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The Crisis of Religious Freedom in the Age of COVID-19 Pandemic

Edited by
Adelaide Madera
Preface by Vincent A. De Gaetano

Printed Edition of the Special Issue Published in *Laws*

www.mdpi.com/journal/laws

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This is a reprint of articles from the Special Issue published online in the open access journal *Laws* (ISSN 2075-471X) (available at: www.mdpi.com/journal/laws/special_issues/religious_freedom).

For citation purposes, cite each article independently as indicated on the article page online and as indicated below:

LastName, A.A.; LastName, B.B.; LastName, C.C. Article Title. *Journal Name* **Year**, *Volume Number*, Page Range.

ISBN 978-3-0365-2279-1 (Hbk)
ISBN 978-3-0365-2280-7 (PDF)

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About the Editor

Adelaide Madera is an associate professor of canon law, and law and religion at the Department of Law of the University of Messina, Italy. She is also a member of the academic board of the PhD School in Legal Studies at the University of Messina. Adelaide Madera's research focuses on the interrelationship between law and religion, specifically church–state relationships, religious organizations and the law, and religious and civil marriage.

Preface to "The Crisis of Religious Freedom in the Age of COVID-19 Pandemic"

By definition, a pandemic is an epidemic on a scale that crosses international boundaries. Implicit in the definition is the notion of easy or rapid contagion, with the disease able to reach the farthest corners of the globe with relatively consummate ease. When, in the first weeks of 2020, it was clear that we were on the brink of such a pandemic, few people could recollect any similar experience. The Spanish Flu, more than a century before, was the closest example of a pandemic that our historic memory could recall, and neither HIV/AIDS nor the regular outbreaks of Ebola and Typhus in some parts of the world or the very recent Zika virus outbreak seemed to bear parallels to what was brewing in many countries.

As with several countries, Malta—my country—was slow to react. As initial restrictions morphed into total lockdown in the months of April, May, and June 2020, people of a slightly older generation began making 'comparisons'with restrictions, mainly restrictions on movement and on assembly, during the worst months of the Second World War. Of course, it was akin to trying to compare apples with lettuce. It was also inevitable that, in an age dominated by the internet and by the exchange of information and ideas within seconds at the touch of a button, there would also be lots of disinformation about the COVID-19 pandemic, about its origins, and conflation (deliberate and otherwise) of fact with opinion.

One of the positive side effects of the restrictions imposed as a result of the COVID-19 pandemic has been that people have begun to appreciate the rights and freedoms that had to be curtailed in the attempts to contain the pandemic. Aside from economic and environmental considerations, the sight of courts without court hearings, parks without people, theatres without audiences, and places of worship without congregations brought home to most people the stark reality of what was at stake.

This collection of essays by eminent academics from different disciplines is a welcome and timely addition to the study and proper understanding of religious liberty. More crucially, the collection looks at the impact of COVID-19 measures not only from a European perspective—with the usual carefully choreographed balance, even in an aggressively secular society such as the French, between the right wing on the one hand and the pressing social need for a proportionate interference on the other hand—but also from perspectives from other continents. These include Prof. Haynes'analysis of COVID-19-related restrictions against a backdrop of an almost fundamentalist Christian approach to religious worship, Prof. Ahmad's exposé of the instrumentalization of fears surrounding COVID-19 to target religious minorities, the Tengatengas'analysis from the perspective of the Malawian traditional religious concept of healing and wholeness, and many more.

This collection is a truly remarkable one for which all of the contributors and Prof. Adelaide Madera are congratulated.

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Chief Justice Emeritus, Malta;
Former Judge & Section President, ECtHR, Strasbourg;
Commissioner for Education, Ombudsman's Office, Malta

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Article

The Implications of the COVID-19 Pandemic on Religious Exercise: Preliminary Remarks

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Abstract: Since 2020, the spread of COVID-19 has had an overwhelming impact not only on our personal lives, but also on domestic regulatory frameworks. Influential academics have strongly underlined that, in times of deep crisis, such as the current global health crisis, the long-term workability of legal systems is put to a severe test. In this period, in fact, the protection of health has been given priority, as a precondition that is orientating many current legal choices. Such an unprecedented health emergency has also raised a serious challenge in terms of fundamental rights and liberties. Several basic rights that normally enjoy robust protection under constitutional, supranational, and international guarantees, have experienced a devastating "suspension" for the sake of public health and safety, thus giving rise to a vigorous debate concerning whether and to what extent the pandemic emergency justifies limitations on fundamental rights. The present paper introduces the Special Issue on "*The crisis of the religious freedom during the age of COVID-19 pandemic*". Taking as a starting point the valuable contributions of the participants in the Special Issue, it explores analogous and distinctive implications of the COVID-19 pandemic in different legal contexts and underlines the relevance of cooperation between religious and public actors to face a global health crisis.

Keywords: COVID-19 pandemic; public health; freedom of religion

Citation: Madera, Adelaide. 2021. The Implications of the COVID-19 Pandemic on Religious Exercise: Preliminary Remarks. *Laws* 10: 44. https://doi.org/10.3390/laws10020044

Received: 6 May 2021
Accepted: 31 May 2021
Published: 2 June 2021

1. Introduction

Since 2020, the spread of COVID-19 has had devastating consequences not only for our daily lives but also on the European and U.S. legal systems.[1]

There is little doubt that there have been other deadly and widespread outbreaks in recent history, such as the 1918–1919 Spanish flu and, more recently, the H1N1 infection. However, the COVID-19 pandemic has been qualified as unprecedented due to its global character, high death rate, high and fast rate of infection, the lack of effective preventive strategies and scientific uncertainty, its devastating impact on health, political and economic systems and its social implications (as it highlighted inequalities and vulnerabilities) so as to give rise to a global crisis, not only in terms of public health.

Such an unprecedented health crisis has negatively affected the enjoyment of fundamental rights. Among them, the exercise of religious freedom has suffered unparalleled restrictions. Legal systems have offered distinctive legal responses to the pandemic emergency, ranging from a complete suspension of the collective exercise of religious worship, to a more cautious accommodation of religious gatherings.[2] The aim of the present Special Issue is to offer a comparative survey of restrictive measures adopted in different juridical contexts and affecting the exercise of religious freedom to different degrees. The Special Issue collects contributions of experts from widely differing disciplinary areas and covering many geographical areas, including some European countries, the United States, Malawi, Peru, and India, and it offers the opportunity to provide some preliminary (but not exhaustive) comparative reflections.

1 (Milani 2020).
2 (Consorti 2020; Balsamo and Tarantino 2020; Martínez-Torrón and Lara 2021).

This Special Issue aims to show that the interaction between religious law and secular law is a complex matter, and it will supplement the existing literature emphasizing the transversal vocation of the study of the management of religious diversity and its operative scope. Several law journals have already produced Special Issues dealing with religion and COVID-19, and have suggested different keys to understanding the current tension between public health and religious exercise, emphasizing the urgency and complexity of the new constitutional conundrum that the clash of competing values has given rise to. The aim of this Special Issue is not to provide a directory of various legal responses to the COVID-19 health crisis. Its aim is to go beyond legal analysis only in terms of the polarization of conflicts between state law and religious commitments, which would be incomplete: for this reason, the Special Issue integrates various perspectives with a view to offering a serious investigation into detailed sociological, historical, political, and religious studies narratives and to fully exploring the pathway of dialogue and cooperation between faith communities and public actors, as they both, together with society as a whole, have much to gain from the building of a synergic network of resources and actions with a view to a person-centered approach.

A key question concerns whether and to what degree fundamental rights can be subject to restrictions due to an unprecedented health crisis. Western scholars are aware that no right can become absolute: specifically, the Italian Constitutional Court held that no right can become a "tyrant" and over-expand to the detriment of other competing rights.[3] However, an analysis of proportionality has become extremely controversial during the pandemic, as ordinary standards of assessment seem unsuitable to balance competing values. There is little doubt that, during an unparalleled pandemic crisis, public health is given priority over other fundamental rights, as, in the end, life becomes the "supreme"[4] interest which has to be guaranteed. Following this perspective, a hierarchy of fundamental rights has arisen, where only those rights which are considered "essential" (in a biological sense) are given prevalence.[5]

2. The Debate over the "Essential" Nature of Religious Freedom during the Pandemic

However, in such a dystopic situation the role of religious freedom has become even more controversial. As is well known, the "exceptionalism"[6] of religion and its protection is a lively battlefield in our Western societies, where various (political and academic) voices claim for the need to put religious and other secular interests on an equal level. The pandemic has emphasized underlying tensions, revitalizing the never-ending debate about whether religious activities should enjoy special treatment and be granted exemptions to general rules in democratic post-secular societies.[7]

During the first wave of the pandemic, various legal systems provided different solutions: in some cases religion was qualified as an essential service and efforts were made to accommodate religious exercise; in other cases religion was considered a good people could do without, as religious buildings have been considered as places where the infection easily spreads, like every public gathering place.[8]

However, academics have underlined that in different legal contexts a juridical language aimed at neutralizing the specific role of religion (i.e., "religious establishments")[9] has been used, and the undue placement of religious gatherings on an equal footing with analogous secular activities, using as the only sterile standard of analysis a comparable level of risk.[10] Although religious autonomy cannot be immunized from any balancing

[3] Constitutional Court, No. 85 of 2013.
[4] (Colaianni 2020, p. 32).
[5] (Fornerod 2021, p. 1).
[6] (Hoover 2014).
[7] (Schwartzman 2012, p. 1351).
[8] (Madera 2020c, p. 75; Licastro 2020b, p. 239).
[9] (Fornerod 2021, p. 6).
[10] (Licastro 2020a, p. 783.)

process with other competing values, legal responses have given rise to concerns, as a religiously neutral state is not equipped to define which aspects of religious exercise can be qualified as essential without consulting faith communities.[11]

There is little doubt that restrictive measures have not been enacted with the intent to target religion and that they are expected to have a temporary nature.[12] However, religious assemblies have often been considered as superspreader events, which require careful monitoring, giving rise to concerns about a risk of intruding into strictly church matters.[13] Academics have warned about the danger that the authoritarian overtone generated by the pandemic crisis could be worrying in terms of fundamental liberties in the long term.[14]

3. The Fragile Balance between Mainstream Religions and Religious Minorities

The pandemic has not only had a negative impact on the collective dimension of freedom of religion, but has also exacerbated an already fragile balance between mainstream religions and religious minorities. Some papers in this issue have focused on analyzing whether and to what extent the COVID-19 emergency has affected the status of religious minorities.[15] In Western legal systems, the restrictive measures of the collective exercise of religious freedom have affected various religious groups to different degrees, which were previously disadvantaged by the pre-existing regulatory framework, because public authorities were initially more inclined to meet the needs of mainstream religions. Although restrictive measures have not been religiously preferential, the practices and rites of minorities have suffered a disparate impact. In the Western landscape, minorities have not been able to take advantage of alternative means of worship/practice provided by the use of digital technology (i.e., religious services online and in-streaming) as they are in contrast with their beliefs (i.e., the Amish approach to electricity is delicate) or because alternative measures were not made equally available to all religious groups (e.g., mainstream religions have been more facilitated in access to mass media in some countries for economic, political or legal reasons).[16] Thus, in some cases, apparently neutral restrictive measures have had a disparate impact on idiosyncratic religious practices, emphasizing their status of marginalization.

In addition, it cannot be underestimated that in Europe the health crisis has given rise to increases in anti-Semitic and Islamophobic reactions that have put social cohesion at risk. On the other side of the Atlantic, in the Unites States, it has underlined a growing politicization of religion, namely, an exasperation of the political polarization between a "conservative" vision of religious freedom and the rights of the most vulnerable subjects. The COVID-19 emergency was at first minimized by Trump's administration, emphasizing a divergence between federal policies aimed at giving prevalence to mainstream religions' narratives and state powers, charged with the effective task of reducing the spread of the virus.[17] Such a clash between the federal perspective and state policies has given rise to fierce litigation, which has emphasized a complex interplay between state governors, the federal courts and the U.S. Department of Justice.[18] Some of the religious communities' challenges of state executive orders imposing restrictive measures on religious exercise have culminated in interventions of the U.S. Supreme Court. At first, some judgements underlined the fragile balance between the two wings of a deeply ideologically divided

11 (Martínez-Torrón 2021).
12 (Licastro 2020b, p. 236).
13 (Durham 2020).
14 (Hill 2020).
15 (Haynes 2021; Ahmad 2021; Tengatenga et al. 2021).
16 (Faggioli 2020).
17 (Haynes 2021; Baumgardner 2021).
18 (Madera 2020b, p. 214).

court, where the Chief Justice has a swing vote.[19] However, after the appointment of Justice Amy Bennett, the Court's rulings have witnessed the marked predominance of the conservative wing and of its conservative understanding of religious freedom, to the detriment of other vulnerable classes.[20]

In some legal scenarios (e.g., India, Iraq, Pakistan, Uganda) where minorities are already victims of disparate treatment linked to specific social, historical, economic and political contexts, and where the religious factor is the subject of increasing politicization, the pandemic emergency has further deteriorated the dynamics between majorities and minorities, as well as infra-confessional divisions, and has been used to justify forms of repression, persecution and discrimination against traditionally marginalized groups, some of which have also been accused of contributing to the spread of COVID-19. Recent surveys[21] have given research evidence that COVID-19 has generated ostracizing, growing segregation and the repression of religious minorities, which have been blamed to be superspreaders of the virus and prevented from accessing health services, and it has given rise to a "new dimension of hate speech."[22] The "minorities within minorities"[23] have therefore been particularly disadvantaged and gender issues have been emphasized.[24]

4. The Complex Interplay between the Three Branches of the Government during the Pandemic

There is little doubt that different countries have had different legal reactions to the pandemic: in some legal contexts suspensions of religious gatherings have been enforced; in others, different degrees of accommodation of religious exercise have been provided. In legal environments where powers are shared at a federal and regional level a higher level of complexity and fragmentation of provisions has been reached.[25]

However, it cannot be underestimated that many decisions have been left in the hands of the executive powers, which have enjoyed an uncontrolled "aggrandizement"[26] of their jurisdiction, and have had to offer quick responses, due to the urgency and the severity of the situation. Such responses have often been not only defective on procedural and substantial grounds, but also blurred, and have generated public skepticism and a growing lack of public trust in the government.[27] Some commentators argue that the lack of a legislative intervention has witnessed a more general crisis of the rule of law.[28] Actually, whether and to what different extent different legal frameworks are equipped with emergency rules, and whether such rules are incorporated into the constitutional text or in specific statutes has had undeniable implications on the quality of legal responses.[29]

Other commentators wonder whether national models of church–state relationships have also influenced the promptness of national responses to claims for religious accommodation during the pandemic.[30] There is little doubt that specific understandings of religious freedom might have affected some public policies. As an example, certain provisions find a clear justification in legal contexts where the protection of religious freedom is strictly intertwined with public order (i.e., in France, the appointment of the "managers of religious

[19] Supreme Court of the United States, *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, et al. Available online: https://www.scotusblog.com/case-files/cases/calvary-chapel-dayton-valley-v-sisolak/ (accessed on 1 June 2021); Supreme Court of the United States, *South Bay Universal Pentecostal Church v. Newsom*. Available online: https://www.scotusblog.com/case-files/cases/south-bay-united-pentecostal-church-v-newsom/ (accessed on 1 June 2021).

[20] Supreme Court of the United States, *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo*, Governor of New York, Available online: https://www.scotusblog.com/case-files/cases/roman-catholic-diocese-of-brooklyn-new-york-v-cuomo/ (accessed on 1 June 2021).

[21] https://www.ids.ac.uk/news/religious-inequalities-and-the-impact-of-COVID-19/ (accessed on 1 June 2021).

[22] (Ahmad 2021, p. 2).

[23] (Eisenberg and Spinner-Halev 2009).

[24] (Ahmad 2021; Tengatenga et al. 2021).

[25] (Consorti 2021).

[26] (Petrov 2020, p. 71).

[27] (Martínez-Torrón 2021).

[28] (Casuscelli 2021).

[29] (Consorti 2021).

[30] (Mosquera Monelos 2021).

establishments").[31] However, multiple factors have influenced the severity of legal responses and demonstrated the need for their constant follow-up, in the pursuit of less restrictive alternatives for other fundamental rights: the phase of the pandemic, the epidemiological data, the level of scientific knowledge, the workability of public health systems.

In any event, the vitality of a democratic system, where a fair level of religious accommodation is granted to all religious communities, has been demonstrated by different degrees of solicitude toward spiritual needs of individuals in the judicial arena.

The courts have become the main actors of the resolution of conflicts, and have been deeply involved in a role of monitoring governments' policies and safeguarding the rule of law. They have been deeply engaged with a role of reconciling competing interests. However, they have also been paradoxically entangled in sharp debates on which the most appropriate secular comparator was: stores, theatres or casinos.[32] Although during the first wave of the pandemic they were more inclined to adopt an attitude of deference toward executive policies, in the long term they have focused on a stricter analysis of proportionality and the necessity of restrictive measures, taking into account their duration, the severity of the burden upon religious exercise, their non-discriminatory nature, the possibility of less restrictive alternatives.[33] Although the temporary nature of such restrictive measures can justify interference in matters of the church province, a disparate treatment of religious gatherings compared to secular activities requires an objective and reasonable justification.[34]

Several international and supra-national provisions, and their interpretation before the courts, draw a complex architecture relating to the protection of religious freedom, even in its collective dimension, and its limits, which has to be taken into account in the balancing process between competing values.[35] However, there is little doubt that the principle of precaution has played a key role in the delicate equilibrium during the pandemic.[36]

In the long run, it will be easier to understand whether this enormous effort has given the judiciary the opportunity to revisit standards of review, and whether their adaptation to the pandemic situation can give rise to serious concern about their implications in the near future.[37]

5. Reactions of Religious Communities to the Restrictive Measures

The reactions of religious groups were different too during the successive phases of the pandemic. During the first wave of the pandemic, religious communities encouraged their faithful to comply with general provisions, even though there were some exceptions.[38] Some Churches enforced self-imposed precautionary measures for their faithful, anticipating state provisions.[39] They demonstrated religious creativity adapting their rituals and practices to the exceptional circumstances of the pandemic.[40]

However, in the long run, there has been a growing judicial mobilization of religious communities, most of all where restrictive measures have had negative implications on the celebration of religious festivities that are deeply rooted in religious traditions.[41]

[31] (Fornerod 2021).

[32] Supreme Court of the United States, *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, et al. Available online: https://www.scotusblog.com/case-files/cases/calvary-chapel-dayton-valley-v-sisolak/ (accessed on 1 June 2021); Supreme Court of the United States, *South Bay Universal Pentecostal Church v. Newsom*. Available online: https://www.scotusblog.com/case-files/cases/south-bay-united-pentecostal-church-v-newsom/ (accessed on 1 June 2021).

[33] (Hill 2021; Fornerod 2021; Androutsopoulos 2021).

[34] (Martínez-Torrón 2021).

[35] *Hasan and Chaush v. Bulgaria*, No. 30985/96, ECtHR (Grand Chamber), 26 October 2000.

[36] (Androutsopoulos 2021).

[37] *Fulton v. City of Philadelphia*, 922 F3d 140 (3d Cir. 2019), *Cert. Granted*, 24 February 2020. https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ (accessed on 1 June 2021).

[38] (Martínez-Torrón 2021).

[39] (Hill 2021; Androutsopoulos 2021).

[40] (Tarantino 2020).

[41] Bundesverfassungsgericht 29 April 2020 -1 BvQ 44; Conseil d´État, ord. 18 May 2020, nn. 440366, 440380, 440410, 440531, 440550, 440562, 440563, 440590; Administrative Court of Lazio-Rome (Italy), Section I, April 29, 2020, no. 3453.

In the long run, such an unprecedented health crisis has offered an opportunity for a legal analysis of the workability of pluralist and democratic systems,[42] and has urged states to develop a constructive dialogue with religious groups in different legal contexts, regardless of their institutional models of church–state relationships, emphasizing the essential need for cooperation and for more solicitude toward religious communities' voices.[43]

6. Moving toward the Implementation of a Constructive Dialogue with Faith Communities?

The pandemic has emphasized the need to revisit the role of religious organizations within the network of social actors which are the driving force of modern democracies and to open new channels of communication between public and religious actors.[44] The health crisis has developed an increasing public awareness about the need to strengthen strategic partnerships between the public sector and religious communities, in order to improve public health and to reach the double purpose of safeguarding *salus corporum* without underestimating *salus animarum*.[45] A virtual cooperation can have many variations: in some legal scenarios religious measures have been negotiated between public and religious actors.[46] However, the opportunity to access public funding on a par with secular corporations, which has been granted in separationist contexts to religious organizations, can also be considered a kind of indirect cooperation.[47] Such access witnesses the growing awareness of the vital social role religious communities have played during the pandemic.

As is well known, religious communities have been traditionally deeply engaged with the delivery of health care, welfare and education. During the pandemic, the ability of religious leaders to provide guidance and support to their faithful as well as the involvement of religious communities in providing primary goods and services to vulnerable classes cannot be underestimated. In many cases religious communities provided guidelines to their faithful to reduce the spread the virus, anticipating public policies; and also provided alternative ways of worshipping, making their tenets flexible enough to prevent their communities facing conflicts of loyalty. Provided that the roll-out and mass distribution of vaccines can be a game-changer in stopping the spread of COVID-19 and reaching herd immunity, religious communities can play a key role during the current immunization challenge.[48] Actually, certain religious leaders are giving a robust contribution in combating vaccination reluctance; in addition, religious organizations are hosting immunization clinics.[49] However, the achievement of this outcome implies the opening of clear communication channels between the government and religious communities.[50] The lesson we have learned is that the possibility to implement networks between religious and public actors can become a key factor crucial to develop a strategic synergy, where all social parties contribute to combating the virus in the pursuit of a shared goal: the well-being of the whole global community and the welfare of the individual.[51]

7. Structure of the Special Issue

This Special Issue gathers contributions by experts from distinctive areas of research and different geographical areas. Three papers focus on the U.S. context, three papers ana-

42 (Ruggeri 2020, pp. 210–11).
43 (Hill 2021; Martínez-Torrón 2021).
44 (Martínez-Torrón 2021).
45 (Martínez-Torrón 2021).
46 With regard to the Italian Protocols between the State and various religious communities, *Protocolli per le celebrazioni delle confessioni religiose diverse dalla cattolica*. *Diresom* 15 May 2020. Available online: https://diresom.net/2020/05/15/protocolli-per-le-clebrazioni-delle-confessioni-religiose-diverse-dalla-cattolica/ (accessed on 1 June 2021).
47 (Chopko 2021; Madera 2020a).
48 (Lo Giacco 2020).
49 (Madera 2021).
50 (Martínez-Torrón 2021).
51 (Madera 2021).

lyze several European countries' perspectives, another three papers investigate distinctive extra-European scenarios and a final paper provides a comparative overview.

Jeffrey Haynes's paper offers a detailed investigation into the strict interrelationship between politics and religion in the U.S. context during the COVID-19 health crisis, how the conservative understanding of religious freedom under Trump's administration affected evangelical Christians' fierce judicial mobilization against restrictive state measures aimed at limiting the spread of the COVID-19 pandemic.

Paul Baumgardner's essay analyzes the abovementioned conservative turn with a view of the Supreme Court's case law, which is increasingly moving toward a re-visitation of traditional standards of review. According to the author, the "Pandemic Court" has "re-written" religious freedom, thus affecting the rights of vulnerable third parties in the areas of education, health and employment areas.

Mark Chopko's work explores another highly controversial issue: the possibility for religious organizations to have access to economic relief from the federal government during the COVID-19 pandemic, on equal footing with other secular entities, to mitigate the devastating economic implication of the health restrictive measures. Following the Supreme Court's most recent judicial trend, according to which religious organizations should not undergo disparate treatment compared to their secular counterparts because of their religious identity, the federal government has opted for equal treatment policies during the pandemic.

Along with the papers focusing on European perspectives, Anne Fornerod's paper examines how France has managed the COVID-19 health crisis, imposing severe restrictions on the exercise of religious freedom. Her paper is centered on the analysis of the Council of State's case law relating to religious exercise during the pandemic. Three different rulings underline the importance of religious freedom as a fundamental right, but also demonstrate that such a freedom can be subject to proportionate restrictions in order to reconcile it with other competing public interests.

Proportionality is the key word for analyzing Greek case law. George Androutsopoulos's paper examines the Greek legal responses to a pressing social need and its efforts to avoid deviations from the constitutional order. He underlines that case law has reviewed health measures by scrutinizing their coherence with the principle of proportionality, taking into serious consideration their temporary and short-term nature, and the need for their periodical revision, depending on changes in the epidemiological data and scientific evidence. The author underlines the cooperative efforts of the Orthodox Church to reduce the spread of the infection.

After giving a general overview, Mark Hill's essay is centered on the analysis of UK government's responses to COVID-19. He provides a detailed analysis of UK health measures, their direct and indirect implications on religious freedom and on other fundamental rights, the key role of the courts in scrutinizing challenges against government provisions with a view to the coherence with ECtHR's review standards. The author emphasizes the role played by religious communities in managing the pandemic through issuing guidelines to their faithful.

Susana Mosquera Monelos's paper examines the restrictions religious freedom has suffered during the pandemic, raising concerns about whether its placement within non-essential activities affected the effective reasonableness of such restrictions. After an overview of the protection of religious freedom at an international level, her analysis focuses on the distinctive nature of the Latin American context and the evolution of church–state relationships in Peru. The crucial issue which the author tries to face concerns whether and to what extent distinctive patterns of church–state relationships have affected the legal tools states have made use of to reconcile the management of the health crisis with the protection of fundamental rights such as religious freedom.

Nehal Ahmad's paper is centered on an in-depth political and legal analysis of the multicultural Indian context. After an exhaustive survey of the notion of minority, the evolution of minorities' protection in different historical periods and geographical areas,

and the protection they have been granted at an international level, Ahmad focuses on the status of religious minorities in India, the complex dynamics between mainstream religions and religious minorities, the historical background of Muslim communities, the clash between the constitutional rights accorded to these minorities and the enforcement of discriminatory laws. The frail position of minorities has been compromised during the health crisis, which increased prejudice, repression and discrimination against such minorities.

James Tengatenga, Susan T. Duley and Cecil Tengatenga's paper develops the tension between human rights and restrictive measures due to the need to limit the spread of the COVID-19 pandemic in the particular context of Malawi. Through a multi-disciplinary perspective, the authors explain the uniqueness of the Malawian government's response to the health crisis, due to the intersection of several factors: religion as a factor of social continuity and the evolution of its role in the public discourse, the inter-relationship between economic freedom and religious freedom, and the historical tensions between political, civil, social and economic rights in the specific Malawian geographical landscape.

The issue is enriched by a comparative chapter by Javier Martínez-Torron, which scrupulously outlines the coordinates of pandemic law, underlining the common aspects of the reactions of the various legal systems to the health emergency, the legal justifications for the restrictions, the reactions of religious communities, and the key role of the principles of equality and state neutrality. The author solicits a new understanding of the health crisis, as an opportunity to investigate future trajectories for religious freedom, aimed at developing new forms of cooperation between public and religious actors.

8. Conclusions

During the pandemic, law makers and courts have had to face a new legal dilemma: is religious freedom an essential right?[52] In a dystopic context where the protection of public health has been recognized as the "legal precondition"[53] of every fundamental liberty, a temporary hierarchy of rights has been established, and religious exercise in its collective dimension has often been assessed through the sterile lens of the comparable threshold of risk. Restrictive policies have often underestimated the spiritual value of religious rituals and practices and risked intruding into church matters.[54] Thus, their proportionality has to be strictly connected to their reasonableness, necessity, and non-discriminatory nature.[55] In the long run, the path of conflict risks emphasizing the polarization and radicalization of religion and undermining social cohesion.

However, the pandemic has also highlighted the need to develop new channels of dialogue between public and religious actors in the pursuit of shared goals.[56] The reconciliation of competing sets of values can promote the implementation of new ways of "living together,"[57] where every social actor offers his support to build a more inclusive society.[58]

Funding: This research received no funding.

Institutional Review Board Statement: Not Applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not Applicable.

Conflicts of Interest: The author has no conflict of interest.

52 (Corbin 2020).
53 (Madera 2020c, p. 71).
54 (Durham 2020).
55 (Androutsopoulos 2021).
56 (Martínez-Torrón 2021).
57 *S.A.S. v. France*, Application Number: 43835/11. ECtHR (Grand Chamber), 1 July 2014. https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-145466&filename=001-145466.pdf&TID=uexpxlons (accessed on 1 June 2021).
58 (Madera 2021).

References

Ahmad, Nehaluddin. 2021. Protecting the rights of minorities under international law and implications of COVID-19: An overview of the Indian context. *Laws* 10: 17. Available online: https://www.mdpi.com/2075-471X/10/1/17 (accessed on 5 May 2021).

Androutsopoulos, George. 2021. The right of religious freedom in light of the Coronavirus pandemic: The Greek case. *Laws* 10: 14. Available online: https://www.mdpi.com/2075-471X/10/1/14 (accessed on 5 May 2021).

Balsamo, Fabio, and Daniela Tarantino, eds. 2020. *Law, Religion and the Spread of COVID-19 Pandemic*. Diresom Papers 2. Pisa: Diresom, Available online: https://diresom.net/2020/11/07/law-religion-and-the-spread-of-covid-19-pandemic-ebook-diresom-papers-2/ (accessed on 5 May 2021).

Baumgardner, Paul. 2021. Immunizing the flock: How the pandemic Court rewrote religious freedom. *Laws* 10: 12. Available online: https://www.mdpi.com/2075-471X/10/1/12 (accessed on 5 May 2021).

Casuscelli, Giuseppe. 2021. Gli "Effetti Secondari" (Ma Non Troppo) Della Pandemia Sul Diritto Ecclesiastico Italiano E Le Sue Fonti. *Stato, Chiese E Pluralismo Confessionale* 8: 1–16. Available online: https://www.statoechiese.it/images/uploads/articoli_pdf/Casuscelli.M_Gli_effetti.pdf?pdf=gli-effetti-secondari-ma-non-troppo-della-pandemia-sul-diritto-ecclesiastic (accessed on 5 May 2021).

Chopko, Mark. 2021. The constitutionality of providing public fund for U.S. houses of worship during the Coronavirus. *Laws* 10: 8. [CrossRef]

Colaianni, Nicola. 2020. La libertà di culto al tempo del coronavirus. *Stato, Chiese E Pluralismo Confessionale* 7: 1–40.

Consorti, Pierluigi, ed. 2020. *Law, Religion and COVID-19 Emergency*. Diresom Papers 1. Pisa: Diresom, Available online: https://diresom.net/2020/05/07/diresom-papers-1-ebook-law-religion-and-covid-19-emergency/ (accessed on 5 May 2021).

Consorti, Pierluigi. 2021. Emergencia y libertad religiosa en Italia frente al medio a la COVID-19. In *COVID-19 Y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 167–82.

Corbin, Caroline M. 2020. Religious Liberty in a Pandemic: Constitutional Challenges to Mass Gatherings Bans. Canopy Forum 2 October 2020 "Law, Religion, and Coronavirus in the Unites States: A Six Month Assessment". Available online: https://canopyforum.org/2020/10/02/religious-liberty-in-a-pandemic-constitutional-challenges-to-mass-gathering-bans/ (accessed on 5 May 2021).

Durham, W. Cole, Jr. 2020. The Coronavirus, the Compelling State Interest in Autonomy, and Religious Autonomy. Canopy Forum 2 October 2020 "Law, Religion, and Coronavirus in the Unites States: A Six Month Assessment". Available online: https://canopyforum.org/2020/10/02/the-coronavirus-the-compelling-state-interest-in-health-and-religious-autonomy/ (accessed on 5 May 2021).

Eisenberg, Avigail, and Jeff Spinner-Halev, eds. 2009. *Minorities within Minorities. Equality, Rights and Diversity*. Cambridge: Cambridge University Press.

Faggioli, Massimo. 2020. Pandemic and Religious Liberty in the USA; Between Privatization of the Church and Neo-Integralism. *Diresom*. April 8. Available online: https://diresom.net/2020/04/08/pandemic-and-religious-liberty-in-the-usa-between-privatization-of-the-church-and-neo-integralism/ (accessed on 5 May 2021).

Fornerod, Anne. 2021. Freedom of Worship during a Public Health State of Emergency in France. *Laws* 10: 15. Available online: https://www.mdpi.com/2075-471X/10/1/15 (accessed on 5 May 2021).

Haynes, Jeffrey. 2021. Donald Trump, the Christian right and COVID-19: The politics of religious freedom. *Laws* 10: 6. Available online: https://www.mdpi.com/2075-471X/10/1/6 (accessed on 5 May 2021).

Hill, Mark. 2020. Introduction. Locating The Right to Freedom of Religion or Belief Across Time and Territory. In *Routledge Handbook on Freedom of Religion or Belief*. Edited by Silvio Ferrari, Mark Hill QC, Arif A. Jamal and Rossella Bottoni. London: Routledge.

Hill, Mark. 2021. Coronavirus and the Curtailment of Religious Freedom. *Laws* 9: 27. [CrossRef]

Hoover, Dennis R. 2014. *Religion and American Exceptionalism*. London and New York: Routledge.

Licastro, Angelo. 2020a. Annotazioni sugli standard di tutela della libertà di culto nella seconda fase di gestione della pandemia (spunti per una comparazione tra Francia, Italia e Stati Uniti d'America). *Consulta Online* 3: 768–87. Available online: https://www.giurcost.org/studi/licastro3.pdf (accessed on 5 May 2021).

Licastro, Angelo. 2020b. Il lockdown della libertà di culto pubblico al tempo della pandemia. *Consulta Online* 1: 229–41. Available online: https://www.giurcost.org/studi/licastro.pdf (accessed on 5 May 2021).

Lo Giacco, Maria Luisa. 2020. Il rifiuto delle vaccinazioni obbligatorie per motivi di coscienza. Spunti di comparazione. *Stato, Chiese e Pluralismo Confessionale* 7: 41–65. Available online: https://www.statoechiese.it/images/uploads/articoli_pdf/Lo_Giacco.M_Il_rifiuto.pdf?pdf=il-rifiuto-delle-vaccinazioni-obbligatorie-per-motivi-di-coscienza.-spunti (accessed on 5 May 2021).

Madera, Adelaide. 2020a. The Impact of Coronavirus on Public Funding of Religious Organizations. Canopy Forum. 2 October 2020 "Law, Religion, and Coronavirus in the Unites States: A Six Month Assessment". Available online: https://canopyforum.org/2020/10/02/the-impact-of-coronavirus-on-public-funding-of-religious-organizations/ (accessed on 5 May 2021).

Madera, Adelaide. 2020b. Reconciling the Protection of Public Health with Religious Freedom: The Viability of Shared Responses. In *Law, Religion and the Spread of COVID-19 Pandemic*. Diresom Papers 2. Edited by Fabio Balsamo and Daniela Tarantino. Pisa: Diresom, pp. 213–26. Available online: https://diresom.net/2020/11/07/law-religion-and-the-spread-of-covid-19-pandemic-ebook-diresom-papers-2/ (accessed on 5 May 2021).

Madera, Adelaide. 2020c. Some preliminary remarks on the impact of COVID-19 pandemic on the exercise of religious freedom in the United States and Italy. *Stato, Chiese E Pluralismo Confessionale* 16: 70–140. Available online: https://www.statoechiese.it/contributi/some-preliminary-remarks-on-the-impact-of-covid-19-on-the-exercise-of-relig (accessed on 5 May 2021).

Madera, Adelaide. 2021. COVID-19 Vaccines v. Religious Objections in the Workplace: How to Prevent a New Catch-22. Canopy Forum. April 30. Available online: https://canopyforum.org/2021/04/30/covid-19-vaccines-v-conscientious-objections-in-the-workplace-how-to-prevent-a-new-catch-22/ (accessed on 5 May 2021).

Martínez-Torrón, Javier, and Belén Rodrigo Lara, eds. 2021. *COVID-19 Y Libertad Religiosa*. Madrid: Iustel.

Martínez-Torrón, Javier. 2021. COVID-19 and religious freedom: Some comparative perspectives. *Laws* 10: 39. [CrossRef]

Milani, Daniela. 2020. Fede E Salute Al Tempo Del Coronavirus: Per Un Primo Bilancio A Un Mese Dal Lockdown OLIR. April 8. Available online: https://www.olir.it/focus/daniela-milani-fede-e-salute-al-tempo-del-coronavirus-per-un-primo-bilancio-a-un-mese-dal-lockdown/ (accessed on 5 May 2021).

