] This was surprising given the Commission's earlier warning to the Berlusconi government and the evidence provided by the Italian Red Cross who were assisting in data collection who reported that almost all camp inhabitants were of Romani origin and the data was collected regardless of their nationality or residence permits.[41] The following year legislation criminalised undocumented stay in Italy with a fine up to 10,000 euros.[42] It was the Italian Council of State, Italy's Constitutional Court, that finally declared the nomad emergency discriminatory and unlawful in 2011.[43]

Expulsions from France in 2011 initially attracted criticism from the European Commission with Commissioner Reding comparing the expulsions to the Vichy regime's treatment of Jews during the second world war.[44] The European Committee on Social Rights[45] subsequently found the eviction and expulsion measures to be a breach of the Charter. The Committee considered that France had failed to demonstrate that the forced evictions were carried out in conditions that respected dignity, or that the Roma were offered alternative accommodation. Furthermore, the Committee found that the evictions took place against a background of ethnic discrimination, Roma stigmatisation, and constraint in the form of the threat of immediate expulsion from France. The Committee attached considerable weight to the fact that a particular ethnic group was explicitly singled out in both the evictions and expulsions ruling that this constituted direct discrimination, in violation of Art. E of the Charter.

Whilst the above examples might appear extreme, the level of Romaphobia across Europe is far greater than suggested. The principal reason for the failure to make significant progress on social inclusion and to secure real opportunity for Romani people across Europe is not one of resources or desire, rather it is a failure to grapple with the menace of or Romaphobia which stems from institutional denial influenced by the tacit acceptance of discriminatory narratives of Roma poverty and criminality.[46]

[39] Renata Goldirova 'Italian plans to fingerprint Roma criticised as 'ethnic cataloguing' EU Observer 27th June 2008; European Parliament Res On the census of the Roma on the Basis of Ethnicity in Italy 10th July 2008 P6_TA_PROV(2008)0361.

[40] Richard Owen, 'EU Clears Berlusconi over Roma gypsies' *The Times Online* (4th Sept 2008) < https://www.thetimes.co.uk/article/eu-clears-berlusconi-over-roma-gypsies-pnqstxp86tj>; EurActiv 'Roma MEP: Italy's fingerprinting should be seen in wider context" (31st July 2008) < https://www.euractiv.com/section/justice-home-affairs/interview/roma-mep-italy-s-fingerprinting-should-be-seen-in-wider-context/>.

[41] Discussed in Helen O'Nions, 'Roma Expulsions and Discrimination: The Elephant in Brussels' (2016) 8 People, Place, Policy, 1.

[42] *Ibid.*

[43] Legge 15 Lugio 2009, n.94. Discussed in Nuno Ferreira and Dora Kostakopoulpou, "The Roma and European Citizenship' in Ferreira and Kostakopoulou (eds.) *The Human Face of the EU: are EU law and Policy Humane Enough?* (Cambridge University Press 2016).

[44] O'Nions (n 42)

[45] Centre on Housing Rights and Evictions (COHRE)v. France 2011 Complaint No. 63/2010.

[46] The European Commission have finally recognised the need for state action plans to mainstream and target policies to address anti-Gypsysim, in their 14th European Platform for Roma Inclusion, 2021. <https://ec.europa.eu/info/sites/default/files/romaplatform21_theme_1.pdf>; European Parliament (2019), Resolution on the need for a strengthened post-2020 Strategic EU Framework for National Roma Inclusion Strategies and stepping up the fight against anti-Gypsyism, 2019/2509(RSP), 6 February 2019.

ROMA EQUALITY IN THE STRASBOURG COURT

Many excellent academic papers have been written criticising aspects of Romani policy and this analysis does not seek to replicate these arguments. Rather it seeks to interrogate the approach of the Strasbourg Court which is accused of frustrating the development of substantive equality norms. The focus is on Article 14 of the Convention as the free-standing provision in Protocol Twelve has not been ratified by the majority of Council of Europe states. The theoretical underpinning of the Court's approach to the protection of minority rights through an individualist framework will be considered with reference to three dimensions of inclusion identified as individual rights, redistribution, and recognition by Delcour and Hustinx.[47]

The realisation of rights depends on a priori recognition of the rights holder.[48] The notion of the unencumbered self which sits at the root of liberal individualism is arguably a fallacy as the self is constituted by the totality of our experiences, our history and environment.[49] For members of minorities whose identity is intrinsically bound to the culture of the group rights can only be realised through the application of positive obligations or special measures that require states to depart from a position which naturally favours the majority.[50] However, any approach grounded in recognition and special measures needs to avoid inadvertently entrenching inequality by essentializing the minority's disadvantage.

General Principles of Interpretation

The prohibition of discrimination in Article 14 is not a free-standing Convention right but its application does not depend on the finding of a substantive right violation. There has been a notable rise in cases alleging discriminatory treatment before the Strasbourg court, such that in 2021 allegations under Article 14 amounted to almost 10% of the Court's caseload.[51]

Direct discrimination involves treating people differently based on one of or more of the protected characteristics. It typically requires a comparator from a majority group who does not possess any of the protected characteristics (usually a white, heterosexual male). Indirect discrimination on the other hand enables an examination of supposedly neutral rules and practices on persons who possess one or more protected characteristic. It recognises the flaw in formal equality whereby treating very different people equally can replicate disadvantage and undermine substantive equality.[52] This approach may necessitate the adoption of special measures to enable members of disadvantaged groups to fully participate in society.[53]

Unusually, under the Convention any discrimination is capable of being justified if the state can advance an objective and reasonable justification. The aim of the measure must be legitimate, and it should be applied proportionately. The precise assessment

[47] Chloe Delcour and Lesley Hustinx, 'Discourses of Roma Anti-Discrimination in Reports on Human Rights Violations' (2015) 3 Social Inclusion 1.

[48] The strongest articulation of this position comes from Charles Taylor, 'The Politics of Recognition' in Gutmann (ed.) *Multiculturalism* (Princeton Univ. Press, 1994) 25–73.

[49] Michael Sandel, 'The Procedural Republic and the Unencumbered Self' (1984) 12 Political Theory 1, 81–96.

[50] See for example Helen O'Nions, *Minority Rights Protection in International Law. the Roma of Europe* (1997 Routledge), Chp 2; Will Kymlicka, *Multicultural Citizenship* (1995 OUP); K VanderWal, 'Collective Human Rights: A Western View' in J Berting and P Baeher *Human Rights in a Pluralist World* (Meckers, The Netherlands 1990); Iris Marion Young, 'Together in Difference' in Will Kymlicka *The Rights of Minority Cultures* (OUP 1995).

[51] So Yeon Kim, 'Les vulnerables: evaluating the vulnerability criterion in article 14 cases by the European Court of Human Rights' (2021) Legal Studies 1, 2.

[52] *Thlimmenos v Greece* App 34369/97 6th April 2000.

[53] Sandra Fredman, *Discrimination Law* (Oxford University Press 2022) 9.

of proportionality will depend on the margin of appreciation that is given to the state. In cases concerning suspect grounds, particularly weighty reasons will be required to justify any difference in treatment. The Convention, now seventy years old, is to be interpreted as a 'living instrument'[54] and the Court will consider whether a particular measure is supported by a European consensus leading to a significantly narrowed margin of appreciation.

Gerards has identified a 'fundamental ambivalence' in the theoretical foundations of Article 14 which is worthy of note when one considers the way in which the Court conceptualises substantive equality and how it accommodates minority rights.[55] Worryingly, it is not easy to predict how the Court will approach an allegation of discriminatory treatment even when faced with a pattern of cases containing strikingly similar facts. Whilst their approach is slowly evolving, there are four areas where the Court's approach frustrates the development of substantive equality:

(i) Inconsistent articulations of indirect discrimination
(ii) Impossible evidentiary burdens
(iii) Paternalistic, vulnerability tropes
(iv) Inadmissibility and exclusion from consideration

The Articulation of Indirect Discrimination

Initially the Court was very reluctant to engage with indirect discrimination and, to a large extent, it remains cautious. This is particularly apparent when it is compared to the Court of Justice of the European Union, the Committee on Social Rights, and the Advisory Committee to the Framework Convention on National Minorities. A more proactive approach has been evidenced in Roma education cases starting with the Grand Chamber decision in *DH*[56] where the Court modified evidentiary requirements and narrowed the margin of appreciation by which states can advance a justification for the treatment. However, as discussed below, this approach has not been consistently applied and the degree of dissent in the more recent case of *Orsus v Croatia* (the majority found a violation by 9 votes to 8) suggests that a significant number of judges do not welcome these modifications.

In *DH* the Grand Chamber by a majority of 13–4 overruled the decision of the Chamber, deciding that the fact that Roma pupils in Ostrava were 27 times more likely to be placed in special schools following a reduced curriculum, constituted a violation of Article 2 of Protocol 1 (the right to education) coupled with Article 14. In addition to its importance in the fight for educational opportunity for Roma pupils, the judgment is significant for four reasons. Firstly, in its recognition that indirect discrimination could fall within Article 14. Secondly, the use of statistics and reports to demonstrate that whilst it was not a general policy to place all Roma pupils in special schools, Roma pupils in Ostrava were differentially treated as they were far more likely to be consigned to these schools. This shifted the burden of proof onto the Czech Government. Thirdly, the rejection of the Government's objective and reasonable justification which centred on the apparently neutral application of an educational admission test, and the consent of Roma parents. The Chamber had accepted the Government's assertion that Roma parents consented to their children's placement, thereby overlooking the rights of the child and 'blaming the parents for the systemic racial discrimination which destroyed

[54] *Tyler v United Kingdom* App No 5856/72 Eur. Ct. HR 25th April 1978.

[55] Janneke Gerards, 'The discrimination grounds of article 14 of the European Convention on Human Rights' Human Rights Law review 13, March 2013, 99–124, 102.

[56] *DH v Czech Republic* App. 57325/00 2007, 47 EHRR 59.

their children's life chances."[57] Finally, the Grand Chamber narrowed the margin of appreciation, requiring that 'special protection' be afforded to vulnerable groups.[58] This vulnerable group category should be considered as a sub-set of the suspect group cases (race, religion, sex or gender, nationality, sexual orientation of illegitimacy) which require the state to provide weighty or particularly serious reasons for differential treatment.[59]

In *Sampanis v Greece*,[60] the Chamber found a violation of the right to education coupled with Article 14 where the Roma pupils were educated in a separate building to their peers. Following the decision, the education authorities moved the Roma pupils into the main school but continued to educate them in separate classes. This led to a further finding of a violation four years later in *Sampani v Greece*. Both *DH* and *Sampani* demonstrate the significant challenges of implementing desegregation for Romani pupils and the need to tackle segregation through a comprehensive strategy that address Romaphobia and inequality at all levels of society. The European Commission commenced enforcement action against the Czech Republic (along with Slovakia and subsequently Hungary) to ensure its compliance with the Race Equality Directive, but the most recent evaluation by the Commissioner on Human Rights in 2020 noted that although there had been legislative reforms there was little change on the ground.[61]

In *Orsus* the Roma pupils were segregated based on Croatian language competency. Both national courts and school authorities took the view that the remedial classes could be justified as they were intended to benefit rather than disadvantage pupils.[62] The Grand Chamber had regard to Council of Europe recommendations,[63] UN instruments and observations of the Committee on the Elimination of Racial Discrimination, including its opinion on the Czech Republic which noted that placement of Roma in special schools led to *de facto* racial segregation.[64] Unlike *DH* the statistical evidence did not establish a prime face case of discrimination but the Court emphasised that Roma were a particularly disadvantaged and vulnerable minority which required the state to take positive measures to correct disadvantages related to linguistic and cultural differences. These measures included challenging the alleged hostility of non-Roma parents, addressing poor school attendance, and increasing the involvement of Roma parents. The majority supporting the finding of a violation in *DH* had considerably narrowed by *Orsus* with dissenting judgments accusing the Court of going beyond the facts of the case and patronising the pupils and parents.

[57] Morag Goodwin, 'DH and Others v Czech Republic: a major set-back for the development of non-Discrimination norms in Europe' (2006) 7 German Law Journal 4, 421–430, 427.

[58] Para. 182.

[59] David J Harris, *Law of the European Convention on Human Rights* (3rd ed, OUP 2014), 785.

[60] *Sampanis and Others v. Greece* App 32526/05, 2008.

[61] Isabelle Chopin, Catharina Germaine and Judit Tanczos, *Roma and the enforcement of anti-discrimination law* (European Commission 2017); Submission by the Council of Europe Commissioner for Human Rights under Rule 9.4 of the Rules of the Committee of Ministers for The Supervision of The Execution Of Judgments and of The Terms Of Friendly Settlements In The Case of *D.H. and Others v. Czech Republic* (application no. 57325/00), judgment of 13 November 2007, Strasbourg CommDH (2020) 24 .

[62] *Orsus v Croatia* App 1576/03, 2010.

[63] Including European Commission Against racism and Intolerance Third report on Croatia (17th Dec 2004); General Policy Rec. No 3 *On Combating Racism and Intolerance against Roma/Gypsies* adopted on 6th March 1998; General Policy Rec no 7 *On National Legislation To Combat Racism And Racial Discrimination*, adopted on 13th Dec 2002; Final Report on the Situation of Roma, Sinti and Travellers in Europe 15th Feb. 2006; UN Committee on the Elimination of Racal Discrimination, General Recommendation 27 *On Discrimination Against Roma*, 16th Aug 2000. A/55/18, Annex V.

[64] *Committee* on the Elimination of Discrimination against Women *Concluding Observations on the report submitted by the Czech Republic* 30th March 1998; see also UN CERD Gen Comment 27 *On Discrimination against Roma* 57th session, 16th Aug 2000.

The *Orsus* dissent illustrates the challenges in developing indirect discrimination norms which are much needed for the eradication of substantive inequality. Segregated education has been condemned by international human rights bodies for decades and this applies irrespective of the educators' motivations and the quality of the education delivered.[65] In finding a violation against France for their policy of repeatedly evicting Roma families, the Committee on Social Rights stressed that the right of equal access to education required positive obligations on all state parties.[66] Drawing on the UN Convention on the Rights of the Child, the Committee of Ministers Recommendation On the Education of Roma/Gypsy Children in Europe,[67] and the best interests of the child principle, the Committee stressed that there should be no separate schools for Roma children and emphasised:

> 'It is also their duty to pay particular attention to vulnerable groups. States' domestic law must prohibit and penalise all forms of violence against children, that is acts or behaviour likely to affect the physical integrity, dignity, development, or psychological well-being of children.'[68]

In *Horvath and Kiss*,[69] two Roma adults complained that the decision to educate them in special schools for mentally impaired pupils was based on discriminatory testing. Once assessed with mild learning difficulties they had no way of moving to mainstream schools and the limited curriculum had significantly reduced their life chances. The Court heard that 42% of pupils in the special school were of Roma ethnicity, though they constituted 8.2% of the total school population in the region. Only 0.4–0.6% of students consigned to the special schools would proceed to take the mainstream school examination.[70] Following *DH and Orsus*, the Court emphasised that, in light of persistent discrimination and their vulnerability as a particularly disadvantaged group, states had a duty to avoid the perpetuation of discrimination against Roma disguised in allegedly neutral tests.[71] Interestingly the decision was unanimous; perhaps suggesting a growing confidence in the Court's articulation of non-discrimination in the educational sphere.

Impossible Evidential Burdens

Whilst the modification of the burden of proof in *DH* is to be welcomed, the Court has adopted a very different approach in caselaw concerning policing and criminal justice. The number of allegations of police ill-treatment towards Romani people is a serious cause for concern. Cases fall into two camps, one where the police themselves are accused of, or complicity in, anti-Roma violence; and the second where the police and prosecutors fail to investigate or prosecute a complaint of ill-treatment made by a Roma complainant.

These cases centre on Articles 2 and 3 of the Convention and there is often an allegation of racial motivation on the part of state authorities. Where the racist motivation is clearly evidenced there will be a violation of Article 14 as in *Lakatosova*[72] where a police

[65] See for example the seminal decision of the US Supreme Court in *Brown v Board of Education of Topeka* 347 U.S. 483 (1954); See further James A Goldston, 'The unfulfilled promise of educational opportunity in the United States and Europe: From Brown v Board to DH and Beyond' in J Bhabha, A Mirga, and M Matache (eds.) *Realizing Roma Rights.* (Univ of Pennsylvania Press 2007) 163–184.

[66] *Centre on Housing Rights and Evictions (COHRE) v. France*, No. 63/2010.

[67] Council of Europe: Committee of Ministers, *Recommendation No R (2000) 4 of the Committee of Ministers to member States on the Education of Roma/Gypsy Children in Europe*, 3 February 2000, R (2000) 4.

[68] *Orsus* (n 63) para. 168.

[69] *Horvath and Kiss v Hungary* App 1146/11, 2013.

[70] *Ibid,* para 7.

[71] *Ibid,* para.116; Helen O'Nions, 'Warehouses and Window-Dressing: A Legal Perspective on Educational Segregation in Europe' (2015) 1 Zeitschrift für internationale Bildungsforschung und Entwicklungspädagogik, 15.

[72] *Lakatosova and Lakatos v Slovakia* App 655/16, 2018.

officer shot and killed three Roma and seriously injured two others. He was convicted of the murder, but the Slovakian courts declined to treat the case as racially motivated even though the perpetrator had told police of his desire to 'deal with the Roma from Hurbanovo' when preparing his gun. Regrettably, the approach of the Strasbourg Court has largely been to side-line this part of the facts, ignoring data and statistics suggesting that the behaviour aligns to a broader pattern of Romaphobia in state authorities. A distinction needs to be drawn between procedural and substantive violations in these cases: the former relates to the failure of the authorities to adequately investigate the substantive breach of the right. In these situations, there is a positive obligation to examine the complaint and take appropriate action which should include scrutiny of any evidence of racist motivation.

There have been recent cases where insufficient investigations into alleged hate crimes have met the threshold required for a breach of Article 14 in conjunction with Article 3. This was the result in the cases of *Balazs*[73] and *MF*[74] where the ill-treatment had not been investigated for possible racial motivations. A breach of Article 14 along with the procedural limb of Article 2 was also made out in *Fedorchenko and Lozenko*[75] where an arson attack killed five Roma including three children. The alleged perpetrators, including a high-ranking police officer, had barricaded the family into their home. Only one of the alleged perpetrators was successfully prosecuted for the offence of wilful destruction of property for which he received a suspended prison sentence. As part of the hearing, the Court's attention was drawn to a report from the European Commission against Racism and Intolerance which highlighted the systematic discrimination faced by Ukrainian Roma and frequent reports of:

> 'excessive use of force, ill-treatment, verbal abuse, and destruction of property by law enforcement personnel. Discriminatory practices are also reported to be widespread and include arbitrary checks, unwarranted searches, confiscation of documents and (. . .) discriminatory enforcement of crime prevention policies targeting persons with criminal records.'[76]

The Court modified the standard of proof by considering this broader context along with three other arson attacks against Romani villagers the same evening. It held that it could not be excluded that the decision to burn the houses had been 'nourished by ethnic hatred.' In March 2019, eighteen years after the incident, the Council of Europe's Committee of Ministers reported that the Ukrainian government had still not done enough to implement the judgment. The Committee heard evidence of numerous attacks on the homes of Roma since the Court's decision, including fifteen families chased from their homes in Lysa Hora by a far-right vigilante group; Roma families dragged from their homes and beaten by thirty masked men in Lviv; an arson attack on a Roma home in Ternopol, and a violent assault on a group of Roma in Lviv which resulted in the murder of one man. To the extent that any prosecutions have occurred, they have been for the lesser charge of hooliganism. The joint evidence from European Roma Rights Centre and the Chircli Roma women's organisation accused the Ukrainian state authorities of collaborating with far-right groups in their violence towards Roma people.[77]

[73] *Balazs v Hungary* App 15529/12 2016.

[74] *MF v Hungary* App 45855/12. 2016.

[75] *Fedorchenko and Lozenko v Ukraine* App 387/03, 2012.

[76] *Ibid,* para. 33.

[77] The evidence submitted to the Committee of Ministers is <http://www.errc.org/uploads/upload_en/file/4199_file1_rule-9-submission-fedorchenko-lozenko-v-ukraine-20-april-2020.pdf>.

Substantive violations of Article 14 are rare before the Strasbourg court due to the impossibly high evidential burden required. In *Bekos and Koutropoulos*[78] an internal investigation into police brutality found that the two officers had acted with cruelty and abused their powers when detaining two Romani men. Their suspension had been recommended but this was never carried out, so the officers remained unpunished. The Court found a procedural breach of Article 14 and substantive breach of Article 3 because the applicants who argued that they were subjected to racial abuse whilst detained, were unable to prove beyond all reasonable doubt that racist attitudes had played a role in their mistreatment.

There is an obvious difficulty in requiring proof of discrimination to the criminal standard and it is not something required by the Court of Justice or many national jurisdictions.[79] Smith and O'Connell describe the Court's approach as setting a 'high and unrealistic burden.'[80] They make a comparison with the Inter-American Court of Human Rights which has openly rejected the criminal standard: 'The objective of international human rights law is not to punish those individuals who are guilty of violations but rather to protect the victims and to provide for the reparation of damages resulting from he acts of States responsible.'[81] For Roma applicants the high threshold for proof of racism is compounded by the fact that state authorities are unlikely to believe their witness statements and may not have properly recorded the evidence of racial motivation. General statements that may be suggestive of Romaphobia will not suffice before the Court.[82] Thus the Strasbourg court's approach runs the risk of compounding the discriminatory treatment.

In *Anguelova*[83] a teenage Roma boy died of a fractured skull he sustained in police custody. It was subsequently revealed that the police forged the detention register, failed to call an ambulance, and lied about the events leading up to his death. The Court found violations of Article 2 due to the absence of a thorough and careful investigation and Article 3 due to the absence of a plausible explanation to explain his injury. However, they found no violation of Article 14 as it could not be shown beyond all reasonable doubt that the police actions were racially motivated. This was the same approach taken in a strikingly similar case where an apparently healthy Romani man arrested for suspected cattle theft had died of injuries sustained whilst in Bulgarian police custody.[84]

The only dissenting opinion in *Anguelova* came from Judge Bonello who, describing the judgment as 'particularly disturbing,' highlighted the failure of the Court to properly protect victims of racially motivated violence, murder, and torture. He criticised the Court's imposition of an unrealistic burden of proof which prevented scrutiny suggesting that Europe was an 'exemplary haven of ethnic fraternity.'[85] He called on his peers to radically and creatively rethink their approach so that the Court was not 'an inept trustee of the Convention'.[86]

[78] *Bekos and Koutropoulos v Greece* App 15250/02, 2005.

[79] See for example *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, 16th July 2015 where the CJEU found discrimination under the Racial Equality Directive in a case concerning Romani people in Bulgaria. Once evidence of discrimination has been provided the burden shifted to the respondent state to disprove or otherwise justify the conduct. See also *Andre Lawrence Shepherd v Bundesrepublik Deutschland* C472/13 11th Nov 2014.

[80] Anne Smith and Rory O'Connell 'Transition, Equality and Non-Discrimination' in Smith and O'Connell (eds) *Transitional Jurisprudence and the European Court of Human Rights* (Cambridge Univ Press 2011) 185–207, 196.

[81] *Velasquez Rodriguez v Honduras* 29th July 1988 (Ser.C) no 4, para 134.

[82] *Balogh v Hungary* App 47940/99, 2004.

[83] *Anguelova v Bulgaria* App 38361/97, 2002.

[84] *Velikova v Bulgaria* App 41488/98, 2000.

[85] *Anguelova* (n 84) Judge Bonello, para 2.

[86] *Nachova and Others v Bulgaria* 43577.98 and 43579/98, ECHR 2005, para 172.

To some extent Judge Bonello's criticism was heeded in the next case on police brutality and discrimination in Bulgaria, coming just two years later. In *Nachova* the Grand Chamber acknowledged that there should be increased scrutiny for differentiations on the basis of race, such that when a person dies at the hands of the state there is a duty to unmask any racist motivation and to establish whether ethnic hatred or violence played a role.[87] This is an important step but it does not go far enough to address the significant barriers to the realisation of substantive equality. As in *DH* the Chamber departed from the approach in *Anguelova* to reverse the burden of proof so that the state was required to prove that the police were not influenced by discriminatory attitudes.[88] However, the enlightened approach of the Chamber was soon modified by the Grand Chamber which distinguished between procedural and substantive limbs of Article 14 and found the state's failure to properly investigate the supposedly racist motivations for the murder should not shift the burden of proof.[89] In so doing, the Court ignores the substantial body of evidence from previous cases concerning police brutality against Bulgarian Roma, reasoning that the state should not be deemed responsible for the 'individual subjective' motivations of their own police force. The decision has been described by Smith and O'Connell as 'a giant step backwards',[90] a position supported by six partially dissenting opinions. The Court subsequently compounded the challenges facing victims of racial violence by granting the state a wide margin of appreciation in *Beganovic*.[91]

It will now be apparent that police brutality is a regular theme in Roma caselaw. *Sashov*[92] was the sixth successful case supported by the European Roma Rights Centre against Bulgaria alone. Yet the Court's unwillingness to place the burden to disprove discriminatory intention on the state adds insult to injury, preventing a full understanding of the challenges that urgently need to be addressed by suggesting, contrary to all the evidence, that the specific incidents are isolated and unusual.

Paternalism and Vulnerability Frames

The decisions in the Roma education cases refer to the Roma as a vulnerable group requiring states to take positive measures to address their situation.[93] The approach can be traced backed to the decision in *Chapman*,[94] concerning a Gypsy woman who wished to settle with her family on her own land but was denied planning permission and consequently evicted. The Court recognised that the desire to reside in a caravan was an intrinsic part of the applicant's identity as a Gypsy traveller, engaging the right to respect for family and private life as well as home life.[95] Respect for the special needs of minorities was a benefit not just for the individual member of the group but crucially for society in general,[96] reflecting the preamble of the Framework Convention on National Minorities.[97] In narrowing the margin of appreciation the Court identifies the emergence of an international consensus justifying a positive obligation to 'facilitate the Gypsy way of life'.[98]

[87] *Ibid* para. 158.

[88] *Ibid* para 169–171.

[89] *Ibid* para 157.

[90] Smith and O'Connell (n 81) 199.

[91] *Beganovic v Croatia* App 46423/06, 2009.

[92] *Sashov v Bulgaria* App 63106/00, [2010] ECHR 899.

[93] *Orsus* (n 63) paras. 147–148.

[94] *Chapman v United Kingdom* App 27238/95, 2001.

[95] *Ibid* para. 73.

[96] This argument was also made in *Nachova and Others v Bulgaria* (n57) para .56.

[97] Council of Europe *Framework Convention on the protection of National Minorities* European Treaty Series No 157, Strasbourg 1.11.1995.

[98] Chapman (n 95), paras. 93; 96.

On the surface this approach appears to fall within a minority recognition frame which departs from formal non-discrimination reasoning.[99] In the event, this recognition proved to have little substance as the majority (17–7) found the interference to be necessary in a democratic society to protect the rights and freedoms of others, an approach echoing the earlier decision of *Buckley* where the European Commission on Human Rights had found a violation of Article 8 having recognised that 'living in a caravan home is an integral and deeply-felt part of her gypsy life- style.'[100] On appeal to the Court, it was held that the violation of the applicants right to a home was justified by the requirements of a robust planning system. In their dissenting opinions Judges Pettiti and Lohmus reasoned that special measures were required to achieve full equality for Gypsy people.

Ringelheim refers to these approaches as 'minority blind'.[101] They are examples of the individual rights frame identified by Delcour and Hustinx which strips Roma of their status as members of a minority and treats them as individuals whose interests can be fairly balanced against those of other individuals.[102] The final approach falls a long way short of recognising minority rights in the way that the Commission in *Buckley* advocated. It is not therefore surprising that when the Court briefly examined the complaints under Article 14 they confined their examination to the specific facts and found there to be no discrimination in *Buckley* and an objective and reasonable justification in Chapman. The Court declined to consider the ample evidence to suggest that the families would be unable to find alternative homes without abandoning their caravan, and therefore, their culture. As such it appears incoherent. On one hand the Court is emphasising the intrinsic importance of the right of a Gypsy to reside in a caravan, on the other hand that right is later expressed as a matter of individual preference which can be interfered with for the enjoyment of the majority.

The Court revisited these questions in *Connors*, this time considering the impact of rental security and procedural safeguards against eviction for Gypsy families. There is a clear evolution in the case law from *Buckley* to *Connors*. The majority found a breach of Article 8, narrowing the margin of appreciation and recognising the positive obligation on states to consider the needs and lifestyle of Gypsies in their regulatory framework.[103] The applicant's argument that the relevant provisions were in fact discriminatory was not addressed.

A clearer articulation of vulnerable groups in relation to non-discrimination came in *DH*, discussed above, with the Court demanding that the respondent state afford 'special protection' to vulnerable groups, such as the Roma whose vulnerability was based on a 'turbulent history' and, rather curiously given their nomadic tradition, 'constant uprooting'.[104] This approach diverges from the conception of vulnerability advanced by theorists such as Fineman who regard it as intrinsic to the human condition.[105] For the Court, it is associated only with specific groups where negative social attitudes,[106]

[99] Delcour and Hustrix (n 48) 3.

[100] *Buckley v United Kingdom* App 20348/92 European Commission on Human Rights, para 64, (1997) 23 EHRR 101, para 71.

[101] Julie Ringelheim, 'Chapman redux: the European Court of Human Rights and Roma Traditional Lifestyle' in E. Brems (ed.) *Diversity ad European Human Rights: Rewriting judgements of the ECHR* (Cambridge Univ press 2012) 431.

[102] Delcour and Hustrix (n 48) 3.

[103] *Connors v United Kingdom, App No 66746/01, 2004* para. 94; Kristen Henrard, 'The ECHR and the protection of Roma' 2004 European Diversity and Autonomy Papers 5/2004. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972960.

[104] *DH* (n 9) para. 182.

[105] Martha Fineman 'Vulnerability and Social Justice' (2019) 53 Valparaiso Law Review 341; B Hoffmaster, 'What does Vulnerability mean?' (2006) 36 Hastings Centre Report, 38.

[106] *VC v Slovakia* App 18968/07, 2011, 146; 179.

dependency on the state, historical prejudice, and social exclusion are considered to be markers of vulnerability.[107]

The vulnerability concept has enabled the Court to justify a modification of the burden of proof and a departure from the immediate facts of the case so that underlying conditions of inequality are brought to the fore. This approach sits most comfortably within the redistribution frame identified by Delcour and Hustinx in its recognition that certain socio-economic factors justify a departure from individually constructed rights.[108] However, the approach with its emphasis on dependency and exclusion, falls short of affirming minority rights and recognising the need for positive measures which members of minorities require to fully participate in society.

Kim argues that the vulnerable groups concept has led to inconsistency and ambiguity in the Court's judgments due to the absence of any coherent theoretical underpinning and corresponding definition of vulnerability.[109] This inconsistency can be seen in several cases where facts are relatively similar. One example is *Yordanova*[110] which concerns the forced eviction of Roma families, here the Court found a violation of Article 8 without any explicit reference to the Roma as a vulnerable group. Yet a year later in *Winterstein* which also concerned forced evictions of Roma families, the Court referred to their previous caselaw and noted 'the vulnerable position of Roma and travellers as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.'[111]

Kim identifies at least four approaches to the concept in Strasbourg jurisprudence, the highpoint being *DH* where vulnerability reversed the burden of proof and narrowed the margin of appreciation. In the state violence cases, an acknowledgement of vulnerability has not been accompanied by any procedural modification. In *Burlya and Others v Ukraine*[112] Roma villagers were violently attacked by their Ukrainian neighbours who looted and set fire to their homes whilst police officers looked on. Whilst the families were forced to reside in temporary accommodation outside the village, the police showed no interest in prosecuting those responsible. Sixteen years after the pogrom, the Strasbourg Court finally ruled that the Romani villagers present at the time of the attack had suffered a breach of Article 3 coupled with Article 14, whilst those not present who lost their homes, had suffered a breach of Article 8 and 14. Whilst the Court emphasised that the Roma were a vulnerable group it did not consider how this designation might impact on the proceedings, for example by narrowing the margin of appreciation.

Whilst the vulnerable group designation lacks a clear theoretical foundation and a consistent application, there is an even greater problem arising from the Court's awkward accommodation of minority interests. This is exemplified by the decision in *Hirtu and Others*, where the Court were asked to consider the impact of the French Besson law which targeted those travelling without a permit, leading to forced eviction and relocation in unsuitable 'slum' camps. Rather than referring to the Roma as a vulnerable group, the Court stripped the Roma camp dwellers of their ethnicity entirely, describing

[107] L Peroni and A Timmer, 'Vulnerable groups: the promise of an emerging concept in European Human rights Convention Law' (2013) 11 Int Journal of Constitutional Law 1070.

[108] Delcour and Hustrix (n 48) 3.

[109] Kim (n 52).

[110] *Yordanova v Bulgaria* App 25446/06, 2012.

[111] Winterstein and Others v France Application no. 27013/07, 2013, para. 148 .

[112] *Burlya and Others v Ukraine* App 3289/10, 2018.

them as an 'underprivileged social group'.[113] Whilst some regard the special protection approach as progressive in its recognition of group -focused rights,[114] Kim argues that allocating obligations based on a vulnerable group status is paternalistic and stigmatising.[115] This accusation is reminiscent of the criticism made by Romani rights advocates against the European Commission.[116] Stigmatisation is seen to hamper engagement with substantive inequality as the group appear to be asking for something extra (rather than something different), reinforcing further negative stereotyping.[117] Thus there is a significant risk that vulnerability strips Romani people of their political identity as rights holders, confirming their outsider status.[118] Crucially, the state responses to allegations of discrimination suggest that vulnerability can be easily repurposed to blame the victim for the rights violation.

Kim's solution is to move away from the limited recognition of group identity in favour of the traditional rights frame with its emphasis on individual dignity and autonomy.[119] The difficulty here is that individual identity is bound up with the identity of the group and this is even more apparent when the group has been excluded from civic society because of discrimination and entrenched inequality.[120] To reference autonomy and dignity without this context is to present an incomplete picture that fails to engage with the complexities of structural inequality. This is recognised in the development of the Council of Europe's Framework Convention on the Protection of National Minorities. Arguably had the non-discrimination approach been sufficient there would be no need to have created a separate legal instrument focussed on the rights of members of national minorities. The preamble to the Convention recognises that a 'pluralist and genuinely democratic society should enable members of minorities to express and preserve their identity', and that a climate of tolerance and dialogue is necessary to enable cultural diversity which should be a source of enrichment for each society.[121] The answer to the denial of rights to Roma people is not to deny recognition but to ensure that rights are realisable and not illusory. This requires Roma identity to be celebrated rather than denied.

Inadmissibility and Exclusion from Consideration

Access to justice remains a significant challenge for Romani people in domestic courts.[122] Unfortunately some of these challenges are replicated in the quest for a remedy before the Strasbourg Court. In *Burlya* the Romani victims of a pogrom in Ukraine waited sixteen years for a remedy during which time they were displaced from their damaged homes. The Romani women denied access to maternity benefits in *Negrea and Others*[123] waited eleven years for a finding that their Article 6 rights had been breached. The Article 14 allegation was dismissed due to an absence of evidence.

[113] *Hirtu and Others v France* App 24720/13, 2015.

[114] Delcour and Hustrix (n 48) 8.

[115] Kim (n 52) 12; See also Catriona MacKenzie, 'The Importance Of Relational Autonomy And Capabilities For An Ethics Of Vulnerability' In Mackenzie Et al (eds) *New Essays in Ethics and Feminist Philosophy* (OUP 2013) 1, 37.

[116] See discussion above page

[117] Kim (n 52) 13.

[118] Gay y Basco 'Picturing 'Gypsies': interdisciplinary approaches to Roma representation' (2008) 22 Third Text 3, 297–303; Peter Vermeersch 'Reframing the Roma: EU Initiatives and the Politics of Reinterpretation' (2012) 38 Journal of Ethnic and Racial Studies 8, 1195–1212.

[119] The Strasbourg Court refers to applicant's dignity in Burlya (n 113) para 134 and VC (n107 para 115.

[120] Sandel (n 50) ; O'Nions (n 51).

[121] Council of Europe, Explanatory Notes to the Framework Convention for the Protection of National Minorities Strasbourg, 1st Nov 1995. European Treaty Series – No. 157.

[122] European Roma Rights Centre, 3rd party intervention in *Hysenaj v Albania,* (2016) para 17. <http://www.errc.org/uploads/upload_en/file/third-party-intervention-hysenaj-v-albania-22-august-2016.pdf >.

[123] *Negrea and Others v Romania* App 53187/07, 2018

Typically, the Court has avoided the question of whether a rights violation was prompted or influenced by discrimination, suggesting that the finding of a violation of the substantive right provides a sufficient remedy. In the planning cases the Court balances the right of a member of a minority to live in a home which is culturally appropriate against the broader, ill-defined, public interest. This balance has typically elevated the right for some members of the public to enjoy a green space over the individual rights of a Gypsy family to enjoy a home. This changed with the decision in *Connors* where an Article 8 violation was substantiated but the Court declined to consider Article 14 as no separate issues arose.[124] This prevented a dialogue with national courts and arguably delayed the development of a European consensus as any discriminatory motivations were hidden from scrutiny. Similarly, in *Bagdonavicius and Others,*[125] the Romani neighbourhood was demolished and burned down by the authorities, leading residents to lose access to their home and essential services. A breach of Article 8 was upheld without any consideration of discriminatory motivations or effects.

Whilst there may be complex planning and environmental concerns in housing cases played out in an awkward balance between individual rights and the public interest, the police brutality cases by contrast appear relatively uncomplicated. The finding of a procedural violation of Article 14 in *Nachova* remains unusual. In *Carabulea v Romania*[126] the Court had found procedural and substantive breaches of Article 2 and 3, as well as the denial of the right to an effective remedy in Article 13, when a Romani man was detained and died in police custody. The majority declined to consider Article 14 or the wider context in which the police were exercising their powers, prompting criticism in the dissenting opinions of Judges Gyulumyan, Ziemek and Power. In *Borbala and Kiss*[127] the Court found a substantive and procedural breach of Article 3 when the police used excessive force to break up a party but rejected the Article 14 allegation due to insufficient evidence of racist motivations. Similarly, in *Koky and Others*, the Court found a breach of Article 3 when the police failed to investigate and prosecute the perpetrators of an armed attack on a group of Roma men. The Article 14 complaint was not examined despite the evidence that perpetrators hurled racist abuse at the victims.[128]

Any hope that the Court's approach might evolve to reflect the living instrument principle, was undermined by *Fogarasi and Others*[129] where a three-judge court found no evidence of racial discrimination in a case involving arbitrary detention and police brutality against a Roma family including an elderly grandfather and thirteen-year-old daughter. One family member needed three months of medical care for the injuries caused by the police officers. The three-judge court is used in an increasing number of cases where established case law exists to assist the Court in addressing its considerable backlog. Given the numerous international reports and previous caselaw it is difficult to justify the Court's finding. A report from the EU Fundamental Rights Agency the year before found that 75% of Roma in Romania did not report in-person crimes due to lack of trust in the police, resulting from excessive police stops and discrimination.[130] The

[124] *Connors* (n 2), para 97.

[125] *Bagdonavicius and Others v Russia* App 19841/06, 2016

[126] *Carabulea v Romania* App 45661/99, 2010.

[127] *Borbala and Kiss v Hungary* 59214/11, 2012.

[128] *Koky and Others v Slovakia* 13624/03, 2013.

[129] *Fogarasi and Others v Romania* App 67598/10, 2017.

[130] EU Fundamental Rights Agency, *Data in Focus: The Roma. European Minorities and Discrimination Survey* 2009. <https://fra.europa.eu/sites/default/files/fra_uploads/413-EU- MIDIS_ROMA_EN.pdf.

Court's own judgment in the earlier decision of *Stoica*[131] had found a breach of Article 3 and 14 when a teenage Romani boy was beaten unconscious by police in Romania. What is particularly concerning about the facts in *Fogarasi* is the level of indifference towards Roma victims and witnesses at all levels of the justice apparatus. The deputy mayor and local police were witnessed making racist remarks, but the statements of the Roma villagers were dismissed on the grounds of alleged bias. The military prosecutor further overlooked police statements which mentioned 'purely gypsy behaviour' and thereby ignored the racial animus. The Court also ignored the evidence of police Romaphobia highlighted in the case of *Moldovan and Others*[132] where police were found to be complicit in a violation of Articles 3, 6(1), 8, and 14 following a pogrom where three Romani men were killed and fourteen homes destroyed. *Fogarasi* marks a new low point in the realisation of substantive equality and raises questions about the Court's commitment to equality for Romani people. Weiss accuses the Court of a shameful decision which makes a 'joke of Roma rights'.[133]

The refusal to fully engage with the discriminatory angle in policing stands in marked contrast to the approach taken in educational discrimination cases. This is particularly concerning given the impact of racism on the victim's dignity and the impact of racist policing on a tolerant, democratic society. In 2012 Moschel collated data on Roma cases pending or decided by the Court and found fifteen cases against both Bulgaria and Romani with a further eight against Slovakia, four against Greece and several others against Croatia, Czech Republic, Hungary, Macedonia, Russia, and Ukraine.[134] It should be immediately obvious from this list that the situation on the ground in these countries has not improved in the intervening decade and in some cases has deteriorated further. The number of these cases that were actively considered under the discrimination provision totalled just twelve (three of which related to Greece).