Mosquera Monelos, Susana. 2021. The impact of the church-state model for an effective guarantee of religious freedom. A study from the Peruvian experience during the COVID-19 pandemic. *Laws* 10: 40. [CrossRef]

Petrov, Jan. 2020. The COVID-19 emergency in the age of executive aggrandizement: What role for legislative and judicial checks? *Theory and Practice of Legislation* 8: 71–92. Available online: https://www.tandfonline.com/doi/full/10.1080/20508840.2020.1788232 (accessed on 5 May 2021). [CrossRef]

Ruggeri, Antonio. 2020. Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese, ormai endemica, del sistema delle fonti. *Consulta on Line* 1: 210–23. Available online: https://www.giurcost.org/studi/ruggeri107.pdf (accessed on 5 May 2021).

Schwartzman, Micah. 2012. What if religion isn't special? *University of Chicago Law Review* 79: 1351–427. [CrossRef]

Tarantino, Daniela. 2020. The "Drive Confession". The Care of Souls at the Time of the Pandemic. Canopy Forum. "Law, Religion, and Coronavirus in the Unites States: A Six Month Assessment". October 2. Available online: https://canopyforum.org/2020/10/02/the-drive-confession-the-care-of-souls-at-the-time-of-the-pandemic/ (accessed on 5 May 2021).

Tengatenga, James, Susan M. Tengatenga Duley, and Cecil J. Tengatenga. 2021. Zimitsani Moto: Understanding the Malawi Covid-19 Response. *Laws* 10: 20. Available online: https://www.mdpi.com/2075-471X/10/2/20 (accessed on 5 May 2021).

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Article

Donald Trump, the Christian Right and COVID-19: The Politics of Religious Freedom

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Abstract: This paper examines the issue of religious freedom in the USA during the coronavirus pandemic of 2020–2021, during the presidency of Donald Trump (2017–2021). It contends that the ability of state governors to close religious places of worship illustrates both the limits on the power of the president and that public health can take supremacy over religious freedom in today's America. The paper is organised as follows: first, we identify the importance of religious freedom for the more than 20 million Americans who self-classify as Christian evangelicals. Second, we assess the transactional importance that President Trump placed on Christian evangelicals' religious freedom. Third, we look at one kind of Christian evangelicals—that is, Christian nationalists—to see how they regarded restrictions on their religious behaviour caused by COVID-19. Fourth, we briefly examine several recent legal cases brought against the governors of California and Illinois by the Liberty Counsel, the leading Christian evangelical legal firm in the USA. Led by Matthew Staver, Dean of the Liberty University Law School, Liberty Counsel regularly represents Christian nationalists who challenge state-imposed restrictions on religious gatherings during the coronavirus pandemic.

Keywords: Christian Right; Donald Trump; COVID-19; coronavirus; pandemic; religious freedom

Citation: Haynes, Jeffrey. 2021. Donald Trump, the Christian Right and COVID-19: The Politics of Religious Freedom. *Laws* 10: 6. https://doi.org/10.3390/laws10010006

Received: 26 November 2020
Accepted: 28 January 2021
Published: 30 January 2021

1. Introduction

> Trump, a vulgarian celebrity, was far from evangelicals' first choice but soon became their champion. In return, they were willing to forgive his sins and believe in redemption, putting him on notice that personal misconduct in office would not be tolerated. *Thus an unlikely relationship rooted in mutual dependency was formed*. (Smith 2019; emphasis added)

> The pejorative du jour is to call evangelicals "transactional", as though buying a loaf of bread and not simply praying for one were somehow faithless. But what is sneeringly called "transactional" *is representational government, in which patriotic citizens vote, deputizing others to act on their behalf for the good of the country*. Isn't it conceivable that faithful Christians think Mr. Trump is the best choice? (Metaxas 2020; emphasis added)

Christian evangelical support for Donald Trump in the 2016 presidential election was a crucial component in his victory (Muirhead and Rosenblum 2019). In the first quotation above, Smith notes that the electoral relationship between "evangelicals" and Trump was rooted in "mutual dependency". The second quotation expresses Metaxas's opinion that "evangelicals" who voted for Trump were doing so selflessly "for the good of the country". Both quotations underline that the electoral relationship between Trump and Christian "evangelicals" in 2016 was based on a quid pro quo: I do something for you and you do something for me. What "evangelicals" did for Trump in 2016 is obvious, enabling him to gain the presidency. What did Trump do for "evangelicals"? This paper argues that President Trump diligently advanced Christian evangelicals' main priority—that is, their religious freedom—in various ways, including most importantly the appointment of conservative judges to the Supreme Court, most recently the conservative Catholic Amy

Coney Barrett, who were expected by many to expand Christian conservatives' religious freedoms, not least by clamping down on abortion rights for women and same-sex marriage. Trump appeared to be a shoo-in for re-election in November 2020—until the onset of the COVID-19 pandemic in early 2020. Over the next few months, Trump lost control of the attempt to enhance Christian evangelicals' religious freedom. Unwilling or unable to lead the fight against the pandemic, the White House saw state governors take on the responsibility of fighting COVID-19. Many shut religious places of worship to the chagrin of many Christian conservatives: to them, this was an intolerable reduction of their religious freedom. Represented by legal firms, including Liberty Counsel, Christian conservatives sought to overturn the closing of their churches in the courts. To the surprise of many, they were not usually successful, demonstrating that religious freedom in America may be secondary in the face of a pressing public health emergency.[1]

The paper examines the issues raised in the previous paragraph. It is organised as follows: first, we identify the importance of religious freedom for the more than 20 million Americans who self-classify as Christian evangelicals. Second, we assess the transactional importance that President Trump placed on Christian evangelicals' religious freedom. Third, we look at one kind of Christian evangelicals—that is, Christian nationalists—to see how they regard restrictions on their religious behaviour caused by COVID-19. Fourth, we briefly examine several recent legal cases brought against the governors of California and Illinois by Liberty Counsel, the leading Christian evangelical legal firm in the USA. Led by Matthew Staver, Dean of the Liberty University Law School, Liberty Counsel regularly represents Christian nationalists who challenged state-imposed restrictions on religious gatherings during the coronavirus pandemic.

2. The Christian Right in Trump's America

There are various labels used to describe Christian conservatives in the USA. Some use the term "Christian evangelical", while others refer to Christian conservatives. In this paper, we will employ the term "Christian Right" as a generic label for politically active Christian conservatives, many of whom are white. Gagné (2019) defines the Christian Right as a "religious coalition with political aims that is mainly comprised of evangelicals and conservative Catholics and Protestants". Many among the Christian Right are ethnically "white", descended for the most part from north-west European Protestants who historically migrated to the USA. Regarding Trump's electoral support base among the Christian Right, this mainly drew on white Protestant (Evangelical) conservatives and white Catholic conservatives, most of whom regularly vote Republican for ideological, cultural and religious reasons (Miller 2019). The Christian Right is not a party, movement or organisation. It is a loose partnership of individuals and groups united in the view that America's Christian foundations are fatally undermined by secularisation and that it is crucial to reverse this trend to return to the founding (Christian) values of America. Lacking organisational unity, the Christian Right does not have a collective view of what tactics and strategy are necessary to achieve a re-Christianisation of America. The Christian Right, in other words, is not monolithic. One thing many members of the Christian Right, including non-white members such as Latino men, can agree on, however, is that support for President Trump was necessary in the November 2020 presidential election. This was not necessarily because of his personal religiosity or recognisably Christian characteristics: he is "a thrice-married adulterer with previously socially liberal views" (Haberman 2018). Instead, for example in the case of many Catholic Latino men, it was mainly because of the perception that Trump was willing to "stand up" to the Left, as well as his appointment of conservative judges to the Supreme Court (Fadel 2020). In both the November 2016 and November 2020 presidential elections, Trump attracted the support of four in five white

[1] There was however a recent notable exception. On 25 November 2020, the U.S. Supreme Court ordered a preliminary injunction in *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87. The ruling stated "that New York may not enforce 10- or 25-person congregation-size limits on certain Catholic churches and Orthodox synagogues, pending further Supreme Court litigation, because the restrictions likely discriminate against religion in violation of the First Amendment." (Nelson and Jones 2020).

Protestant evangelical voters, a greater proportion than fellow Republicans Mitt Romney, John McCain or George W. Bush had achieved in the previous three elections. In addition, Trump was able to gain the votes of more than half (56%) of white Catholics in 2016, with Hillary Clinton receiving only 37 per cent (Sullivan 2019).

While most white Christian conservatives, both Protestant and Catholic, voted for Trump, an important body of evangelicals did not support him. America's largest evangelical organisation, the National Association of Evangelicals (NAE), "represents more than 45,000 local churches from 40 different denominations and serves a constituency of millions" (https://www.nae.net/about-nae/).[2] The NAE opposed Trump primarily for his immigration enforcement policies and pillarization of LGBTQ people (Alexander 2019), as well as for his personal amorality.[3] NAE opposition to Trump was not, however, total. It strongly supported Trump's key policy of religious freedom for Christian conservatives. Unlike some other Christian evangelical leaders, however, especially those in Trump's inner circle, the NAE did not support the unlimited right of Christians to hold religious services as normal during the pandemic (National Association of Evangelicals 2020).

White Christian conservatives, once the "silent majority", are no longer a demographic majority in America today; and many feel beleaguered. Many regard Trump as their saviour, and Trump's aim to "make America great again" involved policies with which most white Christian conservatives strongly agreed. The nonpartisan research organisation, the Public Religion Research Institute, published a report in September 2017, entitled *America's Changing Identity* (Jones and Cox 2017). The report, indicating that white Christians are now a minority among the US population, drew on a huge sample of 101,000 Americans from all 50 states. In the mid-1970s, a little over four decades ago, eight in 10 Americans were so identified, and more than half (55%) were white Protestants. In the mid-1990s, white Christians comprised two-thirds of the population (Jones and Cox 2017). Now, the proportion of white Christians in the USA is only 46% of what it was four decades ago.

The percentage reduction in white Christians was accompanied by a growing sense among many that America's "Christian values" had significantly declined (Ehret 2019). Several landmark legal decisions reinforced these concerns. In 1962 and 1963, the Supreme Court removed prayer and mandatory Bible reading from public schools. In 1965, the Hart–Cellar Act increased America's diversity by opening the country to large numbers of non-western immigrants, some of whom brought with them their diverse religious beliefs. In 1971, the Supreme Court, in *Green v. Connolly*, stripped the tax-exempt status from institutions that discriminated in their admissions policies based on race. *Green v. Connolly* affected a host of mainly Southern Christian schools and academies, many of which perceived the decision in terms of "big government" threatening religious freedom—that is, their liberty to discriminate based upon a particularistic reading of the Bible. In 1973, the Supreme Court supported a women's right to an abortion in *Roe v. Wade*. Many Christian conservatives regarded *Roe v. Wade* as expressly going against God's will, as every child conceived is thought to be a gift from God (DiMaggio 2019, pp. 159–72). The overall result was that over a decade from the early 1960s to the early 1970s, the world that white Christian conservatives thought they knew appeared to be disappearing. They did not like what they saw and wanted it reversed.

3. The Christian Right and Religious Freedom

Many Christian conservatives, buoyed by a burgeoning interest in American identity which came to a head in the USA's bicentennial celebrations in 1976, came to believe that the best way of limiting or even reversing what they perceived as the damaging effect

[2] In addition to its church membership, the NAE runs dozens of schools and non-profits, both in the USA and around the world and "provides resources for ministry leaders and advocates for issues of 'justice and righteousness'. Thus, while "many Americans view evangelicals through a political lens thanks to the media's focus on the strong white conservative evangelical support for President Donald Trump, NAE has been at the forefront of pointing out that *'evangelical' is a theological term that encompasses a politically diverse group of people*" (emphasis added; Smith 2019).

[3] A magazine close to the NAE, *Christianity Today,* published an editorial by its outgoing editor, Mark Galli, in December 2019, which strongly criticised Trump for his lack of moral compass. See (Galli 2019).

of secularisation-led religious, social, cultural and demographic changes was to organise politically. Jerry Falwell, a Baptist minister from Lynchburg, Virginia, formed the Moral Majority in 1979 (Fea 2018, pp. 58–60). Falwell's aim was to "train, mobilize, and electrify the Religious Right" in preparation to fight a "holy war" for the moral soul of America. The Moral Majority played a major role in electing Ronald Reagan as president in 1980 and helped shaped a vision for the Christian Right that remains strong today (Fea 2018). Falwell was able to use "moral majority" arguments to enlist support for Christian Right policies.[4] Today, however, as already noted, white Christians are no longer in the majority in the USA. Furthermore, recent opinion polls indicate that Americans are becoming more liberal on issues such as same-sex marriage, although not on abortion (Lewis 2017). These two developments—the numerical decline of white Christians and growing liberalism of Americans on some social issues—make it implausible that a re-Christianisation of America would occur through a large scale, voluntary readoption of Christian conservative values. How then to bring this about? The answer was to revive and embed Christian conservative values via legislation in relation to religious freedom.

President Reagan encouraged American Christian conservatives to be assertive to protect their values, especially in opposing abortion, and to join him in focusing on America's social problems as stemming from a decline in "Christian values" (McVeigh and Estep 2019, p. 164). During Reagan's presidency (1981–1989), the Christian Right became a powerful component of the Republican Party. The Christian Right support was instrumental in the electoral victories of George W. Bush in 2000 and 2004. While the Christian Right's influence diminished during the Obama administration, Trump's electoral victory in 2016 marked its return to political prominence (Bettiza 2019, p. 218).

Fea (2018) identifies three overlapping strands within today's Christian Right, all strongly supportive of Trump in both the 2016 and 2020 presidential elections. Fea refers to them as "court evangelicals". They are:

- a section of the mainstream Christian Right, whose origins go back to the 1980s.
- a cohort of independent "charismatics" who claim the gifts of the Pentecostal tradition (that is, visions, miracles and direct revelations from God) but do not belong to any established Pentecostal group.
- "prosperity gospel" advocates who resemble the second category but put more emphasis on the material rewards, which following their particular version of Christianity would bring to the faithful. (Fea 2018, pp. 115–52)

Rather than a shared theological worldview, what fundamentally links the court evangelicals, "is an insistence that loyalty to Mr Trump must be unconditional. In their world, the president is presented not just as the least-worst political option whose merits outweigh his flaws, *but as a man assigned by God to restore America to its divinely set course, and therefore almost above human criticism*." (Fea 2018, p. 12, emphasis added). Why do the "court evangelicals" regard Trump in this way, that is, as infallible? It is because he is regarded as representing God's will, articulating divine preferences (Green 2021).

How might Trump set about restoring "America to its divinely set course", characterised primarily by growing religious freedom for the Christian Right? In the context of seemingly inexorable secularisation, it would not be enough simply to assert that Americans should become "better Christians". It would be necessary to legislate to enforce a return to particularistic religious values favoured by the Christian Right. Despite initial doubts, the Christian Right came to regard Trump as the person most likely to reverse America's cultural, religious and social decline and "make America great again" (Miller 2019). Trump's side of the bargain was to show the Christian Right that he would deliver on his electoral promise to improve their religious freedom. Trump's appointment of three Christian conservatives to the Supreme Court—Neil Gorsuch, an Anglican, in

[4] During the 1980s, the Moral Majority became overwhelmed by financial problems due to a lack of income. Falwell disbanded the Moral Majority in 1989 in Las Vegas, announcing: "Our goal has been achieved . . . The religious right is solidly in place and . . . religious conservatives in America are now in for the duration" (Allitt 2003, p. 198)

February 2017; Brett Kavanaugh, a Catholic, in October 2018; and Amy Coney Barrett, a conservative Catholic, in October 2020—was evidence of his determination in this regard.[5] The appointment of these three was especially important for the Christian Right's agenda as the Supreme Court would now have a 6-3 conservative majority.[6] Some among the Christian Right believed that their appointment would make eventual reversal of *Roe v. Wade* more likely, believing that Gorsuch, Kavanaugh and Barrett were personally in favour of a high level of restrictions on the availability of abortion clinics (Mahdawi 2019). Overall, the appointment of these Christian conservatives to the Supreme Court was expected to advance the religious freedom agenda of the Christian Right and provide a clear response to the perceived "ideologically-motivated attack on religious freedom from left-wing, anti-religion secularists" (Rubin 2019).

Trump made his opinion clear on this issue at a ceremony in January 2020 marking "National Religious Freedom Day". He stated that "there's a growing totalitarian impulse on the far left that seeks to punish, restrict and even prohibit religious expression". He said that as president he would enhance the ability of Christians to pray, including in schools, without fear of attack from aggressive secularists. He added, "While I'm President ... we will not let anyone push God from the public square. We will uphold religious liberty for all" (Vazquez 2020). On 15 January 2020, Trump promised action to allow Christian prayers in schools (Trump 2020).

To further bolster his credentials with the Christian Right, Trump appointed to senior roles in his administration three avowed Christian conservatives: (1) Vice-President Mike Pence, a member of the House of Representatives (2001–2013) and former governor of Indiana (2013–2017), who describes himself as "a Christian, a conservative and a Republican—in that order"; (2) Mike Pompeo, a former Director of the CIA whom, following the dismissal of Jefferson Beauregard Sessions III, Trump appointed as Secretary of State in May 2018, and who claims to have an open Bible on his desk to help him reach policy decisions (Wright 2019); and (3) William Barr, Attorney-General from January 2019, a conservative Catholic.[7] In October 2019, Barr "delivered a fiery speech on religious freedom in which he warned that 'militant secularists' were behind a 'campaign to destroy the traditional moral order'" (Barr 2019). The appointment of these three prominent white Christian (male) conservatives to senior positions in Trump's administration underlined its close relationship with the Christian Right, providing comfort for the latter's belief that Trump was the president to roll back secularisation and "re-Christianise" America.

4. Limits to Religious Freedom in a Pandemic

Trump's initial reaction was to claim that the emerging pandemic was not a big deal; he had everything under control and his administration's response to COVID-19 would be prompt, effective and relatively painless for Americans. Life could carry on as before, perhaps with a few temporary inconveniences. Trump was the man, he proclaimed, who had instituted a major economic revival in the USA. He would not let the virus disrupt that. "Trust me, carry on as normal and vote for me in November 2020", might sum up his initial response to the pandemic.

As the pandemic developed and Americans began to die in large numbers, with more than 400,000 deaths by January 2021, the desirability of allowing uncontrolled public gatherings became a highly controversial issue. When people get together, many catch the virus, some become ill, some are okay, and some die. What to do? The Trump

[5] In a January 2017 interview with the Christian Broadcasting Network, Trump claimed that Gorsuch was an appointment that "evangelicals, Christians will love." (Trump quoted in Joshi 2017).

[6] Although a vacancy for the Court arose during Obama's presidency, "Evangelical pressure on Republican senate leader Mitch McConnell not to hold a vote on Barack Obama's nominee for the court, Merrick Garland, started long before Trump was the nominee". According to Henry Olsen, a senior fellow at the Ethics and Public Policy Center in Washington, this was because "they feared the sixth vote would be the death knell for central elements of their faith". McConnell's plan came to fruition: the seat was not filled at the time of the 2016 presidential election. (Olsen quoted in Smith 2019).

[7] Barr also served as Attorney-General in 1991–1993 during the presidency of George H. W. Bush. Barr resigned as Attorney-General in December 2020.

administration did not display either vigour or effectiveness in tackling the pandemic. Attention turned to the state level: what could state governors do to control COVID-19 and save lives? Some states shut down religious services completely; others allowed them to function as normal. The issue was highly controversial everywhere. The Christian Right was alarmed that their religious freedoms were being curtailed—albeit temporarily—in order to fight the pandemic. Many did not accept the medical reasons behind the closures of places of religious worship; instead, some regarded the closures as sinister: an aspect of the toxic process of secularisation whose purpose, they believed, was to undermine and eventually remove the right of religious believers to exercise their faith without control by secular state authorities. Others refused to believe that COVID-19 was "real", contending instead that it was a "phantom plague". An early high-profile case involved the arrest and jailing of a Tampa Bay, Florida-area pastor Rodney Howard-Browne, a controversial figure who claimed that COVID-19 was a "phantom plague" (Woodward 2020). Howard-Browne held two large services defying the county's stay-at-home order when there was fast growth of local coronavirus cases. Following the services, he was detained on 30 May 2020. Two days later, Florida's governor, Ron DeSantis, a close ally of President Trump, issued an executive order. DeSantis ordered that "attending religious services conducted in churches, synagogues and houses of worship" were now deemed to be "essential activities" and allowed to function. He also stated that his order would take precedence over any contradictory local restrictions. By this time, however, "dozens of pastors across the Bible Belt [had] succumbed to coronavirus after churches and televangelists played down the pandemic and actively encouraged churchgoers to flout self-distancing guidelines" (Woodward 2020).

Some other states, including Indiana and Kansas, also relaxed rules about allowing religious services, sometimes without meaningful restrictions preventing large numbers of people meeting. From a public health perspective, to limit in-person religious gatherings made sense, as it did with all such gatherings, both religious and secular. The virus is easily spread as an aerosol, especially when people talk or sing, as in many religious gatherings. In addition, transmission of the virus is known to be spread more easily in enclosed spaces and with people in close proximity. "Church-related gatherings often ha[d] all these features" and were frequently "the nexus for many cases where COVID-19 . . . spread across a community" (The Conversation 2020). Finally, some states, such as California, had stringent rules about in-person gatherings, including in places of religious worship. In April 2020, 71 churchgoers at Bethany Slavic Missionary Church, near Rancho Cordova, California, were infected with the virus, and one died. "Frustrated county officials [said] church leaders [were] refusing to listen to their demands to stop fellowship meetings" (Bizjak et al. 2020). The defiance of churches such as Bethany Slavic Missionary Church may have been encouraged by the Trump administration, which, in May 2020, without prior warning, "removed warnings contained in guidance for the reopening of houses of worship that singing in choirs can spread the coronavirus" (Sun and Dawsey 2020).

The coronavirus pandemic exacerbated the already present political divisions in the United States, especially on the issue of religious freedom. Many Americans, both religious and secular, decried social distancing restrictions as an unacceptable infringement on their freedom. Others regarded social distancing restrictions as sensible and humane, necessary to try to ensure that people remained healthy and did not catch the virus. Within the body of the Christian Right is a group known as Christian nationalists. We are identifying this group in the paper for heuristic reasons: there is no party or movement called "Christian nationalists", although scholars have sought to identify their religious and political characteristics, including in relation to the coronavirus pandemic (Haynes 2021).

Although Christian ideals and symbols have long played an important role in American public life, Christian nationalism is an ideology that goes much further than, for example, asserting that the phrase "one nation under God" belongs in the pledge of allegiance. Stewart (2020) argues that Christian nationalism is a powerful ideological component of the politically potent Christian Right, which first came to prominence during

the Reagan presidency. The Christian Right is a network of well-funded, ideologically-motivated think tanks, advocacy groups and pastoral organisations, with both American and international connections. Stewart (2020) asserts that Christian nationalists seek to acquire power so as to impose their religious vision on all of American society and that Trump was the chosen means to try to achieve this goal. Not until his election as president was it apparent that the political power of Christian nationalism, which over time has extended to both traditional and new social media, was now in the driving seat. Christian nationalists claim to be the public voice of theologically conservative Christian Americans (Whitehead et al. 2018). Many understand the country's travails as punishment for alleged departure from traditional Judeo-Christian values and beliefs. For them, Trump was the leader to put America back on the path of morality and virtue (Haynes 2021). Finally, many have noted that some among the Christian nationalists are also white supremacists; many of the latter are strong supporters of Donald Trump (Cameron 2021).

According to the sociologist Samuel Perry, "Christian nationalists have indicated over several studies that . . . they are more likely to believe in conspiracy theories, more likely to distrust the media and more likely to distrust scientists and feel like there's some kind of conspiratorial agenda that is behind all of that" (Bailey 2020). Perry et al. (2020) argue that American Christian nationalists are likely to scorn social distancing recommendations, be sceptical about the views of science on the coronavirus pandemic, claim that coronavirus-related lockdown orders unacceptably threaten both the economy and Americans' liberty, and downplay or overlook the danger to vulnerable members of society from catching the virus.[8] According to Perry et al. (2020), these findings indicate that many Christian nationalists in the USA adhere to "an ideology that idealizes and advocates a fusion of American civic life with a particular type of Christian identity and culture." In addition, adherence to a Christian nationalist view of the world is a good indicator of whether someone is willing to engage in anti-virus precautionary measures, including prescribed social distancing, wearing face masks and regularly and effectively washing hands. Seeking to explain the Christian nationalist response to the pandemic, Perry points to an emerging crisis of authority in the USA. When Christian nationalists were asked whom they trust for pandemic-related information, such as medical experts and the Centres for Disease Control, they tended to choose President Trump "by a landslide", followed by religious organisations and Republicans. Finally, Perry notes that Christian nationalism often serves as a key characteristic of social identity; it is not necessarily connected to Christian doctrines as the name might imply. Counterintuitively, any kind of religious devotion "often had the opposite effect to Christian nationalism, and was the leading predictor of whether someone would take precautionary measures". According to Perry, actively religious people were "more likely to wash their hands, to use hand sanitizer and to avoid touching their face—all the things that were recommended . . . We find religious people are more likely to say, 'If we have the decision between individual liberty and protecting the vulnerable, we're going to protect the vulnerable"' (Bailey 2020).

The response of Christian nationalists to the coronavirus pandemic demonstrates that restrictions on behaviour caused by measures to try to restrict its spread are seen by them as unacceptable limits on their personal behaviour. Although Perry claims that Christian nationalists are not especially concerned about religious issues, a concern with religious freedom was shown in their response to the measures enacted by some state governors who closed religious places of worship and forbade the gathering of significant numbers of people to worship. In order to try to reverse such measures, legal firms sympathetic to the claims of Christian nationalists and the Christian Right more generally took the governors to court. In sum, it might be argued that Christian Nationalists are more interested in protecting their personal freedom and less concerned with religious issues. This would not,

[8] Perry and his colleagues' findings draw primarily on data extracted from the Public and Discourse Ethics Survey, which polled Americans in August 2019, February 2020 and May 2020. They compare it to 2007 data from the Baylor Religion Survey (https://www.thearda.com/Archive/Files/Descriptions/BAYLORW2.asp).

however, be the case. For Christian nationalists, personal freedom and religious freedom are the same. Christian nationalist advocacy groups, such as Alliance Defending Freedom (ADF), Liberty Counsel and First Liberty Institute defend their view of the free exercise clause of the First Amendment, closely relating religious and personal freedom. ADF puts it like this:

> Since the start of the outbreak, as officials attempt to stop the spread of COVID-19, some have overstepped their authority. At times, these officials quickly course-correct after learning the unintended consequences of their orders. Some have taken prodding from ADF letters to set the record—and the law—straight. Others continue to violate the First Amendment, particularly when it comes to regulations placed on churches and other ministries. (Defending Freedom during a Pandemic n.d.; https://www.adflegal.org/covid19)

In 2020, Liberty Counsel led the defence of a Virginia pastor who faced penalties for continuing to hold in-person church gatherings in violation of state orders (Criminal Charges Against VA Pastor Dropped 2020). In addition, ADF represented two churches who sued Oregon's governor for maintaining restrictions on churches (Oregon Governor Sued 2020), while First Liberty Institute won a temporary restraining order against a Kentucky policy limiting in-person services. (Breaking: Judge Grants Restraining Order 2020): Roger Byron, Senior Counsel at First Liberty, commented that the judge in Kentucky, "Judge Walker recognized that the mayor's prohibition of drive-in church services on Easter violated the church's religious freedom. The church will conduct the Easter drive-in service tomorrow with grateful hearts and in full compliance with the CDC's guidelines." It is clear from Byron's comment that both religious liberty—the right to attend religious services in person—and personal freedom—the right to drive one's car to a church—are intertwined in First Liberty's satisfaction that a court judgement went in their favour.

5. COVID-19, Liberty Counsel and the US Supreme Court

> It is criminal in California to go to your neighbor's home to pray with them or have a Bible study! Let this sink in—you can go to prison in CA for worshipping. (Matthew Staver, founder and chairman of Liberty Counsel, 23 November 2020)

On 9 April 2020, Laura Kelly, the Democratic Governor of Kansas, banned religious gatherings of more than 10 people. Kelly's action was followed by the Republican-controlled state legislature voting to overturn Kelly's directive, claiming that it was "an attack on the free exercise of religion." In response, the governor ordered "her staff to explore all her legal options in order to enforce her decision. Under the Constitution, she is on strong grounds to issue such an order" (Flynn and Stanley-Becker 2020). This is because, although never tested, the free exercise clause is not a *carte blanche* for religious spreaders in a pandemic; the US Constitution is not a "suicide pact" (Turley 2020). Churches that wish to open as normal would in effect be converting the free exercise of religion clause of the Constitution into a suicide pact of sorts: it not only puts the faithful at risk but also risks infecting others in their communities, both religious and non-religious people. No constitutional rights are sacrosanct—under certain compelling conditions. It is hard to imagine anything more convincing than battling a pandemic which, by the time of the 2020 presidential election, had killed more than 230,000 Americans. To put the 230,000 coronavirus deaths in America in eight months (March–October 2020) into perspective, an estimated 47,424 American soldiers died in the two-decades-long Vietnam War (1955–1975). In World War II, 291,557 US service personnel were killed. During the first eight months of the coronavirus pandemic in 2020, America experienced 75% of the numbers of deaths of US soldiers in World War II, a conflict which, for the USA, lasted nearly four years (8 December 1941–2 September 1945).

Limiting the extent of gatherings was the only effective preventative measure to the coronavirus spreading until an effective vaccine is available. What many would see as common sense, as a necessary response to an unprecedented threat to the lives and wellbeing of millions of Americans, was not agreed upon by all. In Florida, Republican

Governor Ron DeSantis overruled local orders limiting or barring church gatherings. In Arkansas, Pastor Chad Gonzales of Awaken Church defied demands to end services. His declaration of Jesus as a coronavirus victim was based on the belief that Jesus took away every sin and disease on the cross, a particularly powerful message for when Gonzales made this claim, namely Easter (Lockwood 2020). Further, Pastor Tony Spell of the Life Tabernacle Church in Louisiana was arrested for holding in-person services. Spell declared his intention to hold large Easter services and insisted that he would never yield to this "dictator law", while his claim that "true Christians do not mind dying" was certainly debatable (Peiser 2020).

If the only people who might catch the virus and suffer as a result were those who choose to attend religious services in-person knowing the risks they face, then one might argue that, while I may not agree with them, it is their choice, it is a free country, and so shouldn't they be allowed to become ill or even die as a result of their determination to exercise their personal religious rights? The response might be that if it was a case that only those attending the religious services are under threat of catching the virus, then a constitutional argument might be made for the right to make a self-destructive decision based on faith trumping science.

The key constitutional question is this: Is free exercise of religion really being denied, as Gonzales, Spell and others claim? Certainly, not allowing religious services to take place as normal—temporarily—restricts the free exercise of religion, especially the very important ability to assemble together in faith. However, note that such restrictions *temporarily* end only one, albeit important, aspect of the expression of faith; they do not stop someone worshipping their god. Indeed, followers of most faiths, not restricted to Christianity but also including other world religions, such as Islam, Buddhism, Hinduism and Judaism, moved online during the pandemic and accepted associated social distancing measures.

It is clear that the concerns of Gonzales, Spell and others are not unimportant as there are considerable restrictions on how faith can be expressed during the pandemic. But the restrictions were a response to an unprecedented threat to health rather than a concerted attempt by political authorities to undermine or diminish religious independence or establish a favoured state church. Measures restricting religious gatherings did not favour one faith over another: all were affected equally by strictly limiting for health reasons how many people could attend at one time for the purpose of religious worship. Furthermore, free exercise of religion does not include egregiously dangerous acts, even if some believe they are necessary in order to demonstrate faith. In other words, a religious leader cannot rightfully disdain scientifically valid public health limits on the size of a religious gathering during a pandemic any more than she or he can ignore a fire which threatens the lives of those attending a religious gathering. God may have sent down the fire in some kind of heavenly punishment but this does not mean that people have to sit back and die from their burns.

The real issue here may be more about state law versus the authority of the president or the Supreme Court. The Kansas Attorney General, Republican Derek Schmidt, stated that "Kansas statute and the Kansas Constitution bill of rights each forbid the governor from criminalizing participation in worship gatherings by executive order" (Shorman 2020). In its protection, Kansas law goes beyond the First Amendment to safeguard religious freedom. On the other hand, even the Kansas Preservation of Religious Freedom Act permits a denial of forms of religious free exercise if there is a compelling state interest and it is applied as non-intrusively as possible. Schmidt admitted that the governor's orders do not stop grocery shopping and other gatherings. But religious services can be supplied online, while grocery shopping for most people continues to take actual visits to the stores.

The issue was a major controversy as the pandemic raged. Christian Evangelical legal firms, including the most prominent, Liberty Counsel, [9] took up cases in order to try to show that religious freedom was sacrosanct under virtually all circumstances, focusing on whether it was constitutionally valid to curtail religious gatherings during a health crisis caused by COVID-19. In November 2020, Liberty Counsel filed for an emergency injunction pending appeal with the Supreme Court. Liberty Counsel requested the Court immediately to stop California Governor, Gavin Newsom's attempts to curtail religious services or, as Liberty Counsel put it, his "escalating assault on churches".[10] In the context of fast-rising numbers of those in California suffering from the coronavirus in November 2020,[11] Newsom instituted new lockdowns for much of the state, including a curfew and limits on the 26 November Thanksgiving dinner. As a result, no more than three families could meet, dinner had to be outside, and facemasks had to be worn by all attending. Guests were allowed—briefly—to visit the toilet indoors, as long as it was sanitised between uses. In most of California in November 2020, all religious worship was banned, including Bible studies in private homes with anyone who did not live there. In the preceding months, Newsom had stepped up his attempts to restrict religious gatherings in order to control the spread of the virus. On 6 July, he issued a "Worship Guidance" document that stated: "Places of worship must therefore discontinue singing and chanting activities and limit indoor attendance to 25% of building capacity or a maximum of 100 attendees". A week later, on 13 July, Governor Newsom banned all religious worship, including stopping people in private homes from having a religious gathering with anyone from outside the home. This applied to any county on the County Monitoring List, which covered most of the state's population. On 13 August, Newsom issued his "Blueprint" which, according to Liberty Counsel, revealed "his discrimination against churches and worship for most of the state". In every one of his newly minted "Tiers", he "*gives preferential treatment to nonreligious gatherings* like museums, gyms, fitness centers, family entertainment centers, cardrooms, satellite wagering facilities, laundromats, malls, destination centers, swap meets and more" (emphasis in original). In sum, Governor Newsom's interventions affected all churches and places of worship, including home Bible studies and fellowships (Staver 2020a).

Liberty Counsel took it upon itself to take cases when several pastors did not wish to go along with the restrictions, which they saw as fundamentally affecting their religious freedom. One was Ché Ahn, pastor of Harvest Rock Church, Pasadena, California. Ahn is the leader of the New Apostolic Reformation, a network of Pentecostalists who believe that God has empowered modern-day apostles and prophets to perform miracles, transform Christianity, and convert whole nations to their biblical worldview in preparation for the return of Jesus Christ (Montgomery 2020). Unwilling to conform to Governor Newsom's restrictions, Ahn, as well as his church staff and parishioners, faced daily criminal charges and fines of USD 1000 per day. In addition, each of the criminal charges could potentially attract one year in prison.[12] Ahn, a big fan of President Trump, established 1RACE4LIFE, an anti-choice initiative which sought to bring about "the end of abortion on a local, state, and national level" (https://www.1race4life.org/advisory-board). In September 2020, Ahn appeared at "The Return", a pro-Trump prayer rally on the National Mall, where he denounced legal abortion and marriage equality and thanked God that Amy Coney

[9] Liberty Counsel describes itself as "a nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family". Liberty Counsel offers pro bono legal assistance in cases regarding those subjects. It was founded in 1989 and is affiliated with the Jerry Falwell-founded Liberty University School of Law, on the campus of which it maintains an office. Liberty Counsel is a 501(c)3 non-profit organization. Matthew Staver is the founder and chairman of Liberty Counsel (https://lc.org/).

[10] "Liberty Counsel is now fighting SIX federal lawsuits against lawless governors and anti-church bureaucrats." "The assaults on Christians happening now" (Staver 2020a).

[11] In late November 2020, California had 1.4 million cases of coronavirus, with more than 17,500 new cases a day and cumulatively 18,768 deaths (23 November). (https://www.google.com/search?client=firefox-b-d&q=how+many+cases+of+covid+in+california+today).

[12] "Ché Ahn is the senior pastor of Harvest Rock Church, the founder/president of Harvest International Ministry, the international chancellor of Wagner University, and the founder of Ché Ahn Ministries. He has appeared on television segments aired on Trinity Broadcasting Network, GodTV, The Eric Metaxas Show, and more" (https://en.wikipedia.org/wiki/Ch%C3%A9_Ahn).

Barrett would "be the judge that will help us to overturn *Roe v. Wade*." (Montgomery 2020) For Ahn, it would appear that the importance of religious freedom was paramount, much greater than the right of women to choose to have a baby or not or for same-sex couples to marry.

Three more cases, all from California, can also be noted to illustrate how some Christian leaders regarded attempts by Governor Newsom to close religious places of worship in the interests of public health. First, there was John MacArthur, pastor of Grace Community Church, who faced tens of thousands of dollars in fines by Los Angeles County for refusing to curtail in-person religious services. Second, Rob McCoy, Pastor of Godspeak Calvary Chapel, Thousand Oaks, was held in contempt, and the church was fined in November 2020 every time it met. The next step could be jail for the pastor and former mayor of Thousand Oaks, California. This is the same pastor who in 2018 consoled and prayed with the families of victims at the mass shooting at the Borderline Bar & Grill. Third, Jack Trieber, Pastor of North Valley Baptist Church, Santa Clara, was fined USD 5000 each service for "singing", and in late November 2020, the church faced more than USD 100,000 dollars in fines. This church is in one of the few Californian counties where limited worship was permitted, but without singing. The city sent spies to the church over the summer, and then posted a letter at the church demanding it cease and desist, stating the church was "unlawful." (Staver 2020a)

Earlier in 2020, Liberty Counsel went to the Supreme Court on behalf of Cristian Ionescu, pastor of Elim Romanian Pentecostal Church, Chicago, Illinois. Ionescu was quick to commend President Trump for his statement that, in his view, religious services are "essential". It was notable that while Trump believed this to be the case, he was unable to overrule restrictions placed on religious gatherings imposed by state governors, in California, Illinois and elsewhere. Liberty Counsel's strategy was to hope that the Supreme Court, which by late 2020 had a preponderance of conservative judges following the appointment of Amy Coney Barrett in October, would come down on the side of pastors who wished to lead uncontrolled religious gatherings. Barrett's appointment to the Supreme Court provided the Court with a perceived 6-3 conservative majority, and it was thought likely to have a pivotal impact on issues central to religious freedom, including abortion, school prayer and gay rights (Haynes 2021). In May 2020, President Trump called on state governors to allow places of religious worship to open, even while some areas remained under coronavirus lockdown. Trump threatened to "override" governors who defied him, although he lacked the authority to do so (Smith 2020). Liberty Counsel hoped that the Supreme Court would be the final adjudicator of religious freedom and would uphold the right of churches and other religious places to host uncontrolled gatherings of believers.

Following Donald Trump's failure to win the November 2020 presidential election, Matthew Staver of Liberty Counsel believed that it was essential to challenge the restrictions on religious services in California and because of the Supreme Court's new conservative preponderance, now was the time to file the case. Staver's emergency request with the Supreme Court in November 2020 sought to prevent Newsom from controlling churches in California until such time as Liberty Counsel's Court of Appeals case was resolved (Staver 2020b). The injunction would prevent Newsom and others from taking any actions against Liberty Counsel's client pastors, churches and parishioners. If ordered by the Court, this injunction would also protect all the other churches and churchgoers in California targeted with USD 1000 per day fines and one year in jail per incidence for merely living their Christian faith. If allowed, such an order would no doubt send a strong message to other states.

6. Conclusions

The article examined the issue of religious freedom in the USA in the coronavirus pandemic of 2020–21, during the presidency of Donald Trump (2017–2021). It showed that the ability of state governors to close religious places of worship both illustrated limits

on the power of the president and that public health can take supremacy over religious freedom in today's America.

Protection and expansion of religious freedom strongly inform the goals of the Christian Right. The latter seeks to combat what it claims to be "aggressive" secularisation at state and federal levels. State governors who ordered the closure of religious places of worship for normal meetings were vilified as aggressive secularists who acted in order not to protect public health, but to undermine religious freedom. Focusing on state-level *cause célèbres* in California and Illinois involving the claimed persecution of Christian pastors, a Christian Evangelical firm of lawyers, Liberty Counsel, sought to argue in court that state governors were acting unconstitutionally when they ordered the closure of religious places of worship. There were no formal ties between Liberty Counsel and the White House, although there may well have been informal ties between some members of the Trump administration and leading figures in the Christian Right, focused in both the Faith & Opportunity Initiative and the President's Evangelical Advisory Board, who were also supporters of Liberty Counsel's actions, notably Jerry Falwell Jr., the recently retired head of Liberty University, where Matthew Staver, head of Liberty Counsel is Dean.

President Trump was not able to reverse the closure of religious places of worship, despite his claimed desire to do so. In claiming that he would "override" state governors, Trump sought to play up his credential with the Christian Right in order to ensure their support in the 2020 presidential election. In November 2019, the founder of the Faith & Freedom Coalition and member of Trump's Evangelical Advisory Board, Ralph Reed,[13] explained why for him Trump was the best presidential candidate:

> If the Christian community doesn't rise up like it never has in modern political history and if we allow, through our inaction, the left to remove this man from the Oval Office, then we will deserve everything that we get. If they get the White House back, it will be open season on Christian ministries, on churches, the IRS will be able to persecute those faith-based organizations again. They will, under Obamacare, be able to force them to pay for abortion again. They will be able to sue the Little Sisters of the Poor and drag God-fearing nuns into federal court again to make them pay for abortion. That's what will happen, and if we don't turn out and vote in the biggest numbers ever, then we deserve it to happen. (Reed quoted in Mantyla 2019)

Reed's comments—exhortations, perhaps—refer generically to religious freedom issues in today's America: especially the freedom of Christian organisations not to be taxed or pay for abortions. Reed, a representative figure of the Christian Right, supported Trump's re-election because he believed not only that Trump had significantly delivered on his promises to the Christian Right in 2016 to but also that *après* Trump *le deluge*: if defeated, aggressive secularists would take control of the government. No other candidate, the Christian Right believed, would be more supportive of their aims and ambitions than Trump; no one else would be quite so supportive of their conception of "religious freedom".

Finally, the issue of religious freedom in America is not closed by the failure of Donald Trump to win re-election. For more than 40 years, the Christian Right has been a powerful political player and has recently managed to take over the Republican Party and establish religious freedom as a key Republican Party position. The coronavirus pandemic has shown however that there are certain conditions when religious freedom is not the first freedom in America. It has shown that public health, in the face of a virulent virus which killed hundreds of thousands of Americans in less than a year, is more important, and as a result, religious freedom is necessarily temporarily curtailed for the greater public good.

Funding: This research received no external funding.

[13] Reed was leader of the Christian Coalition in the early 1990s and is the founder of the Faith and Freedom Coalition (FFC). Claiming a membership of 'over one million conservatives', FFC is an advocacy group pursuing a range of conservative Christian policies. Reed is also a member of President Trump's Evangelical Advisory Board.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The author declares no conflict of interest.

References

Alexander, Laura E. 2019. The 'Christian Left' is Reviving in America, Appalled by Treatment of Migrants. *Salon*. August 20. Available online: https://www.salon.com/2019/08/19/the-christian-left-is-reviving-in-america-appalled-by-treatment-of-migrants_partner/ (accessed on 13 November 2020).

Allitt, Patrick. 2003. *Religion in America Since 1945: A History*. New York: Columbia University Press.

Bailey, Sarah Pulliam. 2020. 'Seeking Power in Jesus' Name: Trump Sparks a Rise of Patriot Churches. *The Washington Post*. October 26. Available online: https://www.washingtonpost.com/religion/2020/10/26/trump-christian-nationalism-patriot-church/ (accessed on 13 November 2020).

Barr, William. 2019. "Attorney General William P. Barr Delivers Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame". The United States Department of Justice. *Justice News*, October 11.

Bettiza, Gregorio. 2019. *Finding Faith in Foreign Policy. Religion and American Diplomacy in a Postmodern World*. Oxford: Oxford University Press.

Bizjak, Tony, Sam Stantion, Michael McGough, and Dale Kasler. 2020. 71 Infected with Coronavirus at Sacramento Church. Congregation Tells County 'Leave us Alone'. *The Sacramento Bee*. April 4. Available online: https://www.sacbee.com/news/coronavirus/article241715346.html (accessed on 25 January 2021).

Breaking: Judge Grants Restraining Order. 2020. *First Liberty*. April 11. Available online: https://www.globenewswire.com/news-release/2020/04/11/2014927/0/en/Breaking-Judge-Grants-Restraining-Order-Against-Louisville-KY-Mayor-in-Dispute-Over-Drive-in-Church-Service-on-Easter.html (accessed on 22 January 2021).

Cameron, Rob. 2021. White Supremacy Created the Capitol Assault. *FP Foreign Policy*. January 11. Available online: https://foreignpolicy.com/2021/01/11/white-supremacy-capitol-assault-trump-supporters/ (accessed on 22 January 2021).

Criminal Charges Against VA Pastor Dropped. 2020. Available online: https://lc.org/newsroom/details/071420-criminal-charges-against-va-pastor-dropped (accessed on 22 January 2021).

Smith, David. 2019. Extreme Abortion Laws Shine Light on Trump's Courting of Religious Right. *The Guardian*. May 13. Available online: https://www.theguardian.com/us-news/2019/may/13/donald-trump-evangelical-christians-republicans-abortion-supreme-court (accessed on 25 November 2020).

Defending Freedom during a Pandemic. n.d. Available online: https://www.adflegal.org/covid19 (accessed on 22 January 2021).

DiMaggio, Anthony R. 2019. *Political Power in America. Class Conflict and the Subversion of Democracy*. Albany: State University of New York Press.

Ehret, Verna Marina. 2019. Contemporary Religious Changes in the U.S.: Responses to the Fracturing of Religious Life. *Religions* 10: 295. [CrossRef]

Fadel, Leila. 2020. Many Latino Men Are Supporting President Trump this Election. *NPR*. October 28. Available online: https://www.npr.org/2020/10/28/928359082/many-latino-men-are-supporting-president-trump-in-tuesdays-vote?t=1611321649112 (accessed on 22 January 2021).

Fea, John. 2018. *Believe Me. The Evangelical Road to Donal Trump*. Grand Rapids: William Eerdmans Publishing Company.

Flynn, Maggie, and Isaac Stanley-Becker. 2020. Kansas Gov. Laura Kelly Sues GOP Lawmakers for Revoking her order Limiting Church Gatherings. *The Washington Post*. Available online: https://www.washingtonpost.com/nation/2020/04/10/kansas-governor-lawsuit-coronavirus/ (accessed on 25 November 2020).

Gagné, André. 2019. The Christian Right's Efforts to Transform Society. *The Conversation*, July 24.

Galli, Mark. 2019. Trump Should be Removed from Office. *Christianity Today*, December 19.

Green, Emma. 2021. A Christian Insurrection. *The Atlantic*. January 8. Available online: https://www.theatlantic.com/politics/archive/2021/01/evangelicals-catholics-jericho-march-capitol/617591/ (accessed on 22 January 2021).

Haberman, Clyde. 2018. Religion and Right-Wing Politics: How Evangelicals Shaped Elections. *The New York Times*. October 28. Available online: https://www.nytimes.com/2018/10/28/us/religion-politics-evangelicals.html (accessed on 30 January 2021).

Haynes, Jeffrey. 2021. *Trump and the Politics of Neo-Nationalism: The Christian Right and Secular Nationalism in America*. London: Routledge.

Jones, Robert P., and Daniel Cox. 2017. *America's Changing Religious Identity. Findings from the 2016 American Values Atlas*. Washington: Public Religions Research Institute.

Joshi, Yuvraj. 2017. Opinion: Gorsuch May Be Supreme Court's Most Religiously Motivated Justice. *NBC News*. March 13. Available online: https://www.nbcnews.com/feature/nbc-out/opinion-gorsuch-may-be-supreme-court-s-most-religiously-motivated-n732726 (accessed on 25 November 2020).

Lewis, Andrew. 2017. *The Rights Turn in Conservative Christian Politics: How Abortion Transformed the Culture Wars*. Cambridge: Cambridge University Press.

Lockwood, Frank E. 2020. Defiant Jonesboro Church Faces Order to Halt Services. *Arkansas Democrat Gazette*. Available online: https://www.arkansasonline.com/news/2020/apr/04/defiant-church-faces-order-to-halt-serv/ (accessed on 25 November 2020).
Mahdawi, Arwa. 2019. Brett Kavanaugh Shows True Colours in Supreme Court Abortion Dissent. *The Guardian*, February 9.
Mantyla, Kyle. 2019. Ralph Reed: Christians Deserve Persecution if they Fail to Reelect Trump in 2020 Right Wing Watch. November 5. Available online: https://www.rightwingwatch.org/post/ralph-reed-christians-deserve-persecution-if-they-fail-to-reelect-trump-in-2020/ (accessed on 25 November 2020).
McVeigh, Rory, and Kevin Estep. 2019. *The Politics of Losing. Trump, the Klan, and the Mainstreaming of Resentment*. New York: Columbia University Press.
Metaxas, Eric. 2020. The Christian Case for Trump. *Wall Street Journal Opinion7*. January 7. Available online: https://www.wsj.com/articles/the-christian-case-for-trump-11578441391 (accessed on 25 November 2020).
Miller, Daniel D. 2019. The Mystery of Evangelical Trump Support? *Constellations* 26: 43–58. [CrossRef]
Montgomery, Peter. 2020. Dominionist Ché Ahn Launches Political Group to Elect Anti-Choice, Anti-Equality Leaders. *RightWing Watch*. October 19. Available online: https://www.rightwingwatch.org/post/dominionist-che-ahn-launches-political-group-to-elect-anti-choice-anti-equality-leaders/ (accessed on 25 November 2020).
Muirhead, Russell, and Nancy L. Rosenblum. 2019. *A Lot of People Are Saying. The New Conspiracism and the Assault on Democracy*. Princeton and Oxford: Princeton University Press.
National Association of Evangelicals. 2020. Coronavirus Response and Resources. Available online: https://www.nae.net/coronavirus-response-resources/ (accessed on 25 November 2020).
Nelson, Nicolas J., and Bruce Jones. 2020. Supreme Court Orders Preliminary Injunction in Roman Catholic Diocese of Brooklyn v. Cuomo. *The National Law Review*. Volume XI. Number 22. Available online: https://www.natlawreview.com/article/supreme-court-orders-preliminary-injunction-roman-catholic-diocese-brooklyn-v-cuomo (accessed on 22 January 2021).
Oregon Governor Sued. 2020. Available online: http://www.adfmedia.org/News/PRDetail/11001 (accessed on 22 January 2021).
Peiser, Jaclyn. 2020. Megachurch Pastor Who Held no-Mask Services Misses Hearing after Refusing to Wear Mask in Court. Available online: https://www.washingtonpost.com/nation/2020/09/23/louisiana-pastor-mask-court/ (accessed on 25 November 2020).
Perry, Samuel, Andrew Whitehead, and Joshua B. Grubbs. 2020. Culture Wars and COVID-19 Conduct: Christian Nationalism, Religiosity, and Americans' Behavior During the Coronavirus Pandemic. *Journal for the Scientific Study of Religion*. July 26. Available online: https://onlinelibrary.wiley.com/doi/full/10.1111/jssr.12677 (accessed on 25 November 2020).
Rubin, Jennifer. 2019. Should Religion and Politics Mix? *The Washington Post*. December 15. Available online: https://www.washingtonpost.com/opinions/2019/12/15/should-religion-politics-mix/ (accessed on 30 January 2021).
Smith, Samuel. 2019. National Association of Evangelicals Elects Walter Kim as its First Minority President. *The Christian Post*. October 17. Available online: https://www.christianpost.com/news/national-association-of-evangelicals-elects-walter-kim-as-its-first-minority-president.html (accessed on 25 November 2020).
Shorman, Jonathan. 2020. Attorney General to Police: Don't Enforce Gov. Kelly's order on Religious Gatherings. *The Wichita Eagle*. Available online: https://www.kansas.com/news/coronavirus/article241860276.html (accessed on 25 November 2020).
Smith, David. 2020. Donald Trump Orders Governors to Allow Places of Worship to Reopen. *The Guardian*. May 22. Available online: https://www.theguardian.com/us-news/2020/may/22/donald-trump-churches-mosques-synagogues-reopen (accessed on 25 November 2020).
Staver, Matthew. 2020a. The Assault on Christians . . . Happening Now. *Email to Author on Behalf of Liberty Counsel*, October 26.
Staver, Matthew. 2020b. Breaking: Church Files Emergency request at SCOTUS'. *Email to Author on Behalf of Liberty Counsel*, November 23.
Stewart, Katherine. 2020. *The Power Worshippers. Inside the Dangerous Rise of Religious Nationalism*. London: Bloomsbury.
Sullivan, Robert. 2019. List: Taking the Pulse of Catholic Voters. *America. The Jesuit Review*, June 4.
Sun, Lena, and Josh Dawsey. 2020. White House and CDC Remove Coronavirus Warnings about Choirs in Faith Guidance. *The Washington Post*. May 29. Available online: https://www.washingtonpost.com/health/white-house-and-cdc-remove-coronavirus-warnings-about-choirs-in-faith-guidance/2020/05/28/5d9c526e-a117-11ea-9590-1858a893bd59_story.html (accessed on 25 January 2021).
The Conversation. 2020. When it Comes to Reopening Churches in the Pandemic, Supreme Court Says Grace Ain't Groceries. June 3. Available online: https://theconversation.com/when-it-comes-to-reopening-churches-in-the-pandemic-supreme-court-says-grace-aint-groceries-135287 (accessed on 25 January 2021).
Trump, Donald. J. 2020. Proclamation on Religious Freedom Day. Available online: https://www.whitehouse.gov/presidential-actions/proclamation-religious-freedom-day-2020/ (accessed on 25 November 2020).
Turley, Jonathan. 2020. Why the Government Can Shut Down Church Gatherings during Pandemic. *The Hill*. April 11. Available online: https://thehill.com/opinion/judiciary/492332-why-the-government-can-shut-down-church-gatherings-during-pandemic (accessed on 30 January 2021).
Vazquez, Maegan. 2020. Trump Administration Updates Public School Prayer Guidance on National Religious Freedom Day. *CNN Politics*. January 16. Available online: https://edition.cnn.com/2020/01/16/politics/school-prayer-religious-freedom-trump-administration-update/index.html (accessed on 25 November 2020).
Whitehead, Andrew, Samuel Perry, and Joseph O. Baker. 2018. Make America Christian Again: Christian Nationalism and Voting for Donald Trump in the 2016 Presidential Election. *Sociology of Religion* 79: 147–71. [CrossRef]

Woodward, Alan. 2020. 'A phantom plague': America's Bible Belt Played down the Pandemic and Even Cashed in. Now Dozens of Pastors are Dead. *The Independent*. April 24. Available online: https://www.independent.co.uk/news/world/americas/bible-belt-us-coronavirus-pandemic-pastors-church-a9481226.html (accessed on 25 January 2021).

Wright, Robin. 2019. Pompeo and His Bible Define U.S. Policy in the Middle East. *The New Yorker*. January 11. Available online: https://www.newyorker.com/news/our-columnists/pompeo-and-his-bible-define-us-policy-in-the-middle-east (accessed on 25 November 2020).

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The Constitutionality of Providing Public Funds for U.S. Houses of Worship during the Coronavirus

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Abstract: U.S. constitutional jurisprudence precludes the direct government funding of religious activity. At the same time, the jurisprudence surrounding the U.S. First Amendment Religion Clauses has evolved to support the general inclusion of religious entities in programs through which a government advances some overarching public interest, such as health care or social services, but does not involve the Government in advancing religion per se. Moreover, the most recent U.S. Supreme Court cases hold that it is a violation of the First Amendment to exclude a religious actor, solely because it is religious, from a general public program and funding on equal terms with secular actors. Pandemic relief from the federal government has been made available to houses of worship (churches, mosques, synagogues, etc.) to mitigate the economic impact of government lockdown orders and public health restrictions on assembly, by offsetting loss of revenue and avoiding the suspension or termination of employees. The extension of such relief sits precisely at the crossroads of debated legal questions about whether such assistance is aid to religion—prohibited—or neutral disaster relief on equal terms with other community-serving entities—permitted. This article concludes that the inclusion of houses of worship is constitutional, given the trend and direction of U.S. law, although the matter will continue to be debated as the effects of the pandemic recede.

Keywords: anti-establishment; free exercise; CARES Act; Payroll Protection Program; Religious Freedom Restoration Act; "Houses of Worship"

Citation: Chopko, Mark. 2021. The Constitutionality of Providing Public Funds for U.S. Houses of Worship during the Coronavirus. *Laws* 10: 8. https://doi.org/10.3390/laws10010008

Received: 13 January 2021
Accepted: 28 January 2021
Published: 30 January 2021

1. Introduction

The United States has been particularly hard hit by the Coronavirus. At the time of writing, more than 24 million people have been infected and nearly 410,000 have died.[1] Those numbers grow seemingly exponentially each day, such that, by the time this article is published, these numbers will be outstripped by the spreading infection. The government response has been uneven and lacks coordination, as is well documented in the international media.[2] At the beginning of the public health crisis spawned by the pandemic, one-by-one, each of the U.S. states went into some form of lockdown. The economic impact of the coronavirus was especially harsh on small businesses, shops, restaurants, service agencies, and other similar businesses on which communities rest for many services and commodities. Restrictions continue for attendance on indoor gatherings, including religious worship and education, and numerous other activities.

The charitable sector that serves communities has faced double challenges—asked to fill the void and respond to human needs in communities while they watched their sources of income wither.[3] The Nonprofit Times reported:

"96.5% of the survey respondents indicated they were negatively impacted. The top three indicators were: 67.9% report a decline in contributions, due to donors giving less

[1] https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last visited 21 January 2021).
[2] (Durkee 2020).
[3] (The NonProfit Times 2020).

and the inability to reach donors; 63% have experienced travel disruption, including cancellations and the inability to work effectively, including contacting clients, donors and recipients; and, 56.4% report an issue with client relations, leading to the inability to meet expectations of those they serve due to inefficiency or barriers to service, such as cancelled public events or face-to-face operations."[4]

Religious charities are at least equally impacted. U.S. houses of worship—churches, mosques, synagogues, etc.—are almost exclusively dependent on weekly collections from worshippers. When worshippers cannot attend services, or can only attend remotely, those houses of worship struggle more than most.[5] For their members, houses of worship are their community centers, dispensing the key commodities of hope and resilience, along with prayer and other basic human needs, such as food, shelter, education, and social services. Although there are encouraging signs regarding increases in philanthropy, directed to relieving the human misery caused by the coronavirus,[6] the road for smaller charities, including houses of worship, has not been smooth.

Those charities serving the general public, sponsored by religions, have long been able to participate in public programs of social welfare on the same footing as their secular counterparts.[7] However, during the coronavirus lockdown, similar to many small community-serving charities, houses of worship have been deprived of their sources of donations and volunteer energy. The coronavirus has impacted their staff, volunteers, and donors, while escalating demands for services. When Americans were most challenged and everyone needed to rethink their basic human needs, Americans were locked down from their houses of worship, which, for many, compounded a sense of hopelessness and other impacts of the pandemic. Their houses of worship were deprived of donations and material support, because the places that many regarded as their "other home" were suddenly off limits. Restrictions on the right to worship and on other religious activities in the United States have been the subject of continuing and hotly contested litigation.[8] They have also been subject to academic critique from a variety of perspectives.[9] In an effort both to assist the development of the overall topic and offer views on an important aspect of the COVID responses by government, this essay will focus on a narrower topic: whether the provision of governmental pandemic relief to houses of worship accords with U.S. constitutional law and tradition.

2. Overview of Assistance and Specific Issues for Religious Participation

Federal Government assistance to small businesses that have and are suffering the consequences of economic disruption on account of the coronavirus through the inability to generate revenue is intended to offset those consequences by sustaining the ability to retain staff and avoid or defer the impact of lost revenue. Legislative and regulatory initiatives to help these businesses mitigate the economic impacts of the coronavirus specifically including houses of worship. The Small Business Administration ("SBA"), whose mission is to sustain community-centered businesses, was tasked with administration of the program.

[4] *Id*.

[5] (Boorstein 2020).

[6] (Darmiento 2020).

[7] *Bradfield v. Reynolds*, 175 U.S. 291, 299–300 (1899) (upholding grant for a quarantine building to a religious hospital, on the grounds that the purposes of the hospital were to promote health, not advance religion).

[8] Decided cases are too numerous to count and the number grows each day. There is no way to categorize the cases meaningfully in the course of this paper. Additionally the results divide—some restrictions upheld, some rejected, and some deferred. *Compare Delany v. Baker*, No. 20-11154 (D. Mass. 6 January 2021) (rejecting challenge to restrictions on worship attendance) [Delaney v Baker | Standing (Law) | Fourteenth Amendment To The United States Constitution (scribd.com) (last visited 20 January 2021)] *with Monclova Christian Academy v. Toledo-Lucas County Health Dep't.*, No. 20-4300 (6th Cir. 31 December 2020) (striking down restrictions on religious schools) [20a0392p-06.pdf (uscourts.gov) (last visited 20 January 2021)].

[9] For example, a series of papers addressing these restrictions and other challenges can be found here: Law, Religion, and Coronavirus in the United States: A Six-Month Assessment—Canopy Forum (last visited 20 January 2021).

The CARES Act[10], authorized the PPP (Paycheck Protection Program)[11] loans, which are administered by the SBA under the U.S. Department of Treasury, for entities with less than 500 employees under qualified SBA industry codes. Unlike the Economic Injury Disaster Loans,[12] the PPP loan programs were made available to public nonprofit organizations, specifically including houses of worship, which is unusual for SBA loan programs, since the SBA mandate to support small business and economic development typically excludes nonprofits in general and religious organizations specifically.[13] As discussed below, not only were such loans provided through the SBA program, but SBA waived its affiliation rules, which require consolidating centrally controlled community organizations solely for religious organizations affiliated based on their religious theology or polity.[14]

The PPP loan program provided for low-interest and forgivable loans of up to USD 10 million, designed to subsidize payroll and prevent businesses from laying off workers. Eligible expenses included payroll (to include benefits, retirement contributions, etc.) as well as some basics, such as rent and utilities. If the loan recipient used loan proceeds primarily for payroll (defined as 75% of the loan amount) over a period ranging from 8 to 24 weeks ("covered period"), did not substantially reduce pay, and did not reduce employee headcount over the selected covered period, then it would be forgiven in its entirety.[15] If the house of worship did not meet the 75% payroll usage threshold, the non-payroll eligible part would be converted to a low (1%) interest loan. SBA guidance made clear that compliance with federal requirements including the anti-discrimination rules applied for as long as the federal financial assistance obligation existed, that is, for the duration of the loan (either until forgiveness or repayment).[16]

In December 2020, the Consolidated Appropriations Act[17] provided for a second draw on PPP loans for which houses of worship and other religious organizations are eligible. However, the second draw loans favor smaller-size employers (fewer than 300 employees) and documentation that would evidence that the recipient suffered a 25% reduction in revenue over the same period the prior year.

It should also be noted that houses of worship were eligible for Federal Emergency Management Agency ("FEMA") disaster assistance. This was not part of the CARES legislation, but the result of legislative and regulatory changes in 2018 to permit FEMA assistance to qualifying nonprofits, including houses of worship.[18] Most FEMA assistance tied to COVID relief was limited to sanitation materials and services, but also could be applied to necessary construction/installation of protective features. Here, the duration of federal financial assistance was less clear, but FEMA funds could only be used to reimburse pre-existing purchases which (given the nature of consumable cleaning/Personal Protective Equipment) appeared to limit the time during which the assistance continued. In the end, the FEMA assistance overlapped with or was subsumed by the PPP loan period and received less attention.

One concern raised by some in the religious charitable community was the potential barrier posed by the SBA's "consolidation" rules. The SBA focus is "small business," and as noted SBA has rules that aggregate "small businesses" that are operated or controlled by a larger regional or national organization, essentially treating them as a single large

[10] Coronavirus Economic Stabilization Act, Public L. No 116–136 §§ 1101–1114, 134 Stat. 281 (27 March 2020) (subsequently amended by Public L. No. 116-142, 134 Stat. 641 (June 5, 2020) and related appropriations laws passed on 27 April and on 27 December of 2020) (hereinafter *CARES Act*).

[11] *Id.* at § 1102. Paycheck Protection Program (sba.gov).

[12] *Id.* at § 1110.

[13] 13 C.F.R. § 120.110 (a), (k) (2020) (excluding non-profit businesses and those "principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs").

[14] 13 C.F.R. pt. 121.103(b)(10) (2020). FAQ Regarding Participation of Faith-Based Organizations in PPP and EIDL (sba.gov).

[15] CARES Act at §1106.

[16] Small Business Administration, Faith-Based Organization FAQ, Question #5 (3 April 2020).

[17] Consolidated Appropriations Act, 2021, Public L. No. 116-260, § 311 (27 December 2020) (Government Publishing Office publication pending).

[18] 42 U.S.C. § 5322 (2018); 44 C.F.R. § 434(a)(2) (2018).

enterprise, even though it is operating at the community level through smaller entities.[19] Religious denominations often seem to function through common "control" provided by the governing religious law or policy, a polity that, in fact, unites these separate actors into a communion of faith. Applying the Religious Freedom Restoration Act,[20] the SBA decided that it would waive the consolidation rules where "common control" is required by religious precept and where, in fact, the individual religious actors at the community level enjoy legitimate autonomy even if they are not recognized and organized corporately under the civil law.[21] Houses of worship have received considerable assistance under the program.[22]

To date, no legal challenges have contested the constitutionality of these assistance mechanisms,[23] although the subject has been raised in academic and public commentary.[24] For some, as long as the assistance to houses of worship is provided on the same terms and conditions, as it is to secular "small businesses," there is no constitutional issue. For others, the exception to the consolidation rules by the SBA raised concerns, and for still others, there are concerns that, notwithstanding the exceptionalism of the current pandemic, the U.S. has taken another step towards the government funding of religious organizations.[25] For houses of worship, there are concerns that being treated similar to secular domestic charities risks losing other forms of religious exceptionalism, as it concerns regulation and the ability to adhere to religious norms. For example, the acceptance of public funds triggers the application of federal anti-discrimination rules at a time when some religious organizations protest their applicability generally if religious norms conflict with secular legal norms.[26] These issues are all complex and no attempt will be made here to chase every facet of the subject. Rather, the purpose here is narrower; namely, to illustrate the competing values at stake and how, in times of crisis, we sometimes bend.

3. Jurisprudential Analysis

For background purposes, the U.S. Constitution contains a First Amendment provision barring governmental actions "respecting an Establishment of Religion" and "prohibiting the Free Exercise" of Religion.[27] For shorthand, they will be referred to as the "anti-establishment" and "free exercise" provisions or clauses. Government funding directed towards religious activities or entities normally is tested by the anti-establishment provision. However, governmental refusal to allow participation in religious activities and entities on the same terms as secular agencies has recently been ruled a violation of the free exercise clause.[28] The focus here is about funding for houses of worship given the unique way in which they have been treated in U.S. constitutional law—generally so exceptional that they cannot be assisted or regulated with regard to their religious affairs.

Federal funding in the pandemic to houses of worship raises concerns in at least these ways. First, there is a form of direct funding for religious agencies to keep them operating through forgivable loans. Second, to facilitate the participation of religious

[19] 13 C.F.R. pt. 121.103(b)(10) (2020).

[20] 42 U.S.C. §§ 2000bb-2000bb-4 (2020).

[21] 85 Fed. Reg. 20817-01 (15 April 2020). FAQ Regarding Participation of Faith-Based Organizations in PPP and EIDL (sba.gov).

[22] https://www.npr.org/sections/coronavirus-live-updates/2020/08/03/898753550/religious-groups-received-6-10-billion-in-covid-19-relief-funds-hope-for-more (last visited 10 January 2021).

[23] On January 20, 2021, the presidential administration changed in the United States. Whether the new Biden Administration will continue the scope of religious accommodations exhibited by the Trump Administration remains to be seen as of this date. In anticipation of the change, litigation has been filed to challenge at least one of the Trump Administration's actions for religious organizations. Religion Clause: Suit Challenges Trump Administration's Loosening of Limits On Faith-Based Federally Funded Programs (last visited 21 January 2021).

[24] (Seidel 2020).

[25] Nelson Tebbe writing in the Washington Post—(Tebbe et al. 2020).

[26] Small Business Administration, Faith-Based Organization FAQ, Question #5 (3 April 2020).

[27] The First Amendment to the U.S. Constitution begins—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[28] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

organizations, the government made special exception to the consolidation rules under the federal SBA. Each raises a number of First Amendment problems. On each issue, the jurisprudence continues to evolve and the result, in a specific challenge to such funding, will depend on how matters are characterized: can a house of worship for these purposes be properly characterized as a community small business and the pastor and ministry staff as "employees" for the purposes of avoiding the constitutional barrier on government assistance to religion? Thus, the extension of funding implicates issues on which courts have been divided for many years. Given the extraordinary circumstances of the current pandemic, it is likely that if a case were filed, the provision of assistance would be upheld as constitutional. There also would not be exceptions made to the conditions, such as the application of anti-discrimination rules. Usually the maxim is "With the King's coin, comes with the King."[29] There have been notable exceptions, however, and the one drawing the most attention from a constitutional perspective is the waiving of SBA consolidation rules to facilitate participation. Whether that is seen as a "preference" or an "accommodation" will be outcome determinative, should the matter be challenged. In the sections to follow, these issues are analyzed and organized under a set of black-letter rules.

A. It is constitutional to allow religious citizens to participate in public programs in a neutral and non-discriminatory fashion.

From the time of *Everson v. Board of Education*,[30] it is settled law that citizens are not precluded from participating in general public welfare programs, even if, as a result, the citizen privately uses the benefit to engage in a religious activity. In *Everson*, the program provided reimbursement for transportation expenses, the cost of bus fare for families that sent their children to public or religious schools in a New Jersey township. The township board reasoned that the provision of transportation assistance allowed parents to make safe transportation choices for their children to and from school.[31] It was not intended as assistance to religion, but instead assistance to families. The Supreme Court in 1947 agreed, although in a sharply divided 5-4 opinion that framed the issue for discussion even today. After acknowledging a general barrier to governmental aid to religion, the Court ruled that the program was not about religion, but about public safety.[32] Citizens could not be deprived of public programs designed to advance a state interest because of religion. If the transportation reimbursement were struck down, it might also signal general hostility towards religion and possibly open the door to undermining the provision of other public services related to public protection to religious entities in the community.[33]

Decades later in *Mueller v. Allen*,[34] involving the provision of tax credits for educational expenses to all parents, the Court found that the program was neutral, non-discriminatory, available to all parents without regard to their religion, and did not encourage religious choices. The anti-establishment clause did not bar "the sort of attenuated financial benefit, ultimately controlled by private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."[35] The Court expanded upon that reasoning twenty years later in *Zelman v. Simmons-Harris*, upholding the inclusion of religious schools in a program that offered parents general educational vouchers towards educational expenses.[36] The program was neutrally available to all eligible parents and supported public, charter, magnet and religious schools serving the City of Cleveland, Ohio. Again, the Court emphasized the fact that the program, which

[29] The author notes he first heard this maxim repeated by the late Rev. Dean M. Kelley, director of religious liberty issues for the U.S. National Council of Churches and widely regarded as an expert in church-state law.

[30] 330 U.S. 1 (1947).

[31] *Id.* at 7.

[32] *Id.* at 17–18.

[33] *Id.*

[34] 463 U.S. 388 (1983).

[35] *Id.* at 400.

[36] 536 U.S. 639 (2002).

is neutral and operated in a non-discriminatory fashion, did not define its beneficiaries with respect to religion.[37] Proper design, in effect, shielded the program from a finding of unconstitutionality, even if most of the participating parents made choices of religious schools for their children.[38]

Not only is it clear that the accommodation of private religious choices in a public benefit program is not forbidden under the anti-establishment clause, but recent jurisprudence from the Supreme Court has indicated that it may be unconstitutional under the free exercise clause to *exclude* religious actors based on their status as religious people or programs.[39] More will be developed on this point below, but the opinions raise important points for the legal issue under review here, whether pandemic relief is a form of general public assistance for the economic disruption or has the primary effect of advancing religion.