In *Aksu v Turkey*[135] an academic book and two state funded dictionaries featured several Roma stereotypes that the applicant alleged were discriminatory. The book included passages stating that Gypsies lived as 'thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers' and were 'polygamist and aggressive'. One paragraph refers to 'sorcery' as one of the 'most striking characteristics' of the group concerned. The Turkish dictionaries contained similar offensive stereotypes. 'Gypsy wedding' was defined as a 'crowded and noisy meeting', 'Gypsy fight' as a verbal fight in which vulgar language is used and 'Becoming a Gypsy' as 'displaying miserly behaviour'. The applicant had made several requests for the Ministry of Culture to ban their distribution. Whilst the Court underlined that positive measures are required to prevent stereotyping it then afforded the state a wide margin of appreciation and found no violation of Article 8. The Court declined to consider Article 14 on the basis that 'the applicant has not succeeded in producing prima facie evidence that the impugned publications had a discriminatory intent or effect'.[136] In a strong dissenting opinion, Judge Gyulumyan reasoned that the case should have been examined under Article 14 with the burden of proof shifted to the respondent due to the discriminatory context in which the books were published and the clear perpetuation of racist stereotypes in the

[131] *Stoica v Romania* App 42722/02, 2008.

[132] *Moldovan and Others v Romania* App 41138/98 and 64320/01, 2015.

[133] Adam Weiss, 'Weckles: the New Minority Making a Joke of Roma Rights' (European Roma Rights Centre, 10th April 2017) < http://www.errc.org/news/weckles-the-new-minority-making-a-joke-of-roma-rights >.

[134] Mathias Moschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'? (2012) 12 Human Rights Law Review 3, 479–507.

[135] App **4149/04 & 41029/04, 2012.**

[136] *Ibid* para. 45.

texts. She cites decisions from Turkish courts in cases where Turkish identity had been similarly denigrated to support the conclusion that there was a difference in treatment based on ethnicity.

Judge Gyulumyan's opinion echoes that of Judge Bonello in *Angeuelova*. Both recognise that the refusal to explore the discriminatory context perpetuates and condones incitement to discrimination. Both make reference to wider international obligations and reports including the UN Committee on the Elimination of Discrimination's Recommendation on Roma,[137] and the Strasbourg Declaration on Roma in 2010 which condemns unequivocally 'racism, stigmatisation and hate speech directed against Roma, particularly in public and political discourse' calling for states to 'Strengthen efforts in combating hate speech. Encourage the media to deal responsibly and fairly with the issue of Roma and refrain from negative stereotyping or stigmatisation'.[138]

In view of the considerable challenges in documenting and addressing Romaphobia, it is also important for the Court to modify its expectation that Roma applicants will have exhausted all domestic remedies.[139] In *Hysenav v Albania* the Romani applicant whose home was set alight was unable to lodge a civil claim against the perpetrators.[140] The European Roma Rights Centre highlighted pervasive racism in the domestic courts and prosecution service.[141] The approach in *Kozak v Poland*[142] where the applicant alleged discrimination on the grounds of homosexuality, offers a to take a more flexible approach given the difficulties and considerable delays Roma applicants typically experience navigating domestic courts. The Court rejected the Government's argument that the applicant had not exhausted all remedies determining it would be unnecessary if a realistic account of the facts demonstrated that the general legal and political context in which formal remedies operated would make them ineffective.

CONCLUSION

Roma exclusion remains the most pressing human rights and equality issue in Europe notwithstanding considerable attention from the European institutions, including the Strasbourg Court. It should be very apparent that there is no easy fix to the complex, intersecting challenges that Romani people face in accessing basic rights, but it should also be evident that the approaches taken have, until quite recently, overlooked the discriminatory context in which policies are designed and implemented. This context has been recognised to some extent in education and housing but nowhere is it more apparent than in the police brutality cases.

The Court's inconsistent and wavering approach to discriminatory context present in many rights violations against Romani peoples has thwarted progress on the realisation

[137] UNCERD (n 1), para 9 calls on States: 'To endeavour, by encouraging a genuine dialogue, consultations or other appropriate means, to improve the relations between Roma communities and non- Roma communities, in particular at local levels, with a view to promoting tolerance and overcoming prejudices and negative stereotypes on both sides, to promoting efforts for adjustment and adaptation and to avoiding discrimination and ensuring that all persons fully enjoy their human rights and freedoms.'

[138] Council of Europe Committee of Ministers High Level Meeting on Roma, *The Strasbourg Declaration on Roma* CM (2010) 133 final 20 October 2010.

[139] Cases declared in admissible for failure to exhaust domestic remedies include *Memet v Romania* App 16401/16; *Kosa v Hungary* App 53461/15, 2017; *Andarov and Others v Bulgaria* App no. 33586/15, 2016; *Petrache and Tranca v Italy* App 15920/16, 2016; *Gratian Lupu v Romania* App 36250/09, 2015; Dimitrova and Others v Bulgaria App 44862/04, 2017.

[140] App 78916/11, 2016 pending.

[141] European Roma Rights Centre, 3rd party intervention. <http://www.errc.org/cikk.php?cikk=4511>.

[142] App 13102/02, 2010; Carmelo Danisi, 'How far can the ECtHR go in The Fight Against Discrimination? Defining New Standards in its Non-Discrimination Jurisprudence' (2011) 9 Int. Journal of Constitutional Law 3, 793–807.

of substantive equality in Europe. It has been argued that the Court needs to urgently refine its approach to provide a consistent and decisive voice which shows no tolerance for Romaphobia. In so doing it must be prepared to modify both the burden and standard of proof, particularly the requirement for applicants to prove discrimination beyond all reasonable doubt. This requirement sets an impossible threshold of proof and allows the actions of racist authorities to be hidden from scrutiny. When the state has not demonstrated a full and fair investigation into an allegation of racist behaviour, the burden of proof must shift to them to demonstrate that the action was not motivated by racism.[143] If the state wants to avoid the allocation of blame before an international court, it needs only to undertake an adequate and fair investigation into the allegations. Shifting the burden will therefore improve police procedures and accountability, ensuring that everyone is subject to equality before the law.

The Court also needs to be more proactive by requiring positive obligations to reduce inequality without resorting to paternalistic and stigmatising tropes which centre on comparative vulnerability and inferiority. As Fineman argues, all human beings are inherently vulnerable, therefore the focus should be on how to develop and shape resilience.[144] An approach singling out one group as particularly vulnerable runs the risk of compounding vulnerability. Positive obligations to reduce inequality require recognition of minority rights, but this must be decoupled from vulnerability which emphasises socio-economic characteristics as the defining feature of Romani identity.

The recent decision in *Lingurar v Romania*[145] may provide hope for a new direction in Strasbourg jurisprudence. The case again concerned police brutality during a raid on a Romani village and a failure to prosecute the perpetrators. It was clear that the raid had been motivated by concerns about Roma crime and anti-social behaviour. The Court, sitting as a three-judge committee, found a violation of both procedural and substantive limbs of Article 3 and Article 14. Significantly, the Court referred to 'institutionalised racism' and 'ethnic profiling' and recognised that stereotypes about Roma behaviour could give rise to suspicions of discrimination based on ethnic grounds.

The Court should be more willing to learn from the work of the Advisory Committee on the Framework Convention, the European Committee on Social Rights and the Court of Justice of the European Union. The CJEU has a highly developed principle of equal treatment with elaborate doctrines of direct and indirect discrimination and positive action to ensure meaningful equality of opportunity.[146] Article 5 of the Framework Convention requires that state parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions, and cultural heritage. The Council of Europe's recommendation on the legal situation of Roma in Europe also advocates special measures to ensure genuine equality of treatment.[147] In her rewriting of the *Chapman* decision, Ringelheim demonstrates how the application of these authorities can dramatically enhance rights protection for members of minorities.[148]

[143] N135 , 500–501, Judge Bonello (dissenting) *Anguelova v Bulgaria*, para. 10

[144] Martha Fineman. 'Equality, Autonomy, and the Vulnerable Subject In Law And Politics' in M Fineman, and A Grear (eds.) *Vulnerability: Reflections on A New Ethical Foundation for Law and Politics*, (2013 Routledge) 13–27; Fineman 'On Vulnerability and the Law' (*New Legal Realism Project*, Nov 30th 2015) <http://newlegalrealism.org/2015/11/30/fineman-on-vulnerability-and-law/>

[145] *Lingurar v Romania* App 48474/14, 2019.

[146] Janneke Gerards, 'The Discrimination Grounds of Article 14 of The European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 101.

[147] Parliamentary Assembly *Legal Situation on the Roma in Europe* Doc 9387 Council of Europe 2002.

[148] Ringelheim (n 102) 443.

Thus, the Court should reaffirm the European consensus on the right of travelling people to live in a caravan and reassert the positive obligation on states to secure that opportunity.[149] Rather than affording states a wide margin of appreciation as in *Aksu*, it should assertively condemn language and behaviour which confirms racist stereotyping. At the same time, it should take care to scrutinise state arguments that endorse a separate but equal approach, particularly in the allocation of socio-economic rights such as housing and education. The dissenting judgements in Orsus evidenced the risk in allowing states a wide margin of appreciation over 'benevolent' education measures that may provide a short-term gain for pupils but ultimately widen inequality and division.

Ultimately it is refreshing to see that European institutions are now, albeit belatedly, coming to understand the problems of structural inequality which have prevented real progress on Roma integration. Unfortunately, the Strasbourg Court has lagged behind with a reductive, regressive and overly formalistic approach to equality.[150] There are small indicators that this approach may be changing, but for the Roma, this change is long overdue.

[149] *Ibid* 440

[150] Anne Smith and Rory O'Connell 'Transition, Equality and Non-Discrimination' in Smith and O'Connell (eds) *Transitional Jurisprudence and the European Court of Human Rights* (Cambridge Univ press 2013) 197.

‘LIVING ROUGH’ IN THE 2020s: LESSONS FROM THE POOR LAW ERA IN ENGLAND AND WALES

*DAVID J. CORNWELL**

ABSTRACT

In many of the major towns and cities of England and Wales at the present time it has become a frequent occurrence to find numbers of apparently homeless persons’ living or ‘sleeping rough’ by day or night in doorways, shopping precincts and other public places for shelter from the weather. Such people are of all ages from youth to late middle age, in the main passively appealing for public support in order to subsist on a daily basis. When weather conditions become severe, a sizeable number deliberately commit a criminal offence in the hope of being sentenced to short-term imprisonment to provide them with accommodation, food, and medical care until conditions ease.

The Poor Law era in England and Wales from the Sixteenth Century until the National Assistance Act of 1948 provided the avenue of relief for the support of destitute, homeless and vagrant persons, initially on a Parish basis until 1834 when a centralised network of Workhouses and Poor Law Unions became established. The system provided no wages but made work available in return for the institutional care (accommodation, food, clothing and medical oversight) that it afforded. Summarily, the state intervened and the destitute surrendered their autonomy in a form of civil segregation. From the Nineteenth Century onwards, the able-bodied and employable were released into communities and awarded ‘Out-Relief’ on gaining employment. The destitute and unemployable ‘Impotent Poor’ remained in social care indefinitely. This article examines the implications of the Poor Relief system in a Common Law setting, and its potential for the reduction of vagrancy in contemporary England and Wales.

I – INTRODUCTION

Vagrancy in England and Wales has a long and chequered history dating back to the medieval period and continuing to the present time. It stems from the Sixteenth Century Old French term *waucrant* (vagabond) derived from the original Latin verb *vagări* (to wander), used to describe persons of no settled abode, income, or employment.

In a contemporary social context, vagrancy is evident in many areas of England and Wales, mainly in towns and cities where persons are to be found and apparently tolerated as a commonplace phenomenon, ‘living rough’ in vacant premises, sleeping in shopping precincts, parking places, underpasses, and even shop doorways during hours of closure. Although most do not actively beg for financial or other support, small bowls or other receptacles are displayed in the hope that passers-by may leave coins on a charitable basis.

This article examines the history of such practices in a Common Law context, the reasons for their existence, the measures taken to limit or eradicate or reduce them over the centuries through the enactment of the English Poor Laws and their administration, and the lessons that may be learned from their evident failure to eliminate vagrancy as an undesirable phenomenon within the contemporary social structure. It is presented in

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three subsequent parts: a survey of the Poor Laws and their effects in Part II; a discussion of their implications for contemporary Social Policy in Part III, and conclusions from both in Part IV.

II – HISTORICAL OVERVIEW

'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'
Anatole France, *Le Lys Rouge*, 1894, ch.7.

Medieval Poor Law.

English Poor Law legislation[1] can be traced back to the Vagabonds Act 1536 when it was enacted in the reign of Henry VIII to impose a measure of national control over the increasing prevalence of vagrancy and begging in public places (Blaug, 1963).[2] Poor Law history is generally referred to as comprising three distinct periods – the Medieval Poor Law, the Old (Elizabethan) Poor Law passed in the Act for the Relief of the Poor 1563 until the New Poor Law was enacted in the Poor Law Amendment Act 1834, and eventually abolished in the National Assistance Act 1948 with the creation of the Welfare State.

Prior to these events, however, it should be noted that in the late-medieval (mid-14th Century) period the outbreak of Bubonic Plague (the 'Black Death') in 1348–50 in Europe and Britain had decimated national populations (Cartwright, 1991)[3] resulting in the loss of some 38–40 *per cent* of the British population. This led to an acute shortage of agricultural labour and to the proclamation of the Ordinances of Labourers of 1349 and 1350 to aid the recovery of the economy by compelling all able-bodied persons to work on the land (Webb and Webb, 1910 and 1963).[4, 5]

Tudor Poor Law.

Provision for relief of the poor was confined to the parish level until 1563 when Elizabeth I passed an Act for the Relief of the Poor requiring all residents within parishes to contribute weekly to poor collections according to their ability to a designated Collector of Alms[6] in wilful default of which parishioners could be 'bound over' to justices of the peace and fined £10. The Vagabonds Act 1572 also required justices to survey and register the 'impotent poor'[7], determine how much money was necessary for their relief, and assess parish residents weekly for the appropriate amount. This 'tax' was considerably resented by parishioners since it brought into question the honesty of the Alms Collectors and the arbitrary nature of the assessments (Slack, 1990).[8]

[1] The term 'English' used in this Article refers to the countries of England and Wales.

[2] See: Mark Blaug, 'The Myth of the Old Poor Law and the Making of the New' 23 Journal of Economic History (1963) 151.

[3] See: Frederick Cartwright, *Disease and History*, (New York, Barnes & Noble 1991) 32–46.

[4] See: Sidney Webb and Beatrice Webb, *English Local Government: English Poor Law History* (London, 2nd edn, Cass 1963) Part 1, 1–2 and 24–25. The first edition of this work was originally published with copyright dating from 1910 and has recently been re-published as *English Poor Law Policy* by Routledge Revivals in December 2020.

[5] And see also the Statute of Labourers 1351 and the Statute of Cambridge 1388 which respectively placed prohibitions on the fleeing of labourers from their employers to become freemen, and the movement of labourers and beggars from area to area.

[6] The appointment of these officials had been authorised in the Poor Act 1552 in the reign of Edward VI which also established a register of the 'licensed poor' in each parish entitled to receive relief and made begging illegal.

[7] The term applied to the elderly and the infirm, and those with disabilities that prevented them from gaining employment.

[8] See: Paul Slack, *The English Poor Law 1531–1782* (Macmillan, 1990), *passim*.

Old (Or Elizabethan) Poor Law.

Three further parliamentary Acts during the reign of Elizabeth I paved the way towards a 'nationalisation' of poor relief administration. The Poor Act 1575 required towns to create stocks of wool, flax, hemp and metal for the poor to work on, and Houses of Correction for those who refused to do so – forerunners of the Workhouse system subsequently developed in the following century. The subsequent Acts for the Relief of the Poor 1597 and 1601 codified the system as it then was and resolved the loss of the 'deserving poor' resulting from the decline in charitable giving and provision after the dissolution of the monasteries and associated religious 'gilds' in the 1530s by Henry VIII.

The Seventeenth Century, taken as a whole, proved to be one of the most turbulent periods in British history and of monarchical rule. Constant conditions of war with France and its allies in continental Europe placed a heavy burden on the exchequer of England and Wales and precluded further improvements in poverty relief at home. The reign of James I,[9] following upon the death of Elizabeth I in 1603, passed relatively quietly until 1625 when he was succeeded by his son Charles I who married the Roman Catholic Princess Henrietta of France and thereby attempt to improve the long-standing antagonistic relationship between the two countries. This marriage, and Charles's own preference for High-Church Anglican Protestantism, set him at odds with both religious groupings (the reformed Protestant Puritans and Scottish Covenanters and the un-reformed Roman Catholics) in Parliament and wider in the English shire counties and in Scotland. Charles needed revenue from taxation to fund expeditions against the Spanish New World colonies to secure treasure and support Protestant English forces and alliances in Europe resisting Catholic domination of the continent.

To do this, funds had to be available from the royal exchequer which had become considerably depleted and depended on revenue from duties and taxes on exports and imports of goods and wines to and from Europe – a system known as 'tonnage and poundage'[10], the revenue from which was traditionally voted in perpetuity by parliament to the sovereign for the defence of the realm. In January 1629, fearing that Charles was set upon an alliance with France through marriage to the Catholic French Princess Henrietta, Parliament decided to vote this revenue for one year only, in response to which in frustration Charles dissolved the parliament and ruled without it for eleven years until 1640.

These grievances eventually led to the English Civil War of 1642–1645 in which Charles's Royalist army was ultimately defeated by the English and Scottish pro-Parliamentary forces[11] to whom he surrendered and was imprisoned on the Isle of Wight. Following an escape and re-capture, Charles was brought to London, tried, convicted of high treason, and executed (beheaded) on 30th January 1649 after a 'show trial' conducted by the re-formed English parliament. Thereafter, a republic was proclaimed and styled the Commonwealth of England under Oliver Cromwell as Lord Protector until 1660 when the monarchy was restored with Charles II, the oldest son of Charles I, as King.

[9] James I was the great, great-grandson of Henry VII.

[10] Dating back to the reign of Edward II, this was a financial mechanism used by the treasury to determine the taxation (duty) levels to be levied on the importation, exportation and sales of goods, applied primarily to the importation of tuns or casks of wine, mainly from Spain and Portugal, and every pound weight of other merchandise imported and exported or imported to and from Europe and elsewhere. By law, only Parliament could legally raise taxes, and without it Charles's ability to acquire funds for his treasury was limited to his customary rights and prerogatives. For a comprehensive explanation of the Parliamentary and constitutional implications of this development, see: Patricia H. Connor, *The Relations of Charles I and Parliament 1625–1629*, Master's Thesis 115, Chicago: Loyola University of Chicago, pp.1–25, available at: https://ecommons.luc.edu/luc_theses/115 [Accessed 02/08/2022].

[11] Known as the 'New Model Army' led by Oliver Cromwell and his supporters in England and Scotland.

Early in his reign, the Settlement Act 1662 (also known as the Poor Relief Act 1662) confined relief only to established residents of a parish (proved through birth, marriage or apprenticeship), thus reducing the mobility of the able-bodied but destitute poor to leave their parishes to seek employment elsewhere. An unemployed and otherwise destitute pauper applying for poor relief had to prove a settlement, and in default of being able to do so, they had to be removed to their place of birth or where they might prove some connection, and in so moving had to rely upon the charity of the parishes through which they passed *en route* which had no responsibility for them even though they were supposed to supply shelter, food and drink for at least one night.

Thereafter, throughout the successive reigns of James II (brother of Charles II) 1685–1689, William III of Orange (grandson of Charles I) 1698–1702 and his wife Mary (daughter of James II) until her death in 1694, no further Poor Law legislation was passed. However, in 1696 and onwards, the Workhouse Movement became established, starting at Bristol with the Corporation of the Poor through an Act of Parliament of that year. The Bristol Workhouse combined housing and care for the poor with a House of Correction for minor offenders and the feckless. This example was followed by some twelve large towns and cities between 1700 and 1720 through private Acts, but was unsuitable for smaller towns which could not afford to establish such corporations.

The reigns of Queen Anne (daughter of William III and Mary) 1702–1714, and of George I (great-grandson of James I) 1714–1727 witnessed the establishment by an increasing number of small towns and parishes of their own similar institutions which were not legally authorised, and sited mainly in the South Midlands and Essex. In 1723 a Private Members Bill sponsored by Sir Edward Knatchbull was passed in parliament as the Workhouse Test Act 1723 providing authority for the establishment of parochial workhouses by individual parishes or as joint ventures between two or more parishes as Poor Law Unions.[12]

Throughout the Eighteenth Century the Workhouse System spread rapidly in England and Wales during the reigns of three Hanoverian Monarchs[13] so that by 1780 some 2,000 parish and corporation workhouses had become established housing almost 200,000 paupers and their dependents, meeting a residential social need for shelter, geriatric care and orphanage crèche provision. In 1782, Thomas Gilbert promoted an Act in parliament to relieve pressure on the workhouse system which introduced Poor House Relief solely for the aged and infirm (Gilbert's Act 1782), and a system of 'Outdoor Relief' for the able-bodied.[14]

New Poor Law.