B. Although religious organizations cannot be excluded solely because of their religious character, the general rule still bars the extension of funds in support of religious exercises.

Nearly a century ago, the Supreme Court upheld the rights of parents to choose religious schools for the education of their children.[40] In the course of this litigation, as well as the public policy debates that followed, it was generally recognized that religious schools both satisfy a state's legitimate interest in the education of children, and advance the parents' choice to provide, through those same schools, for the faith formation of their children.[41] The dual missions of religious schools, therefore, has presented a conundrum for courts and policy makers. Although the state has an interest in ensuring the adequacy of general education, the state is constitutionally barred from promoting or financing such schools because of their sponsorship by houses of worship or by the fear that a state may become too entangled in their oversight, thus implicating religious authority.[42] The Supreme Court recognized that a state can advance its interest in seeing that the secular education meets quality standards through such "neutral" and "secular" programs as the loan of textbooks,[43] which is seen as providing assistance to students, but it had no role in assisting[44] or regulating[45] the religious aspects of the school, including its teaching personnel. Teachers were viewed as essential to the success of the faith formation role of religious schools[46] and public assistance to assure teaching staff were properly compensated (and thus up to the task of assuring an adequate secular education) was unconstitutional.[47] Likewise, the converse is true: the Court has barred the states from applying even neutral non-discrimination rules to disciplined and discharged teaching staff of parochial schools because of their important ministry role.[48]

Between 1971 and 1985,[49] only one public assistance program for religious schools was ruled constitutional by the Supreme Court, and that involved the reimbursement of religious schools for the expense of administering and correcting state-required examinations

[37] *Id.* at 653–54.

[38] In fact, the Cleveland voucher program aimed at equivalence between parents who chose to maintain their children in public schools (but with tutor assistance) and parents that opted for a religious school through a voucher. The voucher did not cover the full cost of tuition. Participating schools had to agree to a list of conditions, including the application of non-discrimination laws. *See id.* at 663–64.

[39] *Trinity*, 137 S. Ct. at 2024.

[40] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[41] *Id.* at 534. *See Board of Education v. Allen*, 392 U.S. 236, 247–48 (1968); *Everson*, 330 U.S. at 18.

[42] *Lemon v. Kurtzman*, 403 U.S. 602, 620–22 (1971) and its progeny.

[43] *Allen*, 392 U.S. at 247–48.

[44] *Lemon*, 403 U.S. at 613.

[45] *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

[46] *Lemon*, 403 U.S. at 618.

[47] *Id.*

[48] *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020).

[49] The line begins with *Lemon* and ends with *Aguilar v. Felton*, 473 U.S. 402 (1985).

to the student body.[50] Frustrated with attempts to tease out the religious from the secular in religious schools, the Court adopted the shorthand rubric that such religious primary and secondary schools were "pervasively sectarian," and therefore any direct assistance that might flow to them was presumptively unconstitutional.[51]

Although religious schools are easily seen as extensions of the sponsoring house of worship, the same concerns have not surrounded the participation of religious agencies in public welfare programs. There was a notable exception, which acknowledged the same doctrinal tension. In *Bowen v. Kendrick*,[52] although the Supreme Court ultimately upheld the involvement of religious social services agencies in a public program promoting abstinence among teenagers, the Court recognized that there may be some sectarian programs for which it may not be possible to be sure that public funds would not be used to advance a particular religious point of view.[53] In a separate opinion, Justices Kennedy and Scalia, concurring in the result, said that what mattered for an anti-establishment analysis was not the religious character of the institution, but the actual use of the funds.[54] That distinction proves critical to understand the reasoning of later decisions by the Court.

In 1997, in *Agostini v. Felton*,[55] the Court reversed its 1985 decision in *Aguilar*[56] and upheld the constitutionality of a federal remedial education program, which provided for extra instruction in mathematics and language arts, provided by public employees on the premises of their schools (without regard to whether they were religious or secular). Students were eligible for such assistance if they were educationally behind their classmates and lived in an area that was less wealthy. The aid was characterized as the assistance to students, and not assistance to schools.[57] Although the Court had enjoined the program from the premises of religious schools in 1985 on the grounds that the program supervisors could not be certain that the public employees in fact did not advance religion in the remedial education program, the Court reversed course twelve years later. In the 1997 decision, the Court noted that its anti-establishment doctrine had evolved and that its prior cases relied on a number of presumptions about the motivations of government and the character of schools and teachers that were no longer part of its jurisprudence.[58]

In 2000, in *Mitchell v. Helms*, the Court upheld a parallel program which allowed for computers and other teaching aids to be loaned to schools serving those same students.[59] That program was often seen as providing material assistance to schools, but it was held to be fulfilling a larger public purpose of advancing the quality of education by assuring that needy students were properly educated. The use of the equipment was subject to rigorous conditions that barred its use to advance religion through any form of religious instruction or proselytization.[60] The deciding vote for the decision was cast by Justice Sandra Day O'Connor who, in concurring separately, cited the above-referenced opinion of Justices Kennedy and Scalia in *Kendrick*,[61] that what mattered for the constitutional question was not the character the institution, but rather the use of the assistance.

In some ways, this distinction between religious character and religious use was reflected in the disposition of *Locke v. Davey*, in which a student was denied state assistance

50 *Committee for Public Education v. Regan*, 444 U.S. 646, 657 (1979).

51 See *Wolman v. Walter*, 433 U.S. 229, 247, 250 (1977) (citations omitted).

52 487 U.S. 589 (1988).

53 *Id.* at 607, 609, 616, 620.

54 *Id.* at 624–25 (Kennedy & Scalia, JJ., concurring).

55 521 U.S. 203, 234-35 (1997).

56 473 U.S. 402.

57 521 U.S. at 228.

58 *Id.* at 224.

59 *Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (plurality).

60 *Id.* at 829-30.

61 *Id.* at 841. She did not join that concurring opinion in *Kendrick* and in *Mitchell* did not cite to her own concurrence, just Justice Kennedy's, which she did not join at the time of that decision.

to attend a school to prepare him to be a minister.[62] Washington State had a scholarship program that offered educational assistance to all students who qualified academically and agreed to attend college in Washington. The program paid any and all educational assistance without limitation, except for theology students. It was undisputed that Davey could have studied religion as philosophy, art, history or anything else and received the scholarship. That is, except to study religion as "truth." Washington had a "Blaine Amendment" in its state constitution[63] that barred any assistance to religion, direct or indirect. In rejecting a free exercise challenge to the Blaine Amendment, the Court made clear that the First Amendment was historically motivated to negate state assistance to the formation and training of clergy provided for the Established Church.[64] In some measure, the line drawn in this case again reflects the Kennedy–Scalia opinion in *Kendrick*, even though it was not cited. In this case, the ultimate use of the state scholarship to prepare for the ministry was material to the determination.

The two religion clauses are not co-extensive. Free Exercise does not begin where anti-Establishment ends. The Court has said there is "room for play in the joints" between the clauses where a State might extend assistance or lift a burden even though not required.[65] Based on that space to regulate and following *Locke v. Davey*, it seemed settled that a state had the discretion to choose to extend a benefit or an exemption to a class of religious actors even though such extension or exemption was not constitutionally required. The 2017 opinion for the Court in *Trinity Lutheran Church v. Comer* raises substantial doubt whether and to what extent the Court would sustain that distinction but rather might, in the right circumstances, mandate the inclusion of religious actors in state programs or even reverse its ban on the direct funding of religious schools dating nearly a half century to *Lemon*.

In *Trinity Lutheran*, a Missouri church which operated a preschool was denied a resurfacing grant to refurbish its playground, specifically because of the state's Blaine Amendment.[66] The majority made plain that it was deciding the case based on the specific facts before it and specifically upheld the rule in *Locke v. Davey*.[67] However, the Court also found that an exclusion of religious actors, solely because they are religious, violated the Free Exercise Clause.[68] In July 2020, *Locke* was again reaffirmed in *Espinoza v. Montana*.[69] In *Espinoza*, the Montana legislature permitted tax deductions for donations to scholarships for children attending schools of their choice. Recognizing the limits of its Blaine Amendment, the Montana revenue department promulgated a rule, excluding contributions to scholarships to attend religious schools. The Montana Supreme Court noted the restriction of the Blaine Amendment and that excluding only religious uses was problematic under *Trinity Lutheran*; seeing no way forward, it struck down the entire statute.[70] The U.S. Supreme Court reversed and, in the process, expressed substantial doubt about the constitutionality of Blaine Amendments that proactively deny participation to religious actors in public programs.[71] But it further affirmed and distinguished *Locke*, noting the difference between religious "character" and religious "uses."[72] What is prohibited is funding for "religious use." The religious character of the actor is no longer presumptively disqualifying.

What does this mean for assistance programs under pandemic relief? It means that houses of worship could not be excluded per se from participation in relief programs

62 540 U.S. 712 (2004).

63 Wash. Const. art. IX, § 4.

64 *Locke*, 540 U.S. at 722.

65 *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

66 137 S. Ct. at 2018.

67 *Id.* at 2023.

68 *Id.* at 2024 n. 4.

69 140 S. Ct. 2246 (2020).

70 *Id.* at 2253 (citing *Espinoza v. Montana Dep't of Revenue*, 435 P.3d 603, 613–14 (Mont. 2018)).

71 *Id.* at 2262–63.

72 *Id.* at 2257–59.

simply because they are religious. Whether some litigant, somewhere, might be able to successfully argue that the principal purpose of houses of worship is religious and that clergy and ministry staff are not like other employees has not been litigated and may never be. It is also not likely to be a narrow question given the historical way in which houses of worship have functioned in communities. The business of religion extends beyond active worship and evangelization into community assistance, counseling, education, food pantries, homeless shelters and clinics. To attempt to draw and defend an exclusion of uniquely religious activities from demonstrably public assistance activities would be constitutionally daunting, as the Court in the older "aid-to-religion" cases recognized.[73] The solution is unlikely to be a blanket exclusion. On the contrary, the Supreme Court likely might hold that the participation by houses of worship is not only permitted but may, in light of *Trinity* and *Espinoza*, be constitutionally required.[74] Certainly, the successful appeal of the Diocese of Brooklyn and Agudath Israel to block the New York State restrictions that seemed to target religious activity more stringently than commercial activity bears out the application of this line of cases in the specific context of the pandemic.[75]

C. Any federal program that might limit the participation of religious organizations in pandemic relief could be subject to strict scrutiny under the Religious Freedom Restoration Act.

In 1990, the U.S. Supreme Court rewrote its free exercise jurisprudence to provide that burdens on religious persons and agencies that arose under a neutral and generally applicable law did not have to be subjected to strict scrutiny analysis.[76] Rather, the religious adherent would have to show why the burden on her religious practice is unreasonable under the circumstances. The only continuing justifications for strict scrutiny under the federal free exercise analysis would be if there were a discriminatory intent or action (thus rendering the law neither neutral nor generally applicable),[77] the infringement included another separate constitutional right which would create a hybrid situation, or the matter invaded the legitimate autonomy of religious institutions.[78] Three years later, the nearly unanimous U.S. Congress passed the Religious Freedom Restoration Act ("RFRA")[79] seeking to overturn that decision across the board, and require strict scrutiny analysis. The Supreme Court ruled that RFRA was unconstitutional, as applied to the States in 1997,[80] but the RFRA continues to be applicable to the federal government with important implications for actual cases, including this one.[81]

If RFRA applies, once a religious claimant shows that a law or government action creates a substantial burden to him, the government which must prove that the restriction

[73] It would also excessively entangle a court in parsing the religious from the secular. How is a court to say that a homeless shelter is or is not a religious activity, not unlike worship? As a maxim attributed to Francis of Assisi states: "preach the Gospel always, use words if necessary."

[74] Over the past year, the Supreme Court has issued a number of orders, some denying relief and some granting relief from governmental COVID-19 restrictions. In July, 2020, three Justices dissented from the denial of an injunction that the dissenters viewed as more restrictive on the rights of churches than casinos. *Calvary Christian Dayton Valley v. Sisolak*, 140 S.Ct. 2603 (2020). In dissent from the injunction, Justice Kavanaugh outlined four different ways in which to categorize restrictions on religion, demonstrating that the Court may give additional guidance in light of Espinoza and the series of cases related to COVID-19: "(1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike; (4) laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations." 140 S.Ct. at 2610 (Kavanaugh, J., dissenting). In this case, the Nevada restiction fell into the fourth category, requiring additional analysis to determine its validity.

[75] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (NY restrictions far more restrictive than those found in other cases to come before the Court). The addition of Justice Barrett in October 2020 strengthened the majority view that the restrictions violated the Free Exercise rights of the religious challengers.

[76] *Employment Division v. Smith*, 494 U.S. 872, 885 (1990).

[77] *Church of Lukumi Babulu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

[78] *Smith*, 494 U.S. at 877, 881.

[79] 42 U.S.C. §§2000bb, et seq.

[80] *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

[81] In November 2020, the Court heard argument in *Fulton v. City of Philadelphia*, in which a Catholic adoption program was excluded from the city's foster parent program because it did not place children with same sex couples. https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ (last visited 10 January 2021). Some have argued that the pandemic illustrates that a *Smith*-sanctioned neutral rule lacks the nuance to account for the ways in which religious observance is distinctive and worthy of special protection (See 2020).

is the narrowest way to achieve a truly compelling interest.[82] The statutory frame raised the hurdle for a state to survive a strict scrutiny analysis in an important way. Under RFRA, the compelling interest analysis has to be specific to the act and/or actor in question. It cannot be some general compelling interest even in an overarching issue, such as the criminalization of certain drugs.[83] RFRA demands more. To prevail, the state must justify the restriction on the specific activity burdened, not a general interest in avoiding an Establishment Clause issue. That provision has been a game-changer for religious persons and organizations seeking relief from the federal government. As Justice Scalia stated for the majority in *Smith*, a truly strict scrutiny analysis would almost always be fatal to challenged state action.[84]

Applying RFRA, the Supreme Court has held that private corporations cannot be forced to violate the consciences of their owners in providing employee benefits.[85] That these were private, for-profit agencies did not disqualify them from the protection of the RFRA. The federal government used concerns about violating RFRA as part of its decision to exempt religious and other entities from certain provisions of the Affordable Care Act. The current version of the rules included more agencies than religiously affiliated actors. In July 2020, the Supreme Court upheld that broad religious and moral exemption to providing contraceptive services under federal health care legislation. In the process, the Court indicated that avoiding a violation of RFRA was a legitimate concern on which the federal government could act.[86]

In the implementation of the PPP loan program, the SBA invoked RFRA specifically to avoid burdening religious rights.[87] It expanded the eligibility of the PPP and waived its affiliation rules for local religious entities that were subject to a hierarchical control and even those that lacked a separate and unique civil structure when also the result of religiously motivated choices.[88] As noted above, the SBA rules are designed to serve small for-profit businesses in communities. To prevent larger regional or national enterprises from accessing SBA funds and programs through numerous local operating entities, SBA affiliation rules aggregate local entities subject to regional or national control to be part of a common enterprise.[89] The SBA, responding to objections from religious organizations as the pandemic relief was being designed, decided that applying those rules to entities whose common control or lack of structure at the community level was a result of religious polity or theology (for example, Catholic parishes being subject to a Bishop) could burden religious beliefs and trigger a violation of RFRA.[90] In so doing, SBA facilitated the participation of houses of worship in pandemic relief programs.

Whether that exemption is an unconstitutional religious preference or an abuse of RFRA might be subject to debate among academics and public policy analysts. But no litigation has been filed, and none is expected. Given the way that the Supreme Court analyzed the RFRA issue in its most recent opinions, it is reasonable to assume that the Court would similarly affirm the SBA analysis in validating the program.[91] To involve the SBA or any government agency in deciding among the variety of religious polities would create confusion and arguably result in line-drawing among religious actors.

82 42 U.S.C.A. § 2000bb-1.

83 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–32 (2006).

84 494 U.S. at 888.

85 *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014).

86 *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383–84, 2386 (2020).

87 85 Fed. Reg. 20817-01 (15 April 2020).

88 *Id.* at 20819. In the most recent SBA guidance, the same accommodation is provided. *See* Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act (sba.gov) (last visited 10 January 2021). Rule Text at pp. 29–30, and 77.

89 13 C.F.R. pt. 121.103(b)(10) (2020).

90 85 Fed. Reg. at 20820.

91 *See Little Sisters of the Poor*, 140 S. Ct. at 2383–84.

4. Conclusions

The pandemic has disrupted the normal operation of institutions, great and small, all around the world. Attempts to provide relief for the economic consequences of the pandemic have been creative and designed around bridging these organizations to a future time when their work might again attract financial support. Including religious houses of worship in U.S. relief mechanisms can be squared with the requirements of the First Amendment. The most recent jurisprudence would seem to require their inclusion on equal terms with their secular counterparts to avoid a free exercise issue.[92] Because the discussion is about federal programs, their inclusion in the relief program would also be seen as required to avoid a violation of RFRA.[93]

Indeed, a premise of the lawsuit filed by the Roman Catholic Diocese of Brooklyn and Agudath Israel against the New York governor's redlining of certain districts to restrict religious worship is that religious institutions were being treated worse than commercial actors, such as grocery stores and shops.[94] Should they now be regulated in the same way? Treating local houses of worship like any other charity without regard to their mission and their pastor and ministers as an executive director and staff could have wider implications for the regulation of these institutions in the future. It seems doubtful, for example, that a house of worship would waive its constitutional right to resist the application of the anti-discrimination rules by a terminated pastor. We are not at the end of the pandemic as these articles are written and the full consequences of U.S. governmental relief programs have not been measured against the requirements of the Constitution. However, these are hard times, and those times require that the body politic find solutions that are not only workable, but constitutional. Weighing the facts and circumstances, the provision of pandemic assistance to houses of worship accords with the U.S. First Amendment Religion Clauses.

Funding: This research received no funding.

Institutional Review Board Statement: Not Applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not Applicable.

Acknowledgments: The author thanks his cooleagues Jennifer Gniady and Bridget Giroud for their review and comments on earlier versions of this paper.

Conflicts of Interest: The author has no conflict of interest.

References

Boorstein, Michelle. 2020. Church Donations Have Plunged Because of the Coronavirus. Some Churches Won't Survive. Available online: https://www.washingtonpost.com/religion/2020/04/24/church-budgets-coronavirus-debt/ (accessed on 8 January 2021).

Darmiento, Laurence. 2020. Charity is off the Charts Amid the Coronavirus. Is That a Sign of America's Strength or Weakness? Available online: https://www.latimes.com/business/story/2020-04-20/coronavirus-philanthropy-charitable-donations-inequality (accessed on 8 January 2021).

Durkee, Alison. 2020. U.S. Popularity Plummets Worldwide Amid Widely Criticized Coronavirus Response, Poll Finds. Available online: https://www.forbes.com/sites/alisondurkee/2020/09/15/us-popularity-global-standing-plummets-worldwide-amid-widely-criticized-coronavirus-response-poll/?sh=7dc8ecd72d63 (accessed on 8 January 2021).

See, Lindsay. 2020. Symposium: In Fulton, the court has the chance to jettison Employment Division v. Smith—And the Pandemic Shows Why It Should Take It. Available online: https://www.scotusblog.com/2020/10/symposium-in-fulton-the-court-has-the-chance-to-jettison-employment-division-v-smith-and-the-pandemic-shows-why-it-should-take-it/ (accessed on 10 January 2021).

Seidel, Andrew L. 2020. Taxpayers Cannot Be Forced to Fund Churches—Even in a Pandemic. Available online: https://religiondispatches.org/taxpayers-cannot-be-forced-to-fund-churches-even-in-a-pandemic/ (accessed on 10 January 2021).

92 *Espinoza*, 140 S. Ct. at 2261.

93 *See Little Sisters of the Poor*, 140 S. Ct. at 2383–84.

94 *See Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66. *See also Calvary Chapel*, *supra* n.74.

Tebbe, Nelson, Micah Schwartzman, and Richard Schragger. 2020. Churches Have Been Hypocritical during the Pandemic. Available online: https://www.washingtonpost.com/outlook/2020/05/13/churches-have-been-astonishingly-hypocritical-during-pandemic/ (accessed on 10 January 2021).

The NonProfit Times. 2020. COVID-19 Negatively Impacting Nearly All Charities. Available online: https://www.thenonprofittimes.com/donors/covid-19-negatively-impacting-nearly-all-charities/ (accessed on 8 January 2021).

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Immunizing the Flock: How the Pandemic Court Rewrote Religious Freedom

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Abstract: When coronavirus began to descend upon the United States, religious freedom advocates across the country sounded the alarm that citizens' religious practices and institutions were under threat. Although some of the most extreme arguments championed by these advocates were not validated by our legal system, many were. This article explores the underappreciated gains made by religious freedom advocates before the U.S. Supreme Court over the past year. As a result of the "Pandemic Court", religious freedom in the United States has been rewritten. This promises to radically change the educational, employment, and health prospects of millions of Americans for the rest of the pandemic and long afterwards.

Keywords: religious freedom; US Constitution; First Amendment; Supreme Court; pandemic

Citation: Baumgardner, Paul. 2021. Immunizing the Flock: How the Pandemic Court Rewrote Religious Freedom. *Laws* 10: 12. https://doi.org/10.3390/laws10010012

Received: 23 January 2021
Accepted: 10 February 2021
Published: 17 February 2021

1. Introduction

As the COVID-19 pandemic swept across the United States in the opening months of 2020, Republican officials and conservative leaders focused their attention on a peculiar casualty of coronavirus: religious freedom. "Allow me to be blunt about what is taking place. There is a movement in this country almost exclusively within the 'left's' dominion to wipe out organized religion; especially Christianity", wrote conservative firebrand Charlie Kirk (Kirk 2020). "The First Amendment to our Constitution guarantees us our religious liberty and we have been fighting to keep it ever since. We need some of that fight now" (Kirk 2020).

This call to arms became a common refrain on the political right, especially as religious adherents and institutions were asked to make adjustments in order to stem the spread of coronavirus. The head of the conservative Faith and Freedom Coalition lamented, "During this pandemic, we've seen disturbing examples of government officials restricting our First Amendment rights" (Posner 2020). Two conservative law professors took to the pages of the *New York Times* to relay what "many are asking: How long must this go on? America was founded in no small part so that people of every creed and conviction could worship without hindrance, in accordance with conscience and tradition" (McConnell and Raskin 2020a). The two scholars—Michael McConnell and Max Raskin—were quick to point out: "It is not for government officials to decide whether religious worship is essential; the First Amendment already decided that" (McConnell and Raskin 2020a).

Christian leaders and conservative journalists entered the fray to condemn governmental coronavirus responses that prioritized public health over spiritual well-being. R.R. Reno, editor of the conservative *First Things* journal, deemed the pandemic response to be decidedly un-Christian. "Clergy won't visit the sick or console those who mourn. The Eucharist itself is now subordinated to the false god of 'saving lives'" (Reno 2020). All the while, Americans were being forced into wearing masks—a clear demonstration of "enforced cowardice", as millions elected to "cower in place" (Sitman 2020). A fellow editor at *First Things*, Matthew Schmitz, elaborated on this collapse of social priorities in his March 27th article, "Church as a Non-Essential Service" (Schmitz 2020). "We are capable of taking

prudent measures to keep our supermarkets open, but not our sanctuaries. Coronavirus has shown what we value", Schmitz mourned (Schmitz 2020, see also Perkins 2020). The pandemic was setting a precedent for national and state governments to devalue religious practices, while also ignoring the grave economic impact that forced closures would have on religious institutions.

The continuous clamor around the alleged weakening of religious rights, the discounting of religious practices, and the targeting of religious adherents led to a series of very public political promises and legal remedies. "The churches are not being treated with respect by a lot of the Democrat governors", President Donald Trump announced in May (Parke 2020). "Churches, to me, they're so important in terms of the psyche of our country", Trump told reporters, "America, we need more prayer, not less" (Parke 2020; Gearan et al. 2020). Conservative lawyers and law firms specializing in religious freedom agreed that more prayer (and litigation) was warranted, in order to stop churches from being "targeted" by the government for discrimination and from being viewed as "second-class" institutions (Galus 2020). NBC News reported in early June that "Ministers and churches, represented by conservative Christian law firms, have sued governors and other public officials not just in California, but also in New Mexico, Illinois, Kentucky, Virginia, Maryland, Kansas, North Carolina, Mississippi, Tennessee, Maine, Minnesota, Michigan, Missouri, Connecticut, Nevada, and Oregon, claiming that stay-at-home orders and safer-at-home restrictions violate their religious freedom rights" (Posner 2020).

Several of these religious freedom crusades received support from the federal government (Armour 2020). United States Attorney General Bill Barr released a public statement that expressed worry about the growing discrimination facing religious institutions: "The United States Department of Justice will continue to ensure that religious freedom remains protected if any state or local government, in their response to COVID-19, singles out, targets, or discriminates against any house of worship for special restrictions" (United States Department of Justice 2020). Barr promised that the Department of Justice would look into allegations of discrimination against religious adherents. "Religion and religious worship continue to be central to the lives of millions of Americans. This is true more so than ever during this difficult time", the Attorney General declared (United States Department of Justice 2020).

While the pandemic spread during the spring and early summer, and the number of coronavirus-related deaths rose within the United States, Republican officials and conservative leaders beat the drum of religious freedom. But it initially appeared that these advocates were fighting a losing battle, especially after the U.S. Supreme Court denied several appeals that called for churches to reopen (*South Bay United Pentecostal Churc; et al. v. Gavin Newsom 2020*; *Calvary Chapel Dayton Valley v. Steve Sisolak 2020*). As a result of the political right's perceived failure, many commentators lost interest in this constitutional kerfuffle.

This dwindling attention paid the political right's push for religious protections amidst the pandemic represents a serious oversight. Political scientists and legal commentators have not recognized how religious freedom advocates became political beneficiaries of the pandemic, largely through decisions handed down by the U.S. Supreme Court in its 2019–2020 term. This article explains the actions of the "Pandemic Court", and how it has successfully rewritten religious freedom within the United States.

While onlookers focused on the hot-button June 2020 cases before the Court—which included legal disputes surrounding President Trump's taxes, Deferred Action for Childhood Arrivals, and abortion—the Pandemic Court handed down several decisions that significantly extended religious protections. These decisions will have serious consequences for millions of religious and irreligious Americans during the pandemic. For, as employment, healthcare, and education have grown increasingly precarious for many Americans, four of the Pandemic Court's decisions—in *Bostock v. Clayton*, *Espinoza v. Montana Department of Revenue*, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, and *Our Lady of Guadalupe School v. Morrissey-Berru*—pave the way for religious freedom claims (and

exemptions) that will dramatically affect the provision of employment, healthcare, and education across the country.

The following sections will not insist that particular justices engaged in unusually sinister or historically unprecedented behavior when they ruled in ways that benefitted religious freedom advocates. In fact, it is not clear whether the Pandemic Court consciously contorted itself (or its case law) in order to uniquely reward religious freedom advocates during the pandemic or set them apart as an especially deserving group because of COVID-19. Nor will it be proven—à la critical phenomenology—that specific justices were biding their time, patiently lying in wait for a legal pretext to exploit for their own pet causes or secret theocratic desires (Kennedy 1986; Vermeule 2020).

Instead, the Pandemic Court's decisions highlight how our current public health crisis coincided with a special set of cases—cases that presented a perfect opportunity for the advancement of religious freedom advocates' longstanding goals.[1] The Court's decisions are particularly noteworthy because the justices did elect to rule in ways that advanced those goals or supplied clear pathways for advancement in future litigation, in spite of the pandemic-specific risks of ruling in the interest of religious freedom advocates.

2. Religious Freedom Advocates in American Politics

Before delving into the Pandemic Court's four decisions, it is important to clarify that the lessons these decisions provide represent more than just seasonal trends on the U.S. Supreme Court or narrow legal developments strictly related to COVID-19. This article fits within—and extends—a rich and developing field of research within American social science. Recent works, such as Bennett (2017), Lewis (2017), Baumgardner and Miller (2019), Waltman (2019), and Hollis-Brusky and Wilson (2020), have investigated the role of religious freedom advocates—especially on the Christian right—in remaking state and national laws, changing the complexion of American laws schools and the legal profession, reshaping our party system, and recentering religion in the public sphere over the past forty years. The recent rewriting of religious freedom under the Pandemic Court illustrates just one weighty piece of this broader, generational story of political involvement and institutional development.

The courts maintain pride of place within this field of research, for religious freedom advocates have turned increasingly to the judiciary in order to have their political agendas vindicated and strengthened. Even resorting to the courts for religious protection during periods of public health crisis has precedent within American law. In *Jacobson v. Massachusetts*, the Supreme Court was tasked with ruling on a potential religious exemption to a mandatory vaccination law (*Jacobson v. Massachusetts* 1905). In order to curb the spread of smallpox, the state of Massachusetts authorized cities and townships to require their citizens to be vaccinated. When the city of Cambridge elected to require smallpox vaccinations, a local pastor—Henning Jacobson—refused to be vaccinated. Jacobson did not believe that the government could force him to be vaccinated. He viewed such a mandatory medical measure to be unconstitutional violation of his basic freedoms. However, the Supreme Court ruled 7-2 against Jacobson, finding that the mandatory vaccination law represented a legitimate use of Massachusetts' police powers.[2]

More than a century later, the Supreme Court would be more accommodating of religious adherents' concerns. As we will see in the pages ahead, the boundaries of religious freedom expanded during a period of public health crisis and social unrest. The actions of the U.S. Supreme Court in its 2019–2020 term clearly demonstrate how the goals

[1] See (Pierson 2004) on the importance of both timing and sequencing to institutional decision-making and American political development.

[2] "This court has more than once recognized it as a fundamental principle that persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made so far as natural persons are concerned. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law" (*Jacobson v. Massachusetts* 1905, p. 26).

of modern-day religious freedom advocates were furthered in this moment of national instability and why these goals portend greater instability for millions of Americans.

3. Little Sisters of the Poor

One of the most impactful decisions that the Pandemic Court handed down in 2020 was *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (2020). This case concerned the legality of several religious exemptions that the Trump administration had granted, in order to excuse a greater number of employers from the contraceptive mandate within the Patient Protection and Affordable Care Act of 2010 (ACA).

Following the passage of the ACA, the Health Resources and Services Administration (HRSA) located within the U.S. Department of Health and Human Services began setting guidelines for the basic medical coverage that employers had to provide under the ACA. These guidelines, released in 2011, "included the contraceptive mandate, which required health plans to provide coverage for all contraceptive methods and sterilization procedures approved by the Food and Drug Administration as well as related education and counseling" (Thomas, pp. 3, 4). After concerns were raised about the contraceptive mandate's effect on employers' religious freedoms, HRSA crafted religious exemptions for group health plans in 2011, 2012, and 2013 (Thomas, pp. 4, 5). One such exemption was the self-certification of accommodation for religious employers, which "required an eligible organization to provide a copy of the self-certification form to its health insurance issuer, which in turn would exclude contraceptive coverage from the group health plan and provide payments to beneficiaries for contraceptive services separate from the health plan" (Thomas, p. 6).

However, although this accommodation was intended to ease the concerns of religious employers, some employers—such as the Little Sisters of the Poor—took issue with self-certification. The Little Sisters sued, arguing that this accommodation would force them to compromise their religious beliefs, because submission of the form would "directly cause others to provide contraception or appear to participate in the Departments' delivery scheme" (Thomas, pp. 6, 7). Following court cases such as *Zubik v. Burwell* (2016), the Obama administration continued to work with employers who were uncomfortable with the self-certification accommodation, with the goal of achieving compromises that would provide contraceptive services to employees while also addressing employers' religious concerns.

When Donald Trump assumed the presidency in 2017, the Departments of Health and Human Services, Labor, and the Treasury radically changed their approaches to ACA exemptions; these three departments "significantly broadened the definition of an exempt religious employer" so that for-profit organizations could be exempted from the contraceptive mandate if they registered religious objections to it (Thomas, p. 10). The states of Pennsylvania and New Jersey sued, claiming that the departments had not followed the rule-making process required under the Administration Procedure Act when updating their ACA exemption guidelines.[3]

In resolving this dispute, the majority of the Pandemic Court sided with the Trump Administration. Conservative Justice Clarence Thomas wrote the majority opinion in *Little Sisters of the Poor*. In his opinion, Justice Thomas explained that "the ACA leaves the Guidelines' content to the exclusive discretion of HRSA. Under a plain reading of the statute, then, we conclude that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the religious and moral exemptions" (Thomas, p. 16). Additionally, the states' concerns regarding the Administration Procedure Act were unwarranted, the majority argued, because the updated exemption guidelines put forth by the Departments of Health and Human Services, Labor, and the Treasury "contained all of the elements of a notice of proposed rulemaking as required by the APA" (Thomas, p. 23).

[3] "As relevant, the States—respondents here—once again challenged the rules as substantively and procedurally invalid under the APA. They alleged that the rules were substantively unlawful because the Departments lacked statutory authority under either the ACA or RFRA to promulgate the exemptions" (Thomas, pp. 11,12).

Justice Ruth Bader Ginsburg, in a dissenting opinion joined by Justice Sonia Sotomayor, decried the majority's abandonment of legal precedent and her colleagues' willingness to prioritize gratuitous employer unease over women's health. In accordance with the First Amendment of the U.S. Constitution and the Religious Freedom Restoration Act (RFRA), previous Courts had sought reasonable political accommodations and legal exemptions for religious adherents.[4] But the Pandemic Court was now doing much more than balancing competing rights claims. "Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree", Justice Ginsburg argued (Ginsburg, p. 1). The majority in *Little Sisters of the Poor* was forcing "women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer's insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets. The Constitution's Free Exercise Clause, all agree, does not call for that imbalanced result" (Ginsburg, p. 2). As a result of the Court's decision, upwards of 125,000 women could be deprived of free contraception (Ginsburg, p. 2).

4. Our Lady of Guadalupe School

The next two Pandemic Court decisions lie at the intersection of religion, education, and employment. The first case—*Our Lady of Guadalupe School v. Morrissey-Berru* (2020)—concerned religious institutions' immunity from basic employment protections. After the Court's 2012 ruling in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (2012), the "ministerial exception" became cemented into First Amendment jurisprudence. This exception—which was found to be required both by the Free Exercise Clause and the Establishment Clause of the First Amendment—concerns religious institutions' independence in doctrinal decisions and internal governance, and the limitations that this independence places on local, state, and national governments. The ministerial exception includes exemptions from "laws governing the employment relationship between a religious institution and certain key employees" (Alito, p. 2). "State interference in that sphere", one Supreme Court justice explained, "would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion" (Alito, p. 10).

But how far does the ministerial exception reach? Is *any* state interference in a religious institution's internal governance constitutionally permissible? In *Our Lady of Guadalupe School*, the Pandemic Court extended the logic of *Hosanna-Tabor* and imposed serious restrictions on the rights of employees working at religious institutions. The consolidated *Our Lady of Guadalupe School* case surrounds the end of two teachers' contracts at Catholic schools. The two teachers—Agnes Morrissey-Berru and Kristen Biel—had similar professional backgrounds and duties at their respective parochial elementary schools. Both Morrissey-Berru and Biel had received some sort of Catholic educational training, and—while serving as teachers in their parochial schools—taught their students a religious curriculum, used Catholic textbooks in their courses, led their students in prayer, attended and participated in their schools' religious programming (such as church services and biblically-inspired school plays), and had employment contracts that explained their roles in promoting the schools' religious mission (Alito, pp. 3–9).

But the two Catholic schools' failed to renew the contracts of Morrissey-Berru and Biel. Morrissey-Berru claimed that her employer had discriminated against her on the basis of her age, and that the school wanted to fill her post with a younger instructor (Alito, p. 6). Biel claimed that her employer had discriminated against her because she had requested time off for cancer treatment (Alito, p. 9). Each of the teachers filed claims with the Equal Employment Opportunity Commission. The two Catholic schools maintained that they

[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". First Amendment, Constitution of the United States; also see Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488.

had not discriminated against their former employees, and also that their institutions were protected from these discrimination suits due to the ministerial exception.

The Pandemic Court ruled on behalf of the two Catholic schools, deeming both Morrissey-Berru and Biel to be "ministers" covered under the ministerial exception. Writing on behalf of the majority, Justice Samuel Alito significantly widened the concept of the ministerial exception, arguing that elementary school teachers—even teachers who do not practice religion in their personal lives—can fall under the purview of the ministerial exception. The ministerial exception insulates religious institutions to a remarkable degree and constitutionally mandates "autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles" (Alito, p. 11).

But how are employees or the courts to know who plays key roles in a religious institution? How do we know who is a minister? According to the majority in *Our Lady of Guadalupe School*, it is important to rely on the word of the religious institution (i.e., the employer). Justice Alito reasoned, "In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important" (Alito, p. 22).[5] Justice Thomas's concurring opinion, joined by Justice Neil Gorsuch, went even further in stressing the necessity of deferring to religious institutions: "I write separately, however, to reiterate my view that the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.' . . . What qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis" (Thomas, pp. 1–2).

In her powerful dissent, Justice Sotomayor pushed back against this degree of religious deference, recognizing that the Court's holding had the potential to jeopardize the basic rights of hundreds of thousands of employees across the United States. "It risks allowing employers to decide for themselves whether discrimination is actionable", Sotomayor noted. "As a result, the Court absolves religious institutions of any animus completely irrelevant to their religious beliefs or practices and all but forbids courts to inquire further about whether the employee is in fact a leader of the religion. Nothing in *Hosanna-Tabor* (or at least its majority opinion) condones such judicial abdication" (Sotomayor, p. 10).

5. Espinoza

The second Pandemic Court decision lying at the intersection of religion, education, and employment was *Espinoza v. Montana Department of Revenue* (2020). The Court's decision in *Espinoza* was a boon for parochial schools and families with children in parochial schools, as well as for religious groups seeking greater public assistance for parochial education in their states.

The Montana legislature had recently created a program that would offer tax credits to those who contributed funds to certain scholarship organizations. The organizations were then permitted to use their funds to provide scholarships to Montanan families that sent their children to private schools. Under this program, student scholarship recipients were free to apply their awards at any "qualified education provider" (Roberts, p. 2). This new program quickly came under legal scrutiny, for the state constitution prohibited public assistance from going to religious schools. The Montana Department of Revenue stepped in and adjusted the program, so that student scholarships could only be applied at non-parochial private schools (Roberts, p. 3). Only non-parochial private schools would be considered qualified education providers.

[5] The majority was not willing to provide any clearer advice for the lower courts, suggesting instead that they "take all relevant circumstances into account and . . . determine whether each particular position implicated the fundamental purpose of the exception" (Alito, p. 22).

In *Espinoza*, the Pandemic Court was tasked with deciding whether the exclusion of parochial schools from Montana's scholarship program constituted a form of religious discrimination that violated the First Amendment. Chief Justice John Roberts, joined by the other four conservative members of the Court, ruled that this exclusion was unconstitutional. Distinguishing *Espinoza* from recent precedents related to state educational scholarships being used for parochial instruction, the Chief Justice asserted: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious" (Roberts, pp. 12–16, 20; see *Locke v. Davey* 2004). Relying on historical research—including research from the aforementioned Michael McConnell—Roberts suggested that public funds for parochial schools have a rich, and perfectly constitutional, legacy (Roberts, p. 14).

But several of Chief Justice Roberts's colleagues were willing to go much further in their condemnation of the Montana state constitution and in their safeguarding of religious education. Justice Thomas (joined by Justice Gorsuch) filed a concurring opinion, in which he pointed out the grave state of religious freedom in 2020 America. Quite simply, religious freedom is under threat: "The Free Exercise Clause, although enshrined explicitly in the Constitution, rests on the lowest rung of the Court's ladder of rights, and precariously so at that" (Thomas, p. 9). Thomas protested that Supreme Court decisions and individual justices' remarks over the years had demonstrated "hostility" for religion and for robust religious freedom protections (Thomas, pp. 6–8). This hostility included fresh and "repeated denigration of those who continue to adhere to traditional moral standards, as well as laws even remotely influenced by such standards, as outmoded at best and bigoted at worst" (Thomas, p. 8).[6]

First Amendment case law needed to be redirected more forcefully than the majority opinion in *Espinoza* permitted—redirected away from the erroneous, Jeffersonian vision of a strict separation existing between church and state. Justice Thomas claimed in his concurrence that states needed to be constitutionally permitted to accommodate—and even favor—religion. "[T]he modern view, which presumes that States must remain both completely separate from and virtually silent on matters of religion to comply with the Establishment Clause, is fundamentally incorrect", Thomas contended. "Properly understood, the Establishment Clause does not prohibit States from favoring religion. They can legislate as they wish, subject only to the limitations in the State and Federal Constitutions" (Thomas, p. 3).

Justice Alito's concurring opinion also registered worries about the American political system malfunctioning and working to the detriment of religion. Far from envisioning an overextension of religious freedom claims following *Espinoza*, Alito spent his concurrence focusing on the historical obstacles that remained in the way of the faithful. Justice Alito's opinion was especially notable for its detailed description of anti-Catholicism within the United States and the longstanding scourge of Blaine Amendments (Alito, pp. 2–13). These nineteenth-century changes to state constitutions—such as the anti-aid provision in the Montana constitution—have perpetuated religious discrimination for generations, Alito wrote. Accordingly, the Court's decision in *Espinoza* represented just the first step in rooting out structural injustice against believers and religious organizations.

6. Bostock

The final Pandemic Court decision that buttressed religious freedom was *Bostock v. Clayton* (2020). The Court's ruling in this consolidated case has garnered a sizable amount of public and scholarly attention, both for its landmark extension of LGBTQ rights and for the justices' clash over proper interpretive methods. Not to be overlooked, however, is the extraordinary narrowness of the majority opinion in *Bostock* and the conspicuous amount of room that different justices carved out for future religious exemptions.

[6] Regarding these newer wounds, Thomas cited the Court's recent decisions in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018) and *Obergefell v. Hodges* (2015).

A complex case, which resulted in 168 pages of majority and dissenting opinions, *Bostock* concerned the inclusion of sexual orientation and gender identity protections within Title VII of the Civil Rights Act of 1964. The Supreme Court was charged with deciding whether Title VII's prohibitions against sex-based employment discrimination meant that employers who discriminated against employees on the basis of sexual orientation and gender identity violated Title VII. Justice Neil Gorsuch, writing on behalf of a six-member majority, determined that sexual orientation and gender identity protections were included within Title VII. For any "employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids" (Gorsuch, p. 2).

The majority acknowledged that the congressmembers who passed the Civil Rights Act in 1964 probably did not believe that sexual orientation and gender identity would be protected under Title VII. However, close examination of both the ordinary public meaning of "sex" and also the development of statutory precedent around the Civil Rights Act supported the conclusion that sexual orientation and gender identity fall under the purview of Title VII (Gorsuch, pp. 2, 4, 12, 24–26).

But Justice Gorsuch's opinion was intentionally narrow, and it left open the possibility of future religious exemptions. Gorsuch understood that religious freedom advocates would worry that *Bostock* "may require some employers to violate their religious convictions" (Gorsuch, p. 32). Warding off this worry, Gorsuch emphasized the limited reach of *Bostock*. "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society", Gorsuch reassured (Gorsuch, p. 32). Moreover, Justice Gorsuch underlined the religious freedom protections secured by the First Amendment, RFRA, and recent court cases:

> This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers". *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171, 188 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA). That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. (Gorsuch, p. 32)

In his dissenting opinion, Justice Brett Kavanaugh made sure to reiterate this passage from the majority opinion, in order to stress the religious protections that counterbalanced LGBTQ civil rights gains (Kavanaugh, p. 3). Justice Alito also penned a dissenting opinion in *Bostock*, which Justice Thomas joined. Alito's dissent methodically articulated a roadmap for religious freedom advocates to use to curtail the application of *Bostock*. Regardless of whether their challenges pertained to healthcare, or workplace speech, or employment, religious freedom advocates now had a clear guide for future litigation (Alito, pp. 48–53).

7. Conclusions

After the Supreme Court's 2019-2020 term concluded, conservative law professor Michael McConnell composed another *New York Times* article (McConnell 2020). In this article, "On Religion, the Supreme Court Protects the Right to Be Different", McConnell praised the pragmatism, moderation, and thoughtfulness of the Supreme Court. Across a host of cases, the justices had demonstrated their investment in "protecting pluralism—the right of individuals and institutions to be different, to teach different doctrines, to dissent from dominant cultural norms and to practice what they preach" (McConnell 2020). McConnell's upbeat coda represented a stark contrast to his earlier writing. Although

initially fearful about the weakening of religious freedom during the pandemic, the passage of a few months had left McConnell quite comforted and pleased by the common sense of the Pandemic Court.

The basis for this change of tune is obvious. Religious freedom advocates became political beneficiaries of the rise of COVID-19 in the United States, due to the efforts of the Pandemic Court. At first glance, *Little Sisters of the Poor*, *Our Lady of Guadalupe, Espinoza*, and *Bostock* may appear unrelated to the pandemic. None of these decided cases are inherently related to COVID-19; the facts of all four cases do not pertain to coronavirus in any way. However, these four cases have vital linkages to the pandemic, even if some would argue that these linkages are unconscious or accidental. The decisions in all four of these cases were handed down while the pandemic was raging across the United States. The Court's rulings echoed (and addressed) prominent religious concerns raised during the pandemic, and the impact of these cases is likely to compound the suffering caused by the pandemic.

To be clear, these legal developments do not represent a COVID-19-inspired conspiracy or coordinated religious takeover; religious freedom advocates pushed these cases and rallied around their core causes for years before the Supreme Court granted certiorari and before COVID-19 was detected in the United States. Instead, these legal developments show how the heightened material stakes of expanding religious freedom converged with the parochialism of religious freedom advocates and the Pandemic Court.[7] This imbalance has the frightening potential to exacerbate and lengthen Americans' hardships.

In *Little Sisters of the Poor*, *Our Lady of Guadalupe, Espinoza*, and *Bostock*, the Court effectively immunized the flock by rewriting the boundaries of religious freedom to further protect religious adherents, institutions, and practices. Meanwhile, millions of Americans were struggling to find or keep a job, to gain or maintain reliable healthcare, and to adjust to new educational changes and learning costs created by the pandemic. The Pandemic Court compounded those struggles, by vindicating religious freedom claims that can hamper the provision of employment, healthcare, and education across the country.

With the recent death of Justice Ruth Bader Ginsburg—and the whirlwind confirmation of the rightwing Amy Coney Barrett to the high court—religious freedom advocates have already begun celebrating their improved political fortunes (Boorstein 2020; Olsen 2020; McConnell and Raskin 2020b). And with more religious freedom cases appearing on the Supreme Court's 2020-21 docket, there is no reason to expect the Court's immunization work to slow down. In fact, the Court has already indicated its desire to pick up where it left off last term (*Roman Catholic Diocese of Brooklyn, New York v. Cuomo* 2020).

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: All data are contained within the article and corresponding references.

Conflicts of Interest: The author declares no conflict of interest.

References

Armour, Stephanie. 2020. Hospitals' Covid-19 Policies Face Religious-Rights Checks by Trump Administration. *The Wall Street Journal*, August 10.

Baumgardner, Paul, and Brian K. Miller. 2019. Moving From the Statehouses to the State Courts? The Post-RFRA Future of State Religious Freedom Protections. *Albany Law Review* 82: 1385–1410.

Bennett, Daniel. 2017. *Defending Faith: The Politics of the Christian Conservative Legal Movement*. Lawrence: University of Kansas Press.

Boorstein, Michelle. 2020. Religious conservatives hopeful new Supreme Court majority will redefine religious liberty precedents. *The Washington Post*, November 3.

[7] These findings are consistent with research conducted within the American political development (APD) subfield of political science, especially APD scholarship that details how even unconscious and contingent alignments of actors, agendas, and temporal opportunities can generate profound and durable political outcomes. See (Pierson 2004; Orren and Skowronek 2004; Staszak 2015).

Bostock v. Clayton. 590 U.S. ___. 2020. Available online: https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf (accessed on 14 February 2021).
Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada; et al. 591 U.S. ___. 2020. Available online: https://www.supremecourt.gov/opinions/19pdf/19a1070_08l1.pdf#page=13. (accessed on 14 February 2021).
Espinoza v. Montana Department of Revenue, 591 U.S. ___. 2020. Available online: https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf (accessed on 14 February 2021).
Galus, Jeremiah. 2020. A New Wave of Government Officials Treating Churches Unconstitutionally. *Alliance Defending Freedom*. May 29. Available online: https://www.adflegal.org/blog/new-wave-government-officials-treating-churches-unconstitutionally (accessed on 14 February 2021).
Gearan, Anne, Lena H. Sun, Josh Dawsey, and Michelle Boorstein. 2020. Trump tells states to let houses of worship open, sparking cultural and political fight over pandemic restrictions. *The Washington Post*, May 22.
Hollis-Brusky, Amanda, and Joshua C. Wilson. 2020. *Separate But Faithful: The Christian Right's Radical Struggle to Transform Law & Legal Culture*. New York: Oxford University Press.
Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171. 2012. Available online: https://www.supremecourt.gov/opinions/11pdf/10-553.pdf (accessed on 14 February 2021).
Jacobson v. Massachusetts, 197 U.S. 11. 1905. Available online: https://tile.loc.gov/storage-services/service/ll/usrep/usrep197/usrep197011/usrep197011.pdf (accessed on 14 February 2021).
Kennedy, Duncan. 1986. Freedom and Constraint in Adjudication: A Critical Phenomenology. *Journal of Legal Education* 36: 518–62.
Kirk, Charlie. 2020. Will Christians Stand Up Against a Godless Kentucky Government? *Newsweek*. April 12. Available online: https://www.newsweek.com/charlie-kirk-will-christians-stand-against-godless-kentucky-government-opinion-1497475 (accessed on 14 February 2021).
Lewis, Andrew R. 2017. *The Rights Turn in Conservative Christian Politics: How Abortion Transformed the Culture Wars*. New York: Cambridge University Press.
Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. ___. 2020. Available online: https://www.supremecourt.gov/opinions/19pdf/19-431_5i36.pdf (accessed on 14 February 2021).
Locke v. Davey, 540 U. S. 712. 2004. Available online: https://www.supremecourt.gov/opinions/03pdf/02-1315.pdf (accessed on 14 February 2021).
Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. ___. 2018. Available online: https://www.supremecourt.gov/opinions/17pdf/16-111_j4el.pdf (accessed on 14 February 2021).
McConnell, Michael, and Max Raskin. 2020a. If Liquor Stores Are Essential, Why Isn't Church? *The New York Times*, April 21.
McConnell, Michael, and Max Raskin. 2020b. The Supreme Court Was Right to Block Cuomo's Religious Restrictions. *The New York Times*, December 1.
McConnell, Michael. 2020. On Religion, the Supreme Court Protects the Right to Be Different. *The New York Times*, July 9.
Obergefell v. Hodges, 576 U.S. 644. 2015. Available online: https://www.supremecourt.gov/opinionsd/14pdf/14-556_3204.pdf (accessed on 14 February 2021).
Olsen, Henry. 2020. The Supreme Court finally has a majority that will protect religious freedom. *The Washington Post*, November 27.
Orren, Karen, and Stephen Skowronek. 2004. *The Search for American Political Development*. New York: Cambridge University Press.
Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ___. 2020. Available online: https://www.supremecourt.gov/opinions/19pdf/19-267_1an2.pdf (accessed on 14 February 2021).
Parke, Caleb. 2020. Trump slams Dem governors for unfair treatment of churches during coronavirus. *Fox News*. May 22. Available online: https://www.foxnews.com/politics/trump-coronavirus-dem-governors-church-essential-open (accessed on 14 February 2021).
Perkins, Tony. 2020. Religious liberty during COVID-19: Get a haircut, but stay away from church. *The Washington Times*, May 21.
Pierson, Paul. 2004. *Politics in Time: History, Institutions, and Social Analysis*. Princeton: Princeton University Press.
Posner, Sarah. 2020. From St. John's Episcopal Church to pandemic response, Trump co-opts religion to woo the religious right. *NBC News*, June 2.
Reno, R. R. 2020. Say 'No' To Death's Dominion. *First Things*, March 23.
Roman Catholic Diocese of Brooklyn Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York (2020) Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York, 592 U.S. ___. 2020. Available online: https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf (accessed on 14 February 2021).
Schmitz, Matthew. 2020. Church as a Non-Essential Service. *First Things*, March 27.
Sitman, Matthew. 2020. Why the Pandemic Is Driving Conservative Intellectuals Mad. *The New Republic*, May 21.
South Bay United Pentecostal Churc; et al. v. Gavin Newsom, Governor of California; et al. 590 U.S. ___. 2020. Available online: https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf (accessed on 14 February 2021).
Staszak, Sarah. 2015. *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment*. New York: Oxford University Press.
United States Department of Justice, Office of Public Affairs. 2020. *Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing; Department of Justice Files Statement of Interest in Mississippi Church Case*. Washington, DC, USA: United States Department of Justice, Office of Public Affairs, April 14.
Vermeule, Adrian. 2020. Beyond Originalism. *The Atlantic*, March 31.

Waltman, Jerold. 2019. *Church and State in the Roberts Court: Christian Conservatism and Social Change in Ten Cases, 2005–2018*. Jefferson: McFarland.

Zubik v. Burwell, 578 U.S. ___. 2016. Available online: https://www.supremecourt.gov/opinions/15pdf/14-1418_8758.pdf (accessed on 14 February 2021).

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COVID-19 and Religious Freedom: Some Comparative Perspectives

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Abstract: The government's measures against COVID-19 have raised, in virtually all contemporary democracies, important issues regarding the proportionality of limitations on fundamental rights, including freedom of religion or belief. This paper analyses some of those issues with particular reference to religious freedom, in the light of the experiences of various European and American countries. It also examines the cooperation (or lack of) between governments and religious communities in the fight against the pandemic, as well the response of religious communities to anti-COVID-19 rules, which has included recently some litigation alleging the unequal treatment of religion in comparison with other activities or institutions. The author argues that more dialogue and reciprocal cooperation between governments and religious communities (and civil society in general) is needed in this type of crisis, as well a strict scrutiny of restrictions imposed on freedom of religion from the perspective of proportionality and equality.

Keywords: COVID-19; religious freedom; fundamental rights; discrimination; proportionality; cooperation between government and religious communities; public health

Citation: Martínez-Torrón, Javier. 2021. COVID-19 and Religious Freedom: Some Comparative Perspectives. *Laws* 10: 39. https://doi.org/10.3390/laws10020039

Received: 12 April 2021
Accepted: 8 May 2021
Published: 18 May 2021

1. The Coronavirus Crisis as an Opportunity for Social and Legal Analysis

I must begin with a caveat. These brief pages are not intended to perform a deep or exhaustive analysis of a very complex subject. They merely contain, in response to a kind invitation of professor Adelaide Madera, some initial personal reflections upon the impact that the pandemic of COVID-19 has had—and still has—on religious freedom and the relations between the State and religious communities. These reflections should not be taken as definitive, among other reasons, because the pandemic is still evolving and so are government policies in the five continents. Being this a global phenomenon, I will adopt here a comparative law perspective and will commence by recognizing that I am indebted to some collective volumes that have been published in the last months and provide insightful comparative studies[1].

Contemporary societies, especially in the West, have been accustomed for decades to the absence of new challenges that could seriously endanger or question their foundations. This has all changed with the emergence of COVID-19. Admittedly, we have had grave pandemics in the past. One century ago, the 1918 flu (also known, improperly, as the "Spanish flu") caused millions of deaths around the globe.[2] And some other—lesser—pandemics came after that, including the 2009 swine flu. The COVID-19 crisis is not strictly speaking an unprecedented health crisis but some of its characteristics make it different from others. First, we must consider a biological factor: leaving aside the lethality

[1] In particular (Consorti 2020a; Balsamo and Tarantino 2020; Martínez-Torrón and Lara 2021). The latter volume, and my own chapter in it, have especially inspired these pages. See also (Soler Martínez 2020). For the rest, I will try to keep bibliographical references to a minimum.

[2] The actual number of victims caused by the 1918 flu remains unclear after decades of studies—with a tendency to raise the figures with the passage of time. More or less recent studies suggest a death toll of between 50 and 100 million (Johnson and Müller 2005). I am grateful to professor John Eicher, Fellow at FRIAS in 2020–2021, for bringing this work to my attention.

and mortality indexes, the SARS-CoV-2 is a virus that is transmitted with tremendous facility, mutates fast, and is proving to be particularly resilient. Second, since it was first detected, the virus has spread very rapidly and uncontrollably because of the mobility of the population all over the world nowadays. And third, the reaction of people has been different.

A certain "complex of invulnerability" has been for years one of the idiosyncrasies of present-day societies, particularly in the more developed areas of the planet. After the Second World War and once disappeared, long ago, the cold war and the threat of a nuclear catastrophe, our societies took for granted that no factor—external or internal—could actually endanger them. Yes, from time-to-time we knew of a tsunami, an earthquake, a "little war" here or there; or some epidemics, especially in Asia and in Africa. However, those were things that "occurred to others". Even AIDS caused by HIV was supposed to affect mostly certain groups of people or geographical areas. For most people, the biggest global concern in recent times has been climate change, which still appeared too far in the horizon and too "intangible" as to cause proper fear. And perhaps, since 2001, also jihadist terrorism; but this has been mentally "digested" as producing isolated attacks that normally also hurt "other people".

COVID-19 has changed this state of mind. Wrapped up in the feeling of safety produced by technological advance, as well as by a systematic and deliberate distancing from, and softening of, the experience of death, Western societies have experienced real and serious fear for the first time in decades. Many people fear for their lives, for their families, for their economy, for their jobs, for their future—virtually for everything. This has made them accept more or less easily—or at least without resistance—the restrictions imposed by authorities to contain the disease. By contrast, some other people, tired of the substantial changes that coronavirus has brought to their routines, have decided to act in recent months as if nothing grave was happening.

The fact is that the 2020 pandemic has affected all areas of social life, including the law. Some of the problems raised by COVID-19 are new, especially in matters of science and public health. In other areas, however, the pandemic has not in rigour raised new questions but rather unprecedented circumstances in which it is necessary to deal with already familiar questions. This is what, in my view, has occurred in the legal arena and in particular in the field of human rights. In this sense, COVID-19 has served to cast new light on how our legal systems face issues that are essential in our conception of the rule of law, and manifest with special clarity in moments of crisis.

For that reason, from a legal perspective, if we focus exclusively on the concrete situation caused by COVID-19 we would miss the key point. All epidemics end sooner or later, one way or other, with some consequences or other. In my view, it is more important to concentrate on what this pandemic teaches us about ourselves, that is, about our societies, our conception of political organization, our understanding—and guarantee—of fundamental rights, including freedom of religion or belief. We should take this as an opportunity to recognize our societies' strengths and flaws—what should be preserved or improved, what is dispensable or unacceptable. As in individuals going through a personal crisis, the coronavirus pandemic brings up the best and the worst of every society. Identifying and distinguishing those elements, and proposing solutions when appropriate, is one of the significant contributions that a jurist can make in these times.

2. Governmental Measures Against the Pandemic

Simplifying a complex reality, we could say that governmental measures against COVID-19, in every country, fall into two broad categories: measures aimed at fighting the virus and its expansion, and those others that are meant to mitigate the pandemic's consequences for economy and public health. Both types of measures deserve the jurists' attention. We even could add another relevant element for the legal analysis of the coronavirus pandemic: society's reaction to the government's measures—a reaction that can trigger new measures or move to the modification of the existing ones.

As everyone else, jurists understand that exceptional circumstances call for exceptional measures of government. However, this exceptionality raises also a certain concern in the legal world, especially with regard to two aspects of governmental action. On the one hand, the effect of measures adopted during the pandemic on the essential procedures of democratic governance—in particular, the extraordinary regulatory powers assumed by the executive, which have led to a simplification, and sometimes a cancellation, of parliamentary control (as well as a certain deferential attitude on the part of the courts). On the other hand, the strict limitations imposed on fundamental rights, which would have been otherwise unconceivable; the fundamental rights that have been most affected are probably freedom of movement, freedom of trade and entrepreneurial freedom in general, freedom of assembly, the right to respect for private and family life, the right to education, and of course freedom of religion or belief.

The problem with extraordinary powers is that governments get easily accustomed to have them and to exercise them. The longer governments are in possession of them, the more comfortable they feel in that position. It is a natural human tendency. Precisely because of that, the time factor is here especially relevant. As time passes by, and once the most immediate urgent measures have been taken and the initial uncertainties about the nature and expansion of the pandemic begin to wither away, jurists begin to raise legitimate questions about two issues: if keeping the executive's extraordinary powers is still justified, and the precise justification of specific restrictions on fundamental rights from the perspective of their necessity and proportionality (their legitimate aim—the protection of public health—is not in question).

The first word that comes to mind in this respect is *accountability*. It is not a matter of a lack of trust in the government, or of adopting attitudes of scepticism or negationism. It is just that citizens have the right, and the reasonable expectation, to be explained why their rights are still being limited and why the normal procedures of democracy and parliamentary control are not yet fully functional. Governments must be accountable and transparent. Otherwise, the broad discretion they are recognized under these circumstances may easily transform into arbitrariness.

This is the reason why, in every country, legal scholars have examined with a critical eye the legal norms and policy measures adopted by governments to control the expansion of the pandemic, in order to scrutinize their actual consistency with the constitutional framework and the whole legal system.[3] Such analysis has been performed following a variety of criteria, which include the requisites established to declare a state of emergency or alarm, as well as the respective competences of the executive and legislative powers in these situations. The latter aspect is particularly complex in countries with a decentralized structure, where the distribution of competences between the different levels of the State's organization often was not designed taking into account emergencies of this nature, seriousness, and global dimension.[4]

In countries with a federal or regional structure, normative production and consistency becomes more intricate, and the possibility of confusion or even conflict between rules is higher than in centralized States, with the consequence that the national legal chart may become irregular. Thus, a legal scholar has expressively described the initial Italian normative construction of measures against COVID-19 as *a macchie di leopardo* (leopard-design; Consorti 2021, p. 171)—i.e., heterogeneous and uneven, and maybe not as beautiful as that feline's fur. Something similar has been said about the legal situation in Spain, Brazil, Argentina and Mexico. Conversely, in Germany the federal government was determined, since the very beginning, to coordinate its action with

[3] The legal literature about this issue multiplies at incredible speed, but it is still enlightening to see the early studies published in the first months of the pandemic. In Spain, see for instance, from a general perspective (Sieira Mucientes 2020); see also the contributions of different authors gathered in the special issue 86–87 of the legal periodical (El Cronista del Estado Social y Democrático de Derecho 2020).

[4] Normally, the type of emergencies that legislators had in mind when organizing the distribution of competences were military (war), political (insurrection), or the result of natural catastrophes such as earthquakes or storms. A global pandemic was not probably considered, and even less in the last decades.

that of each of the *Länder*'s government (Mückl 2021, pp. 76–83; Rodrigo Lara 2021, pp. 125–42; Navarro Floria 2021, pp. 312–34; Souza Alves et al. 2021, pp. 361–67; and Patiño Reyes 2021, pp. 460–76).

The level of constitutional meticulousness when regulating emergency situations has been another element of uncertainty. The less precise a national Constitution is in this point, the more unpredictable are the reach and duration of the powers that the central government can assume in these circumstances. The problem aggravates if there is, in addition, an unstable political situation, as occurred in Belgium since the May 2019 elections—which caused the paradox that a government that was initially constituted to take care of ordinary business (*affaires courantes*) ended up being transformed by Parliament into a temporary government endowed with special powers for half a year (Christians and Overbeeke 2021, p. 102).

In any event, some recent analyses of a representative sample of European and American countries[5] suggest that, despite many constitutional and structural differences between those countries, they tend to share a common characteristic: the lack of clarity in the measures adopted by their governments. Such lack of clarity can be observed in those measures that, declaredly based on technical criteria, were aimed at protecting public health through restrictions on fundamental rights, as they prohibited or imposed certain conducts. Especially in the first months of the fight against the pandemic, sometimes there were even contradictions between rules as well as a continuous change of criteria, which raised in many people a reasonable suspicion that governmental action was pervaded by improvisation and amateurism.

This fact, even if we cannot judge here the actual impact of those limitative measures on containing the pandemic, had an important effect—the confusion caused in and perceived by citizens. Such confusion led to legal uncertainty and to an increasing scepticism of a large part of the population, not convinced that the measures were appropriate and proportionate. This, in turn, had obvious consequences for the degree of acceptance of and respect for the rules, and therefore for their efficacy.[6] As a US scholar wrote with regard to his country, the effects caused by the citizens' lack of trust in their government and their public institutions are potentially more harmful than the effects caused by the pandemic itself (Scharffs 2021, pp. 447–51). This is not an overstatement; we can see in recent months that, even though the rules are now definitely clearer and more precise, a feeling of incredulity about their efficiency has been spreading in the population of most countries (also fuelled, no doubt, by a parallel feeling of impatience and despair vis-à-vis the prolongation of an exceptional situation that nobody could predict at the time of the pandemic's outburst).

Some comparative legal studies[7] show also that virtually in every country a number of concerns have been raised about the legitimacy of the restrictions on fundamental rights, both from the point of view of *procedure* and *substance*. With regard to procedure, three main points have been discussed: to what extent the government respected the proper legislative channels after the first weeks of the pandemic, marked by uncertainty and by the urgency to adopt measures that could help save human lives; to what extent the central government coordinated its activity with regional and local authorities; and to what extent the main actors of civil society were consulted and their cooperation to fight the pandemic was actively sought, instead of relying on the exclusive official resources and personnel.

With regard to substance, the main issue has been the actual proportionality of the limitations imposed by governments on the exercise of various fundamental rights. Naturally, a judgment of proportionality in these circumstances must be based on scientific and technical criteria, and it seems sensible to recognise a wider discretion to governments in this regard considering that there is still a large margin of discussion and disagreement

[5] See the different chapters of (Consorti 2020b; Balsamo and Tarantino 2020; Martínez-Torrón and Lara 2021).

[6] (See ibid).

[7] (See especially ibid).

among scientists about key aspects of the spreading of COVID-19 and the most efficient means to fight it. Nevertheless, to be legally acceptable, limitations on fundamental rights must be justified with a reasonable degree of specificity and not just by vague references to risks for public health. If citizens must yield large parts of the exercise of their fundamental rights they are entitled to know why. Here, the time factor plays an important role; the more time passes by, the less urgency exists—because there is more knowledge about how the virus works and can be contained—and therefore the more precise must be the governments in justifying the necessity to restrict certain rights of the population. Extreme limitative measures that would be easily obeyed at the beginning of the pandemic could seem less acceptable as the months went forward. I will return to this point in Section 6 of this paper.

3. The Justification of Limitations on Freedom of Religion or Belief

As has occurred with other fundamental rights, the general legal and policy measures adopted by governments to control the pandemic have had an impact, direct or indirect, on the exercise of freedom of religion or belief, especially in the case of religious believers and religious communities. From the perspective of religious freedom there are, in my view, four thematic areas of special interest: the legal regulation of the fight against coronavirus; the equal treatment of religious freedom in relation to other fundamental rights; the cooperation between the State and religious communities; and the reactions of religious communities to governmental measures. When dealing with each of these areas it is important that legal scholars keep a balance between a critical analysis of reality—neither submission nor resignation should be characteristics of a jurist—and the interest in providing solutions or suggestions that may contribute to improve one's own legal system.

With regard to the first of these areas, what I wrote in the previous section about fundamental rights in general is applicable to freedom of religion or belief; and vice versa, so that much of what is being said below about religious freedom would apply to freedom of assembly or freedom of trade, for instance. As is well known, according to international standards and jurisprudence,[8] limitations on religious freedom must, in the first place, pursue a legitimate aim; in the case of the measures adopted against the COVID-19 pandemic, it is undisputed that they pursue the legitimate aim of protecting public health, as well as the rights and freedoms of others. In addition, such limitations must be deemed *necessary*, and not only useful or convenient. Establishing the necessity of a restriction on religious freedom—as in any other fundamental right—entails a judgment about the existence of a relation of proportionality between the restriction in question and the aim that it is declaredly pursuing.

There are different criteria to determine the proportionality of a limitation, depending on the fundamental right we deal with and on the concrete circumstances of the case. However, when we look specifically at the limitations on religious freedom caused by measures adopted against COVID-19, we can identify prima facie two criteria that are especially relevant.

One of them is the duration of the restriction, which is of great significance if we take into account that such restrictions affect almost always the freedom of worship—collective as well as individual—and the religious assistance to people who are in a situation of particular vulnerability, such as being in a hospital, perhaps with the prospect of near death. In other words, it is important to justify not only *which limitations* can—or must—be imposed on the practice of worship or on religious assistance, but also for *how long* they will be held. The temporal aspect is essential here because for believers—and for their churches—there is a big difference between eliminating, or severely reducing, the possibility of worship and religious assistance for two weeks or for several months. This applies to regular or periodical religious worship as well as to episodic ceremonies that

[8] For a detailed explanation, (see Gunn 2005; van den Vyver 2005; Martínez-Torrón 2005). With specific reference to public health as a legitimate justification for limitations, (see Payne and Doe 2005).

have unquestionable significance, such as baptism (or its equivalent in non-Christian religions), weddings and funerals among others.

The other especially relevant criterion is the *equal treatment* of religious freedom vis-à-vis other fundamental freedoms that have been subject to qualitative and quantitative limitations as a result of anti-COVID-19 actions. The State must not only prove that certain restrictive measures are necessary, it is obliged also to regulate and apply those measures in a way that is neither arbitrary nor discriminatory. Religious freedom should not be either privileged or discriminated in relation to other fundamental rights. For instance, it would not seem reasonable to request a different safety distance between persons in churches, or dissimilar occupancy rates, in comparison with supermarkets, museums or theatres. However, religious freedom, as any other fundamental freedom, does require a specific legal treatment that is based on an appropriate comprehension of the importance or centrality that certain acts of worship or religious assistance have for the doctrine of churches and religious communities as well as for their members' practice of religion.

4. Equal Treatment and State's Religious Neutrality

This leads us to consider some immediate question. To what extent can a religiously neutral State—as is normally the case in Europe and America—define which aspects of the practice of religion are essential and therefore deserve to be recognized as an exception to rules that restrict freedom of movement and freedom of assembly?[9] Are the State authorities entitled to decide by themselves which expressions of religious worship must be included in—or excluded from—those "essential services" that will be allowed to function during a situation of emergency or alert, in the same way they take such decision with regard, for example, to pharmacies, supermarkets, public transportation or accommodation services?

The relevance of this question is not circumscribed only to the discussion about the degree of rationality or consistency shown by public authorities when they select the services considered essential for society (this issue raised a heated debate in Spain and in Brazil when, at the very beginning of the declaration of the state of emergency, barbershops and beauty parlours were included among those essential services that were authorized to remain open; (Rodrigo Lara 2021, p. 120; Souza Alves et al. 2021, p. 360). Beyond that first layer, there is a deeper question that relates to the legal notion of discrimination. In order to assess if a differential legal treatment is discriminatory or not, the first criterion consists in determining if such difference is based on a "reasonable and objective justification".[10] Certainly, it is not easy to reconcile the State's religious neutrality with a judgment of public authorities deciding if religious worship—be it collective worship or individual worship practiced in a temple—is or not "sufficiently essential" to be distinguished, on a "reasonable and objective" basis, from other more dispensable activities.

Public authorities cannot be deemed qualified, either intellectually or legally, to make such a judgment by themselves, without counting on the view of the relevant churches and religious communities (each religious community has its own rules concerning the mandatory character, and the dispensability, of various manifestations of worship). This is a consequence, in certain countries, of a constitutional principle. But it is also a consequence of the international standards on freedom of religion or belief—we can infer from these standards that States are obliged to keep a certain religious neutrality in order to guarantee an adequate protection of religious freedom on equal conditions for all individuals and groups. Indeed, the State's religious neutrality has received progressive attention on the part of international jurisdictions, especially in Europe,[11] considering that this is not

[9] The question was raised by Professor Rafael Palomino in an international seminar held at Complutense University on 13 November 2020. For a detailed explanation of his ideas on this point, see (Palomino 2014).

[10] This is a common and well-known judicial doctrine. In the case law of the European Court of Human Rights, it dates back to 1968 (Belgian linguistic case). For an analysis of the principle of equality in the Strasbourg Court in the context of other European institutions, see (Besson 2012). For a summary of criteria and case law of the Strasbourg Court, see (European Court of Human Rights 2020).