As the Nineteenth Century began, the Napoleonic Wars intervened (from 1799–1815) to severely disrupt the national life of almost every European country. Involving huge loss of life and prohibitive expense, this sixteen-year series of conflicts was precipitated by France under Napoleon Bonaparte. The succession of battles followed on from the turmoil of the French Revolutionary Wars that brought him to power and lasted from 1792 until 1802. As a result, a shortage of able-bodied labour emerged once more, and

[12] The Bill bore the title *For Amending the Laws relating to the Settlement, Employment and Relief of the Poor*, see: Marjie Bloy, 'The Workhouse Test Act (1723), *The Victorian Web*, (Created 2001, Modified 29 August 2015) 1.

[13] George I, great-grandson of James I (1714–1727), George II, son of George I (1727–1760), and George III, grandson of George II (1760–1820).

[14] The system of Outdoor Relief allowed the able-bodied but destitute to live within the community and seek employment. This became the basis of the 'Speenhamland System' which made financial provision for low-paid workers, and lead to revision of the Settlement Laws in the Removal Act 1795 which prevented non-settled persons from being 'moved-on' unless they had applied for Poor Relief.

attention was diverted away from the poor towards the survival of the economy.[15] However, following upon the allied victory at the Battle of Waterloo in 1815, both the Poor Employment Act 1817 and the Poor Law Amendment Act 1820 were passed to alleviate public concern over the decline in industries such as wool spinning and lace making, and the sharply rising cost of poor relief through the increased construction of workhouses (Finn, 1961;[16] Boyer, 1990[17]).

In 1830–31 a widespread uprising of the agricultural sector of working-class labourers broke out in Southern England and subsequently throughout the country. Agricultural machinery was damaged, crops destroyed, barns burned down, and farmers threatened in what became known as the 'Swing Riots' – named after a mythical 'Captain Swing' denoting the wooden flail used in the hand threshing of corn (Clews, 1985: 249–253).[18] The rioters protest was against the introduction of farming machinery, and in particular threshing machines, combined with depression of the wages of labourers and redundancies that resulted.

The Royal Commission into the Operation of the Poor Law 1832 was set up to assess the state of the Poor Law as it stood in relation to the status of independent labourers and the practices of their employers. Two practices by the latter had become of particular concern: the "roundsman" system by which overseers hired out paupers as cheap labourers; and the Speenhamland system which subsidised low wages without poor relief.[19] The Report of the Commission concluded that the existing Poor Laws undermined the national prosperity by interfering with the laws of supply and demand, and the existing system of poor relief allowed employers to force down wages, and thus poverty itself was inevitable. The Commission proposed the New Poor Law governed by two fundamental principles:

- 'Less Eligibility' – that paupers should have to enter the workhouse with conditions inferior to those of the poorest free labourer outside the workhouse; and,
- The Workhouse Test – that relief should only be available in the workhouse, and that the reformed workhouses should be sufficiently uninviting so that anyone capable of working outside them would choose not to enter them.

The recommendation that outdoor relief should be abolished was never implemented. However, the Poor Law Amendment Act 1834 subsequently passed by Parliament did recommend separate workhouses for the aged, infirm, children, able-bodied males and females. It also proposed that parishes should be grouped into 'unions', and that a

[15] See: Victorianweb.org, 'Changing Attitudes Towards Poverty After 1815', at: https://www.victorianweb.org/history/poorlaw/changes.html, (2002, November). [Accessed 07/12/21].

[16] See: M.W. Flinn, 'The Poor Employment Act 1817' (1961) 14(1) The Economic History Review 82.

[17] See: George R. Boyer, *An Economic History of the English Poor Law 1750–1850*, (Cambridge University Press 1990).

[18] John F. Clews, *The Common People of Great Britain: A History From the Norman Conquest to the Present*, (1985, Bloomington: Indiana University Press, 1st Midland Book Edition) 249–253. For further explanation on the causes and extent of the 'Swing Riots', see also: C. Griffin, *The Rural War: Captain Swing and the Politics of Protest*, (2012, Manchester University Press, *passim*.), and: E. Hobsbawm and G. Rude, '*Captain Swing*', (2005, New York: Pantheon Books), 56

[19] The Speenhamland System derived from a meeting of magistrates of the Court of Quarter Sessions at the Pelican Inn at Speen in Berkshire, England on 6th May 1795, concerned at the extent of local unrest among local labourers and the poor over the price of bread, which was their staple foodstuff, and in an attempt to regulate the price of bread and other commodities subject to price rises allegedly caused by shortages of imported grain and consequent price increases during the Napoleonic Wars. Price increases affected the poor very considerably, leading to discontent and genuine hardship. The system was devised to supplement low wages when prices rose, paid for out of parish funds on a means-tested basis depending on the size of families and their net income from agricultural labour. Thus, in the main, the cost of the system fell upon landowners and the wealthier citizens of parishes who were required to subsidise the poor rather than increase the wages of agricultural labourers. Though the system went into decline after the cessation of the Wars, it arose again during the period of the Swing Riots during the 1830s. For a more detailed explanation of the system and the objections to it, see: M. Bloy, *The Speenhamland System*, (The Victorian Web, 7 November 2002), 1–3.

central authority should be established to enforce these measures. The Act received the Royal Assent from William IV (1830–1837) in 1834.

During the Victorian Period (1837–1901) there were, predictably, significant problems that would attend implementation of the Less Eligibility and the Workhouse Test principles which quickly became evident where these were adopted. In the case of the former it would be necessary to make the conditions within workhouses so unpleasant and the diet so deprived that even the destitute 'deserving' poor would go to almost any lengths to avoid admission. As to the latter 'principle', the high cost of building workhouses to achieve the separation of the sexes and children would fall upon the parishes in which, even if unions could be formed, the taxpayer and the employer would have to 'foot the bill'. In 1846, conditions within the workhouse at Andover were found to be both inhumane and dangerous that a national scandal ensued.[20] As a result, the Poor Law Commission was replaced by a national Poor Law Board in 1847. Later still, the Union Chargeability Act 1865 was passed in order to make the costs of pauperism fall on entire unions rather than on individual parishes.

After The New Poor Law.

Subsequent to The Reform Act 1867 welfare legislation increased in frequency, but this now required local government support. To achieve this support the Poor Law Board was replaced by the national Local Government Board in 1871. The Board, supported by the Charitable Organisation Society, led a move to eliminate or at least deter outdoor relief which had the effect of reducing claimants by almost one third while increasing the workhouse population by some twelve to fifteen *per cent*.

In 1888 County Councils were formed in England and Wales, followed by District Councils in 1894 with the result that public housing provision developed outside the scope of the Poor Law which began to fall into decline. This process was accelerated, albeit slowly, by the adoption of several national social welfare policies and provisions during the opening decades of the Twentieth Century including Old Age Pensions and National Insurance. Increasingly, national social welfare policies were developed and implemented to provide relief for the poor that was not affected by the stigma of pauperism.

Following the death of Queen Victoria in 1901, the short reign of her son Edward VII passed without much further change in the Poor Law situation until his second son George V became monarch in 1910. In 1911 the National Insurance Act had extended the availability of support for the unemployed to all but self-employed persons. In the same year the term 'workhouse' was replaced by that of 'Poor Law Institution' indicating a wider acceptance that poverty was a national problem requiring state rather than local intervention to overcome its effects upon the disadvantaged.

The First World War (1914–1918) intervened to slow down the process of dismantling the Poor Law administration in its entirety as unemployment and poverty increased more widely as a result of the conflict and the huge number of casualties among able-bodied men that left many families destitute and fatherless as a result. Though employment amongst women increased during the war – particularly in the munitions and other industries contributing to support of the military – wages were less than those of men able to work but who were deemed unfit for combative duties.

After the Armistice Declaration of 1918, a period of considerable industrial unrest followed in the wake of universal euphoria at the end of the conflict. Widespread discontent

[20] In 1848 a further scandal emerged over the inhumane treatment of paupers in the Huddersfield workhouse – see: 'The Huddersfield Workhouse Scandal', at: http://www.history home.co.uk/peel/poorlaw/huddscan.html [Accessed 08/12/2021].

with wage levels and working conditions, particularly in the coal-mining industry under private ownership[21], led to militancy and eventually to the General Strike of May 1926 that brought the entire United Kingdom to a standstill for twelve days (Robertson, 1926:376).[22]

As an indirect result, the Local Government Act 1929 officially abolished workhouses, and five years later the Unemployment Assistance Board was set up to provide for people not covered by the Insurance Act 1911. The Poor Law was finally abolished with the passing of The National Assistance Act 1948 and the implementation of the National Health Service Act 1946 in the same year to create the modern Welfare State.[23]

III – IMPLICATIONS FOR CONTEMPORARY SOCIAL POLICY

At the starting point of this section of the discussion it seems necessary to concede that any comparisons drawn between the feudal rural British agricultural economy of the Middle Ages, overtaken by that of the Industrial Revolution of the mid-Eighteenth and Nineteenth Centuries until the mid-Twentieth Century during which two World Wars (1914–18) and (1939–45) took place, and yet again by a Post-War welfare and service-based economy may reveal inherent difficulties. One way or another, however, the same British population survived these seismic changes, adapting to the necessary social and economic demands of each.

To many observers of the social structure and its extensive welfare provisions in England and Wales at the present time, it must seem somewhat anomalous that a problem of vagrancy is so evident predominantly in the urban sprawls of towns and cities across the country. Some would question why this situation is tolerated or even permitted, and why apparent poverty is so widespread without some or another form of officially sanctioned intervention. To other observers who may be indifferent about the plight of those 'living rough' on the basis that their situation is apparently self-inflicted, it may perhaps be overlooked as a life-style choice that has to be tolerated without interference.

Either way, or for other exculpatory reasons, the deeper question is that of why vagrancy persists, apparently unchallenged, in modern societies within which it should either be deprecated on humanitarian grounds or as posing a direct threat to the lives and health of those involved. In medieval times, as the account in the previous part of this article made evident, vagrancy was strongly resisted on the grounds that it represented an unreasonable burden on the lives of the low-paid but law-abiding populations that were taxed to pay for poor relief, and also because acute shortages of able-bodied labour[24] frequently occurred due to wars, famine and disease. It also

[21] Mine owners expected to make a considerable profit from the industry in which exported coal had decreased significantly after the War, and miners' pay levels had dropped by almost 50 *per cent* in addition to the requirement to work additional hours. The Miners Federation of Great Britain members had the support of the Trades Union Congress (TUC) in their grievance, along with that of the railwaymen, transport companies, printers, dockworkers, and those in the iron and steel industries. On 4th May 1926 matters came to a head when a General Strike was called, and the country ground to a standstill for twelve days with 1.7 million workers on strike and refusing to work. The government had made plans to resist such a strike and maintain essential public services through the enlistment of 'Special Constables' to augment the Police and maintain order which was not seriously threatened due to the TUC's insistence that its support was conditional upon non-violent action by the strikers, and the strike was called off on 12th May 1926. For a more detailed account and excellent bibliography of the circumstances and effects of the strike see: Jessica Brain, *The General Strike of 1926*, at https://www.historic-uk.com/History UK/History of Britain/General-Strike-1926/ [Accessed 02/08/2022.

[22] Robertson, D.H., 'A Narrative of the General Strike of 1926' (1926) 36 (143) The Economic Journal 376. And see also: Keith Laybourn, *The General Strike of 1926* (1993, Manchester University Press) 43.

[23] In the process of creating this account the author is considerably indebted to the Wikipedia Foundation, The Victorian Web organisation, and Historyhome.co.uk for the foundational material variously cited with acknowledgements throughout.

[24] Particularly within the agricultural sector of the national economy which was the dominant source of national wealth and employment.

led to the prevalence of criminal acts such as theft, violence and poaching as bands of vagabonds roamed the country in order to subsist.

Although in contemporary England and Wales such a threat cannot be held to exist to any significant extent, or stemming from groups of homeless vagrants, other considerations have overtaken the presence of such persons within the social *milieu*. Foremost among these is the extent to which drug dependence and alcohol or other substance abuse is evidently prevalent within this sector of the displaced population. The advent of the Coronavirus pandemic and the subsequent emergence of the highly virulent Omicron variant have placed such persons at high risk of infection themselves, and of cross-infection of the wider community around them if they remain unvaccinated or ill and at large.[25]

During the past two or so decades in particular, dependence on illicit and illegal drugs has proved to be both the principal cause and the outcome of vagrancy throughout Western Europe and the British Isles. The scale of the drugs trade in England and Wales is difficult to gauge with certainty, though in 2020 at least 6,000 people died as a direct abuse of classified drugs traded through an extensive network of distribution outlets such as the 'county lines' organisation which is believed to employ up to 27,000 young people as couriers, and makes an annual profit estimated to be in the order of £800 million. Over 60 *per cent* of prisoners received into prisons admitted to having taken Class A drugs, and in a recent survey half of the drug users said they could get cocaine delivered in 30 minutes – half the time it currently takes on average for an ambulance to arrive (Nelson, 2021: 12; Prison Reform Trust, 2021:43).[26]

In addition to these dismal facts, it is probable that thousands more mostly relatively young people will have become enticed into experimenting with 'hard' drugs such as heroin or cocaine, or other so-called 'recreational' drugs,[27] which create a dependency and lead to a lifetime of addiction and criminality to sustain the craving that they induce. Many will eventually enter prisons (both male and female) in which the drugs cultures and the violence that accompanies them will further damage their lives. On release, a sizeable number will become homeless and unable to find employment, and so the cycle of despair will have become completed with more people 'living rough' in the towns and cities of the country.

From a social policy perspective, the situations described above pose some considerable difficulties of resolution. For although engaging in the drugs trade in the possession, supply and distribution of Class A and B listed Controlled Drugs is evidently criminally illegal,[28] other equally dangerous psychoactive substances are manufactured and sold within a 'black market' which operates illegally and under-cover financed by cartels that control the pricing and distribution networks at the 'street level'. The production methods and composition of these substances is of a constantly changing nature which

[25] Vagrant persons of no settled abode are unlikely to have routine access to medical services and practices as registered patients of the National Health Services. They will therefore not attract notifications to attend clinics and treatment centres or have access to remedial medications in the event of becoming ill or infected with contagious conditions.

[26] Here, see: Fraser Nelson, 'Crackdown: A Plan to Tackle Britain's Drug Problem Was Long-Overdue', *The Spectator*, (London, 11 December 2021) 12–13, and Prison Reform Trust, *Bromley Briefings – Prison Factfile*, 2021 (Winter), 43.

[27] Such as amphetamines and other chemically manufactured drugs freely available in clubs or on the streets, and the more dangerous psycho-active substances such as 'spice' 'skunk' 'fake weed', and a variety of other cannabis-related substances.

[28] Under the Misuse of Drugs Act 1981 or Medicines Act 1985, Listed Class A ('Hard' Drugs) and B (some of which are 'Hard' and others 'Soft' Drugs) are prohibited or proscribed substances, possession (etc.) of which constitutes a criminal offence other than in specific medical usage instances. Many other substances such as 'recreational' drugs fall within Class C ('Soft' Drugs) not all of which are illegal to possess unless or until they are listed as such. Cannabis, for instance, falls within this category. For an introduction to this complex situation, see: Leonard Jason-Lloyd, *Misuse of Drugs: A Straightforward Guide to the Law*, (Winchester, Waterside Press 2007).

is kept ahead of the detection technology employed by the governmental agencies tasked to counter drug trafficking.

The proliferation of drugs and their availability has had two main outcomes: first, their disabling effects upon the health and employability of those who become addicted, causing them to become vagrant; and second, the social costs associated with maintaining the 'war on drugs' by police and drug-enforcement agencies in the attempt to reduce the supply of illicit substances, while at the same time providing income and treatment support for those addicted at an estimated overall cost of £20 billion *per annum*.[29]

The costs of supporting large numbers of persons within any society who, due to their circumstances, become unemployed (or unemployable) and vagrant are a questionable but far from a modern phenomenon.[30] The Poor Law history described earlier provides ample evidence of this fact from the time of the Settlement Act 1662[31] and onwards. However, it took the entire Eighteenth Century and the Workhouse Test Act 1723 subsequently to establish the Workhouse System to absorb the growing numbers of destitute and unemployed citizens who sought accommodation, food and protection within it.[32] Eventually, however, even the workhouse system became overloaded, and the able-bodied were given 'Outdoor Relief' and were expected to gain employment within the community wherever they could find it.

However laudable and necessary the concept of Poor Relief might have appeared to be, and the Workhouse System might have appealed to Parliament in London, it was deeply flawed at the local levels of the towns and parishes that had to administer it. The social structure of government in England and Wales until the Nineteenth Century was founded on the supremacy of a remote Parliament in London focused on national and international affairs and law-making, leaving it to the cities, towns and parishes of the countryside to handle the economic aspects of national life and local affairs.

Administration of the Poor Relief system was thus placed in the hands of locally appointed tax collecting officials (Collectors of Alms) employed by town and parish councils, and whose honesty could not be guaranteed, and local magistrates who were responsible for administering fines for the enforcement of compliance with local rates of tax contributions from the public.[33] This did not, however, preclude the rapid development of a widespread network of town and parish workhouses during the Eighteenth Century until by 1776 almost two-thousand parish- and city-based workhouses were in operation in England and Wales housing some 100,000 paupers (see, e.g., Thompson, 1963).[34]

This brief backward glance suggests strongly that while the workhouse movement and poor relief were a justifiable expense for the support of the destitute, aged, infirm, and women with children, it was not appropriate insofar as able-bodied and employable

[29] As Nelson (2021, *op. cit.*) has indicated, the actual costs are so widespread among government departments and other non-governmental and charitable bodies as to be difficult to calculate with certainty. Some £600 million is being spent on treatment and prevention, but the overall cost of drug-related harm to society stands at around £20 billion *per annum*. (*Ibid.* 13).

[30] Particularly so where those concerned have histories of truanting from school, exclusion due to persistent misbehaviour, families in which illegal drug-taking or alcohol abuse are prevalent, and criminal offending is condoned.

[31] See: p.4 *supra*.

[32] See: Gilbert's Act 1782 at pp.5–6 *supra*. However, it will be recalled that residents in Workhouses received no income for the work they were obliged to do in return for their accommodation etc..

[33] Here, see: Paul Slack, *The English Poor Laws 1531–1714*, (Macmillan 1990) 59–60. However, well-intentioned as the Workhouse System may have been, it effectively excluded many of those who could prove no 'settlement' or place of abode, others involved in seasonal work only, vulnerable and exploited persons escaping from abusive domestic or other employers, and those who became physically infirm as a result of occupational accidents or suffering from long-term illness.

[34] See: E.P. Thompson, *The Making of the English Working Class*, (1st edn, Gollancz Ltd. 1963) 147.

adult males and childless women were concerned, because they could reasonably be expected to find employment without support.

Returning to the contemporary situation in England and Wales and the social desirability of reducing and ultimately eradicating 'living rough' in public places, it appears that an entirely new social action paradigm to resolve the situation has become a necessity. This much stated, however, difficulties arise. The Poor Law experience indicates emphatically that, following Parkinson's Law,[35] the more the capacity of a process that is provided, the more the work done will expand to fill it. This became very much the case within the Workhouse System as it expanded during the late Eighteenth and early Nineteenth Centuries until as the Twentieth Century approached and it had become overloaded.[36]

It would seem to be the case that a considerable number of those who 'live rough' are not criminal persons and do not live that way with criminal intent but do so because they perceive there to be no alternative to doing so. It becomes questionable, therefore, to 'criminalise' their behaviour, however inappropriate it may be considered to be, because it is not a matter of choice but rather one of survival. Others of them may indeed have criminal records, possibly for possession of controlled drugs or other non-violent or serious offences, but their present behaviour might not, *ceteris paribus*, justify their apprehension other than perhaps temporarily on humanitarian grounds. Therefore, if involuntary removal is to be considered, it should be to some place where their safety and their personal situations could be assessed with a view to assistance and desistance from vagrancy.

The experience of the Vagrancy Acts of 1495 and 1531 strongly indicated the uselessness of measures designed to 'move vagrants on' from one area to another, either punitively[37] or by *dictat*, which merely transferred the problems caused by their presence without reducing their numbers. Indeed, even the Poor Relief (Settlement) Act 1662 which required those seeking poor relief to prove an entitlement (or 'settlement') to it through birth, marriage, or apprenticeship in a parish or else return to some place in which they could prove such a settlement, caused more disruption than it resolved (Victorianweb.org, 2002:17).[38]

As was indicated in Part II of this article, the solution to these difficulties was resolved in part by the genesis of the Workhouse System during the Eighteenth Century and onwards, though it merely contained the problems of homelessness and poverty to an extent rather than resolving the causes of them. In the present circumstances in England and Wales a somewhat different procedure is evidently required if these symptoms of social deprivation and isolation are to be overcome to an acceptable extent. A possible means of doing so is outlined in the Part IV of this analysis which follows. It is, however, a model based upon non-criminalising social restoration and responsible citizenship rather than upon the coercive social control and stigmatisation of already disadvantaged and marginalised persons.