[11] For a comprehensive and insightful study of the Strasbourg Court's jurisprudence on the State's religious neutrality, in the light of the constitutional principles of France and Germany, see the doctoral dissertation of (Valero Estarellas 2017).

something that can be left entirely at the disposal of national constitutions. The traditional doctrine that international conventions do not impose a particular system of relations between State and religion remains intact, for this is a delicate matter in which culture, history and socially accepted values play a crucial role. However, at the same time, it is gaining momentum the idea that without a minimum neutrality of the State and its institutions, it is not viable to provide full protection to religious freedom and to avoid some level of discrimination of all individuals and communities, especially minorities.[12]

If we look at the rules enacted against COVID-19, it is not difficult to observe a double tendency in the action of the governments of a number of European and American countries. On the one hand, a "weak", generic and ambiguous justification of the alleged necessity of the restrictions imposed on the freedom of worship. On the other hand, a relative lack of sensibility to understand how important are, for individuals and communities, some aspects of the exercise of religious freedom, which have been particularly impaired by the measures against the pandemic. Among these aspects is, of course, collective worship, which by definition implies the congregation of people in the same place, often a closed space. And we must include also the individual worship that is rendered in a church or place of worship, alone or in the company of other persons. For many people, to pray in a temple has a special meaning and cannot be easily replaced by other practices; this offers a particular nuance in the case of Catholics and Orthodox Christians because of the consequences of the theological doctrine of transubstantiation and the belief in the real and continued presence of Jesus Christ in the consecrated form. To that we can add religious assistance, which has a singular moral transcendence in the practice of the sacraments of penance and the anointing of the sick in some Christian churches. Moreover, in most religions there are collective rituals or ceremonies of remarkable significance, either because they must be performed at specific times of the year or because they are linked to special moments in the life of a person, such as baptism or rites with an analogous meaning, weddings, and funerals and burials.

Such lack of sensibility has some similarity with the attitude that can be seen on occasion in high courts, national or international, when they judge situations of conflict between religious autonomy and other fundamental rights.[13] Sometimes, they tend to judge the reasonability of decisions adopted by religious authorities, or certain religious practices or ways of life, from a merely secular—or even personal—perspective. Moreover, they may take a similar approach with regard to the gravity of concrete interferences with the autonomy of religious communities. This often results in a "lax" evaluation of the necessity of restrictions imposed on religious freedom. Naturally, I am not contending that the manifestations of religious freedom, individual or collective, must always have priority over other legitimate interests that deserve protection, as public health in the case we consider here. But I would like to emphasize that, in order to assess the necessity and proportionality of limitations on the freedom of worship, it is essential to depart from a realistic appraisal of the true impact that those limitations have in the life of people and communities; and such appraisal cannot—and probably must not—be done by the State authorities by themselves, ignoring the religious frame of reference.

Certainly, *religious autonomy is not absolute*, and if needed, the State is entitled to impose coercively severe restrictions on worship to preserve public health in the circumstances of serious risk. However, *the State's autonomy is not absolute either*; it is subject to the principle of equality among other things. Therefore, restrictions on worship cannot be discriminatory in relation to limitations imposed on other freedoms and must be adopted on the basis

[12] With specific reference to Europe, see in Spain (Cañamares Arribas 2019; Valero Estarellas 2019). See also (Martínez-Torrón 2018); and, from a broader perspective, (Martínez-Torrón 2015).

[13] A recent and striking example of this is the case of *Sandra Cecilia Pavez Pavez v. Chile*, in the Inter-American jurisdiction, which involves the situation of a teacher of Catholic religion in a public school who was deprived of her licence to teach Catholic doctrine because of some public and lasting conduct that was considered immoral from the perspective of the Catholic Church. The opinion delivered by the Inter-American Commission of Human Rights completely ignored the religious autonomy perspective, as if the situation had no implications at all for religious freedom (cf. merit report No. 148/18, case 12.997, 7 December 2018). When I write this page, the case is still pending before the Inter-American Court of Human Rights. The report is available in: http://www.oas.org/es/cidh/decisiones/corte/2019/12997Fondo-ES.PDF (accessed on 11 May 2021).

of a reasoned judgment about the importance that a particular type of worship has for individuals and communities. And, as mentioned above, a neutral State should not make such judgment on its own volition but in dialogue and consultation with the relevant churches and religious groups.

5. The Necessary State's Dialogue and Cooperation with Religion

Indeed, if generally speaking it is considered a good practice that the State keeps channels of communication with civil society, in this area the dialogue and cooperation with the collective actors of religious freedom is imperative. To argue that State authorities can, for instance, unilaterally label some worship activities as "dispensable" not only is unrealistic but also risks weakening that delicate and important line that separates the secular and the religious as realms that possess their own reciprocal autonomy. In Western societies, State and religion live in a legal habitat that has been eloquently described as a "frontier system"; certainly, frontier conflicts are inevitable, but to abandon or blur the notion of frontier between those two realms has historically proved to be "lethal" (Navarro-Valls 2008, p. 105).

Furthermore, the importance of the time factor emerges here again. Initially, because urgent measures were needed, a momentary invasion of a central aspect of religious autonomy could be tolerated. However, once the urgency has passed, it is much less acceptable that the State continues to restrict, or even suspend, religious worship without an appropriate consultation process with religious communities. This is even less tolerable when, as occurred in Portugal, once the state of emergency was over and the constitutional normality restored, limitations on fundamental rights were kept on the sole basis of the government's will (Raimundo et al. 2021, pp. 231–38).

During the COVID-19 pandemic, in a number of countries of Europe and America, governments have approached limitations on religious freedom—and usually also limitations on other freedoms—with an attitude that is characterized by unilateralism, imposition, and improvisation, instead of turning to consultation, cooperation and reflection. This fact is disheartening, for we are in a situation that requires broad consensus on the measures and patterns of action to be adopted; the gravity of the circumstances calls for *co-responsible deliberation* and not for unilateral imposition—especially if it often appears to be not sufficiently informed (and sometimes uninformed). One of the collateral effects of such a deficient governmental approach has been the uncertainty raised among citizens about the precise reach of the limitations. To cite just a minor but revealing example, in countries such as Belgium, France, Italy or Spain, places of worship were never closed, not even during the pandemic's initial moments when the rules were most stringent (Christians and Overbeeke 2021, pp. 104–12; Fortier 2021, pp. 150–57; Consorti 2021, pp. 173–76; Rodrigo Lara 2021, pp. 130–38); but at the same time, governments did not foresee explicitly that going to a place of worship to pray individually was a legitimate exception from lockdown at home; hence, it was unclear if that was an involuntary legal oversight or if that meant that temples could be visited only when they were within the route to one of the authorized places or activities, such as a pharmacy or a supermarket.

On the other hand, in situations of crisis such as this pandemic, the cooperation between State and religious communities should not be circumscribed to a dialogical procedure in the determination of limitations to be imposed on religious freedom. It would have been advisable that governments, conscious of how important it was to use all available means and aware that the society's resources go far beyond those directly controlled by political power, had requested—or sometimes just accepted—the collaboration of the vast network of entities and institutions that form what we normally call the religious "landscape" of a country. Churches and religious communities have at their disposal means that can be immensely useful to face emergency situations. This includes institutions that have a religious ethos even though they do not have a proper relation of dependence on a church or religious community. For instance, health institutions, as well as religiously inspired

NGOs and volunteers mobilized by organized religions to provide services to particularly vulnerable people and take care of them.[14] Also, we could think of other less quantifiable or visible areas, such as spreading and explaining the anti-COVID-19 measures; raising in the population consciousness of the significance—also from a moral perspective—of complying with the government's rules and avoiding irresponsible behaviour that may endanger other people; identifying situations and sources of risk and conveying them to public authorities; and combatting the disinformation—be it the result of ignorance or of mischievous interests—and hate speech that tend to proliferate in these type of scenarios, etc.

Therefore, it is surprising that, in a number of countries, State authorities have insisted on fighting this battle practically solo, renouncing to count (or counting in a very limited way) on the cooperation of civil society, and in particular of the multidimensional universe of religious institutions. This was an ideal opportunity to build bridges and channels of collaboration between the secular and religious environments, united in a common cause which is easily comprehensible for everybody, irrespective of one's personal position in matter of beliefs. It is difficult to understand not only that in many places there has been no actual effort to create cooperation channels, but also the fact that some countries have not even made use of the already existing channels. This has been the case in Spain and Portugal, where, for what I know, their respective commissions on religious freedom have not been consulted or informed for months after the pandemic started.[15]

In any event, we should not forget that cooperation circulates also from the State towards religious communities—this is indeed what the Spanish Constitution explicitly provides.[16] In Europe, because of the awareness of the positive contribution that normally religions provide to society, State cooperation with religion is often conceived as involving direct or indirect financing through a variety of national systems according to each country's tradition.[17] In this regard, as a Polish scholar has suggested, one of the possible collateral consequences of the pandemic is a rethinking of the State economic cooperation with churches, taking into account that restrictions on collective worship have made more difficult the viability of customary ways of self-financing, such as collections during religious ceremonies or services (Brzozowski 2021, pp. 205–8).

6. Reactions of Religious Communities to Governmental Measures

The way churches and religious communities have reacted to governmental measures against the pandemic also deserves the jurist's attention. Sociologists are not the only ones interested in analysing the social behaviour in relation to State laws. This is also of interest for legal studies, for on the one hand, it has an impact on the norms' efficacy, and on the other hand, it can contribute to the norms' consolidation or, quite the opposite, to their reform or even their abrogation. Moreover, the analysis of the motives underlying certain reactions, especially the negative ones, may shed light on possible flaws or anomalies in the normative process, which in turn could explain the inadequate content of the norm in question and the reasons why it was socially rejected.

Except for some isolated positions of negationism or radical providentialism,[18] by and large we can say that the vast majority of religious communities have initially acted in a sensible and responsible fashion with regard to the anti-COVID-19 rules enacted by the governments that imposed restrictions—sometimes severe—on freedom of worship (as well as on other fundamental freedoms). They acknowledged the gravity of the problem and recognized, explicitly or implicitly, the competence of State authorities to take rapid and drastic action. Furthermore, some churches and religious communities took the initiative

[14] Clear examples of this activity are provided, in the context of Peru, by (Flores Santana 2021, pp. 507–10).

[15] For a critical analysis of the Spanish Advisory Commission on Religious Freedom, from various perspectives, including some comparison with the Portuguese Commission, see the collective volume (Ministero de la Justicia 2009).

[16] See art. 16.3 of the Spanish Constitution.

[17] For a recent and clear analysis of the State economic cooperation with religion in Europe, see (Meseguer Velasco 2019).

[18] Some examples of these attitudes in Asia, Africa and Latin-America are provided by (Consorti 2020a; Fattori 2020; Introvigne 2020; and Picciaredda 2020).

before the government did or enforced self-imposed limitations on collective worship, or on the opening of places of worship, which went beyond the governmental measures. For instance, dispensing from the dominical mass in the case of Catholics, suspending collective prayers in mosques and synagogues, or even closing meeting places on their own volition. Such an attitude was prompted by natural reasons of prudence but also by loyalty and support of the government, irrespective of how much they were convinced of the consistency and accuracy of the scientific foundations flagged by the government when adopting restrictive measures (Christians and Overbeeke 2021, p. 99).

In this regard, it is significant the fact that many churches and religious communities opted for the self-restriction of collective worship and prayer even when most governments did not formally oblige to close the temples. The most common governmental solution was a limitation on the number of participants in collective ceremonies. In Germany, public worship was prohibited only for some weeks in almost all Länder, following the same criteria applied to any public event that involved the congregation of people (Mückl 2021, pp. 76–78). The Church of England has been particularly cautious and meticulous all over these months (Cranmer and Pocklington 2021, pp. 261–68).[19] In some Latin-American countries, such as Argentina or Peru, the irregular itinerary of governmental rules and their interpretation moved to order a severe prohibition of worship, including individual worship in temples and the administration of sacraments in private homes, with the consequence that part of Catholic bishops felt obliged to close the churches (Navarro Floria 2021, pp. 312–22; Flores Santana 2021, pp. 495–97).

In general, most religious communities showed a high degree of responsibility and respect for the relevant governments' rules and guidelines. Some churches suspended open-air ceremonies with deep popular roots, such as Holy Week processions in Mexico and Spain (Patiño Reyes 2021, pp. 465–69; Rodrigo Lara 2021, pp. 138–40). Moreover, at least at the beginning, religious communities did not discuss restrictions on worship and focused on making their own rules and praxis more flexible in order to keep pursuing their mission through alternative ways, including the use of contemporary communication technologies to broadcast religious ceremonies or to provide religious instruction and religious assistance[20] (which some churches have also applied to the collection of money offerings in temples).

Such deference of religious communities to governments has not always received a positive judgment by scholars. For instance, a Uruguayan scholar has maintained that the Catholic bishops of his country were too subservient in their acritical obedience to governmental policies and did not take sufficiently into account the medium-term impact that such policies could have on the religious freedom of Catholic citizens (González Merlano 2021, p. 518). In any event, the attitude of a number of religious communities has been changing as the urgency faded away with the passage of time and many governments kept taking their decisions about such important issues in small and closed circles, without hardly any real contact with the civil society's main actors—not even with the most authoritative voices that, from a constitutional perspective, could provide guidance to the government not only about what was reasonable or unreasonable but also about what was respectful or abusive in relation to fundamental freedoms.

Thus, from the initial unconditional support, religious communities have been changing to more critical positions in many places, especially due to the lack of dialogue and comprehension of the significance of religious worship, or because religious organizations felt unfairly discriminated in comparison with other entities or activities. A very illustrative example is the comportment of Colombia's Bishops Conference, which passed from the full endorsement of the government in early March 2020 to demand, about six weeks later, more flexible limitations on religious worship in parallel with the rules applicable to other secular activities (Prieto 2021, pp. 400–2, 409–10). Nevertheless, particularly traditional

[19] Updated and detailed information on the Church of England and the UK regulations can be found in the blog *Law & Religion UK* (https://lawandreligionuk.com) (accessed on 11 May 2021).

[20] These practices have become rapidly spread all over the world. In Europe, see for instance, (Fortier 2021, p. 153; Brzozowski 2021, pp. 200–5).

churches and religious communities have made this criticism compatible with the respect for precautionary measures aimed at avoiding contagion—for instance, keeping carefully an appropriate safety distance between persons, cleaning scrupulously the inside of temples and places of prayer, and hygienic measures such as providing disinfectant solution at the entrance, removing the holy water, or giving the holy communion always in the hand instead of in the tongue.

Naturally, the positioning of religious communities vis-à-vis governmental measures has depended much on their own internal organization and structure; the more centralized and hierarchical it was, the more uniform the reaction of the relevant religious community has been. However, there have been exceptions, the most significant being probably the different attitudes adopted by the Vatican and the Italian Bishops Conference—the former very deferential to the government, the latter very critical to it (Consorti 2021, pp. 180–82; Cavana 2021, pp. 285–98). Another important factor has been the severity of the restrictions on worship and religious assistance adopted in various countries, as well as the procedure that was followed to decide them—as could be expected, the more consultation of the government with religious communities, the more easily the restrictive measures were accepted and respected. Therefore, the panorama of the different countries in Europe and America offers significant variations in the attitudes of religious communities. We can identify trends towards collaboration (more or less active), perplexity accompanied by resignation, resistance, or even plain objection.[21]

Nonetheless, by and large it is fair to say that the tendency in religious communities has not been a systematic blind opposition to limitations that appeared reasonable from the perspective of the protection of public health. In most countries the tendency has been rather to seek a dialogue with the government with two aims. On the one hand, reaching consensus on the limitations that should be imposed. On the other hand, ensuring that the religious communities' point of view was considered and they were not discriminated as a result of a superficial assessment of the importance of the freedom of worship, or of an arbitrary application of the rules.

Indeed, when tensions have led to litigation, the element of arbitrariness has been central in some jurisdictions, as in some lawsuits pursued in Chile (Celis Brunet and Castro 2021, pp. 388–94), while in others, such as Germany, the core issue has been the interpretation of the principle of proportionality (Testa Bappenheim 2020). The responses of the courts have been different depending on the countries. Significantly, however, within the same country, the courts' approach has sometimes changed depending on the moment that the claim was decided.

A decision of the Supreme Court of the United States of America, *Cuomo*, rendered in November 2020, illustrates such change of direction. Unlike what had occurred in previous similar occasions,[22] in this case the Supreme Court granted the injunctive relief requested by a Catholic diocese and an Orthodox Jewish association against an executive order issued by the governor of New York. According to that executive order, no more than 10 or 25 persons—depending on the risk classification of the relevant zone—could attend a religious service, irrespective of the capacity of the temple. This restriction contrasted with the more benevolent treatment received by other secular businesses that provided services deemed "essential", such as, for example, liquor stores, hardware stores or acupuncture facilities. The Court recognized that its justices were not experts in public health and nevertheless they must demand that the executive power provided a convincing and compelling reason to subject a fundamental right to such severe restrictions, which were not comparable to limitations imposed on activities that involved an apparently equivalent risk. Together with the principle of equal treatment, the time factor was considered by the Court of the utmost importance. Giving carte blanche to the executive might have had sense at the beginning of the pandemic, for urgent action was needed and there were still

[21] See, for instance, the examples provided by (Bussey 2021, pp. 52–64), as well as by the chapters on the American countries in (Martínez-Torrón and Lara 2021).

[22] For some interesting comments on the precedent decisions of the Supreme Court on comparable claims in 2020, see (Madera 2020; also Durham 2020).

many uncertainties about how the coronavirus spread. However, more than half a year later, such deference with the executive's discretionary powers was not compatible with the guarantee of constitutional rights.[23]

More recently, the Supreme Court of Chile has delivered a unanimous decision in a similar direction in a claim that involved the celebration of the Catholic Holy Mass. Emphasizing the significance of religious freedom, the need to carefully justify restrictions on this fundamental freedom, and that manifestations of religions should be treated on equal terms in comparison with other activities conducted in public, the Court held that public authorities should foresee a system of authorizations similar to those granted for other activities.[24] Also, the Outer House of the Court of Session in Scotland has taken an analogous approach, with a strict scrutiny of the proportionality of the measures ordered by the Scottish government in the light of article 9 of the European Convention on Human Rights.[25]

Needless to say, the history of the reactions to COVID-19 for religious reasons continues as far as the pandemic subsists. And new fronts have appeared when the vaccines have commenced to be distributed, especially if vaccination is made mandatory at a certain point, either because governments so decide or because, for example, employers impose it to employees.[26]

Conscientious objection to vaccination has existed for a long time, normally for religious reasons, as well as objections on other grounds. In the USA and Australia, some movements of religious inspiration resisting the COVID-19 vaccination have already emerged.[27] The traditional legal response in these cases has been to justify restrictions on the objectors' religious freedom by giving priority to the protection of public health; even if the individual's right to reject a medical treatment on religious grounds is recognized, such right must yield when the lives of other people may be endangered because of a risk of contagion.[28] Such reasoning seems certainly sensible, for nobody is entitled to put anyone else's life at risk as a consequence of a personal moral decision regarding vaccination.

However, we must not forget that this judicial doctrine was declared with regard to vaccines that were considered safe and necessary at the time. Therefore, it should be taken with caution in the case of anti-COVID-19 vaccines, in view of the unusual speed with which currently existing vaccines have been developed and approved, as well as the ongoing scientific debate about their actual efficiency and negative collateral effects for some people—in occasions possibly lethal. Moreover, the percentage of the population that oppose vaccination on religious grounds is very low. In other words, when there are still so many uncertainties and controversy about the anti-COVID-19 vaccines, making vaccination mandatory may seem an extreme and disproportionate measure, and even

[23] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___ (2020) (25 November 2020, per curiam). The decision was taken by five votes to four. For a quick and incisive comment, vid. (McConnell and Raskin 2020). Later, the Supreme Court decided in a similar direction the (somewhat more complex) case *South Bay United Pentecostal Church et al. v. Newsom*, 592 U.S.__ (2021) (5 February 2021).

[24] Judgment of the Supreme Court of Chile (Third Chamber), 29 March 2021 (Rol 19062–2021).

[25] *Philip & Ors for Judicial Review of the closure of places of worship in Scotland*, (2021) CSOH 32.

[26] The relationship between religious freedom and vaccination is analysed, from a comparative perspective, by Meseguer Velasco 2021, which I could read thanks to the author's courtesy.

[27] (See Scharffs 2021, pp. 439–40). See also, for instance: https://www.dailymail.co.uk/news/article-2915544/No-jab-no-play-Victoria-second-state-make-vaccinations-compulsory-children-day-care.html (accessed on 11 May 2021). In Australia, before COVID-19, the issue was discussed by (Barker 2017).

[28] See, more than one century ago, the US Supreme Court judgment *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), denying exemption from the smallpox vaccination requirement. Its doctrine has been reiterated in various subsequent judgments of the Supreme Court with particular clarity—although the case was not related to vaccination but to child labor laws—in *Prince v. Massachusetts* (1944), where the Court said: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease" (321 U.S. 158, at 166–67).

more if it means to override the freedom of conscience of an insignificant minority of citizens.[29]

A different type of conscientious objection has also been raised not to vaccination per se but to specific types of vaccines, because in their research and development cell lines from electively aborted foetuses have been utilized. These vaccines have raised a moral dilemma, especially in Christians, some of whom hesitated to accept those vaccines thinking that it might constitute material passive cooperation with abortion.[30]

In response to that concern, the Holy See's Congregation for the Doctrine of the Faith, published in December 2020, a tranquilizing note approved by Pope Francis, stating that accepting inoculation with those vaccines is morally acceptable—the greater good of containing the pandemic makes such a remote and indirect cooperation in evil licit.[31] The same note made clear that this should not be understood as any kind of moral endorsement of the use of cell lines proceeding from aborted foetuses—indeed, the note encourages pharmaceutical companies and governmental health agencies to "produce, approve, distribute and offer ethically acceptable vaccines that do not create problems of conscience for either health care providers or the people to be vaccinated".[32] The note also declared that vaccination should be voluntary, but it remarked that those persons who in any event consider that type of vaccine as morally unacceptable must do their utmost to avoid, by other means, becoming agents for the transmission of the virus.[33] With this note, the Vatican has adopted a very flexible and deferential position vis-à-vis governmental choices in the matter, instead of pressuring and urging governments to choose and promote those vaccines that have been developed using resources that accommodate the moral standards of Catholic doctrine.

7. Concluding Remarks

At the beginning of these pages, I mentioned that the COVID-19 pandemic has harshly revealed our vulnerability, both as individuals and as community, and has brought to light the best and the worst in us. Depending on whom we look at, we have witnessed incredible acts of altruism, generosity and dedication, in parallel with the desire of taking unfair advantage of the situation—with the latter I refer of course to criminal activities, but we may probably include also the enormous business made with the occasion of medical supplies, protection masks, disinfectants, lab tests, etc., with oscillations in prices that were not certainly moved by philanthropy.

The foregoing is relevant when we ask ourselves what will remain in our societies after the pandemic passes. What will the world after COVID-19 be like?

It has been pointed out that, on the positive side, the coronavirus crisis may lead hopefully "to a new sense of community", considering the feeling of shared responsibility and the many expressions of solidarity generated in a large amount of people during the pandemic, especially in the first months. However, other people have started looking at fellow human beings as a danger, as far as they are potential carriers of the virus, which has led frequently to social distancing—not just physical distancing as a precaution—"as well as growing isolation and loneliness, especially among mentally unstable individuals".[34]

[29] The interest in the issue of objection to vaccination has been revived by the recent judgment of the European Court of Human Rights *Vavřička and others v. The Czech Republic* (Grand Chamber, 8 April 2021, App. no. 47621/13 and five others), which involved the opposition of some parents to comply with the State's policies about vaccination of children. The Court decided in favour of the respondent State, but I find particularly convincing the remarks made by Judge Wojtyczek in his dissenting opinion, arguing for a stricter scrutiny of the factual reasons that supported governmental policies that imposed health measures on children against the parents' wishes, as well as in favour of a proper analysis of the implications that this type of case may have for freedom of conscience.

[30] See, for instance: https://blogs.bmj.com/medical-ethics/2020/04/09/covid-19-and-vaccine-ethics-pre-empting-conscientious-objection/ (accessed on 11 May 2021).

[31] Note of the Congregation for the Doctrine of the Faith on the morality of using some anti-Covid-19 vaccines, 21 December 2020. Available in: https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2020/12/21/201221c.html (accessed on 11 May 2021).

[32] (Ibid., para. 4).

[33] (See ibid., para. 5).

[34] (See Kortmann and Schulze 2021, p. 35). From the same authors, see the interdisciplinary book (Kortmann and Schulze 2020).

At the end of the day, the scientific challenges posed by COVID-19 may be new to a large extent, but when we look for solutions to the social problems it has caused, our best bet is likely on traditional means. From a legal perspective, we need a scrupulous respect for the requirements of the rule of law, with especial emphasis on the protection of fundamental rights, among which is freedom of religion or belief. Every limitation on a fundamental right must be precisely justified and must carefully follow the appropriate procedure, avoiding the temptation to trivialize the guarantee of what are actually the pillars of a democratic society. Allowing that an exceptional health crisis results in a lack of accountability of governments vis-à-vis the citizens would be one of the most undesirable outcomes of the pandemic. And, from a broader social perspective, in addition to the gigantic welfare machinery of the State, we must rely on the traditional resources of society—also its ethical resources, of which religious communities are an integral and essential part.

Religious freedom is one of the vital freedoms that should not be easily dispensed with, not even in times of emergency, and religious communities—which represent the collective exercise of this fundamental right—are a unique and valuable resource that society has at its disposal to fight against critical threats. These are two lessons that the COVID-19 pandemic has taught us, and we should take a good note of them for possible future extraordinary crises. If we apply them also to ordinary situations, it would be even better.

Funding: This research was done during my stay as a Senior Fellow and Marie-Curie Fellow of the European Union at FRIAS (Freiburg Institute for Advanced Studies), 2020-2021. This paper has been written in the context of the Project HUDISOC (PID2019-106005GB-I00) of the Spanish Ministry of Science and Innovation.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Acknowledgments: I would like to express here my gratitude to Roland Muntschick, Assistant at FRIAS, for his diligent and efficient editing work of this paper.

Conflicts of Interest: The author declares no conflict of interest.

References

Balsamo, Fabio, and Daniela Tarantino, eds. 2020. *Law, Religion and the Spread of COVID-19 Pandemic*. DiReSoM Papers 2. Pisa: DiReSoM, Available online: https://diresom.net/category/ebook/ (accessed on 11 May 2021).

Barker, Renae. 2017. No Jab-No Pay, No Jab-No Play, No Exceptions: The Removal of Conscientious and Religious Exemptions from Australia's Childhood Vaccination Policies. *Quaderni di Diritto e Politica Ecclesiastica* 25: 513–26.

Besson, Samantha. 2012. Evolutions on Non-Discrimination Law within the ECHR and ESC Systems: It Takes Two to Tango in the Council of Europe. *American Journal of Comparative Law* 60: 147–80. [CrossRef]

Brzozowski, Wojciech. 2021. Polonia: La libertad religiosa en tiempos de la pandemia del COVID-19. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 183–210.

Bussey, Barry W. 2021. Contagio: El temor de los gobiernos a la religión durante la crisis del COVID-19. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 37–72.

Cañamares Arribas, Santiago. 2019. Ministros de culto y autonomía confesional en la jurisprudencia del Tribunal Europeo de Derechos Humanos. In *Libertad Religiosa, Neutralidad del Estado y Educación. Una Perspectiva Europea y Latinoamericana*. Edited by Javier Martínez-Torrón and Santiago Cañamares Arribas. Madrid: Thomson Reuters Aranzadi, pp. 81–100.

Cavana, Paolo. 2021. Libertad religiosa y COVID-19 en el Vaticano y en la acción de la Santa Sede. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 279–304.

Celis Brunet, Ana María, and René Cortínez Castro. 2021. Religión y Coronavirus: Los desafíos en Chile en tiempos de estado de excepción constitucional. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 377–96.

Christians, Louis-Léon, and Adriaan Overbeeke. 2021. El Derecho belga sobre los grupos religiosos frente al desafío de la crisis sanitaria del COVID-19. Normativa de crisis entre viejos reflejos y nuevas realidades. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 97–118.

Consorti, Pierluigi, ed. 2020a. *Law, Religion and COVID-19 Emergency*. DiReSoM Papers 1. Pisa: DiReSoM, Available online: https://diresom.net/category/ebook/ (accessed on 11 May 2021).
Consorti, Pierluigi. 2020b. Religions and virus. In *Law, Religion and COVID-19 Emergency*. Edited by Pierluigi Consorti. Pisa: DiReSoM, pp. 15–18.
Consorti, Pierluigi. 2021. Emergencia y libertad religiosa en Italia frente al miedo a la COVID-19. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 167–82.
Cranmer, Frank, and David Pocklington. 2021. El impacto de la pandemia de COVID-19 en la práctica religiosa en Reino Unido. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 241–78.
Durham, W. Cole, Jr. 2020. The Coronavirus, The Compelling State Interest in Health, and Religious Autonomy. *Canopy Forum*. October 2. Available online: https://canopyforum.org/2020/10/02/the-coronavirus-the-compelling-state-interest-in-health-and-religious-autonomy/ (accessed on 11 May 2021).
El Cronista del Estado Social y Democrático de Derecho. 2020. pp. 86–87. Available online: https://www.iustel.com/v2/revistas/detalle_revista.asp?numero=86&id=16 (accessed on 11 May 2021).
European Court of Human Rights. 2020. *Guide on Article 14 of the Convention (Prohibition of Discrimination) and on Article 1 of Protocol No. 12*. Available online: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf (accessed on 11 May 2021).
Fattori, Gabriele. 2020. Religious freedom at the time of coronavirus. In *Law, Religion and COVID-19 Emergency*. Edited by Pierluigi Consorti. Pisa: DiReSoM, pp. 57–64.
Flores Santana, Gonzalo. 2021. El respeto a la libertad religiosa en las políticas sanitarias del gobierno frente al coronavirus en el Perú. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 491–512.
Fortier, Vincente. 2021. La libertad de religión, en Francia, en tiempos de coronavirus. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 145–66.
González Merlano, Gabriel. 2021. La libertad religiosa en Uruguay durante la pandemia. Entre el derecho fundamental y el espectáculo público. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 513–35.
Gunn, Jeremy. 2005. Deconstructing Proportionality in Limitations Analysis. *Emory International Law Review* 19: 465–98.
Introvigne, Massimo. 2020. Lesson from the Shincheonji Case in South Korea: Monitoring without Scapegoating. In *Law, Religion and COVID-19 Emergency*. Edited by Pierluigi Consorti. Pisa: DiReSoM, pp. 145–50.
Johnson, Niall A. P. S., and Jürgen Müller. 2005. Updating the Accounts: Global Mortality of the 1918–1920 "Spanish" Influenza Pandemic. *Bulletin of the History of Medicine* 76: 105–15. [CrossRef] [PubMed]
Kortmann, Bernd, and Günther G. Schulze, eds. 2020. *Jenseits von Corona: Unsere Welt nach der Pandemie—Perspektiven aus den Wissenschaft*. Bielefeld: Transcript.
Kortmann, Bernd, and Günther G. Schulze. 2021. The Post-COVID World. Deutschland Edition. Available online: https://www.deutschland.de/en/fighting-corona-together-magazine-available-for-free-download (accessed on 11 May 2021).
Madera, Adelaide. 2020. Reconciling the Protection of Public Health with Religious Freedom: The Viability of Shared Responses. In *Law, Religion and the Spread of COVID-19 Pandemic*. Edited by Fabio Balsamo and Daniela Tarantino. Pisa: DiReSoM, pp. 213–25.
Martínez-Torrón, Javier, and Belén Rodrigo Lara, eds. 2021. *COVID-19 y Libertad Religiosa*. Madrid: Iustel.
Martínez-Torrón, Javier. 2005. Limitations on Religious Freedom in the Case Law of the European Court of Human Rights. *Emory International Law Review* 19: 587–636.
Martínez-Torrón, Javier. 2015. La neutralidad religiosa del Estado. In *Historia y Constitución*. Edited by Miguel Carbonell Sánchez and Óscar Cruz Barney. México: Instituto de Investigaciones Jurídicas de la UNAM, vol. 2, pp. 313–39.
Martínez-Torrón, Javier. 2018. State Neutrality and Religious Plurality in Europe. In *Religion, Pluralism, and Reconciling Difference*. Edited by W. Cole Durham Jr. and Donlu D. Thayer. New York: Routledge, pp. 159–76.
McConnell, Michael, and Max Raskin. 2020. The Supreme Court Was Right to Block Cuomo's Religious Restrictions. *The New York Times*. December 1. Available online: https://www.nytimes.com/2020/12/01/opinion/supreme-court-Covid-19-religion.html (accessed on 11 May 2021).
Meseguer Velasco, Silvia. 2019. *La Financiación de la Religión en Europa*. Madrid: Digital Reasons.
Meseguer Velasco, Silvia. 2021. Libertad religiosa, salud pública y vacunación COVID-19. *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 56, forthcoming.
Ministero de la Justicia, ed. 2009. *Comisión Asesora de Libertad Religiosa: Realidad y Future*. Madrid: Ministero de la Justicia.
Mückl, Stefan. 2021. Libertad religiosa y COVID-19: La situación en Alemania. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 73–96.
Navarro Floria, Juan G. 2021. La pandemia y la libertad religiosa en la Argentina: Algunas reflexiones. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 305–52.
Navarro-Valls, Rafael. 2008. Neutralidad activa y laicidad positiva. In *Laicismo y Constitución*. Edited by A. Ruiz Miguel and Rafael Navarro-Valls. Madrid: Fundación Coloquio Jurídico Europeo, pp. 97–145.
Palomino, Rafael. 2014. *Neutralidad del Estado y Espacio Público*. Navarra: Thomson Reuters Aranzadi.
Patiño Reyes, Alberto. 2021. Libertad religiosa ante la pandemia por el COVID-19 en México. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 459–90.
Payne, Heather, and Norman Doe. 2005. Public Health and the Limits of Religious Freedom. *Emory International Law Review* 19: 539–55.

Picciaredda, Stefano. 2020. Covid-19 in Africa and Latin America. Certain forms of religious negationism favor the pandemic. In *Law, Religion and the Spread of COVID-19 Pandemic*. Edited by Fabio Balsamo and Daniela Tarantino. Pisa: DiReSoM, pp. 129–40.

Prieto, Vicente. 2021. Pandemia y límites a la libertad religiosa. El caso colombiano. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 397–414.

Raimundo, Miguel Assis, Paulo Pulido Andragão, Anabela Costa Leão, and Tiago Ramalho. 2021. COVID-19 y libertad religiosa en Portugal. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 211–40.

Rodrigo Lara, Belén. 2021. La libertad religiosa en España durante la pandemia de COVID-19. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 119–44.

Scharffs, Brett G. 2021. El coronavirus y la libertad religiosa: Un análisis preliminar de los Estados Unidos. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 415–58.

Sieira Mucientes, Sara. 2020. Estado de alarma. *Eunomía. Revista en Cultura de la Legalidad* 19: 275–305. [CrossRef]

Soler Martínez, José Antonio. 2020. Estado de alarma y libertad religiosa y de culto. *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 53: 1–40.

Souza Alves, Rodrigo Vitorino, Andréa Letícia Carvalho Guimarães, José Renato Prata Resende, and Gabriellen da Silva Xavier do Carmo. 2021. La libertad de religión o de creencias y la pandemia del COVID-19. Análisis de las medidas restrictivas adoptadas en Brasil. In *COVID-19 y Libertad Religiosa*. Edited by Javier Martínez-Torrón and Belén Rodrigo Lara. Madrid: Iustel, pp. 353–76.

Testa Bappenheim, Stefano. 2020. State of emergency and religious freedom: Constitutional stress in German law (art. 4 of the Basic Law for the Federal Republic of Germany. In *Law, Religion and the Spread of COVID-19 Pandemic*. Edited by Fabio Balsamo and Daniela Tarantino. Pisa: DiReSoM, pp. 227–54.

Valero Estarellas, María José. 2017. Neutralidad del Estado y Protección de la Autonomía Religiosa en Europa. Ph.D. Thesis, Universidad Complutense de Madrid, Madrid, Spain. Available online: https://eprints.ucm.es/id/eprint/47989/1/T40016.pdf (accessed on 11 May 2021).

Valero Estarellas, María José. 2019. Autonomía de las confesiones religiosas, neutralidad del Estado y prohibición de arbitrariedad, en la reciente jurisprudencia del Tribunal Europeo de Derechos Humanos. In *Libertad Religiosa, Neutralidad del Estado y Educación. Una Perspectiva Europea y Latinoamericana*. Edited by Javier Martínez-Torrón and Santiago Cañamares Arribas. Madrid: Thomson Reuters Aranzadi, pp. 55–79.

van den Vyver, Johan D. 2005. Limitations on Freedom of Religion or Belief: International Law Perspectives. *Emory International Law Review* 19: 499–537.