Another of the problems arising from the Poor Law experience described in this account is that of deciding how, and at what administrative level(s), contemporary forms of relief for the homeless and vagrant population should be administered without

[35] Cyril Northcote Parkinson, 'Parkinson's Law or The Pursuit of Progress' *The Economist* (London, November 1955) 1.

[36] As Workhouses had to be provided and financed at the taxpayer's expense, means had to be found to reduce the demand for places, and the Outdoor Relief process for able-bodied workers was implemented. In addition, a Poor Law Commission was established as a function of central government in the Poor Law Amendment Act 1834.

[37] By such measures as imposing three days and nights in the 'Stocks' on bread and water, or by whipping them at the parish boundary and driving them elsewhere.

[38] See: http://victorianweb.org/history/poorlaw/settle.html [Accessed 27/12/21}.

creating a monolithic governmental structure to oversee its operation. As became clear earlier, the operation of the Poor Laws was left to the local level of towns and parishes to resolve through a taxation process based upon almsgiving on an enforceable basis. This tended to alienate the poor and vagrant from the general population and was considerably resented by those taxed to support it.

The situation in contemporary England and Wales is of an entirely different nature, particularly for the homeless existing on charitable giving without any entitlement to benefits in many cases.[39] Perhaps the single unifying thread that through-runs these accounts is the evident fact that throughout the generations there has always been an impoverished and destitute segment in British society combining the impotent and the able-bodied poor reliant upon external charitable support for their existence. Interestingly, however, when Henry VIII ordered the dissolution of the monasteries in the mid-Sixteenth Century, he destroyed with them a widespread network of established charitable religious institutions which the nation has never been able to replace completely.[40]

By way of compensation in contemporary England and Wales there exist a number of charities dedicated to the reduction of homelessness, 'sleeping rough', and vagrancy.[41] Meanwhile, the Vagrancy Act 1824 had been implemented, styled as 'An Act for the Punishment of idle and disorderly Persons, Rogues and Vagabonds in England.' This archaic piece of legislation has never achieved repeal in spite of repeated government pledges to do so up to, and including, the present day. A Parliamentary Consultation Process has recently been completed (from 7th April to 5th May 2022), the results of which are awaited.[42]

IV – CONCLUSION: TOWARDS THE SOCIAL RE-INTEGRATION OF VAGRANCY

One of the most concerning lessons that emerged from the historical account in Part II was the somewhat alarming fact that in spite of the various laws dealing with the poor, vagrants, and their social situations, and the provision of workhouse accommodation instituted before the 1830s, the Workhouse System had become over-populated to an extent at which its cost became nationally unsustainable. Even the principle of 'lesser eligibility' (q.v.) notionally applied to workhouse admissions in the Report of the Poor Law Commission of 1832 had failed to reverse that situation since it was never fully implemented.[43]

This much noted, the Poor Law Amendment Act 1834[44] had recognised the need for a national network of Workhouse Unions under the direct control of three Poor

[39] Such as Unemployment, Housing and Social Care support to provide medical treatment or addiction assistance.

[40] This was because many of the monasteries and priories destroyed in the dissolution had within their boundaries space to provide accommodation for travellers, people locally destitute and homeless, and medical care facilities for the aged, the sick and the injured, the able-bodied among who would work to maintain the life of the establishment and repay its charitable care for them.

[41] Prominent amongst these charitable bodies are Shelter, Centrepoint, Crisis UK, St. Mungo's, The Salvation Army, Glass Doors, and Emmaus. The organisation The Big Issue has also been promoting abandonment of the Vagrancy Act 1824 in its periodicals.

[42] See: www.gov.uk/government/news/consultation-launched-on-replacing-the-vagrancy-act. [Accessed 15/08/22]. Press Release from the Department for Levelling-Up, Housing and Communities, 7 April 2022.

[43] See: S.G. Checkland and E.O.A. Checkland (eds.), *The Poor Law Report of 1834* (Pelican Books Reprint 1978) 338. It arose due to the acute shortage of agricultural products (in particular imported grain) during the Napoleonic Wars, and the subsequent depression of wage levels across the agricultural sector of the national economy which drove many labourers and their families into poverty.

[44] The full title of the Act was: An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales [4 & 5 Will. IV cap.76].

Law Commissioners for England and Wales, and answerable to one of the Principal Secretaries of State with a requirement to compile annually a 'general Report of their Proceedings' to be laid before both Houses of Parliament for approval (Chapters II and V). Subsequent Chapters of the Act specified in considerable detail how the Act was to be implemented by the Boards of Guardians and Workhouse Masters with legal penalties for non-compliance. (Bloy, 2002: 1–3).[45]

Here, it becomes possible to perceive a skeletal structure which might serve as a blueprint for dealing with the social challenges posed by vagrancy in the contemporary context of England and Wales. At the least, the 1834 Act proposed a national structure subject to annual parliamentary approval, a geographically based implementation model with defined oversight, and a process for provision and delivery of a regulated social service at the local level which survived for more than a century with certain necessary modifications as was described in Part II previously.

One of the social challenges implied by such a development would be that of ensuring that the entire operational structure did not, as has all too frequently occurred in recent years, result in the creation of a massive, over-centralised, and controlling governmental departmental bureaucracy[46] at the expense of providing effective service delivery at the front line level of the consumer.

A second and essential social challenge in the particular circumstances involved in this article would arise from the need to avoid 'criminalising' the process by which vagrancy reduction should be given operational effect without stigmatising the persons subject to it. Many of them may not have an antecedent criminal record, or any intention of acting in a criminal manner: rather, they are the victims of dysfunctional social circumstances not necessarily of their own choice or causation.[47] Therefore, to add a further dimension of disapprobation to their situations would be both counter-productive and likely to encourage rejection of the process. Even in the cases in which previous criminal offending is an evident factor, the entire purpose is to assist them to accept the desirability of a non-vagrant lifestyle, and a return to responsible citizenship in their own interests and those of the wider public around them who might find their situation disturbing.

Bearing in mind these factors, and recalling the model set up in the 1834 Act, it would seem appropriate for a network of small but secure hostels to be established in major cities and towns throughout England and Wales to which those people found 'living rough' might be escorted and admitted.[48] These hostels, centrally registered, approved and inspected, would provide accommodation, food, clothing and assessment of their individual situations[49] and employability as a social service in return for participation in supervised domestic and maintenance duties during the assessment period.[50]

The criteria for removal and escorting of vagrant persons from public places would necessarily require careful specification to avoid, insofar as is possible, creation of a

[45] Bloy's Victorian Web document *The Poor Law Amendment Act: 14 August 1834* was compiled from a source publication by N. Gash, *The Age of Peel*, (Edward Arnold 1967) [Accessed 29/12/2021].

[46] Such, for instance, as the Ministry of Justice created in 2007 has proved to become. See: David J Cornwell. *Prisons, Politics and Practices 1945–2020*: *The Operational Management Issues* (Palgrave Macmillan 2021) 125–144.

[47] Such, for instance, as broken relationships, abusive treatment from partners or family members, accommodation unfit for habitation, drugs/solvent/alcohol dependence, long-term unemployment, etc..

[48] Here see, however, the subsequent text in relation to the criteria for admission to such hostels.

[49] The assessment to include current physical and mental health, addiction counselling where appropriate, employment potential, relationships with families and close others, and the circumstances in which their vagrancy has arisen.

[50] Though each of the major Charities (mentioned previously) has developed its own arrangements for support of the homeless, all follow a similar pattern of provision. Shelter, Crisis, The Salvation Army and Glass Doors operate nationally throughout the United Kingdom. St. Mungo's focuses on the Greater London area, Centrepoint provides specifically for the 16–25 year-old age group, while Emmaus operates in the South Wales Region alone.

public spectacle, the use of arrest or forcible restraint, or of intimidation amounting to a violation of human rights and freedoms. It should therefore be performed on a statutory basis,[51] but whether a new Vagrancy Act would be necessary might have to be decided. It would remain for consideration what officials should be authorised to perform this duty, and preferably on a non-uniformed basis to reduce its public impact as far as possible.[52]

Once safely lodged in a hostel, those admitted should be required to remain within the premises for at least the period of time necessary to complete the assessment process before leaving for any reason other than to attend necessary clinical or medical treatment appointments at a local hospital escorted by a member of the hostel staff. This period of individual 'social quarantine' should be supervised by a personal mentor, or 'key worker', member of the hostel staff allocated to each individual for the duration of their stay in the facility until the admission assessment process has been completed, and thereafter as appropriate.

Every resident within a hostel should have his/her own bedroom with *en suite* shower, basin and lavatory, and be expected to keep them clean and tidy to the standard found on entry. Meals to meet dietary requirements would be provided in a communal dining room with an adjacent sitting room equipped with television and soft furnishings. Those remaining beyond the assessment period would be expected to undertake domestic employment on a daily basis to assist in maintaining the regime of the hostel as directed by the Warden and permanent staff.

The responsibility for overall provision, staffing, regulation, inspection, and operation of hostels on a regional basis would seem to rest somewhere between the former Department for Health and Social Security (DHSS) and now the Department for Work and Pensions (DWP), and Social Services Departments (SSDs) in a manner that would have to be decided and legislated nationally – even possibly on a separate Agency basis.[53]

The Homelessness Reduction Act 2017 c53 passed through Parliament with a raft of provisions relating to the duties of Local Authorities and other public bodies in dealing with homelessness in England and Wales. The Act should have presented an ideal opportunity for repeal of the Vagrancy Act 1824 with its criminalising implications, but the opportunity was lost due to concerns expressed by police and local authorities in areas of the country still using the Act to prosecute rough sleeping and begging.[54] Instead, the Act somewhat self-consciously focused on definitional issues and the duties of local authorities to provide services for the homeless regardless of the fact that their overall budgets had been reduced by some £1 billion *per annum* since 2007–8. Further spending cuts were also imposed on the DWP budget and spending on homelessness services from 2020 onwards which the leading Charities (NSPCC, Crisis and St. Mungo's) attempted to forestall in negotiation over the passage of the Homelessness Reduction Act 2017 through Parliament (see: Hudak, *op. cit.*, 22–3 and *passim.*). Though the Act has been broadly welcomed as an indication of the intention of the Government to improve homelessness service provision, the way ahead remains uncertain.

[51] Similar to the provisions for the detention of persons under Mental Health Act legislation with a view to subsequent sectioning. An Order or Warrant for such temporary detention made by a Justice of the Peace and served on the individual at the time of detention might suffice for this purpose.

[52] Possibly by a team comprising two Police Officers in plain clothes and a qualified Social Worker.

[53] Any further specification in this regard evidently lies beyond the scope of this article to suggest.

[54] Here see: Centrepoint, St. Mungo's and Crisis, '*Adjournment Debate Briefing*', 28 August 2020 [Use of the 1824 Vagrancy Act – Layla Moran MP, 29 January 2019], at: https://centrepoint.org.uk/about-us/blog/everything-you-need-to-know-about-the-vagrancy-act [Accessed 11/08/2022]. For a comprehensive assessment of the Homelessness Reduction Act 2017 see: Tess Hudak, *The Homelessness Reduction Act of 2017*, Worcester: Worcester Polytechnic Institute, Undated.

The charities Centrepoint, St. Mungo's and Crisis presently jointly spearhead the initiative to have the 1824 Act repealed. (See: e.g. Crisis, 2018: 28).[55] Each of them relies extensively on financial donations from the public to maintain this initiative and their continuous support to homeless people in England and Wales.

Within the scope of this Article an attempt has been made to trace and describe the origins and nature of vagrancy in England and Wales from the early Poor Law era until the present day. It is a sombre reflection that the social spectre of poverty and deprivation among the most vulnerable sector of the national population should have persisted for so many centuries and have remained largely unresolved within a relatively wealthy national democracy in the Twenty-First Century in such an evident manner.

Whatever the causes of vagrancy (or 'living rough') have been and remain throughout this history, some of them imposed, others self-inflicted, the huge differences of wealth distribution between the richest and the poorest members of British society have been structurally maintained – seemingly carelessly or deliberately – throughout our history.

The vagrants of the 2020s differ little from those of the 1520s. Homeless whether accidentally or deliberately, friendless, reliant upon charitable giving, victims of ill-health, close to starvation, without employment, and prone to addiction in one form or another, they roam abroad. Early laws made to curb their relatively minor criminal predations[56] became laws to limit their social mobility, but little else changed. The countryside outlaws of the 1500s ultimately became the urban outlaws of the present century in which opportunities for temporary shelter and anonymity in towns and cities became more abundant.

The history of the Poor Law era is replete with lessons about how not to resolve the poverty of the poorest members of our society: that much has emerged with clarity in these pages. Little has emerged about how this could have been done better because the errors of the past have become the legacy of the present. A tentative prescription for engaging with this now deeply engrained social problem has been offered as a starting point for such a process in the latter part of this analysis, but it is only a starting point. How it could be developed requires much further consideration. The Law in its majestic inequality, and with a small amount of positive discrimination, could surely do better.

[55] See: https://www.crisis.org/media/237532/an_examination_of_the_scale_and_impact_of_enforcement_2017_pdf. [Accessed 17/08/22]. And, see also: Crisis Monthly Magazine 'Spotlight on Services', (London: Crisis), 28 August 2020.

[56] Such as theft of food, poaching, begging etc..

REFORMING HEALTH SYSTEM GOVERNANCE IN THE KURDISTAN REGION IN IRAQ (KRI) IN THE WAKE OF THE PANDEMIC

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ABSTRACT

At its most basic level, Health System Governance (HSG) is the state of affairs regarding use of governance within a given health system. Integrating some of the more partial definitions in the discourse, we suggest that it entails a mix of health system focused strategy and related policymaking, organisation, co-ordination, and regulation. Whilst there has been considerable theoretical work done on what constitutes effective HSG, there are numerous jurisdictions in which weaknesses in its operation have yet to be properly explored, characterised and addressed.[1] This paper draws on the experience of Kurdistan Region of Iraq (KRI) as a very pertinent example. We develop a more complete analysis of the weaknesses in KRI HSG and their links to systemic weaknesses in the quality of healthcare in this jurisdiction. We also provide an understanding of how these weaknesses have influenced the impact that the pandemic has had on the health system and population health.

HSG reform, we argue, should always have been treated as urgent but now has become even more so because of the ongoing shocks and aftershocks of the pandemic and also the growing potential for other dangerous viruses to emerge in human beings; spreading rapidly through the KRI population. In particular, we argue that it is urgent to strengthen cross-sector collaboration, public health, and risk management initiatives, as well as a need to shift towards evidence-based healthcare practice, more efficient use of scarce resources, and to improve staff management. As well as recommending specific policies in these areas, we draw on the 'inputs-processes-outputs' governance framework of Baez Camargo and Jacobs[2] to help define and visually map the health service outcomes that they could give rise to.

INTRODUCTION

The concept of governance has been examined in numerous disciplinary contexts over a considerable period of time with variant notions of its meaning and scope resulting.[3] Nonetheless, the concept of Health System Governance (HSG) is relatively new compared to that of Governance more broadly.[4] Some definitions of it are heavily regulatory

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1 Siddiqi S., et al, *Framework for assessing governance of the health system in developing countries: Gateway to good governance* (2009) Health Policy 90, 13–25, at 13; Anonymous, *Developing governance to foster healthcare quality in Kurdistan Region of Iraq* (2020).

2 Baez-Camargo C., and Jacobs E., *A Framework to Assess Governance of Health Systems in Low Income Countries* [2011] Basel Institute on Governance 5–22.

3 Pyone T. et al, *Frameworks to assess health systems governance: a systematic review* (2017) 32(5): 710–722. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5406767/ (accessed 21 June 2022).

4 *Ibid.*

in focus. For example, Abimbola describes it as the *"making, changing, monitoring and enforcing the rules that govern the demand and supply of health services."*[5] However, the systemic element of it can be said to point to a need to incorporate high-level strategy and implementation into its definition as Transparency International note that it "determines the primary objectives of a health system and the direction of policy and legislation needed to achieve these."[6]

Combining these ideas, the World Health Organisation (WHO) have suggested that HSG entails "a wide range of steering and rulemaking related functions carried out by governments/decisions makers as they seek to achieve national health policy objectives . . . "[7] The systemic element of HSG can extend to strategy and implementation at lower levels – for example, in healthcare regions and even at the local healthcare organisation level. In this regard, the WHO Department of Health Systems Governance and Financing have made a useful distinction between 1) broad and 2) narrow notions of governance.[8]

The former is about "politics, policy, public administration, the interaction of these with civil society and the private sector, and the effects the various institutions have on socio-economic outcomes."[9] Whereas the latter can be said to refer to "the oversight, control and incentive mechanisms that are used to hold any particular institution accountable to its owners or founders, and to align the objectives and interests of the institution's management with the objectives of its owners or founders."[10] Governance within the health sector, as any other, involves a combination of both.[11] Nonetheless, in this paper we are largely concerned with the former as we are focused more on the health system as a whole than a particular analysis of a sub-element of it.

Allied to work to define it, significant efforts have been made to analyse when HSG is effective. However, many jurisdictions continue to lack a comprehensive appreciation of the state of their HSG and its impact on their healthcare systems. Like many lower and middle-income jurisdictions, the Kurdistan Region of Iraq (KRI) is a case in point. As a platform for understanding this we begin this paper by outlining the geographical, political, and economic context of KRI and key structural issues faced by its healthcare system. We then proceed to analyse the state of KRI HSG and its relationship to healthcare quality prior to the pandemic. Here we draw both on published research and the hitherto unpublished findings from semi-structured interviews with KRI policy makers, health service leaders and healthcare practitioners conducted by the first author and overseen by the second author.

In the third part of the paper, we draw on scholarly research to provide a better understanding and contrast of how KRI HSG and healthcare quality have fared in the course of the covid pandemic. In particular, we illustrate how weaknesses in strategic mobilisation of policy, resource and action against SARS Cov-2 virus have made a clearly significant, if not precisely quantifiable, contribution to the harm that the pandemic has

[5] Abimbola S., et al, *Institutional analysis of health system governance* (2017) Health Policy and Planning, 1337–1344, available at https://www.researchgate.net/publication/318699090_Institutional_analysis_of_health_system_governance (accessed 6 September 2022).

[6] Transparency International Global Health, *Health System Governance* (2022) available at https://ti-health.org/health-system-governance/ (accessed 6 September 2022).

[7] WHO, *Health Systems: Governance* (2020) https://www.who.int/healthsystems/topics/stewardship/en/ (Accessed 8 February 2020).

[8] *Ibid* (WHO, 2020).

[9] WHO, *Health Systems Governance for Universal Health Coverage: Action Plan* (2014) 9 https://www.who.int/universal_health_coverage/plan_action-hsgov_uhc.pdf (accessed 30 July 2022).

[10] WHO, *Health Systems Governance for Universal Health Coverage: Action Plan* (2014) 9 https://www.who.int/universal_health_coverage/plan_action-hsgov_uhc.pdf (accessed 30 July 2022).

[11] James N. Rosenau, *Along the domestic-foreign frontier: Exploring governance in a turbulent world* (1997) 34.

caused to health and health systems. So too have pre-existing weaknesses in the state of KRI HSG and healthcare quality. In the fourth and fifth parts of the paper we consider and recommend policies as preventative and responsive strategies. In the final present a visual process map that identifies the outcomes these recommendations would have for the KRI health services, drawing to this end on the on the 'inputs-processes-outputs' governance framework of Baez Camargo and Jacobs.[12]

1. KRI GEOGRAPHICAL, POLITICAL AND ECONOMIC CONTEXT AND THE STRUCTURAL ISSUES FACED BY ITS HEALTHCARE SYSTEM

Kurds number over 25 million and are identified as a distinct ethnicity primarily by ancestry, language, culture and, to a certain extent, even religion. The Kurdish population has long had a strong tendency to want that distinctness to be reflected and defended by political autonomy in the form of independent statehood. The Treaty of Sevres (1921) anticipated that Kurds would have their own state sandwiched between Turkey to the West, Armenia to the North, Persia to the East, and Mesopotamia and Syria to the South.[13] However, the Treaty was not ratified by Turkey and was replaced by the Treaty of Lausanne (1923)[14] under which the notion of a Kurdish state is not recognised. Since then, the Kurds have remained one of the World's largest ethnic groups not to have their own state.[15] Regionally speaking, over 43% live in Turkey, 31 % in Iran, 18% in Iraq (mostly in the KRI) and 6% in Syria.[16] These states have tended to have regimes that disrespect Kurdish distinctness. The most infamous example is the Baathist regime of Iraq. It agreed considerable political autonomy for the KRI population in 1970 but only in a manner that was hollow, having redrawn the boundaries to exclude vast oil reserves that had been on the fringes of Kurdish lands.[17] The regime also moved to displace many Kurdish farmers with Arabs from the South. After putting down a revolt in 1975, the regime moved to displace many more Kurdish farmers from areas bordering Turkey and Iran in order to create 'cordon sanitaire.'[18]

In 1980, after Iraqi garrisons in the North were abandoned or reduced in size at the start of the Iran-Iraq war, the Kurdish Peshmerga stepped into the breach and, having allied themselves with Tehran, were subject to severe reprisal from the Iraqi regime in 1983.[19] With all of this context in mind, the regime treated the winding up of the Iran-Iraq war on Iraq's terms as an opportunity to mount its most crushing anti-Kurdish drive from 1987–9. This so-called Anfal campaign utilised military, security, and civil forces to wreak extreme and systematic destruction onto the Kurdish population. Gross violations of rights included mass summary executions and disappearances, widespread use of chemical weapons, wholesale destruction of some 2000 villages and a number of larger towns, looting, arbitrary arrest, arbitrary long-term detention, and mass

[12] Baez-Camargo C., and Jacobs E., *A Framework to Assess Governance of Health Systems in Low Income Countries*, [2011] Basel Institute on Governance 5–22.

[13] Hasan F. M., *A quantitative analysis about the prevalence of PTSD after the chemical attack I Halabja/Kurdistan*, Iraq (2010) European Psychiatry, 344.

[14] Saeedpour V. B., *Kurdish Hopes, Kurdish Fears: a survey of Kurdish Public Opinion* (1992) Kurdish Studies 5, at 1–30.

[15] Clémence S., and Marie Le R., *'Knowledge, ideology and power. Deconstructing Kurdish Studies'* [2006] European Journal of Turkish Studies, Power, ideology, knowledge – deconstructing Kurdish Studies 5, 1–54, at 19.

[16] WHO, *Patient safety: Safer Primary Care* (2014) at <https://www.who.int/patientsafety/safer_primary_care/en/> (Accessed 5 January 2021).

[17] Human Rights Watch, *Anfal Campaign Report* (1993) Available at: https://www.hrw.org/reports/1993/iraqanfal/ANFALINT.htm (Accessed 17 Oct 2022).

[18] Robert Olson, *The Kurdish Question in the Aftermath of the Gulf War: Geopolitical and Geostrategic Changes in the Middle East* (1992) at p. 475.

[19] Saeedpour (n21).

displacement.[20] In totality, it was nothing short of a genocide that is estimated to have killed up to 182.000 Kurds.[21]

The 1991's uprising against the regime resulted in formal recognition of the Kurdish area as a semi-autonomous region under the Iraqi constitution.[22] However, the degree to which KRI is economically autonomous has varied. Under current arrangements the Kurdistan Regional Government (KRG) has limited control over its resources and the region is dependent on Iraqi central government for disbursement of funds.[23] In theory, 17% of the Iraqi central government budget is allocated for disbursement to the KRG, but political instabilities and conflicts in relationship have led to instances of delay in disbursement and even de-allocation.[24] Unfortunately, the KRG only allocates 2.5% of its total budget to the health sector,[25] meaning that there is no 'meat on the bone' to cope with this situation which has resulted in delays in paying practitioner's salaries and, in some cases, the termination of their employment.[26]

On a population level, and in addition to problems of unmet needs,[27] and substandard health care,[28] health in the KRI leaves a lot to be desired.[29] As one commentator has observed, 'the rural poor suffer from malnutrition and cholera, while the urban middle and upper classes deal with issues of obesity and Type 2 diabetes.'[30] Whilst well directed additional funding has the theoretical capacity to bring great benefits, to realise these practically is going to require substantial prior improvements in health system governance. Most notably, there is a need to reform the existing initiatives related to the follow-up system, the system for making practitioners and services accountable, the distribution of limited resources, and patient safety strategies. One of the few good consequences of the Iraqi invasion in 2003 was that it led to the KRG being further empowered. Although this has resulted in the expansion of investment,[31] ineffectual regulation of the budget has led to issues of clientelism and has prevented the advancement of a publicly funded healthcare sector.[32] Instead, the limited budget is mostly spent on private health sector, which are known to be excessively high-priced and that not every patient can afford to pay for healthcare.[33]

[20] *Ibid* (n25).

[21] *Ibid.*

[22] Maylroie L., *The Kurdish Uprising, Part I: 25th Anniversary* (2016) Kurdistan24.net at <http://www.kurdistan24.net/en/Analysis/ad973e42-b6db-4170-ab87-f5ebdad891aa/The-Kurdish-Uprising--Part-I--25th-Anniversary> (Accessed 5 January 2021).

[23] Anthony C. R. et al, *Health Sector Reform in the Kurdistan Region — Iraq: Financing Reform, Primary Care, and Patient Safety* (2014) 5 RAND Corporation, 6.

[24] The Kurdish Project, *Kurdistan Oil: The Past, Present and Future* (2015) at <https://thekurdishproject.org/kurdistan-news/kurdistan-oil/> (Accessed 5 January 2021).

[25] Tawfik-Shukor A., and Khoshnaw H., *The impact of health system governance and policy processes on health services in Iraqi Kurdistan* (2010) BMC International Health and Human Rights, 1–7.; Invest in groups, On Track for Expansion: Health (2021) at https://investingroup.org/review/245/on-track-for-expansion-health-kurdistan/ (accessed 21 May 2022).

[26] Saeedpour (n21).

[27] Al-Kli S, *The new Iraqi government and the Kurdistan Region,* Middle East Institute (2020) available at <https://www.mei.edu/blog/new-iraqi-government-and-kurdistan-region> (Accessed 5 January 2021).

[28] Moore M. et al, *The Future of Health Care in the Kurdistan Region—Iraq: Toward an Effective, High-Quality System with an Emphasis on Primary Care* (2014) RAND Health 1–254, at xvii.

[29] WHO, *Report on the Regional Consultation on improving quality of care and patient safety in the Eastern Mediterranean Region, Jeddah Saudi Arabia* (2014) 1- 31, at 11–12.

[30] Tawfik-Shukor A., and Khoshnaw H., *The impact of health system governance and policy processes on health services in Iraqi Kurdistan* (2010) BMC International Health and Human Rights, 1–7.

[31] Cetorelli V. and Shabila N. P., *Expansion of health facilities in Iraq a decade after the US-led invasion, 2003–2012* (2014) Conflict and Health 8: 1–7

[32] Aboulenein A. and Levinson R. *The medical crisis that's aggravating Iraq's unrest* (2020) available at <https://www.reuters.com/investigates/special-report/iraq-health/> (Accessed 5 January 2021).

[33] Aboulenein A. and Levinson R. *The medical crisis that's aggravating Iraq's unrest* (2020) available at <https://www.reuters.com/investigates/special-report/iraq-health/> (Accessed 5 January 2021).

2. PRE-PANDEMIC GOVERNANCE ISSUES IN KRI HEALTH CARE

Whilst bodies like the WHO, the NHS Leadership Academy, and the Royal College of Nursing have provided useful categorisations of the key dimensions of HSG,[34] in this paper, we home in on those HSG dimensions that are most in need of reform in the KRI. The lead author's doctoral research has shown that these include cross sector collaboration, public health management, risk management, policy formulation, and accountability mechanisms.[35] Cross-sector collaboration consists of fostering relationships with relevant stakeholders.[36] In the KRI context, there has been criticism of the quality of key relationships between the Ministry of Health (MOH), the Ministry of Higher Education,[37] the Iraqi government,[38] local NGO's, and international health organisations.[39] Whilst Article 14 of the Iraqi Constitution 2005, highlights the importance of continuous liaison with national and international bodies,[40] it is found that "both Baghdad and Erbil's MOHs lack clear strategic policy directions, resulting in uncoordinated planning and fragmented projects."[41] This appears to be partly a function of weaknesses in leadership, which has significantly affected the process of seeking solutions for improving HSG and reshaping primary health services under the Iraqi public health sector.[42] The key collaboration challenges faced by the KRI health governing authorities include ineffective communication protocols, lack of transparency, and unstable Iraqi government political structures.[43]

Weaknesses in collaboration between the KRI MOH and the Ministry of Education have contributed to ineffective strategies in promoting public health.[44] Initiatives aimed at preventing diseases and promoting health in the KRI are limited and ineffective.[45] For instance, efforts to ensure comprehensive access to water resources, sanitation products, food safety regulations, and community health education that would promote and protect individual's health have been weak.[46] Serious health problems (such as heart attack, diabetes, stroke, cancer, and infectious diseases) are more common than they would be were the public well educated in how to live healthily[47] and this has

[34] NHS Leadership Academy, *Healthcare Leadership Model: the nine dimensions of leadership behaviour* (2013) <http://www.leadershipacademy.nhs.uk/wp-content/uploads/dlm_uploads/2014/10/NHSLeadership-LeadershipModel-colour.pdf> Accessed 4 October 2016; Royal College of Nursing, *A key part of patient centred care is allowing people to engage in their own health and help design health systems. Learn about the four areas where patients are getting involved* (2020) https://www.rcn.org.uk/clinical-topics/clinical-governance/patient-focus (accessed 9 February 2020).

[35] Anonymous, *Developing governance to foster healthcare quality in Kurdistan Region of Iraq* (2020).

[36] Robert Francis (n260); Helena Legido-Quigley (n82) 7; Catherine Hambley (n273).

[37] KRG Cabinet, *Health minister: Top priority is improving primary healthcare* (2006).

[38] C. Ross Anthony et al, *Health Sector Reform in the Kurdistan Region — Iraq: Financing Reform* (2014) Primary Care, and Patient Safety.

[39] WHO, *Iraq: WHO intercountry cooperation yields rich health dividends* (2018) http://www.emro.who.int/irq/iraq-news/who-intercountry-cooperation-yields-rich-health-dividends.html 7 August 2019.

[40] WHO, *Iraq: WHO intercountry cooperation yields rich health dividends* (2018) http://www.emro.who.int/irq/iraq-news/who-intercountry-cooperation-yields-rich-health-dividends.html 7 August 2019.

[41] Ali Towfik-Shukur, Hiro Khoshnaw (n2) 5.

[42] Moore M. et al, *The Future of Health Care in the Kurdistan Region—Iraq: Toward an Effective, High-Quality System with an Emphasis on Primary Care* (2014) RAND Health 1–254, at 172.

[43] Hamzeh Hadad, *Deadlocked and loaded: Iraq's political inertia*, European Council on Foreign Relations (2022) available at https://ecfr.eu/article/deadlocked-and-loaded-iraqs-political-inertia/ (accessed 6 August 2022).

[44] Yaseen Gallali, *The impact of COVID-19 confinement on the eating habits and lifestyle changes: A cross sectional study* (2021) at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8014478/ (accessed 30 July 2022).

[45] Hiwa Omer Ahmed et all, *The life styles causing overweight or obesity: Based on 5 years of experience in two centers in Sulaimani Governorate, Kurdistan Region/Iraq* (2018) International Journal of Surgery at p.22.

[46] *Ibid* (n63).

[47] Teshk Shawis, *Health and education needs in Kurdistan* (2004) at https://www.bmj.com/content/329/7464/s90.1 (accessed 30 July 2022).

significantly increased demand for healthcare services.[48] A study, conducted prior to Covid-19 pandemic, found that in the KRI overweight and obese patients are mostly at risk of long-term medical conditions and that diet-related diseases are on the rise.[49] There are also weaknesses in communication between health professionals and patients. For example, staff are often ill equipped to communicate effectively with illiterate patients, with training on this being insufficient[50] and many of the patients concerned ending up at risk of accidental self-harm, because, for example, they are unable to understand written medication instructions[51]

Risk management is another area that requires reform in the KRI healthcare system. Amongst other things, it entails identifying medical errors and taking initiatives to prevent their reoccurrence.[52] There are a range of systemic issues with the operation of the KRI health system that impinge on this. One is that hospital admissions systems are not organised around the prioritisation of patients with critical conditions, putting them at substantially increased risks of serious harm.[53] Another is the fragmented state of the medical records system. This consists of localised silos of paper and computer-based records that often result in delays in the provision of necessary health information and thereby often delay diagnosis and treatment.[54]

Healthcare policies are a critical tool for managing risks of harm.[55] They involve establishing objectives and setting targets.[56] Within the KRI, political party interferences (also known as clientelism), have adversely impacted objective and priority setting by governing authorities.[57] Often, political values outweigh the development of KRI HSG, and improving the KRI publicly funded healthcare sector is not regarded to be the top priority in the KRI.[58] The public health sector has shortfalls in essential medical supplies, overcrowded wards and overworked staff. The quality of healthcare provided has suffered as a result.[59] The government, by contrast, has significantly invested in the private health sector. The KRI system of accountability operates unevenly due to clientelism. Those with a political party's support are less likely to face professional disciplinary actions and, particularly, it is rare for health service leaders and policy makers (i.e. members of ministerial departments and members of the KRI Department

[48] *Ibid* (n63).

[49] *Ibid* (n63).

[50] Karadaghi G. and Willott C., *Doctors as the governing body of the Kurdish health system: exploring upward and downward accountability among physicians and its influence on the adoption of coping* behaviours (2015) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4464857/ (accessed 30 July 2022).

[51] Yari A. et al, *Measuring the constructs of health literacy in the Iranian adult Kurdish population* (2021) at https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-021–10589-z (accessed 30 July 2022).

[52] UNHCR, *Iraq | UNHCR COVID-19 Update | 10 November 2020* (2020) available at <https://reliefweb.int/report/iraq/iraq-unhcr-covid-19-update-10-november-2020> (Accessed 6 January 2021).

[53] Moore M. et al., *The Future of Health Care in the Kurdistan Region—Iraq: Toward an Effective, High-Quality System with an Emphasis on Primary Care* (2014) 36, at https://www.rand.org/content/dam/rand/pubs/monographs/MG1100/MG1148-1/RAND_MG1148-1.pdf (accessed 30 July 2022).

[54] Merza M. A. et al, *COVID-19 outbreak in Iraqi Kurdistan: The first report characterizing epidemiological, clinical, laboratory, and radiological findings of the disease* 14 (4) (2020) 547–554.

[55] Baez-Camargo (n15) at 9.

[56] WHO, on *Health Policy* (2020) available at <https://www.euro.who.int/en/health-topics/health-policy#:~:text=An%20explicit%20health%20policy%20can,the%20short%20and%20medium%20term> (Accessed 5 January 2021).

[57] Susan C. Stokes, *Clientelism* (2009) The Oxford Handbook of Comparative Politics 4 http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199566020.001.0001/oxfordhb-9780199566020-e-25 Accessed 3 January 2016.

[58] Aboulenein A. and Levinson R. *The medical crisis that's aggravating Iraq's unrest* (2020) available at <https://www.reuters.com/investigates/special-report/iraq-health/> (Accessed 5 January 2021).

[59] Kurdistan Human Rights Association, *A child died due to medical mistake* (2021) available at https://www.kmmk.info/en/2989/2989/ (Accessed 17 October 2022).
Azhin Omer, *A critical analysis of patient safety strategies in Kurdistan Region of Iraq* (KRI) in Global Patient Safety: Law, Policy and Practice (2018) Routledge, at 223.

of Health) to be subjected to disciplinary proceedings.[60] These problems along with the absence of an independent professional regulatory authority have limited accountability for healthcare quality, patient satisfaction, and the effectiveness of use of healthcare resources.[61]

Although, in some instances, those healthcare practitioners without political party's support are held accountable for medication errors, no effective follow-up system is in place to prevent failures re-occurring.[62] With the incident reporting system for KRI patient safety events being ineffective, the root causes of medical errors are often left unfound l and the process of learning from them stymied.[63] Governing authorities have also failed to develop a proper system for compensation for medical negligence, leaving patients with unmet needs for redress.[64]

3. THE IMPACT OF COVID-19 PANDEMIC

The Covid-19 pandemic has affected a total of 230 countries around the globe.[65] The KRI is one of the more adversely affected areas in terms of case numbers per head of population.[66] To date, over 454,849 positive cases have been reported in the KRI population, and in with 7,456 of these cases death has ensured.[67] In the early stages of the outbreak, one study posited that the KRI population have stronger than average immune system due to limited use of alcohol and drugs.[68] However, by the end of May 2020, the number of infected cases had sharply increased, and levels of harm started to escalate shortly after.[69] During this period, health governing authorities took a range of measures to contain the spread of the virus within healthcare facilities, and more generally deal with the added strain to healthcare services.[70] This not only included the restriction of family visitation and the limitation of hospital admissions, but in some instances the KRI health governing authorities had taken extraordinary actions such as the cancellation of non-covid-19 related medical treatments and the closure of primary health services.[71]

The latter inevitably accentuated treatment wait times,[72] and has often led to deteriorations in their conditions and thus ultimately generated additional demand for

[60] Moore M. et al., *The Future of Health Care in the Kurdistan Region—Iraq: Toward an Effective, High-Quality System with an Emphasis on Primary Care* (2014) 36, at https://www.rand.org/content/dam/rand/pubs/monographs/MG1100/MG1148-1/RAND_MG1148-1.pdf (accessed 30 July 2022).

[61] Jangiz K., *Corruption erodes Iraq's health care: German think tank* (2021) https://www.rudaw.net/english/middleeast/iraq/141220212 (accessed 30 July 2022).

[62] Melinda Moore et al (n36) 23.

[63] *Ibid* (n89).

[64] Anthony C. R. et al., *Health Sector Reform in the Kurdistan Region—Iraq: Financing Reform, Primary Care, and Patient Safety* (2014) 77 at https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR490-1/RAND_RR490-1.pdf (accessed 30 July 2022).

[65] WHO, *Coronavirus* (2020) available at <https://www.who.int/health-topics/coronavirus#tab=tab_1> (Accessed 5 January 2021); World meter, *COVID-19 CORONAVIRUS PANDEMIC* (2021) available at <https://www.worldometers.info/coronavirus/> (Accessed 15 April 2022).

[66] Aziz P. Y., The strategy for controlling COVID-19 in Kurdistan Regional Government (KRG)/Iraq: Identification, epidemiology, transmission, treatment, and recovery (2020) International Journal of Surgery 25: 41–46.

[67] KRG, *Situation update: Coronavirus (Covid-19)* (2021) available at <https://gov.krd/coronavirus-en/situation-update/> (Accessed 27 April 2022).

[68] Aziz 2020 (n97).

[69] *Ibid.*

[70] Hussein N. R., *The impact of COVID-19 pandemic on the care of patients with kidney diseases in Duhok City, Kurdistan Region of Iraq,* Diabetes & Metabolic Syndrome: Clinical Research & Reviews 14(2020) 1551–1553.

[71] *Ibid.*

[72] Nidhamalddin, S. J. et al, *Cancer treatment during the COVID-19 pandemic in the Kurdistan Region of northern Iraq* (2020) available at https://ecancer.org/en/journal/article/1096-cancer-treatment-during-the-covid-19-pandemic-in-the-kurdistan-region-of-northern-iraq (Accessed 27 Jan 2022).

healthcare at a time when its provision is depleted.[73] There have also been a range of avoidable failings in the way that the health system has operated. Hospitals have lacked a consistently effective system with respect to review of Covid-19 tests results and have not done enough to protect patients and those visiting them at Covid-19 hospitals from becoming infected. A recent study suggests that risks of acquiring infectious diseases and poor hygiene in resource-limited healthcare settings have become a dominant issue,[74] with non-compliance with hand hygiene rules increasing risks of becoming infected with coronavirus.[75]

The burden of the pandemic has fallen too heavily on the public health sector due to the reluctance of the private health care sector to treat Covid-19 patients and collaborate effectively. Public health sector workers have faced a direct threat to their health from the virus, often exacerbated by shortages of PPE[76] and an indirect threat in the form of the stresses emanating from additional demands being placed on the mental, physical. With respect to the latter, a recent study by Sabir suggests that the majority of frontline nurses and physicians in the KRI have been screened positive for Post-traumatic Stress Disorder, anxiety, and depression during the course of the pandemic.[77]

Another recent study by Saeed (2021) found the majority of participants were suffering from moderate to high level of stress.[78] Additional governmental strategies on managing mental health risks and providing relevant support for frontline healthcare practitioners at the time of global health emergencies are needed. Ineffective governance of healthcare finance has exacerbated that threat in various ways. Staff pay has remained poor in the pandemic and post pandemic period and contributed to problems in morale and staff shortages which are in turn linked to long hours of working.[79] At certain points workload has become unmanageable, leading to unsafe environment for patients. This was particularly so when the Federal Iraqi Government suspended the national budget in May 2020,[80] an action which led to anger and a strike amongst frontline health workers in the KRI public health sector.[81]

The response of the public healthcare sector to the pandemic appears to have been impaired partly by a lack of political will to appropriately fund it.[82] One of the factors undermining the efforts of healthcare workers on the ground to best allocate resources has been the poor state of maintenance of medical information alluded to in the prior section. In the case of Covid-19 specifically it has often made it difficult to identify

[73] Hussein 2020 (N103).