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Article

Freedom of Worship during a Public Health State of Emergency in France

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Abstract: This paper analyses three key decisions issued by the French State Council in 2020 following emergency proceedings concerning the impact of pandemic-related measures on the freedom of worship. The Council interestingly recalls that the freedom of worship is a fundamental freedom, but shows, too, how it is influenced by circumstances when determining whether the measures limiting the freedom to practice one's religion are proportionate to the goal of protecting public health.

Keywords: state of emergency; freedom of religion; French law and religion

Citation: Fornerod, Anne. 2021. Freedom of Worship during a Public Health State of Emergency in France. *Laws* 10: 15. https://doi.org/10.3390/laws10010015

Academic Editor: Adelaide Madera

Received: 12 January 2021
Accepted: 20 February 2021
Published: 25 February 2021

1. Introduction

Along with the vast majority of countries, France has managed the health crisis by limiting, and in some cases prohibiting, the exercise of certain civil liberties[1]. Rights and freedoms related to individuals as physical beings have been the primary focus, whereas the rights and freedoms of the mind have continued to be protected. This Cartesian division between mind and body contrasts with "the oneness of life, which is always inseparably physical and spiritual at the same time", and splits us into "purely biological organisms on the one hand," and "affective, cultural [beings] on the other"[2]. This description fits the impact of the state of emergency on the freedom of religion perfectly. By denying the right to worship, the government has severely curtailed the freedom of religion while leaving the freedom of conscience intact. The lockdown has turned society upside down and reconfigured values by giving priority to what is deemed, by the executive branch, "essential to the continuity of the life of the Nation" (Article 7, decree no. 2020-293 of 23 March 2020 setting out the general measures needed to manage the COVID-19 epidemic in the context of the public health state of emergency). Limiting funeral rites to the strict minimum showed that the "continuity" in question is first and foremost "biological". As a result, social life has been largely structured around a distinction between what is necessary to that continuity and what is not[3]. No exception was made for the freedom to worship, so religious services were cancelled along with numerous other activities. I will focus here on places of worship—places built specifically for exercising the freedom of worship—to determine what repercussions the public health state of emergency laws are having on this fundamental right.

1 For a timeline of pandemic-related legislation since Emergency Law no. 2020-290 of 23 March 2020 to manage the Covid-19 epidemic see: https://www.vie-publique.fr/loi/276818-loi-14-novembre-2020-prolongation-etat-urgence-sanitaire-16-fevrier-2021 (accessed on 22 February 2021).

2 Agamben (2020).

3 More recently, the distinction was made between what is necessary—to protect individuals' physical health—and what is essential. Thus, even though books "are essential . . . [they] cannot be deemed basic necessities like food or the products required to maintain economic activity itself". See State Council (*Conseil d'État*, or CE), order, 13 November 2020, nos. 445883, 445886, 445899, *Société Le poirier-au-loup, Monsieur Prats et autres*: https://www.conseil-etat.fr/actualites/actualites/dernieres-decisions-referes-en-lien-avec-l-epidemie-de-covid-19 (accessed on 22 February 2021).

Since 14 March 2020, several executive orders and decrees[4] have targeted the freedom of worship directly, raising, between the lines, the question of whether the freedom of worship is unique. Since the end of the first lockdown, the restrictions that had been enacted in March to deal with the circumstances have been loosened but not necessarily lifted. In addition, new provisions have been issued every time the health situation has changed, so there is little hope that we will return to the previous situation soon.

It has also become evident since March that "law in the time of the pandemic" can evolve as rapidly as the health situation. Pandemic-related law has been enacted in record time, and most litigation related to this law is being conducted through so-called emergency proceedings, in particular the emergency-civil liberty (*référé-liberté*) proceeding, which enables an administrative court to order, within forty-eight hours, "all measures necessary to protect a civil liberty that has clearly been seriously and illegally infringed by a public entity or a private organization charged with providing a public service" (Article L. 521-2 of the French Administrative Justice Code). I will focus on the three orders issued by the French State Council in 2020 following emergency proceedings concerning the impact of pandemic-related measures on the freedom of worship: although the vast majority of the religions in France stopped holding services during the two lockdowns without voicing any objections, the Catholic community manifested its disagreement with the terms for recommencing services in May and November, as well as during the lockdown in October 2020[5].

First, several individuals and associations filed petitions with the State Council regarding decree no. 2020-548 of 11 May 2020[6] on lifting the lockdown[7]. According to the decree's implementing terms, religious services could not be held until 2 June 2020, despite the religious holidays that fall in the Spring and "are important for the three religions that have the highest numbers of followers in France"[8]. Next, in an order dated 7 November 2020, the State Council reviewed the provisions on practicing one's religion in decree no. 2020-1310 of 29 October 2020, which lifted the lockdown and against which some Catholic associations had also challenged[9]. Third, the latest suit to date challenges decree no. 2020-1454 of 27 November 2020, which loosens the lockdown measures but limits religious services to 30 participants[10].

The State Council initially threw its full support behind the legislation passed in March not only to manage the "exceptional circumstances", but also to serve "the public interest related to the lockdown measures taken in today's context of overloaded healthcare facilities"[11]. In the three decisions discussed here, however, it (1) upheld a broad definition of the freedom of worship (although there is some lingering ambiguity), but nonetheless

[4] The executive order of 14 March 2020 instituting various measures to combat the spread of the Covid-19 virus; decree no. 2020-293 of 23 March 2020 setting out the general measures needed to manage the Covid-19 epidemic in the context of the public health state of emergency; decree no. 2020-548 of 11 May 2020 setting out the general measures needed to manage the Covid-19 epidemic in the context of the public health state of emergency, then decree no. 2020-618 of 22 May 2020 supplementing decree no. 2020-548 of 11 May 2020 setting out the general measures needed to manage the Covid-19 epidemic in the context of the public health state of emergency; decree no. 2020-1310 of 29 October 2020 setting out the general measures needed to manage the Covid-19 epidemic in the context of the public health state of emergency; and decree no. 2020-1454 of 27 November 2020 amending decree no. 2020-1310 of 29 October 2020 setting out the general measures needed to manage the Covid-19 epidemic in the context of the public health state of emergency.

[5] For a sociological analysis, see https://www.lemonde.fr/le-monde-des-religions/article/2020/11/24/le-sentiment-de-privation-de-la-messe-ne-concerne-que-les-catholiques-les-plus-zeles_6060905_6038514.html (accessed on 22 February 2021).

[6] Decree no. 2020-548 of 11 May 2020, article 10, III: "Type V places of worship are authorized to stay open. All gatherings or meetings inside them are prohibited. Funerals are authorized but are limited to 20 people".

[7] CE, order, 18 May 2020, no. 440366, no. 440361-440511, no. 440512, no. 440519. See Fornerod (2020).

[8] CE, order, 18 May 2020, no. 440366. Note that "the restrictions on […] the freedom of religion, and more specifically the right to participate collectively in rites in the above-mentioned institutions, entered into force on 3 November 2020, pursuant to Article 56 of the decree [of 29 October 2020], in particular to allow for All Saints' Day celebrations devoted to commemorating the believers who have died" (Conseil d'État, ordonnance du 7 November 2020).

[9] CE, order, 7 November 2020, *Association Civitas et autres*, nos. 445,825, 445,827, 445,852, 445,853, 445,856, 445,858, 445,865, 445,878, 445,879, 445,887, 445,889, 445,890, 445,895, 445,911, 445,933, 445,934, 445,938, 445,939, 445,942, 445,948, and 445,955.

[10] CE, order, 29 November 2020, *Association Civitas, Conférence des évêques de France et autres, Mgr M., Association pour la messe*, nos. 446,930, 446,941, 446,968, and 446,975.

[11] CE, order, 24 March 2020, no. 439,694.

(2) showed that it, too, was influenced by circumstances when determining whether the measures limiting the freedom to practice one's religion are proportionate to the goal of protecting public health.

2. Freedom of Worship and Places of Worship

In each of its orders discussed here (issued 18 May[12] and 7 and 29 November 2020), the State Council (Section 2.1) reiterates, in identical terms, that the freedom of worship is a fundamental freedom and (Section 2.2) broadens the scope of that freedom.

2.1. The Freedom of Worship Is a Fundamental Freedom

French law reflects a distinction between the freedom of religious conscience and the freedom to worship, such that several texts must be read together to establish the freedom of worship.

That distinction is made first in constitutional law, through Article 10 of the Declaration of the Rights of Man and the Citizen and Article 1 of the French Constitution of 1958, which protect the freedom of conscience and religious pluralism. Before 1974, the year France ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) Article 14 that protects freedom of thought, conscience, and religion[13], the only protection for the freedom of worship was in Article 1 of the French law of 9 December 1905, concerning the separation of church and state. That article enshrines both the freedom of conscience and the freedom of worship, but legislation does not afford the same kind of protection as the Constitution does, and it took more than a century for the freedom of worship to be recognized as a fundamental freedom[14]. More than a decade after that, in the context of a different state of emergency during which the State Council was petitioned several times with respect to the closure of places of worship[15], it again stated that the freedom of worship is a fundamental freedom, in a recital that it then repeated in each of its 2020 orders and that stands as precedent: "the freedom to worship confers on everyone the right to express the religious convictions of their choosing and includes the freedom to possess and use the items required to practice a religion, subject to compliance with public policy"[16].

The State Council has not deviated from this approach to religious freedom during today's public health state of emergency. Instead, it has held that "as established by law, this freedom is not limited to an individual's right to express their chosen religious convictions provided they do so in a manner consistent with public policy. Its fundamental components also include, subject to the same proviso, the right to participate in collective ceremonies, in particular in places of worship"[17]. In doing so, the Council applies its earlier, broader definition of the freedom of worship, giving it both an individual and a collective dimension. It also goes beyond its previous case law in this respect by not restricting the exercise of this freedom to places of worship.

As in the cases mentioned above related to the closure of Muslim houses of worship during a state of emergency, the State Council innovates by putting individual and collec-

[12] CE, order, 18 May 2020, no. 440,366.

[13] See Gonzalez (2020), comparing French law, and in particular the State Council's orders of 18 May 2020, with European case law.

[14] CE, order, 16 February 2004, no. 264,314, *M. Benaissa*.

[15] Closing places of worship was based on Article 8 of the French law of 3 April 1955, as amended by Article of the law of 21 July 2016, which provides that "[t]he minister of the Interior, for all of the territory subject to the state of emergency, and the prefect, in the department, may order the provisional closure of theaters and performance halls, drinking establishments, and meeting places of all kinds, in particular places of worship in which remarks constituting incitement to hatred, violence, or the commission of acts of terrorism are made or where such acts are advocated, in the areas determined by the decree provided for in Article 2". These provisions have since been included in Law No. 2017-1510 of 30 October 2017 and codified in Article L. 227-1 of the French Code of Domestic Security.

[16] CE, order, 6 December 2016, no. 405,476, *Association islamique Malik Ibn Anas*, concerning the closure of the Ecquevilly mosque: "the freedom of worship is a fundamental freedom which the closure of a place of worship is likely to infringe"; 20 January 2017, no. 406,618 (closure of the Al Rawda mosque in Stains); 11 January 2018, no. 416,398 (closure of the Salle des Indes mosque in Sartrouville); 31 January 2018, no. 417,332 (closure of the As Sounna mosque in Marseille); 22 November 2018, no. 425,100 (closure of the Centre Zahra place of worship in Grande-Scynthe).

[17] CE, order, 18 May 2020, no. 440,366, recital no. 11, CE, order, 7 November 2020, *Association Civitas et autres*, recital no. 10; CE, order, 29 November 2020, *Association Civitas*, *Conférence des évêques de France et autres*, *Mgr M.*, *Association pour la messe*, recital no. 11.

tive religious practices on equal footing. Whereas the freedom of worship traditionally encompassed only collective practices, it now includes individual practices, which under French law are generally considered a manifestation of the freedom of conscience. For example, the State Council opinion of 3 June 2000 clearly indicates that "whereas like all public employees, public school employees enjoy freedom of conscience . . . , the principle of secularity (*laïcité*) prevents them from having a right to manifest their religious beliefs while providing a public service"[18]. Where individuals are concerned, references to freedom of worship have generally required a collective practice in the background, such as in the case that led the State Council to hold that the freedom of worship is a fundamental freedom. In that case, the petitioner worked in a public housing office and contested his employer's refusal to allow him to miss work every Friday from 2 P.M. to 3 P.M. to go to the mosque to pray[19].

Similar thinking reigns when it comes to the freedom of religion of people who attend chaplaincies in "closed" public establishments such as hospitals and prisons. Chaplaincy services have always been and still are closely related to collective ceremonies as they require, at the very least, a chaplain. In healthcare facilities for example, "hospitalized patients must be able to practice their religion. After sending a request to the facility's administrators, they are visited by the minister of the religion of their choice" (Art. R. 1112-46 of the French Public Health Code). This means more broadly that "everyone must be able to be made capable of participating in worship (contemplation, presence of a minister of their religion, food, freedom of action and expression, funeral rites, etc.)"[20]. The law on prisons of 24 November 2009 thus grants detainees "freedom of opinion, conscience, and religion" and the ability to "practice the religion of their choice" (Art. 26)[21]. In a case decided in 2016, however, the individual practice of eating halal products was not assessed in the light of the freedom of worship but of the "religious convictions" of the detainee who had filed the claim[22].

What is particularly interesting about the orders of 18 May and 7 and 27 November 2020 is that they go beyond the earlier cases on closing places of worship and make the right to participate collectively in the ceremonies that take place there "a fundamental component" of the freedom of worship.

2.2. Religious Buildings Are Places of Worship Par Excellence

The freedom of worship can clearly be exercised in different places. But as the law arising from the health crisis—as interpreted by the State Council—has reminded us, religious buildings are inherently well suited to hosting religious worship.

The idea that religious buildings are places of worship *par excellence* comes to us directly from the revolutionary period, which inaugurated a strictly understood conception of worship: religious services could be held only in the buildings designed for them[23]. By providing that "the services of any religion are prohibited outside the premises chosen for their exercise" (Art. IV), the decree of 3 *ventôse* year III (21 February 1795) created a close link between place and function. Less radically, the State Council echoed that decree two centuries later when it held that a structure is a religious building when it is used "exclusively and permanently" for religious ceremonies[24]. Places devoted to worship are therefore the natural setting for exercising the freedom of worship, but that setting became an empty shell during lockdown. Although gatherings or meetings of up to 20 people were briefly authorized in religious establishments (executive order of 14 March 2020), they were

[18] CE, opinion, 3 June 2000, no. 217,017, *Mlle Marteaux*.
[19] CE, order, 16 February 2004, no. 264,314, *M. Benaissa*.
[20] Memo, 2 March 2006, on the rights of hospitalized individuals and including a hospitalized person's charter, NOR: SANH0630111C.
[21] Like other collective activities in prisons, "worship" was suspended during lockdown. See, *inter alia*, CE, order, 8 April 2020, no. 439,827.
[22] CE, 10 February 2016, no. 385,929.
[23] Messner et al. (2003).
[24] CE, 19 July 2011, no. 313,518, *Commune de Montpellier*.

eventually prohibited, "except for funerals limited to 20 people", by the decree of 23 March 2020 (Art. 8, IV).

In particular, the 23 March decree ushered in a period during which only individual visits to religious buildings were allowed, ignoring the inherent collective dimension of the freedom of worship and the central role played by religious ministers in various religious traditions. From this perspective, it is probably not insignificant that in the first case to give rise to a State Council ruling concerning places of worship in 2020, the petitioner requested the suspension of the orders of 14 and 15 March 2020 because "they prohibit the practice of religions as well as the ability to enter into contact, inside religious buildings, with religious ministers[25]". In this regard, the European Court of Human Rights (ECtHR) has several times found that "religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention"[26]. From this point of view, the State Council interprets the decree of 2 October 2020 fairly broadly in its order of 7 November: whereas the decree expressly authorizes only "funerals limited to 30 people" in places of worship (Art. 47), the Council holds that "religious ministers may continue to welcome believers [there] individually" (recital no. 16).

Even though the law of 23 March 2020 instituting a public health state of emergency "exempts religious buildings from the injunction to close temporarily that applies to other categories of establishments open to the public and public meeting places"[27], services other than funerals (limited to 20 participants) were prohibited. The colorless, ersatz services developed in response to that prohibition highlight that the exemption was merely symbolic, casting doubt on the close connection between the freedom of worship and religious buildings, and more importantly, on the fact that the services held there constitute the very essence of worship. This is especially true since these buildings were not considered establishments open to the public "that supply the goods and services required to satisfy basic needs" (Art. 2, Law no. 2020-290 of 23 March 2020) and it was not until the decree of 27 November 2020 took effect that going to a place of worship became an expressly authorized reason for people to leave their homes during lockdown. The State Council's order of 7 November was probably taken into account, because on this issue it had said that "the statements made by the government during the hearing [indicate] that instructions have been given so that believers may go to the place of worship closest to home or within a reasonable distance by checking the 'pressing family reasons' box on the permission slip"[28] (recital no. 16).

Until the decree of 27 November 2020 took effect, only religious funerals were expressly exempt from the prohibition on religious services, such that "funeral rites, which in Europe are one of the last sources of the social legitimacy of churches"[29], have been closely associated with religious buildings since mid-March even though, for sanitary reasons, many funeral-related activities (e.g., preparing the dead for burial or cremation) have simply been suspended. Funerals were thus the primary link between religious buildings and the exercise of religious freedom until the State Council, in its order of 18 May 2020, restored those buildings to their primary purpose (subject to conditions) for the first lockdown lifting[30].

[25] CE, order, 30 March 2020, no. 439,809. The central role assigned to religious ministers has been interpreted as evidence of a certain clericalism (see Rauwel (2020)), whereas the Catholic Church has been talking about this for a number of years, if not decades, because of the decreasing number of priests. See Borras (2001).

[26] ECtHR, Gd. ch., 24 October 2000, no. 30,985/96, *Hasan and Chaush v Bulgaria*, para. 62.

[27] Fialaire (2020).

[28] Translator's note: To leave their homes during lockdowns, residents of France must fill out a form that contains nine legitimate reasons to go out. Failure to have a correctly filled out form result in a €135 fine.

[29] Rauwel (2020).

[30] More precisely, the State Council holds that "the Prime Minister has a period of eight days to take measures strictly proportionate to the health risks incurred and appropriate to the circumstances of time and place applicable at the beginning of the lockdown lifting" (recital 36).

Lastly, in its order of 7 November, the State Council interprets the decree of 2 October 2020 particularly broadly. That decree expressly authorizes only "funerals limited to 30 people" in places of worship (Art. 47), but the Council finds that "religious ministers and everyone who may be deemed their personnel" may attend religious services, "in particular to make sure they are broadcast, while following the so-called protective measures and in particular wearing a mask, which may momentarily be removed to accomplish the rites that require it" (recital no. 16). This recital refers to the important role televised broadcasting of religious services came to play during the first lockdown and illustrates how the State Council takes into account numerous factors that have concretely characterized the exercise of worship since the beginning of the pandemic.

3. A Fact-Based Approach to Worship

A detailed analysis of the material conditions for worshipping is a thread running through all three orders. This approach is to be expected. As discussed in Section 3.2 below, the issue is whether or not exercising the freedom of worship is compatible with the goal of protecting the physical health of the individuals targeted by the challenged decrees. Less expected, however, is (Section 3.1) the terminological effect these decrees have on the State Council's decisions.

3.1. Unusual Terminology Related to Places of Worship

The State Council is no stranger to disputes involving religious buildings, whether the issue is their construction, preservation, or use, and it has developed abundant case law in this regard over several decades[31]. Despite that expertise, in the three orders issued in 2020, it borrows terminology from the decrees related to combating Covid-19, which reflect the view that individuals are essentially, if not exclusively, physical rather than spiritual beings. The public health legislation has thus had an unanticipated terminological effect.

First, the term "religious establishments" has been used in the decrees adopted since mid-March and, to a lesser degree, in the case law, where it coexists with the classic terms "places of worship" and "religious buildings". "Religious establishments" is the term used in safety-related legislation (on the risks of fire and panic in establishments open to the public) based on the executive order of 25 June 1980. Although it cannot be said that the decrees clearly intend to separate religious buildings from their fundamental function of providing a place for people to exercise their freedom of worship, the terminology leads them to be read solely through the lens of safety, thus equalizing religions to some extent when, in fact, different religious buildings have different statuses[32]. Over the course of the year, however, there was a slight shift in terminology. Whereas decree no. 2020-293 of 23 March 2020, setting out the general measures needed to manage the Covid-19 epidemic in the context of the public health state of emergency, almost cavalierly included places of worship among "establishments open to the public" (articles 8 to 10), the decree of 29 October is more deferential and devotes a separate chapter to them, providing that "[r]eligious establishments, falling within category V, are authorized to stay open. All gatherings or meetings inside them are prohibited except for funerals limited to 30 people" (chapter 6: Religions, article 47).

Similarly, the "manager of the place of worship" is assigned an important new role, namely, to implement the measures "necessary to manage the Covid-19 epidemic", such as physical distancing and mask wearing, provided for by decree no. 2020-618 of 22 May 2020 supplementing decree no. 2020-548 of 11 May 2020. In wording subsequently reused in the decrees of 29 October and 27 November 2020, this decree provides that "the manager of the place of worship ensures compliance at all times, and in particular on entering and exiting the building", with the requirement to wear a protective mask starting at age

[31] In addition to the cases mentioned in footnote 16, case law on places of worship can be found in the minister of the Interior's memo, 19 July 2011, on Places of worship: ownership, construction, repair and maintenance, town planning rules, taxation, NOR/ICO/D/11/21246C.

[32] See, e.g., Ministry of the Interior memo NOR/IOCD1121246C of 29 July 2011. Religious buildings: ownership, construction, repair and maintenance, urban planning rules, taxation, available at: https://legirel.cnrs.fr/IMG/pdf/110729.pdf (accessed on 22 February 2021).

11 and to limit on the number of individuals admitted to a religious service. The extent of this promotion of the "manager" of a place of worship is clear in the State Council's order of 29 November. The "manager's" new role arises from the fact that "it has been established that for public health reasons, there is a need to regulate, pursuant to Article L. 3131-15 of the Public Health Code[33], the conditions for entering and remaining in religious establishments, in particular in this early period of easing the lockdown conditions" (recital no. 17). More importantly, the Council finds that the authority of "the manager of the place of worship" prevails over that of "religious ministers with respect to practicing their religion" (which is based on the provisions of Article 5 of the law of 2 January 1907 on the public exercise of religions). In so doing, the Council breaks, in the name of public health, with earlier case law granting important prerogatives to religious ministers in organizing places of worship[34].

3.2. Freedom of Worship and Protection of Health

As with any civil liberty, there are limits to exercising one's right to worship. In the context of the Covid-19 pandemic, freedom of worship must "be reconciled with the goal of protecting health, which is a constitutional right"[35]. It has been noted that the legal measures (especially the first ones) taken to combat the pandemic tended to reduce life and human health to their biological dimension, which must be protected and nourished in the literal sense. This approach has two tangible effects on the State Council's orders: both religious services and places of worship are viewed through the lens of behaviors likely to spread the virus.

With respect to religious services, not only does the State Council ignore their spiritual dimension and theological scope, but it also seems to dissect them and consider only their physical features. For example, in its orders of May and November 2020, the Council finds that "religious services that constitute gatherings or meetings within the meaning of the challenged provisions expose the participants to a risk of infection, which is increased because the services are held in an enclosed area of limited size over a significant amount of time with a large number of individuals, and are accompanied by prayers said aloud or by singing, as well as ritual gestures that involve contact, movement, or exchanges between participants, including on the margins of the services themselves"[36].

This approach is not at all consistent with the solemnity of the recital in the three orders, which proclaims that a broadly understood freedom of worship is a fundamental freedom and implies that practices other than services in religious buildings are key components of that freedom[37]. Nor is it consistent with settled European and French case law, according to which collective religious practices such as funerals (protected under the freedom of religion[38]), gatherings and meetings (protected as a form of worship[39]), and processions and pilgrimages may take place outside religious buildings. While the State Council does not explicitly assign a hierarchy to "the essential components" of the freedom of worship, the wording of the recitals in the order of 18 May 2020 implies one.

[33] That article provides that "in territorial districts where a public health emergency has been declared, the Prime Minister may, by a regulatory decree issued on the basis of the health minister's report, for the sole purpose of protecting public health: . . . 5° Order the provisional closure and regulate the opening of one or more categories of establishments open to the public as well as places of worship, including the conditions for entering and remaining in them, by providing individuals with access to goods and services of basic necessity".

[34] See Fornerod (2013), discussing the powers of religious ministers in places of worship, and Catholic churches in particular.

[35] CE, order, 18 May 2020, no. 440,366.

[36] CE, order, 18 May 2020, no 440,366, recital no. 27 and CE, order, 29 November 2020, *Association Civitas, Conférence des évêques de France et autres, Mgr M., Association pour la messe*, nos. 446,930, 446,941, 446,968, 446,975, recital no. 15.

[37] In a way, however, this recital could have been understood to establish an "internal hierarchy" within the freedom of worship, "other aspects of religious life [being] downgraded to the rank of 'minor components' of the freedom of worship". See Fialaire (2020) and also, in the same sense, Gonzalez (2020).

[38] The European Court of Human Rights clearly states that "the manner of burying the dead and cemetery layout represents an essential aspect of the religious practice": ECtHR, *Johannische Kirche and Peters v. Germany*, 10 July 2001, no. 41,754/98.

[39] It has thus been held with respect to the Limousin ostensions that they consist "in the solemn presentation by the clergy of relics of saints who are from or who lived in Limousin, with veneration of those relics by the believers and occur during Christian religious services such as processions and eucharist; they therefore constitute a religious practice". CAA Bordeaux, 21 December 2010, no. 10BX00634.

For example, the Council finds that the prohibition on outdoor gatherings in public places does not, "in its generality or with regard to religious activities in particular, seriously and clearly illegally infringe a fundamental freedom" (recital no. 38) and the Prime Minister is not enjoined to reauthorize them.

This decision seems doubly paradoxical given that the goal is to limit the spread of Covid-19. Due to the "lack of alternatives to protect the freedom of worship" (recital no. 36), after noting that "religious services expose the participants to a risk of infection, which is increased because the services are held in an enclosed area of limited size over a significant amount of time" (recital no. 27), the State Council enjoins the Prime Minister to amend the provisions of decree no. 2020-548 of 11 May 2020 that maintain the prohibition on gatherings and meetings in religious establishments[40]. The uniqueness of the circumstances is undeniably at play here. The approach to religious worship is much more functional than in the decisions addressing the May 2020 lockdown-lifting measures or the lockdown easing in November 2020, both of which raised the issue of whether a place of worship is a place of infection like any other.

More specifically, in the three orders issued in 2020, the State Council finds that the way in which religious services are carried out exposes the participants to a risk of infection. But the petitioners also complained that the lockdown and lockdown-lifting measures were implemented differently for different activities, so the Council had to rule on those differences. Given the public health situation at the time, the justification for the second lockdown (which began on 29 October 2020) did not require a long explanation: allowing certain activities to continue was designed "to avoid the most harmful economic and social effects that had been observed during the first lockdown" (order of 7 Nov., recital no. 18). However, the comparison with other activities or other places in which there was a risk of spreading the virus worked to the petitioners' advantage when both lockdowns were lifted. In May 2020, the State Council noted that there were fewer restrictions on public access regarding many activities, such as transporting travelers, or for "stores and shopping centers, educational institutions, and libraries which, for economic, educational, and cultural reasons, are open to the public while complying with the provisions applicable to them" (recital no. 31). More importantly, in the midst of several practical and technical considerations, it couches its reasoning in terms of civil liberties, underscoring that "if, during the first phase of lifting the lockdown, gatherings and meetings are not authorized in establishments open to the public other than places of worship, [it is because] the activities carried out in them are not of the same type and the fundamental freedoms at stake are not the same" (recital no. 32). The Council then uses similar wording in the order of 2 November 2020 to enjoin the government to repeal the 30-person limit on religious services[41].

4. Conclusions

Ultimately—and surely inevitably—the public health situation set a special tone for these State Council decisions. Nonetheless, the orders of 18 May and 29 November freed worship from the constraints of strict compliance with the measures arising from solely health-related concerns. Moreover, they enabled the State Council to reiterate the fundamental link between the freedom of worship and religious buildings.

Despite the context of the public health state of emergency, the State council has, to some extent, not deviated much from a classic reasoning aimed at combining freedom of worship and public policy. In this regard, the orders of 18 and 29 November 2020 are in line with previous case law on religious buildings.

[40] CE, order, 18 May 2020, no. 440,366.

[41] On 2 December 2020, a press release issued by the ministry of the Interior indicated that every third seat and every other row may now be occupied in places of worship. Ministry of Interior Press Release of 2 December 2020, *Organisation des cérémonies religieuses durant la deuxième phase de confinement*: https://www.interieur.gouv.fr/Actualites/Communiques/Organisation-des-ceremonies-religieuses-durant-la-deuxieme-phase-de-confinement (accessed on 22 February 2021).

In addition, through those orders, the State Council provides a kind of instruction manual for places of worship in the current period. Unless the general health situation in France deteriorates and requires a new and particularly strict lockdown, there is no reason for the legal framework for religious celebrations to change for the time being and to expect other litigations.

One question remains open, however. One may indeed wonder what will happen to the above-mentioned terminological impact of the measures to combat the spread of the Covid-19 virus. Will the courts continue to consider religious buildings as mere "religious establishments ", with its consequences for the management of celebrations, or will they revert to pre-pandemic terminology?

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Acknowledgments: This article was translated from French into English by Naomi Norberg.

Conflicts of Interest: The authors declare no conflict of interest.

References

Agamben, Giorgio. 2020. Una Domanda. April 14. Available online: https://www.quodlibet.it/giorgio-agamben-una-domanda (accessed on 3 December 2020).

Borras, Alphonse. 2001. Considérations canoniques sur la vie liturgique dans la nouvelle paroisse. *Esprit Et Vie* 34: 7.

Fialaire, Jacques. 2020. Liberté de culte et urgence sanitaire: Les leçons de la jurisprudence. *Jurisclasseur Périodique A*, 2155.

Fornerod, Anne. 2013. *Le Régime Juridique Du Patrimoine Religieux*. Paris: L'Harmattan.

Fornerod, Anne. 2020. Les édifices cultuels et la liberté de culte pendant l'état d'urgence sanitaire. *Revue du Droit Des Religions* 10: 175–85. Available online: https://journals.openedition.org/rdr/1268 (accessed on 22 February 2021). [CrossRef]

Gonzalez, Gérard. 2020. Covid19: Le Conseil d'État au chevet de la liberté de culte. *Jurisclasseur Périodique Général*, 717.

Messner, Francis, Pierre-Henri Prélot, and Jean-Marie Woehrling, eds. 2003. *Traité De Droit Français Des Religions*. Paris: Litec, pp. 4–5.

Rauwel, Alain. 2020. Les Pratiques Rituelles Par Temps De Pandémie. April 9. Available online: https://www.ehess.fr/fr/carnet/coronavirus/pratiques-rituelles-par-temps-pandémie (accessed on 22 February 2021).

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Article

Coronavirus and the Curtailment of Religious Liberty †

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† This is a revised version of a public lecture delivered online on 5 October 2020 as part of the Global Spotlight Lecture Series, Notre Dame University, London Law Program. I wish to record my particular thanks to Professor Michael Addo and Professor Rick Garnett.

Received: 9 October 2020; Accepted: 12 November 2020; Published: 26 November 2020

Abstract: Even public health emergencies must be handled within the framework of the rule of law. The alternative is social chaos. Every nation on earth has been touched by the impact of COVID-19, a deadly pandemic that has changed—perhaps permanently—the manner in which we are governed and live our daily lives. This paper addresses the effect of the State's response to the threat of Coronavirus upon the enjoyment of religious liberty, both directly and indirectly.

Keywords: coronavirus; religious liberty; emergency restrictions; COVID-19; judicial review; Supreme Court; constitutionality; global challenges to lockdown

1. The Pandemic

COVID-19 is caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), and was first identified in Wuhan, China, in December 2019. The World Health Organization declared the outbreak a pandemic on 11 March 2020. Pending the discovery and manufacture of a vaccine, governments have been taking a variety of steps to inhibit the spread of the disease by restricting individual movement and implementing social distancing. This has been achieved through various means including legislation, executive action, public health advice and government guidance.[1] A British judge has described the regime which was brought into force in the United Kingdom[2] as "possibly the most restrictive regime on the public life of persons and businesses ever—certainly outside times of war".[3]

In my introduction to the *Routledge Handbook on Freedom of Religion or Belief*, I say this:

> [The COVID-19 pandemic] has led to a resurgence of authoritarianism, particularly in Western democracies, with towns, cities and entire countries being placed into lockdown and places of worship closed, with the active concurrence, or passive acceptance, of faith leaders. Civil rights, including freedom to manifest religion and belief, have effectively been suspended in consequence of a global health emergency. Severe limitations on personal and associational autonomy—unthinkable in normal times—have been imposed, in circumstances in which

1 For a comprehensive repository of COVID-related regulations and guidance in the United Kingdom (together with advice issued by religious organisations) see the designated page on *Law and Religion UK*. https://www.lawandreligionuk.com/2020/08/20/covid-19-coronavirus-legislation-and-guidance/.
2 The national governments made different provision for Wales, Scotland and Northern Ireland, leaving the Westminster Parliament to legislate for England alone.
3 *Dolan, Monks and AB v Secretary of State for Health*: Reasons for Grant of Permission to Appeal, 4 August 2020, per Hickinbottom LJ.

most major faith groups have been complicit and supportive. It will be interesting to see how the landscape will have changed after the current public health emergency has passed.[4]

2. Religious Liberty—General Overview

A clutch of pan-national instruments, most notably the Universal Declaration on Human Rights make aspirational claims to an inherent right to freedom of religion. Individual states give effect to these global rights in different ways: some as a component element of their written constitutions, others through adoption in domestic legislative. Again, it is not the purpose of this paper to evaluate the different ways in which nation states give effect to securing religious liberty within their jurisdictions. Freedom of religion is not an absolute right: it is to be maximally interpreted but is subject to certain limitations, the boundaries of which, ultimately, fall to be drawn by the judiciary. Freedom of religion is one of a suite of rights contained in international declarations and conventions, which overlap and interconnect.[5]

The focus of this paper is the curtailment of religion in the current COVID-19 emergency but it is not concerned solely with violations to the right to freedom of religion. The practice of faith communities can be curtailed by breaches of other rights: freedom of association being particularly relevant when social gathering is limited and church buildings closed for public worship.[6]

Take, for example, the European Convention on Human Rights, not as a paradigm of best practice, but as a representative example of the architecture of both the primary right and the legitimate limitations.[7] The first part of Article 9 sets out the content of the right while the second part specifies the grounds on which the right may lawfully be limited:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[8]

The internal aspect of Article 9—the right to freedom of thought, conscience and religion—is an absolute right such that it may not be restricted.[9] In contrast, the external aspect of Article 9, the right to manifest a religion or belief in 'worship, teaching, practice and observance', is subject to the limitations in Article 9(2).[10] In determining whether there has been a breach of Article 9, the Strasbourg Court has developed a methodology which consists of addressing, sequentially, the following questions:

(i) Does the complaint fall within the scope of Article 9?
(ii) Has there been any interference with the manifestation of religion?
(iii) Is the limitation prescribed by law?
(iv) Is the limitation in pursuit of a legitimate aim?

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4 M Hill, 'Locating the right to freedom of religion or belief across time and territory' in (Ferrari et al. 2020).
5 See (Ferrari et al. 2020).
6 Note also the right to marry.
7 For a detailed discussion of the ambit and reach of Article 9, see (Hill and Barnes 2019).
8 This language is near identical with that of Article 18 of the United Nations Covenant on Civil and Political Rights.
9 *Darby v. Sweden*, 9 May 1989, European Commission on Human Rights, Application No. 11581/85, para. 44. As Queen Elizabeth I reputedly stated: 'I would not open windows into men's souls': letter drafted by Francis Bacon. See JB Black, *Reign of Elizabeth 1558–1603* (1936).
10 A state is permitted to derogate from its obligations under Article 9 '[i]n time of war or other public emergency threatening the life of the nation' as permitted by Article 15. The United Kingdom has not, as yet, purported to invoke this derogation.

(v) Is the limitation necessary in a democratic society?

On points (i) and (ii) the burden of proof would lie on applicants to demonstrate that restrictive coronavirus provisions prevented their manifestation of religion. Once that threshold is reached, the burden of proof then shifts to the government on points (iii)–(v) to demonstrate the lawfulness of the restriction, its purpose and its necessity. Here we enter into the realm of proportionality—the necessity must be of such a gravity as to trump the exercise of religious liberty.[11] No lesser means is possible.[12] There is an emergent body of court and tribunal decisions from around the world where the point of engagement has been whether the potential risk to public health through coronavirus is such that individual (or associational) freedom of religion can lawfully be curtailed.