[74] Aziz Baban T. A. et al, *Occupational Toxicity and Health Hazards of the Healthcare Providers at Healthcare Facilities in Sulaimani City*, Iraq (2021) at https://www.researchgate.net/publication/357262244_Occupational_Toxicity_and_Health_Hazards_of_the_Healthcare_Providers_at_Healthcare_Facilities_in_Sulaimani_City_Iraq (accessed 25 July 2022).

[75] Moued I. et al, *Observational Study of Hand Hygiene Compliance at a Trauma Hospital in Iraqi Kurdistan* (2021) at file:///C:/Users/VOP3OMERA/Downloads/Observational_Study_of_Hand_Hygiene_Compliance_at_.pdf (accessed 25 July 2022) p 795.

[76] Shehata D. et al, *The COVID-19 Pandemic in the Kurdistan Region of Iraq*, at https://hphr.org/29-article-shehata/ (accessed 2 July 2022).

[77] Sabir D. K., *Psychological Impact of COVID-19 on Healthcare Workers in the Kurdistan Region, Iraq* (2021) at https://www.researchgate.net/publication/356184547_Psychological_Impact_of_COVID-19_on_Healthcare_Workers_in_the_Kurdistan_Region_Iraq (accessed 25 July 2022).

[78] Saeed B. A., et al, *Stress and anxiety among physicians during the COVID-19 outbreak in the Iraqi Kurdistan Region: An online survey* (2021) at https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0253903 (accessed 25 July 2022).

[79] Hussein 2020 (N103) at p 1553.

[80] Shehata (n109).

[81] *Ibid.*

[82] Skelton M., Hussain A. M., *Medicine Under Fire: How Corruption Erodes Healthcare in Iraq* (2021) 9, at https://www.kas.de/documents/266761/0/Medicine+Under+Fire.pdf/03f798a0-c431-f3b2-3492-ba3b0448bc58?version=1.0&t=1639479110892 (accessed 1 July 2022).

patients with underlying medical conditions and to prioritise those at higher risks of medical respiratory diseases.

Corruption appears to be an ongoing major problem in the KRI.[83] Indeed, it appears to also be so in Iraq more broadly with Dr. Aizen Marrogi, a former U.S. Army Surgeon General liaison in Iraq, being moved recently to call it the number one issue, exemplifying this by noting that *that '(t)he first, second day after medicines arrive, they disappear. The government pays for a lot of employees that don't exist.'*[84] At the height of the pandemic $14 million was allocated for health personnel, medical supplies, test centres, Covid-19 hospitals,[85] and the repurposing hospital wards into COVID-19 centres.[86] However it was not clear how much of this and other covid related funding was actually spent on its intended purposes. This became the subject of scandal at the early summer 2020, case load peak when a shortage of oxygen in both KRI and Iraq more broadly appears to have been exacerbated by the siphoning off of funds allocated for it.[87]

In Iraq as a whole there has also been an unfortunate bias towards prioritising private health sector profits during the course of the pandemic. Efforts to improve the safety systems of public hospitals have not been strong enough to avert problems in the management of Covid, ranging from the mismanagement of oxygen tanks in Covid-19 wards to the outbreak of fires in health care facilities that have killed over 200 patients.[88] Overall, both the diversion of resources to the private sector and corruption have significantly hindered the public health sector's fight against coronavirus,[89] exacerbated its need to ration, harmed its already weak ability to meet patient needs[90] and damaged its quality more broadly.[91] The KRI health sector's lack of preparedness for global health emergencies and its impacts on patients in the long-term,[92] have heightened the urgencies to reform the governance of KRI healthcare system. In the next two sections we examine post-pandemic governance challenges in further details and discuss measures that can be taken to address covid-19 challenges more effectively; aid the KRI health sector's recovery from the pandemic; and foster better preparedness for future outbreaks of infectious diseases.

[83] Jangiz J., *Corruption erodes Iraq's health care: German thin tank* (2021) at https://www.rudaw.net/english/middleeast/iraq/141220212 (accessed 1 July 2022).

[84] https://www.npr.org/2020/07/01/885274646/in-iraq-rising-virus-cases-and-oxygen-shortages-stoke-outrage-fears-of-chaos?t=1657716523895&t=1658901840019

[85] Shehata (n109).

[86] *Ibid.*

[87] https://www.npr.org/2020/07/01/885274646/in-iraq-rising-virus-cases-and-oxygen-shortages-stoke-outrage-fears-of-chaos?t=1657716523895&t=1658901840019

[88] Skelton M., Hussain A. M., *Medicine Under Fire: How Corruption Erodes Healthcare in Iraq* (2021) 9, at https://www.kas.de/documents/266761/0/Medicine+Under+Fire.pdf/03f798a0-c431-f3b2-3492-ba3b0448bc58?version=1.0&t=1639479110892 (accessed 1 July 2022).

[89] Tawfik-Shukor A., and Khoshnaw H., *The impact of health system governance and policy processes on health services in Iraqi Kurdistan* (2010) BMC International Health and Human Rights, 1–7; Qaradaghi G., Willott C., *Doctors as the governing body of the Kurdish health system: exploring upward and downward accountability among physicians and its influence on the adoption of coping behaviours* (2015) at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4464857/ (accessed 25 July 2022).

[90] Nidhamalddin, S. J. et al, *Cancer treatment during the COVID-19 pandemic in the Kurdistan Region of northern Iraq* (2020) available at https://ecancer.org/en/journal/article/1096-cancer-treatment-during-the-covid-19-pandemic-in-the-kurdistan-region-of-northern-iraq (Accessed 27 Jan 2022).

[91] Khazan Jangiz, *Corruption erodes Iraq's health care: German think tank* (2021) Rudaw https://www.rudaw.net/english/middleeast/iraq/141220212 (accessed 25 July 2022).

[92] Hussein 2020 (N103) at p.1552.

4. RECOMMENDING HEALTH CARE POLICIES AS PREVENTATIVE STRATEGIES

4.1 Introduction

Health policy is defined by the WHO as '*decisions, plans, and actions that are undertaken to achieve specific health care goals within a society*.'[93] As decisions, plans and actions have the potential of addressing governance issues in health care, it can be regarded as an important tool for improving HSG. Healthcare policies can be established through a number of phases such as identifying healthcare needs, recommending actions that would respond to those needs, and the exploration of healthcare goals that are intended to be achieved. Our theory is that well designed healthcare policies will foster a reduction in harm caused by the ongoing outbreak, ensure better preparedness for future outbreaks and significantly improve HSG overall. Below, we explore how policies designed to improve cross-sector collaboration, public health, and risk management initiatives can be of specific value in preventing the spread of coronavirus and further developing KRI HSG.

4.2 Strengthening Cross-Sector Collaboration

During a pandemic strong cross-sectoral collaboration benefits infection control and mitigates crisis at the domestic level and beyond.[94] Cross-sector partnerships *'. . . can help multiple stakeholders create and deliver value in response to an emergency like a global health pandemic caused by the COVID-19*.'[95] To effectively respond to Covid-19 pandemic and to reach consensus on policies relevant to public spending, travel restrictions and curfews, members of the KRG have had regular gatherings with the Federal Iraqi Government.[96] Further, members of the KRI MOH department have been working with the *Iraqi Higher Committee for Health and National Safety*, in deciding whether to fund initiatives to address impacts of coronavirus (COVID-19).[97]

However, collaborative relationships beyond one's geography are also important – such as with health service leaders from other jurisdictions and with global health organisations ranging from the WHO, UN, UNICEF to health related NGOs.[98] The KRG has collaborated with *Global Alliance for Vaccines and Immunization (GAVI),*[99] and has received over 98,810 vaccinations from international health organisations, including the WHO,[100] In this paper, we suggest that collaborations with these organisations need to strengthen the extent to which they aim at optimising HSG as a whole.[101] The long-term negative legacy that the pandemic has had on healthcare quality[102] has made the case for strengthened collaboration more compelling – not least as regards relationships between the KRI MOH and other government officials, including the ministry of economy and

[93] WHO, *Health System Governance* (2022) at https://www.who.int/health-topics/health-systems-governance#tab=tab_1 (accessed 2 July 2022).

[94] Arsalan A., et al, Adaptive learning in cross-sector collaboration during global emergency: conceptual insights in the context of COVID-19 pandemic (2020) at https://www.emerald.com/insight/content/doi/10.1108/MBR-07–2020-0153/full/html (Accessed 3 July 2022).

[95] Arslan et al, *Adaptive learning in cross-sector collaboration during global emergency: Conceptual insights in the context of COVID-19 pandemic* (2020) available at <https://kar.kent.ac.uk/84254/> (Accessed 5 January 2021).

[96] KRG 2021 (n99).

[97] UNHCR 2020 (n79).

[98] Kurdistan Regional Government, the cabinet of ministers (2020) available at <https://gov.krd/english/government/the-cabinet/> (Accessed 6 January 2021).

[99] UNHCR 2020 (n79).

[100] Shehata (n109).

[101] Aziz 2020 (n97).

[102] Hussein 2020 (N103).

finance with respect to cost implications, and the minister of education on matters relevant to updating medical knowledge.[103] The KRI could learn from Japan which brought medical experts from fields like virology and infectious disease together with government actors, including high ranking bureaucrats,[104]

With regards to the structure of collaborative partnerships between the KRI public and private health sectors, the communication strategies did not run particularly smoothly at the start of Covid-19 pandemic. While the public hospitals were not able to accommodate the overflow, the private hospitals were reluctant in providing medical care and they were only prepared to treat Covid-19 patients at a very high cost. Given the emergency nature of the situation, we would argue that the correct approach would consist of the development of action plans; setting up common goals; and the requisition of space and care at cost.

4.3 Public Health Management

To manage public health and to prevent the spread of coronavirus (COVID-19) disease, it is evident that the KRG had taken a number of measures such as travel restrictions, which applied to those travelling to and arriving from the federal Iraqi provinces, and other countries.[105] The additional measures taken included national lockdown; closure of public places; curfews;[106] and imposition of duties to wear face coverings, keep distance, self-isolating, and regularly taking confirmatory polymerase chain reaction (PCR) tests.[107]

Notwithstanding, due to cultural traditions, stigma, and adverse economic impacts for households, it is found that the restrictive measures were not welcomed by the majority of KRI population and that some were even reluctant to follow the particular rules of social distancing.[108] The government's policies on national lockdown, had not only caused public anger for loss of earnings, and infringements of restrictive rules, [109] but also relaxation of lockdown rules,[110] and a rapid increase in Covid-19 cases.[111] The KRG's decisions in adjusting lockdown rules were subject to criticisms for not including plans to guard those at high risk from coronavirus (Covid-19).[112] Whilst, the KRG embraced a major campaign, involving thousands of volunteer community workers reaching over 80,000 Kurds,[113] and providing over 20.000 daily PCR tests,[114]

[103] Kurdistan Regional Government, *Ibid* (n50).

[104] Keio University et al, *Joint Research Coronavirus Task Force Established to Promote Research and Development of COVID-19 Vaccine for Mucosal Immunity Based on Genetic Findings of the Novel Coronavirus Disease* (2020) https://www.keio.ac.jp/en/press-releases/2020/Jun/30/49–70870/ (Accessed 3 July 2022).

[105] Aziz, 2020 (n97); KRG, 2021 (n99).

[106] KRG, 2021 (n99).

[107] WHO, *Strengthening public health function in the UAE and EMR of the WHO*, Royal Colleges of Physicians of the United Kingdom (2001) 1–114.

[108] Hussain N. et al, *The Impact of Breaching Lockdown on the Spread of COVID-19 in Kurdistan Region, Iraq* (2020) Avicenna Journal of Clinical Microbiology and Infection 7: 34–35

[109] Qadar S. The COVID-19 Pandemic in the Kurdistan Region of Iraq (2021) Harvard Public Health Alumni Bulletin 29(29):1 at https://www.researchgate.net/publication/352180011_The_COVID-19_Pandemic_in_the_Kurdistan_Region_of_Iraq (accessed 27 July 2022).

[110] Hussain N. R., *A sharp increase in the number of COVID-19 cases and case fatality rates after lifting the lockdown in Kurdistan region of Iraq* (2020) p 140.

[111] Hussain N. R., *A sharp increase in the number of COVID-19 cases and case fatality rates after lifting the lockdown in Kurdistan region of Iraq* (2020) p 140.

[112] *Ibid.*

[113] UNHCR 2020 (n79); US Embassy and Consulates in Iraq, Covid-19 Information (2020) available at <https://iq.usembassy.gov/covid-19-information/> (Accessed 6 January 2021).

[114] United Nations Iraq, *Kurdistan Region of Iraq embraces a major COVID 19 awareness campaign* (2020) available at <http://www.uniraq.com/index.php?option=com_k2&view=item&id=12740:kurdistan-region-of-iraq-embraces-a-major-covid-19-awareness-campaign&Itemid=605&lang=en> (Accessed 6 January 2021).

there appears to have been widespread non-compliance with social distancing rules, which is likely to have been a central cause in levels of harm and death.[115]

Due to ineffectiveness of social distancing rules in the KRI,[116] in this paper we recommend policies on Covid-19 related health literacy (CRHL), which could have the impact of broadening public's knowledge about the risks of respiratory infection diseases and ensure full compliances with Covid-19 prevention measures.[117] The fact that those patients with pre-existing health conditions like heart attack, diabetes, stroke and cancer had an increased risks of undesirable Covid-19 outcomes,[118] increasing one's understanding about healthy lifestyle such as nutrition, hygiene, exercise, and eating balanced diet, cannot only limit the number of patients with underlying medical conditions, but also risks of death in Covid-19 cases.[119] A recent cross-sectional study indicates that Covid-19 pandemic has negatively impacted the lifestyle habit of KRI population, whereby it is found that it has led to the deterioration of their lifestyles, including increased sleeping hours and weight gain.[120] Covid-19 vaccine hesitancy is also found to be one of the most prevalent and recent issues in the KRI.[121] Making vaccination campaigns part of health policymaker's strategies,[122] and more generally raising awareness of their capacity to limit serious illnesses and death could possibly encourage take-up.[123]

4.4 Risk Management

Risk management in healthcare involves *"clinical and administrative systems, processes, and reports employed to detect, monitor, assess, mitigate, and prevent risks."*[124] Whilst several methods, including Covid-19 hospitals and PCR test centres, were established to mitigate risks of spreading respiratory infection diseases in the KRI,[125] the health sector has faced numerous challenges in funding Personal Protection Equipment (PPE), disinfection products, and screening/tests. Due to the lack of PPE in the KRI, international efforts were required and as the result the WHO provided KRG with over 20 tons of medical supplies.[126] Furthermore, sharing of records between the Covid-19 hospitals and the PCR test centres has not been seamless as some are kept electronically whilst others are paper based. Without an effective system of prioritising patients, hospitals

[115] Hussain (n66); Aziz, 2020 (n97).

[116] Health Watch Haringey, *Understanding the impact of Covid-19 on Turkish/Kurdish communities* (2020) available at < https://www.healthwatchharingey.org.uk/report/2020–07-23/understanding-impact-covid-19-turkishkurdish-communities-haringey> (Accessed 6 June 2021).

[117] Huimin Wang et al, How to improve the COVID-19 health education strategy in impoverished regions: a pilot study (2022) available at https://idpjournal.biomedcentral.com/articles/10.1186/s40249-022–00963-3#:~:text=A%20good%20level%20of%20COVID,people%20to%20take%20proactive%20preventive (Accessed 17 Oct. 22).

[118] Aziz 2020 (n97).

[119] WHO, *Report on the Regional Consultation on improving quality of care and patient safety in the Eastern Mediterranean Region* (2014) Jeddah Saudi Arabia 12.

[120] Yaseen Galali, *The impact of COVID-19 confinement on the eating habits and lifestyle changes: A cross sectional study* (2021) Food Science and Nutrition at p.2105.

[121] Tahir A. I. et al., *Public fear of COVID-19 vaccines in Iraqi Kurdistan region: a cross-sectional study* (2021) at https://mecp.springeropen.com/track/pdf/10.1186/s43045-021–00126-4.pdf (Accessed 3 July 2022).

[122] Tahir 2021 (n170).

[123] NHS, *Why vaccination is safe and important* (2019) https://www.nhs.uk/conditions/vaccinations/why-vaccination-is-safe-and-important/ (Accessed 3 July 2022).

[124] Nejm Catalyst Innovation in Care Delivery, *What Is Risk Management in Healthcare?* (2022) available at https://catalyst.nejm.org/doi/full/10.1056/CAT.18.0197 (Accessed 5 August 2022).

[125] US Embassy and Consulate in Iraq, 2020 (n67); Shafaq News, *Kurdistan Covid-19* (2020) available at <https://shafaq.com/ar/Kurdistan/New-decision-about-Covid-19-costs-in-Kurdistan> (Accessed 28 December 2021).

[126] WHO, *WHO supports Kurdistan region with over 20 tons of medical supplies to enhance national response to COVID-19 health challenges* (2022) available at https://www.emro.who.int/iraq/news/who-supports-kurdistan-region-with-over-20-tons-of-medical-supplies-to-enhance-national-response-to-covid-19-health-challenges.html (Accessed 17 October 2022); Aziz 2020 (n97); UNHCR 2020 (n79).

have had to use scarce resources on covid patients in general rather than being able to fully prioritise those in critical conditions.[127] We recommend that hospital admission arrangements be reformed to address the overuse of limited resources. Unnecessary hospital admissions could be limited through the use of 'medical advice lines' which could triage patients and provide or refer them for non-emergency health help where this is all that is required.[128] It should be noted that advice lines can not only serve the better use of scarce resources but also protect those who don't need to attend hospital from the risk of acquiring an infection should they do so (particularly at the time of Covid-19 pandemic) and provide patients and their families with immediate access to relevant medical information.

Although, on the one hand, it is necessary to prevent overconsumption of health care, on the other hand, those patients who are suffering from severe medical conditions should have immediate access to health care. The policy makers decisions to close down primary health centres, emergency departments, and private clinics at the start of corona virus pandemic, had the impact of causing delays in treating non-covid-19 related medical conditions, and increased the probabilities of poor healthcare outcomes.[129] We recommend that the health benefits and costs of this strategy be reviewed.

5. RECOMMENDING HEALTHCARE POLICIES AS RESPONSIVE STRATEGIES

5.1 Introduction

The substantial escalation of Covid-19 cases in the KRI caused the need for an effective system of governance that would be capable of responding quickly and enforcing effective control mechanisms.[130] Due to the existing political and economic issues, it is arguable that the KRI healthcare leaders were not effectively prepared to respond to the challenges and burden of Covid-19 pandemic.[131] To advance the KRI HSG, this part of the paper critically discusses the existing initiatives in relation to Covid-19 pandemic and recommends healthcare policies with reference to evidence-based healthcare practice; the allocation of scarce resources; and healthcare staff management.

5.2 Evidence-Based Healthcare Practice

While global responses to COVID-19 pandemic are continuously developing,[132] it has had the impact of significant adjustment to clinical practices.[133] These adjustments have not always been positive. In the KRI most healthcare providers substantially lowered their quality standards at the start of the coronavirus outbreak.[134] Lack of knowledge about covid and resource shortages, the meant that practices were falling short of prior standards.[135] To facilitate the maintenance of quality of health services at

[127] Merza M. A. et al, *COVID-19 outbreak in Iraqi Kurdistan: The first report characterizing epidemiological, clinical, laboratory, and radiological findings of the disease* 14 (4) (2020) 547–554.

[128] KRG, *Instructions for Kurdistani Citizens* (2020) available at <https://gov.krd/coronavirus-en/information/#hotline> (Accessed 6 November 2021).

[129] WorldAware, COVID-19 Alert: Kurdistan, *Iraq Tightens Restrictions from Aug. 4* (2020) available at <https://www.worldaware.com/covid-19-alert-kurdistan-iraq-tightens-restrictions-aug-4> (Accessed 28 December 2021).

[130] Mercier G.et al, *Understanding the effects of COVID-19 on health care and systems* (2020) The Lancet Public Health: 1.

[131] Jangiz K., *Corruption erodes Iraq's health care: German think tank* (2021) https://www.rudaw.net/english/middleeast/iraq/141220212 (accessed 30 July 2022).

[132] Appleman B. L, *Kurdish region: COVID-19 lockdown, flight restrictions extended* (2020) available at <https://www.balglobal.com/bal-news/iraq-covid-19-lockdown-flight-restrictions-extended-2/> (Accessed 28 December 2021).

[133] WHO, *Considerations in adjusting public health and social measures in the context of COVID-19* (2020) 1–4.

[134] Hussein 2020 (N103).

[135] *Ibid.*

the time of global health emergencies, it is critical to formulate policies that are centred on evidence-based clinical practice. Evidence based clinical practice has been defined as *"the integration of clinical expertise, patient values and the best research evidence into the decision-making process for patient care."*[136] In a governance sense this is about using a base of sound research to assist with the identification of relevant issues, and from this recommend pertinent solutions which can be translated into rules that can be enforced through follow-up processes and regular check-ups.[137]

Effective communication of emerging rules is required as part of the process but during the Covid-19 pandemic the natural way of doing so – through in-person training courses – was rendered impossible through physical distancing rules. As the WHO has noted, virtual workshops and trainings are the best route forward in this situation.[138] A virtual learning environment is also the logical response to limitations on travel in the context of international conferences and courses. Such an environment could foster continued development of practitioner's knowledge and competence and represent an opportunity to actually advance educational systems.[139] Whilst the UK and many other countries attempted to keep all educational settings open and continued virtual tutoring,[140] the KRG's initiative in closing all schools in the region,[141] has adversely impacted medical student's knowledge,[142] and skills attainment.[143]

5.3 Allocative Efficiency in Healthcare

As medical care demands are accelerated since the Covid-19 outbreak, undoubtedly, it has put an increased burden on the KRI healthcare resources. Under an annual spending review, it was found that the increasing demand to healthcare during Covid-19 pandemic gave rise to an additional spending of 11%.[144] It was noted that such increase in expenditure mostly related to oxygen therapy, hydroxy-chloroquine tablets,[145] vitamin tablets, and other pain-relieving medications.[146] Further, the increasing number in Covid-19 patients in the KRI connote the growing demand of frontline medical staff, PPE, and relevant medical products, including Covid-19 test kit, oxygen/anaesthetic ventilator, nasal prongs, needles, syringes, cannula etc.[147] While the KRI MOH has taken initiatives in funding ventilators, PPE, Covid-19 specific hospitals, and the production of chloroquine and azithromycin medications in Sulaymaniyah pharmaceutical

[136] Melnyk B. M., *Why Choose Evidence-based Practice?* (2018) at https://www.aanp.org/news-feed/why-choose-evidence-based-practice (accessed 1 August 2022).

[137] WHO, *Reporting and learning systems: Patient safety incident reporting and learning systems* (2006) at <https://www.who.int/patientsafety/topics/reporting-learning/en/> (Accessed 28 December 2020).

[138] WHO, *Coronavirus disease (COVID-19) training: Online training* (2022) at https://www.who.int/emergencies/diseases/novel-coronavirus-2019/training/online-training (Accessed 2 August 2022).

[139] Aziz 2020 (n97).

[140] HM Government: *Analysis of the health, economic and social effects of COVID-19 and the approach to tiering* (2020) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944823/Analysis_of_the_health_economic_and_social_effects_of_COVID-19_and_the_approach_to_tiering_FINAL_-_accessible_v2.pdf> (Accessed 6 January 2021).

[141] Kurdistan 24, *Kurdistan closes schools, universities as fears of coronavirus outbreak grow* (2020) available at <https://www.kurdistan24.net/en/story/21937-Kurdistan-closes-schools,-universities-as-fears-of-coronavirus-outbreak-grow> (Accessed 28 December 2020).

[142] UNHCR 2020 (n79).

[143] Hussein 2020 (N103); WorldAware 2020 (n178).

[144] The Health Foundation: *Spending Review 2020: Priorities for the NHS, social care and the nation's health* (2020) at <https://www.health.org.uk/publications/long-reads/spending-review-2020> (last visited 28 December 2021).

[145] Aziz 2020 (n97).

[146] *Ibid.*

[147] European Medical Device Nomenclature: *List of COVID-19 essential Medical Devices (MDs and IVDs)* (2020) available at <https://ec.europa.eu/info/sites/info/files/list-covid-19-essential-medical-devices_en.pdf> (Accessed 28 December 2021).

factory,[148] a recent study found that high demand for such resources continue to make their allocation a bone of contention.[149] With the Covid-19 pandemic being an additional burden on the limited resources, it has often increased risks of patient safety failures.[150] For instance, insufficient supply of PPE not only increased chances of transmission amongst the frontline medical staff, but also caused an understandable reluctance to treat Covid-19 patients. A shortage of frontline medical staff in the public health sector has led to patients not being treated at the right time.[151]

To achieve a coherent response to the issues of scarce resources, the healthcare budget must be allocated in an efficient way. Fundamentally, the concept of 'efficiency' is described by the Health Foundation as "*the best possible use of available funding in order to resource*."[152] The best possible use of healthcare funding could be through the implementation of a filtering system, whereby only patients in critical conditions are prioritised for treatment and admitted to hospitals. It is arguable that such initiative can have a dual role including the limitation of unnecessary hospital access by family members and could potentially prevent the oversupply of limited resources to those patients who are not in critical condition.[153]

Scarce resources being a global concern,[154] the KRI could learn lessons from other jurisdiction's healthcare efficiency measurements. For instance, the German guidelines on *'Choosing Wisely Together (Germanism Klug Entscheiden)'* which initially aimed to guide decision-making processes, it also provides a list of specific disease-related information about whether a particular patient suffering from a specific medical condition does require hospital admission and long-term medical care.[155] In our view such guidelines could boost up to the recommended filtering system, as this would direct frontline healthcare practitioners in prioritising those patients in critical condition.

5.4 Healthcare Staff Management

The increasing demand to health care during Covid-19 pandemic has not only adversely affected the limited budget, but also the management of human resources in health care. In many jurisdictions the spread of covid-19 pandemic has caused increasing concerns about the extent to which the needs of healthcare staff are properly protected.[156] This is due to the fact that work pressures have been extreme, and that staff have had to face hostility from some patients and/or their families.[157] The added risk of infection

[148] Aziz 2020 (n97).

[149] Hussein 2020 (N103); Fraser I. et al, *Improving Efficiency and Value in Health Care: Introduction* (2008) at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2654165/

[150] Qadar S. The COVID-19 Pandemic in the Kurdistan Region of Iraq (2021) Harvard Public Health Alumni Bulletin 29(29):1 at https://www.researchgate.net/publication/352180011_The_COVID-19_Pandemic_in_the_Kurdistan_Region_of_Iraq (accessed 27 July 2022).

[151] Qadar S. The COVID-19 Pandemic in the Kurdistan Region of Iraq (2021) Harvard Public Health Alumni Bulletin 29(29):1 at https://www.researchgate.net/publication/352180011_The_COVID-19_Pandemic_in_the_Kurdistan_Region_of_Iraq (accessed 27 July 2022).

[152] The Health Foundation, *Efficiency and productivity of the health and social care system* (2022) https://www.health.org.uk/what-we-do/sustainability-of-health-and-social-care/efficiency-and-productivity-of-the-health-and-social-care-system (Accessed 28 December 2021).

[153] Institute of Medicine Committee on Quality of Health Care in America, *Crossing the Quality Chasm: A New Health System for the 21st Century* (Washington DC, National Academy Press, 2001).

[154] Aziz 2020 (n97).

[155] Muche-Borowski C. et al, *Protection against the overuse and underuse of health care – methodological considerations for establishing prioritization criteria and recommendations in general practice* (2018) BMC Health Services Research 1–12

[156] Greenberg N. et al, *Managing mental health challenges faced by healthcare workers during covid-19 pandemic* (2020) BMJ 1–4.

[157] Qadar S. The COVID-19 Pandemic in the Kurdistan Region of Iraq (2021) Harvard Public Health Alumni Bulletin 29(29):1 at https://www.researchgate.net/publication/352180011_The_COVID-19_Pandemic_in_the_Kurdistan_Region_of_Iraq (accessed 27 July 2022).

has been, in some situations, exacerbated by weaknesses in PPE provision, and in the KRI specifically, ineffective guidelines and scarce resources are also one of the key challenges in dealing with healthcare practitioner's wellbeing.[158] Empirical evidence implies that the KRI frontline healthcare practitioners are facing elevated stress levels due to Covid-19 related work pressure, intensified by the need, in some contexts, to make choices over which patients to prioritise.[159] These difficulties have taken a toll on mental health – leading to higher rates of anxiety, insomnia, and depression,[160] and also increased rates of suicide.[161]

Given the stress levels and other related issues emanating mental health during global health emergencies, efforts should be made to learn lessons and ensure better planning of relevant support services for healthcare staff. One of the day-to-day recommended methods in dealing with healthcare practitioner's stress is through a mixture of peer and management interaction and support. In England and Wales, for example, it has been observed that '*most people find that support from their colleagues and their immediate line manager protects their mental health*.'[162] In part support is reactive but there is also a need for what the National Institute for Health and Care Excellence (NICE) has described as '*active monitoring' of staff 'to ensure that the minority who become unwell are identified.*'[163] Active management can ensure proper account is being taken of potential risk factors.[164] From the lead author's own empirical programme it appears that this is an area in which many healthcare practitioners in the KRI feel that its system could be significantly improved.[165]

It is our view that the identification of potential risks factors goes beyond staff management initiatives, and that recommending policies on the process of meeting practitioner's needs could have the potential of curbing stress levels amongst KRI healthcare practitioners.[166] Learning lessons from the Egyptian healthcare system, it is arguable that the KRI healthcare staff would benefit from a specific hotline, whereby psychologists are made available to hear practitioner's concerns.[167] To effectively respond to practitioner's concerns, health service leaders should be duty bound to provide relevant support through continued supervision, effective teamwork, and relevant trainings.[168] Predominantly, hearing healthcare practitioner's concerns does not only have the potential of reducing stress, anxiety, fear, and nervousness, but the disclosure of relevant information can also facilitate the process of learning from existing failures and improving health system governance.[169]

[158] Abdulah D. M. and Mohammed A. A., *The consequences of the COVID-19 pandemic on perceived stress in clinical practice: experience of doctors in Iraqi Kurdistan,* Sciendo (2020) 1–9.

[159] *Ibid.*

[160] Elkholy H., *Mental health of frontline healthcare workers exposed to COVID-19 in Egypt: A call for action* (2020) International Journal of Social Psychiatry 1–10.

[161] *Ibid.*

[162] Greenberg 2020 (n205).

[163] *Ibid.*

[164] *Ibid*; Elkholy (n209).

[165] Anonymous (n1).

[166] Greenberg N. et al, *Managing mental health challenges faced by healthcare workers during covid-19 pandemic* (2020) BMJ 1–4; Aziz 2020 (n97).

[167] Elkholy 2020 (n143).

[168] Williams R, Murray E, Neal A & Kemp, The top ten messages for supporting healthcare staff during the Covid-19 pandemic (2020) https://www.rcpsych.ac.uk/docs/default-source/about-us/covid-19/top-ten-messages-williams-et-al.pdf?sfvrsn=990e3861_0 (Accessed 28 Feb 2022).

[169] Hussein 2020 (N103); Aziz 2020 (n97).

6. IMPLEMENTATION AND IMPACT OF RECOMMENDED MEASURES

6.1 Introduction

To better explain the implementation process and the impact of the recommended healthcare policies, this part of the paper draws on Baez Camargo and Jacob's '*Governance Assessment Framework of law-income countries*.[170] Alternative frameworks to assess and map governance exist, such as Siddiqi's framework which concentrates on hierarchical approaches from national to policy implementation.[171, 172] However, the framework developed by Baez Camargo and Jacob is of particular importance to this study because it focuses on a much broader context of healthcare,[173] including its intersection with governmental services like finance, education, food safety, housing, infrastructure etc.[174] To ensure an effective governance operating framework and support the implementation of the recommended healthcare policies, below, we have developed a visual process map that illustrates the strategic measures that can be taken to ensure higher quality of healthcare and improved health service outcomes.[175]

Preventative strategies

Policies	Input Indicators	Processes	(Impact on KRI HSG) Output Indicators
Cross-sector collaboration	* Funding * Information (protocol) * Training courses * Human resources (competent leaders and regulators)	* Communication * Comparing standards * Learning from other jurisdictions * Reaching agreement * Sharing best practices	* **Collaborative leaders** * **Strategic community building** *Comprehensive overview of best practices * **Compliance with national and international standards**
Public health	* Funding * Restrictive rules /protocol * Human resources (Community workers) * Reliable platforms of social media	* Increasing roles of community workers. * Broadening public's knowledge about healthy lifestyle * Raising awareness about the impact of communicable diseases	* **Compliance with restrictive measures** * **Healthful lifestyle** * **Reduced numbers of Covid-19 patients** *Less demand for limited healthcare resources.
Risks management initiatives	* Funding * protocol * Education system * Training courses * Resources (medications, PPE, vaccinations, clinics and hospitals).	* Critically evaluating clinical practice * Research *Communicating emerging rules. * Enhancing practitioner's knowledge * Providing access to relevant resources	* **Learning lessons from reported failures** * **Up-to-date medical knowledge** * **Competent practitioners** * **Reduced risks of coronavirus and medical errors.** *Reducing risks of harm

[170] Baez-Camargo 2011 (n15).

[171] Kirigia JM, Kirigia DG., *The essence of governance in health development* (2011) International Archives of Medicine 4: 1–13, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3072323/ (accessed 3 August 2022).

[172] Siddiqi 2009 (n1)

[173] Kirigia 2011 (n220).

[174] Pyone 2017 (n5).

[175] *Ibid.*

6.2 The Visual Process Map

Responsive strategies

Policies	Input Indicator	Processes	(Impact on KRI HSG) Output Indicators
Evidence-based clinical practice	* Funding * Research facilities * Education system * Training courses	* Developing medical knowledge * Reshaping healthcare practice * Communicating emerging healthcare standards * Reflecting on emerging practice and reporting failures	* Up-to-date knowledge * Competent practitioners * Transparent rules * Consistent healthcare practice * Higher quality of healthcare
Effectiveness, efficiency in healthcare	* Competent regulators and leaders * Number of doctors and nurses * Infrastructure * Medical equipment * Health expenditure	* Accountability * Managing workload * Overseeing the process of resource allocation * Complying with a filtering system	* Effective medical care * Efficient healthcare * Increased access to healthcare * Equity
Staff management	* Competent regulators and leaders * Healthcare practitioners * Support services * Research facilities	* Regular supervision * Identifying practitioners needs * Providing psychological support *Clarifying roles and responsibilities	* A supportive environment * Enhanced medical care * Minimum risks of moral injuries.

6.3 Explanation and Analysis

As indicated above, this process map presents six recommended healthcare policies on cross sector collaboration, public health management, risk management, policy formulation, and accountability mechanisms. These policies are based on those governance dimensions that mostly require reform under the KRI healthcare system.[176] The overarching goal of this process map is to describe governance inputs-processes-outputs as a visual means of understanding the implementation and the impact of the proposed Covid-19 related healthcare policies. '**Governance inputs'** refer to the management of healthcare systems resources, namely infrastructure, doctors and nurses, and medical equipment.[177] Inputs like rules governing financial resources could ensure access to medical equipment, fund infrastructure and remunerate healthcare practitioners. In the pandemic specifically, effective rules in this area might have reduced the spread of coronavirus by fostering better access to PPE, research facilities, medications, vaccinations, and specific medical equipment like ventilators.[178] While consensus-oriented decisions are recognised as an important governance input,[179] we argue that it is also vital to have competent health service leadership to help set and implement policy goals, drive the demand for resources and ensure there are effective plans for their allocation and aid collaboration between relevant bodies such as the KRG, KRI MOH, and Iraqi central government.

[176] Anonymous (n1).

[177] Baez-Camargo 2011 (n15).

[178] WHO, *Public financial management for effective response to health emergencies* (2022) available at https://www.who.int/publications/i/item/9789240052574 (Accessed 21 August 2022).

[179] Baez-Camargo 2011 (n15) at page 9.

The **'process'** component, under the context of this study, concentrates on strategies for implementing the recommended healthcare policies. We argue that the key 'governance processes' are distributing relevant resources, comparing standards, and ensuring transparencies. More specifically, under the implementation of cross-sector collaboration policies, the abilities of health regulating authorities to work together across sectors, take responsibilities in communicating information, and comparing standards are key examples of governance processes. Further, the application of unconventional Covid-19 related practices, the re-evaluation of the emerging standards, and the distribution of relevant resources in a cost-effective way are the key strategies for implementing allocative efficiency policies. While the recommended measures depend very much on the capacity of the KRI healthcare system, effective governance of accountability systems, can increase the chances of successful implementation of the recommended policies and reduce both outright corruption.[180] and various other forms of normatively poor behaviour such as clientelism.[181]

The **'governance outputs'**, which emphasise the inherent implication of recommended policies, is defined by Baez Camargo and Jacob as '*positive qualities that health system outputs should generate once rules and processes have been designed and implemented*.'[182] While it is true that positive qualities cannot always be guaranteed, successful implementation of the recommended policies could potentially improve the overall outcome in the KRI healthcare. For instance, the recommended policy on evidence-based clinical practice could be successfully implemented through the provision of effective research facilities, educational system, and training courses (governance inputs); the integration of clinical expertise,[183] identification of issues and translation of solutions into rules (governance processes).[184] The governance outputs, that stems from successful implementation of this policy, is not only about generating new knowledge in the medical field, but also optimising clinical decision-making and minimising potential harmful medical intervention.[185]

With regards to the overall impact, in our view, the recommended policies are comprehensive enough to cover a wide-ranging area of governance. As shown above, the first part of the process map presents preventative strategies, indicating that the implementation of policies on cross-sector collaboration, public health, and risk management initiatives could have the impact of reducing the spread of communicable diseases. For example, the imposition of duties under risk management policies to provide essential healthcare resources like PPE, face covering, disinfectant products and screening tests does not only have the impact of preventing the spread of coronavirus, but it could also lead to a safe environment for healthcare practitioners. Thus, increasing the number of frontline practitioners willing to work and better opportunities for patients to access appropriate healthcare services at the time of global health emergencies.

While the focus of the first part is on preventative strategies, the second part of the visual process map presents an overview of responsive strategies. It provides that policies on evidence-based clinical practice, efficiency, and staff management could potentially respond to the existing governance challenges faced in the field of KRI

[180] NHS Leadership Academy, 2013 (n50).

[181] Ryhove S. D. *Primary health care implementation: A brief review* (2012)available at <http://www.polity.org.za/article/primary-health-care-implementation-a-brief-review-2012–08-21> (Accessed 28 July 2021).

[182] Baez-Camargo 2011 (n15) at page 9.

[183] Melnyk 2018 (n185).

[184] WHO, *Reporting and learning systems: Patient safety incident reporting and learning systems* (2006) at <https://www.who.int/patientsafety/topics/reporting-learning/en/> (Accessed 28 December 2020).

[185] Baez-Camargo 2011 (n15).

healthcare. For instance, the policy on healthcare staff management could respond to the challenges with regards to Covid-19 related work pressures and the added stress levels suffered by frontline healthcare practitioners. The imposition of duties to actively manage healthcare practice; introduce a hotline to hear practitioner's concerns; and provide relevant support could effectively respond to the challenges faced by the KRI healthcare practitioners.

Overall, the recommended policies are multi-disciplinary as the focus is also on nursing, public health, and critical care medicine. For example, the policy on cross-sector collaboration focuses on the functions of professional authorities from more than one discipline. The policies on risks management, evidence-based healthcare practice and staff management focus on the functions of nurses as well as doctors. A multi-disciplinary approach in healthcare can have the advantage of comprehensive care and could potentially prevent unnecessary errors in healthcare.[186] Due to the challenges faced by Covid-19 pandemic, we argue that successfully implementing the recommended policies and reforming the KRI HSG would be key to resilience and improved performances in healthcare.

CONCLUDING REMARKS

During the course of this paper, we have shown that KRI HSG is in a weak state and that this along with the poor state of KRI healthcare itself has greatly heightened the damage wrought by the pandemic. The pandemic has yet to run its course and it is also becoming easier for new pandemics to emerge in the human population. Given this the case for reform of KRI has become more urgent than ever. in this paper, we specifically noted how strengthening policies on cross-sector collaboration, public health, and risk management initiatives could help to minimise the spread of, and harm caused by, infectious deceases. We also discussed policy recommendations on evidence-based healthcare practice, effective allocation of scarce resources, and staff management that could also help in this regard.

We also presented and applied Baez-Camargo and Jacob's 'inputs-processes-outputs' governance framework,[187] to illuminate strategies for implementing policies and ways of transforming inputs into the desired health service outcomes. The ball is very much now in the court of health service policy makers to consider these or similar policies and to begin the transition to KRI's HSG and its healthcare service becoming much more comprehensive and effective.

[186] Epstain N. E., *Multidisciplinary in-hospital teams improve patient outcomes: A review* (2014) Surg Neurol Int. 295–303.
[187] *Ibid.*