As Professor Christopher McCrudden has observed,

> 'Seeing issues arising from COVID-19 through a human rights lens should, instead of focusing on one right to the exclusion of others, take in the full range of human rights protections, including the right to life and to health, the right to an adequate standard of living, and the right to work, *with the consequence that we locate human rights appropriately, often on both sides of major political disputes*.'[13]

It is of note that the *Joint European Opinion Towards Lifting COVID-19 Containment Measures* made no mention of religion in its guidance and observations.[14] A Diplomatic Statement issued by the Religious Freedom Alliance in August 2020 included the following:

> States should not limit the freedom to manifest religion or belief to protect public health past the point necessary, or close places of worship in a discriminatory manner. To the extent that states are taking measures in response to COVID-19 that limit the freedom to manifest, either individually or in community with others, one's religion or belief in worship, observance, practice, and teaching, they should do so only to the extent that these restrictions are established by law and necessary for a limited number of purposes, including public health.[15]

Some guidance has been offered to assist in the complex and fact-specific exercise. For example, in April 2020, the Council of Europe issued a Toolkit for Member States: *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis*:[16]

> Effective enjoyment of all these rights and freedoms guaranteed by Articles 8, 9, 10 and 11[17] of the Convention is a benchmark of modern democratic societies. Restrictions on them are only permissible if they are established by law and proportionate to the legitimate aim pursued, including the protection of health. The significant restrictions to usual social activities, including access to public places of worship, public gatherings and wedding and funeral

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11 For a discussion on proportionality in the limitations on freedom of religion, see (Bielefeldt et al. 2016).

12 Lord Sumption, a retired Justice of the United Kingdom Supreme Court, has suggested that a challenge on ECHR Article 5 grounds (right to liberty and security) 'would require the judges to say whether the objective of the lockdown was important enough to justify it, whether some less intrusive measure would have done as well and whether the injury to liberty was disproportionate to the likely benefit. I suspect that the courts would run a mile before tackling issues like these': (Sumption 2020a).

13 (McCrudden 2020).

14 March 2020. https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf.

15 COVID-19 and Religious Minorities Pandemic Statement: https://www.government.nl/documents/diplomatic-statements/2020/08/20/covid-19-and-religious-minorities-pandemic-statement. The *co-signatories comprised: Albania, Armenia, Australia, Brazil, Bulgaria, Colombia, Estonia, Georgia, Greece, Hungary, Latvia, Lithuania, Netherlands, Poland, Slovakia, Slovenia, United Kingdom, United States of America*.

16 https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40 (7 April 2020).

17 These are (respectively): right to private life, freedom of conscience, freedom of expression, freedom of association.

> ceremonies, may inevitably lead to arguable complaints under the above provisions. It is for the authorities to ensure that any such restriction, whether or not it is based on a derogation, is clearly established by law, in compliance with relevant constitutional guarantees and proportionate to the aim it pursues.
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> While heightened restrictions to the above-mentioned rights may be fully justified in time of crisis, harsh criminal sanctions give rise to concern and must be subject to a strict scrutiny. Exceptional situations should not lead to overstatement of criminal means. A fair balance between the compulsion and prevention is the most appropriate, if not the only way, to comply with the Convention proportionality requirement.[18]

The United States Commission on International Religious Freedom has also offered some general guidance of universal application.

> It is important for governments to account for religious freedom concerns in their responses to COVID-19, for reasons of both legality and policy effectiveness. From a legal perspective, international law requires governments to preserve individual human rights, including religious freedom, when taking measures to protect public health even in times of crisis. From an efficacy perspective, considering religious freedom concerns can help build trust between governments and religious groups, who in past public health crises have played a critical role in delivering health interventions. Such concerns include the cancellation of large gatherings, among them religious activities, where viruses easily can spread.[19]

I propose to illustrate this dynamic by reference to some decided cases from the United Kingdom, and from further afield.

3. The Constitutionality of Government Responses

It is not the purpose of this paper to examine the constitutionality of government action the world over in response to the COVID-19 pandemic. Each nation will have its own means for the exercise of emergency powers and to the extent that there may have been governmental overreach that will be a matter for the courts of those countries to determine,[20] and for academic comment from specialists within particular jurisdictions.[21] It is worth noting, however, that as a generality, the more imminent and severe the risk to the public, the more likely that government action will be deemed necessary and reasonable. As the pandemic continues and its trajectory becomes clearer, a greater scrutiny will be given to issues of constitutionality.[22] The deference which is afforded by the governed to those who govern will depend upon the competence of the government and the extent to which it carries the trust of the people.[23] This is a matter to which I shall return later in this paper.

In relation to unconstitutionality, there is a steady stream of cases from around the world, now developing into something of a torrent, where the constitutionality of emergency provisions has

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[18] *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis*: A Toolkit for Member States (above).

[19] *The Global Response to the Coronavirus: Impact on Religious Practice and Religious Freedom* (March 2020) produced by the United States Commission on International Religious Freedom. https://www.uscirf.gov/sites/default/files/2020%20Factsheet%20Covid-19%20and%20FoRB.pdf.

[20] For example the High Court of Malawi concluded: 'The impugned lockdown fundamentally restricts the right to life, the right to equality and recognition before the law and the right to freedom of conscience, belief, thought and religion which cannot be derogated' [in the absence of a declaration of a state of emergency being declared by the President]: *Kathumba v President of Malawi* (paragraph 7.8, emphasis added).

[21] Retired UK Supreme Court Justice, Lord Sumption, regular appears in the broadcast and print media criticising the authoritarian approach of the British government and encouraging non-compliance with the law. Some British bloggers have been active on the subject. See particularly the twitter account of @AdamWagner1 and his podcast @bhumanpodcast.

[22] 'The longer these emergency procedures are used, the less Rule of Law compliant they are': (Cormacain 2020).

[23] For an outspoken critic of the British government, see (Sumption 2020b).

been challenged. In *The State on application of Kathumba and others v President of Malawi and others* (Constitutional Reference Number 1 of 2020),[24] the High Court of Malawi determined that the country's Public Health (Corona Virus Prevention Entertainment and Management) Regulations 2020 were *ultra vires* its parent legislation, the Public Health Act, which it condemned as 'very old and ill-equipped to deal with a pandemic of the COVID-19 magnitude'.[25] The judgment observed that 'By its very nature, the declaration of [lockdown] measures will have an impact on the exercise of constitutional rights of the populace'.[26] However, it continued: 'Even public health emergencies must always be handled within the framework of the rule of law. The alternative is social chaos.'[27]

4. Assessing Risk and Deference to Government

The common law world has considerable experience in the fine judgments which allow the decision maker a reasonable discretion in assessing risk. In the Kenyan case of *Republic v Ministry and others, ex parte Kennedy Amdany Langat and others*,[28] the Court made reference to the 'precautionary principle' which allows—indeed compels—the state to take protective measures without having to wait until the reality and seriousness of the risk are fully demonstrated or manifested. Such principle was applied in *Law Society of Kenya v Hillary Mutyambai, Inspector General of Police and others*,[29] where the imposition of a night curfew to prevent the spread of COVID-19 was challenged as being unconstitutional.[30]

A procedural decision of the Supreme Court of Victoria, Australia[31] raised an interesting point about the evidence which a court would expect to see when assessing the validity of emergency regulation. The Defendant was the Deputy Public Health Commander for Melbourne, authorised to exercise emergency powers by the Public Health Officer. She issued *Stay at Home (Restricted Areas) Directions (No 15)* on 13 September 2020 imposing, as their title implied, a curfew from 9 p.m. to 5 a.m. The Plaintiff contended that the Directions violate her rights under the *Charter of Human Rights and Responsibilities Act 2006*.[32] The Defendant led evidence that in deciding to make the Directions she had considered assessments by the Legal Services Branch that they are likely to be compatible with the Charter. Both the assessments and certain in-house legal advice was redacted[33] and a claim of legal professional privilege was raised.

A central issue in the case was the extent to which the Defendant had regard to Charter rights and the requirements of s 38 of the Charter. The legal advices relied on by her may be directly relevant to deciding that issue: they informed her state of mind in deciding to impose a curfew. Accordingly, the judge determined that the assessments and advice were disclosable in full. This is plainly correct and illustrates a principle of wider application. How can a court make a proportionality assessment unless the governmental body produces adequate expert evidence of the genuine risk to public health of the

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[24] [2020] MWHC 29 (3 September 2020), https://malawilii.org/system/files/judgment/high-court-general-division/2020/29/LOCKDOWN%20JUDGMENT.pdf.

[25] Para 10.2.1.

[26] Para 7.1.

[27] Para 10.2.1. The judgment focussed on the impact of lockdown provision on education, health (particularly sexual health) and domestic violence, and made no specific reference to religious liberty, but the principles are of general application. The Malawi Council of Churches were joined as sixth respondent in the proceedings. Of particular concern was the government's decision to declare a lockdown without providing for social security interventions for marginalised groups: para 2.1(2).

[28] *Judicial Review Case 2 of 2018 & 709 of 2017 (Consolidated)* [2018] eKLR.

[29] Petition 120 of 2020 (Covid 025).

[30] The provision survived the challenge, upon the government specifying precise timings which had been omitted from the original order. The court considered it a valid precautionary measure to prevent the spread of the disease.

[31] *Loielov Giles* [2020] VSC 619 (24 September 2020). http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2020/619.html?fbclid=IwAR3R1XFw0N16TxlWml4S51xoUhcB2IW85QL5eVzwFlf-TUU9qRJa_aYprO8. I am grateful to Professor Neil Foster of the University of Newcastle, Australia, for bringing this judgment to my attention in a recent Facebook post.

[32] Particularly the following rights: to freedom of movement under s 12; to liberty and security under s 21(1); not to be subject to arbitrary detention under s 21(2); and, not to be deprived of her liberty under s 21(3).

[33] The redaction included passages concerning the application of the right to freedom of religion: s 14 of the Charter.

pandemic and of a proper and informed consideration of the impact of any restriction on the civic rights of citizens?

The High Court of Malawi offered advice and guidance as to the matters which should be considered and addressed by government prior to the imposition of future lockdown measures.[34] But due deference—or a proper margin of appreciation—should still be given as Chief Justice Roberts remarked in one of the COVID cases to reach the United States Supreme Court:

> 'The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect" . . . Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people . . . That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.'[35]

5. The UK Government's Response—An Overview[36]

The principal lockdown provisions in England were contained in The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.[37] This included the closure of business premises. Regulation 5(5) provided that 'A person who is responsible for a place of worship must ensure that, during the emergency period, the place of worship is closed', except for various specific uses, namely: funerals, to broadcast an act of worship, whether over the internet or as part of a radio or television broadcast, or to provide essential voluntary services such as food banks, support for the homeless or vulnerable people, blood donation sessions or support in an emergency.[38]

In relation to restriction of movement, the Regulations contained more detailed and nuanced provisions than merely the three-fold exemptions which were outlined by the prime minister in a televised press conference. Reg 6(1) provided that 'During the emergency period, no person may leave the place where they are living without reasonable excuse'. A person who breached the regulations without a reasonable excuse commits a criminal offence.[39] A non-exhaustive list of reasonable excuses

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[34] *Kathumbav President of Malawi* [2020] MWHC 29 (3 September 2020), at paragraph 10.2.2 *et seq*.

[35] *South Bay United Pentecostal Church v Gavin Newsom, Governor of California* 590 U. S. (2020): See also *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada* 591 U. S. (2020).

[36] For a detailed study see (Cranmer and Pocklington 2020). The Report of the UK Parliament Joint Committee on Human Rights: *The Government's response to COVID-19: human rights implications* (HC 265; HL Paper 125, 21 September 2020) is disappointingly light on freedom of religion.

[37] http://www.legislation.gov.uk/uksi/2020/350/made, made pursuant to powers in section 45R of the Public Health (Control of Disease) Act 1984. The regulations are dated 26 March 2020, three days after the lockdown was declared by the prime minister on national television and are recorded as being made at 1.30 p.m., laid before Parliament at 2.30, but coming into force at 1.30 p.m. They have been subject to a series of amending regulations, generally intended at clarification or the relaxing of particular provisions.

[38] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 5(6). Places of worship that served as premises for early years childcare provided by a registered person were permitted to open for this purpose from 1 June 2020: Reg. 5(6)(d) inserted by The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 (S.I. 2020/558), regs. 1(2), 2(5)(b)(ii).

[39] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. reg 10. The offence is punishable by a fine, and police officers are authorised to issue fixed penalty notices. There were some examples of over-zealous policing, and criminal many convictions for breaches of lockdown law were quashed for procedural irregularities. See, by way of example only: https://www.independent.co.uk/news/uk/crime/coronavirus-fine-police-lockdown-travel-newcastle-marie-dinou-a9444186.html. Section 64 of the Public Health (Control of Diseases) Act 1984 provides that criminal proceedings in respect of offences created by regulations made under this Act (such as these) may not be initiated other than by health protection authorities or other authorized persons. Regulation 11 of Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 states that proceedings for an offence under the regulations may be brought by the Crown Prosecution Service. It would appear that a private prosecution (by a member of the public) is not permissible.

was set out in reg 6(2). These included the three principal exemptions, but also others such as to attend a funeral of a member of the person's household or a close family member;[40] and, in the case of a minister of 'religion or worship leader', to go to their place of worship.[41]

Although schools were generally closed, the children of those categorised as 'keyworkers' were permitted to attend school. The Cabinet Office and Department of Education issued *Guidance*: *Critical workers who can access schools or educational settings*,[42] which was periodically updated, identifying categories of keyworker. Under 'critical workers' was a section entitled 'key public services' which included the category of 'religious staff'. This term was not further defined.[43]

The advice from faith leaders invariably followed and adopted government guidance, and occasionally went further than the restrictions imposed by the civic authorities. Controversially, the Church of England instructed its clergy not to enter churches even to live-stream Eucharistic or other liturgy, notwithstanding that this was permitted under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 then current. Even at the height of the lockdown, under reg 5(6) attendance at places of worship was permissible 'to broadcast an act of worship, whether over the internet or as part of a radio or television broadcast'. Anglican priests were instructed not to do so, although subsequently church authorities sought to clarify that this had merely been advice,[44] albeit strongly worded, in order to set an example and encourage churchgoers to remain at home.

The easing of the lockdown was similarly defined by a lack of clarity, inconsistent messaging and a confusion as to the mandatory or advisory nature of various provisions. In addition there was an overlay of non-governmental guidance from religious organizations, which in some instances was more restrictive, or at least interpreted as such.[45] The gradual opening up of places of worship was equally unsystematic and somewhat confused. With effect from 13 June 2020, places of worship were permitted to open but only for private prayer by individuals.[46] Private prayer was defined in the Regulations as 'prayer which does not form part of communal worship'.[47]

The Ministry of Housing, Communities and Local Government issued guidance before the changes came into effect:[48] *COVID-19: guidance for the safe use of places of worship during the pandemic*.[49] The Guidance included a roadmap suggesting further easing not before 4 July 2020, subject to scientific advice. It gave examples of activities which were not permitted. These included communal or corporate worship, defined as 'led devotions/worship/service/prayer by a Minister of Religion or lay person, e.g., Evensong, informal prayer meetings, Jummah, Mass or Kirtan'; together with matters such as: services other than funerals; study groups, and out of school settings, including faith supplementary

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[40] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 6(1)(g). A friend was permitted to attend but only if there were no member of the household or family member attending.

[41] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 6(1)(k).

[42] https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-educational-provision/guidance-for-schools-colleges-and-local-authorities-on-maintaining-educational-provision.

[43] Also named under key public services are: those essential to the running of the justice system, charities and workers delivering key frontline service, those responsible for the management of the deceased, journalists and broadcasters who are providing public service broadcasting.

[44] The Archbishop of Canterbury offered this clarification during a television interview on Easter Day.

[45] See the Church of England's press release https://mailchi.mp/churchofengland/church-of-england-to-close-all-church-buildings-to-help-prevent-spread-of-coronavirus?e=3746409744 and subsequent Guidance which has been updated periodically, https://www.churchofengland.org/more/media-centre/coronavirus-covid-19-guidance-churches.

[46] The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 (laid before Parliament on 12 June 2020) introduced a new reg 5(6)(e) into the original regulations adding to restricted categories of purposes for which a place of worship may be used.

[47] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 5(6)(e), inserted with effect from 13 June 2020, by The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 (S.I. 2020/588), regs. 1(2), 2(4)(c)(ii).

[48] It was not unusual for government guidance to precede publication of the very regulations which they were designed to explain and amplify.

[49] https://www.gov.uk/government/publications/covid-19-guidance-for-the-safe-use-of-places-of-worship-during-the-pandemic.

schools such as Sunday schools, madrassas or yeshivas; choir practice or bell ringing; and tourism.[50] The guidance encouraged faith leaders to consider and adopt the general guidance in the document and seek to include changes that could be made to religious rituals that usually involve close contact between individuals. All use of shared objects and food items should be prevented to limit the spread of infection. The guidance set out key principles designed to minimise the spread of infection to vulnerable persons, and to enforce social distancing.[51]

The guidance made practical recommendations including staggered entry times, multiple entrances, and a one-way flow of people entering and leaving the building, as well as the provision of hand sanitisers. It was strongly advised that individuals should be prevented from touching or kissing devotional and other objects that are handled communally; that books and communal resources such as prayer mats, service sheets or devotional material should be removed from use; that singing and/or playing instruments should be avoided[52] that any pre-requisite washing/ablution rituals should not be done at the place of worship and shared washing areas should be closed; and that where possible faith leaders should discourage cash giving and continue to use online giving and resources where possible.[53] The guidance concluded at paragraph 11 with the following exhortation:

> 'Each place of worship is strongly advised to implement the measures set out in this guidance to ensure that visitors comply with Regulations, and any risk assessments completed for the venue, for the safety of all those who visit and work there. The Government strongly advises each place of worship ensures that visitors comply with the social distancing guidelines.'

With effect from 4 July 2020, places of worship were allowed to open for collective acts of worship subject to certain conditions.[54] This permitted communal worship subject to social distancing and a risk assessment on the capacity of the building; marriage ceremonies with fewer than 30 people in attendance and adherence to social distancing; funerals subject to like conditions; and 'life cycle ceremonies', again subject to the same conditions. A range of detailed governmental guidance was issued such as: *COVID-19: guidance for the safe use of places of worship during the pandemic*;[55] and *COVID-19: guidance for managing a funeral during the coronavirus pandemic*.[56]

6. The Reaction of Religious Organisations

Many religious organizations issued their own guidance, either nationally or locally.[57] Guidance notes was issued by the Church of England and revised periodically.[58] The British Board of Scholars

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50 *COVID-19: guidance for the safe use of places of worship during the pandemic* (Ministry of Housing, Communities and Local Government, 12 June 2020).

51 *COVID-19: guidance* (above) para 3.

52 With the exception of organists who are able to use buildings for practice with appropriate social distancing.

53 *COVID-19: guidance* (above) para 4.

54 The remaining parts of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 were revoked by the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (SI 2020 No 684) with effect from 00.01 hrs on 4 July 2020. This included the restrictions on the use of places of worship under reg 6 discussed above. The government issued the *COVID-19: Guidance for the safe use of places of worship from 4 July* on 29 June in advance of the revocation of the regulations.

55 https://www.gov.uk/government/publications/covid-19-guidance-for-the-safe-use-of-places-of-worship-during-the-pandemic-from-4-july/covid-19-guidance-for-the-safe-use-of-places-of-worship-during-the-pandemic-from-4-july.

56 https://www.gov.uk/government/publications/covid-19-guidance-for-managing-a-funeral-during-the-coronavirus-pandemic/covid-19-guidance-for-managing-a-funeral-during-the-coronavirus-pandemic.

57 By way of example, Church of England guidance on the reception of the sacrament encouraged each communicant to sanitise their hands before and after removing their face covering to receive the bread, and before and after putting it on again: https://mcusercontent.com/14501d5eebc3e98fa3015a290/files/e3431843-273b-403d-9c70-aed1a0678ae7/COVID_19_Advice_on_the_Administration_of_Holy_Communion_v4.1_0.pdf.

58 This included guidance on Baptisms; Weddings; Funerals; Holy Communion; Confirmation; Ordinations and Consecrations; Conducting public worship; Pastoral support in the community including care homes; and a Frequently Asked Questions on the vexed question: *Can a choir sing during worship?* See the commentary at https://www.lawandreligionuk.com/2020/08/17/covid-19-further-changes-to-church-of-england-guidance/ As noted above, on occasions instructions from the Church of England (later styled advice) went further than government regulations required.

and Imams, in a briefing document published on 16 March 2020, offered guidance which included the following:

> 3. We take seriously our responsibility to minister to the welfare of the Community, both worldly and next-worldly. This involves a recognition of the serious importance that our religion places on life, health, community, and spiritual well-being. To trivialise any aspect of this would be an error. As our scholarly tradition demands, our approach in the Guidance is directed by consideration of what is essential, recommended, and desirable. This includes a keen understanding of when (and which) religious rulings may be suspended due to temporary harms or hardship.
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> 5. In the event that government directives are issued over-riding any part of the guidance relating to gathering in public or private spaces, then the government directives would take priority.

This is illustrative of an approach, common across the broad range of religious organizations, suggestive of a willing, voluntary surrender of certain aspects of religious liberty in pursuit of the common good during a global health emergency. Within the Jewish community in the United Kingdom, Chief Rabbi Ephraim Mirvis counselled extreme caution in reopening synagogues, even after the Prime Minister's announcement of a gradual easing of the lockdown, arguing that the overriding guiding principle for a return to normality had to be the sanctity of human life. He went as far as to suggest that 'The Jewish community may need, in some respects, to hold back for a time, even if guidance would permit going further—indeed we may have a religious obligation to do so'.[59] The Initiation Society, which oversees circumcisions for Orthodox Jewish families, directed that attendance at a *bris* be restricted to the parents of the baby and the mohel, while the Association of Reform and Liberal Mohalim decided to suspend circumcisions altogether during the pandemic: 'Such a difficult decision has not been made lightly, but we believe it is in keeping with the overriding Jewish value of *pikuach nefesh* (preserving life)'.[60]

7. Mandatory or Advisory?

Due to speed with which the emergency measures were introduced, there was a lack of clarity as to which provisions were mandatory, which were backed by criminal penalties,[61] and which were merely advisory. Many provisions were portrayed as being compulsory although they had no status in formal law. Guidance was couched in prescriptive terms, albeit it was merely advisory. One distinguished legal academic argued that the guidance on COVID-19 elided and obscured the distinction between public health advice and information about legal prohibitions, a phenomenon he describes as the creation and exploitation of normative ambiguity:

> This phenomenon meant that the scope of individual liberty was unclear and at times misrepresented. Whilst the coronavirus guidance was drafted to fulfil well-intentioned public health objectives, by implying, even unintentionally, that criminal law restrictions were different or more extensive than they in fact were and by failing accurately to delineate the boundary between law.[62]

Likewise, it was unclear which religious directions were mandatory and which were merely advice.[63] Further, the manner in which the restrictions were introduced into law created a democratic

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[59] (Mirvis 2020).
[60] (Rocker 2020).
[61] The imposition of criminal sanctions in the form of £10,000 fines for those organizing gatherings (including protests) was a particularly draconian response.
[62] (Hickman 2020).
[63] For example, the instruction not to live-stream liturgies from closed churches, discussed above.

deficit and lack of legitimacy. There may very well be justification for each of the rules, but they were not imposed by Act of Parliament, nor even sanctioned in advance by Parliament. They were made by government decree which only subsequently come before Parliament for retrospective approval.[64] As the Czech scholar Jan Petrov has observed:

> the deliberative and scrutiny functions of the legislature . . . are crucial not only for preventing the abuse of emergency measures, but also for increasing the effectiveness of emergency measures by improving conditions necessary for compliance.[65]

8. Challenging Government Restrictions—United Kingdom

The case of *R (on the application of Hussain) v Secretary of State for Health*[66] concerned the forced closure of places of worship during 'the emergency period' under regulation 5 of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020.[67] Regulation 6(1) provided that no person is to leave or be outside the place where they live "without reasonable excuse". Regulation 6(2) provided a non-exhaustive definition of what comprises reasonable excuse which included ministers of religion and worship leaders going to their place of worship.[68] There was no corresponding provision permitting others to go to their place of worship.

Swift J refused an application for interim relief concerning Friday prayers (particularly the Jumu'ah)[69] at a mosque in Bradford.[70] The substance of the application was to seek an order effectively suspending the mechanisms of enforcement, including criminal enforcement, contained in the Regulations so that a group of about 40 to 50 Muslims could attend Friday prayers, undertaking to abide by the social distancing requirements set out in government guidance. There was a particularly high burden for the claimant to discharge in demonstrating a real prospect of a permanent injunction being obtained at the substantive trial of the matter. It was argued that the failure to make provision for the claimant to open the Mosque for communal Friday prayers was contrary to his right, under Article 9 of the ECHR, to be permitted to manifest his religious belief in worship, teaching, practice and observance.[71]

Swift J held:

> There is no dispute that the cumulative effect of the restrictions contained in the 2020 Regulations is an infringement of the Claimant's right to manifest his religious belief by worship, practice or observance. The Claimant's case is that attendance at Friday prayers is a matter of religious obligation, and the Secretary of State does not seek to contend otherwise.

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64 See (Cormacain 2020).

65 (Petrov 2020).

66 [2020] EWHC 1392 (Admin).

67 Part of a suite of restrictions contained in the Health Protection (Coronavirus Restrictions) (England) Regulations SI 2020/350. This is a statutory instrument (secondary legislation) made pursuant to powers contained in the Public Health (Control of Disease) Act 1984, an Act of Parliament (primary legislation). Under regulation 5(6) of the Regulations, places of worship could only be open for funerals, the broadcast of acts of worship and the provision of essentially voluntary support services or urgent public support services.

68 In addition, regulation 7 prevented gatherings of more than two people in any public place, save for any of seven specified purposes. Attendance at an act of worship was not one of the permitted purposes. Swift J took the provisional view, without the benefit of full argument, that a public place would naturally include a place of worship. The matter is not free from doubt: see, by way of example, *Church of Jesus Christ of Latter-day Saints v Gallagher (Valuation Officer)* (2008) UKHL 56; and *Church of Jesus Christ of Latter-day Saints v United Kingdom* (2014) ECtHR.

69 "Jumu'ah is both an obligation on healthy adult males and a clarion sign of Islam; lifting or suspending that obligation from the community at large is not a step that can or should be taken lightly. Nonetheless, we reiterate that the prime directive for animating this briefing paper is people's health and welfare, particularly protecting the elderly and infirm," *per* British Board of Scholars and Imams in a Briefing Document published on 16 March 2020.

70 A city in northern England with a large Muslim population.

71 There was no Article 14 claim because the regulations applied equally in respect of collective worship in a church, synagogue, temple or chapel and, accordingly, there was no discrimination against Muslims.

But he considered the interference with the Article 9 right was justified: it only inhibited one aspect of the claimant's religious observance, albeit a significant one. Further the duration of the infringement would be finite, albeit it was currently occurring during Ramadan. And the Government had published a strategy document with a route map to lifting the restrictions as and when it was safe to do so, and in consultation with the Places of Worship Task Force, established for this express purpose.[72] The view of the British Board of Scholars and Imams,[73] which differed from that of the claimant, was relevant to the question of justification.

> This legitimate difference of opinion has something to add to consideration of the question of justification—the fair balance between the general and societal interest and the Convention rights of those such as the Claimant. The Claimant's beliefs do not cease to be important. Real weight continues to attach to them. But the overall fair balance can recognise the indisputable point that the Claimant's beliefs as to communal Friday prayer in current circumstances are not beliefs shared by all Muslims.

There was no real prospect that the claimant would succeed at obtaining a permanent injunction at trial because the pandemic presented 'truly exceptional circumstances' such that the interference would be justified on grounds of public health.

> The virus is a genuine and present danger to the health and well-being of the general population. I fully accept that the maintenance of public health is a very important objective pursued in the public interest. The restrictions contained in regulations 5 to 7, the regulations in issue in this case, are directed to the threat from the COVID-19 virus. The Secretary of State describes the "basic principle" underlying the restrictions as being to reduce the degree to which people gather and mix with others not of the same household and, in particular, reducing and preventing such mixing in indoor spaces. I accept that this is the premise of the restrictions in the 2020 Regulations, and I accept that this premise is rationally connected to the objective of protecting public health. It rests on scientific advice acted on by the Secretary of State to the effect that the COVID-19 virus is highly contagious and particularly easily spread in gatherings of people indoors, including, for present purposes, gatherings in mosques, churches, synagogues, temples and so on for communal prayer."

Swift J referred to the judgment of the German Constitutional Court dated 29 April 2020 in *F* (1BBQ 44/20). In that case, the German Constitutional Court granted relief so as to permit Friday prayers to take place. It concluded that a general prohibition in German law brought in to address the COVID-19 pandemic was in breach of Article 4 of the German Constitution since the law did not allow for exceptional approval to be granted for religious services on a case-by-case basis.

In *Dolan, Monks and AB v Secretary of State for Health*,[74] a wide-ranging application for a judicial review of the regulations and of school closures was refused. However, Lewis J adjourned consideration of the alleged breach of Article 9 as the easing of the regulations with regard to communal worship was already in train. The Claimant asserted that the prohibition on the use of places of worship for communal acts of worship involved a breach of Article 9 of the Convention because, as a Roman Catholic, he had not been able to attend communal worship, or receive the sacraments. Following

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[72] The judgment was handed down on 21 June 2020, and less than two weeks later places of worship were allowed to open for collective acts of worship subject to certain conditions: the remaining parts of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 were revoked by the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (SI 2020 No 684) with effect from 00.01 hrs on 4 July 2020. This included the restrictions on the use of places of worship under reg 6. The government issued the *COVID-19: Guidance for the safe use of places of worship from 4 July* on 29 June in advance of the revocation of the regulations.

[73] Namely that "at this time and until further notice the obligation of Jumu'ah should be lifted from the generality of UK Muslims".

[74] [2020] EWHC 1786 (Admin).

the hearing, which took place on 2 July 2020, regulations were made at 10 a.m. on 3 July 2020 which permitted places of worship to hold acts of communal worship for up to 30 people with effect from 4 July 2020. Lewis J remarked in his judgment (delivered on 6 July 2020) that in relation to the Article 9 breach, "this aspect of the claim may have become academic".[75] He afforded the parties the opportunity to make submissions on the relevance of the new regulations on this issue. The matter is scheduled for a further hearing in the Court of Appeal in September 2020 when the decision of Lewis J will be reviewed.[76]

One effect of the lockdown in the United Kingdom was that secular and religious weddings could no longer take place. Some argued that this amounted to a contravention of Article 12 ECHR (right to marry) which could not be justified by the government by reference to the dangers and disruption caused by the coronavirus epidemic.[77] Others, myself included,[78] were less convinced. The lockdown restrictions amounted to a short-term suspension, not a permanent prohibition, and in an emergency it was still possible to marry either on the authority of a Superintendent Registrar's Certificate or under a Special Licence issued by the Archbishop of Canterbury.[79]

9. Challenging Government Restrictions—USA

Two cases, as far as I am aware, have thus far reached the Supreme Court of the United States:[80] each has ruled against a church which was seeking exemption from statewide closure of places of worship during the COVID-19 pandemic. The general rule in religion cases is that people of faith are bound by valid and neutral laws of general applicability: they cannot claim special exemptions from laws that apply to everybody. But the government may not single out religious organizations for inferior treatment or place undue burdens on them.

South Bay United Pentecostal Church v. Newsom[81] concerned with the distinction between laws of general applicability and laws that treat churches differently from similar institutions.[82] By the time *South Bay* reached the Supreme Court, retail businesses and many workplaces had reopened, albeit with restrictions. Churches were treated more favorably than similarly situated businesses, as they were allowed to re-open sooner than other places where groups of people gather in auditorium-like settings. As Chief Justice Roberts observed:

> Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts,

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[75] The jurisdiction of a court to address matters when the impugned legislation had been revoked was discussed in *Kathumba v President of Malawi* [2020] MWHC 29 (03 September 2020), High Court of Malawi. The Court observed: 'Ordinarily, the extinction of the subject matter to litigation has the consequence of extinguishing the entire action rendering any decision-making by the Court moot thereby becoming a mere academic exercise and of no legal consequence. However, subject matter extinction must arise out of an uncontrollable or inevitable event that occurs during the course of the proceedings. Subject matter extinction cannot be conduced by any of the parties to the matter' (paragraph 3.3) and: 'a finding that the matter herein is moot would only enable the Respondents to evade review of a matter capable of repetition. The facts of the present case are therefore not caught by the constitutional doctrine of mootness' (paragraph 3.5).

[76] In referring the matter for reconsideration by an appellate court, Lord Justice Hickinbottom stated: 'the challenged Regulations impose possibly the most restrictive regime on the public life of persons and businesses ever—certainly outside times of war—but, they potentially raise fundamental issues concerning the proper spheres for democratically elected Ministers of the Government and judges': Reasons for Grant of Permission to Appeal, 4 August 2020.

[77] (Addison 2020).

[78] See also (Cranmer and Pocklington 2020).

[79] The Archbishop of Canterbury's power to authorise a marriage in Wales by Special Licence predates the disestablishment of the Welsh dioceses of the Church of England. The Welsh Church Act 1914 did not remove that power.

[80] On 1 October 2020, the U.S. Ninth Circuit Court of Appeals (by a majority of 2:1) uphold the Governor of California's coronavirus restrictions on indoor worship, concluding that the health orders on churches did not discriminate against religious expression https://www.latimes.com/california/story/2020-10-01/california-appeals-court-churches-coronavirus.

[81] *South Bay United Pentecostal Church v Gavin Newsom, Governor of California* 590 U. S. (2020).

[82] In Europe these would be categorised as discrimination claims: wrongful discrimination on the ground of religion, being a protected characteristic under equality law.

> movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

California's public health order did not require any additional accommodations for places of worship: it was sufficiently compliant with free exercise provisions. As to the general approach of the exercise of judicial discretion, Roberts CJ said this:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." [ ] When those officials "undertake [ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." [ ] Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. [ ]
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> That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.[83]

The dissenting Opinion of Justice Kavanaugh,[84] considered that California's latest safety guidelines discriminate against places of worship and in favour of comparable secular, violating the First Amendment. Factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries were not subject to the 25% occupancy cap imposed on religious premises.

> As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." [ ] This Court has stated that discrimination against religion is "odious to our Constitution." [ ] To justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." [ ] California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens. But "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." [ ]
>
> What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap. California has not shown such a justification. [. . .]
>
> The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: the State may not discriminate against religion.

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[83] This deference principle might be likened to the margin of appreciation exercised by the European Court of Human Rights: legitimate and worthy as a concept, but valueless when deployed capriciously and untethered: see (Hill and Barnes 2019).

[84] Joined by Justices Thomas and Gorsuch.

In *Calvary Chapel Dayton Valley v. Sisolak*,[85] a Nevada public health order directed that churches may not admit more than 50 people at any one time, whereas casinos, breweries, bowling allies and gyms could operate at fifty per cent capacity. The church argued that this disparate treatment was unconstitutional. The order under consideration did not treat churches more favorably than similar institutions,[86] implying that a gathering of 100 people in a church, mosque, or synagogue was more dangerous than a similar gathering of 100 people at a bowling tournament. The rejection of the church's claim for an injunction was not supported by written reasons,[87] but it is indicative a high level of deference under the constitutional principles outlined. However, there are two powerful dissenting opinions.

The first is penned by Justice Alito[88] who notes that whilst the Constitution guarantees the free exercise of religion, it says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance, and remarks that 'the Governor of Nevada apparently has different priorities'. A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy. Justice Alito remarks:

> That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing. We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.

In Justice Alito's opinion,

> [Nevada's] discriminatory treatment of houses of worship violates the First Amendment. In addition, unconstitutionally preventing attendance at worship services inflicts irreparable harm on Calvary Chapel and its congregants, and the State has made no effort to show that conducting services in accordance with Calvary Chapel's plan would pose any greater risk to public health than many other activities that the directive allows, such as going to the gym.

He considered the initial response was understandable.

> In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules.

But he continued that a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists.

> As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

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[85] *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada* 591 U. S. (2020).

[86] As was the case in *South Bay*, although the dissentient Justices viewed it otherwise, taking a different—and broader—comparator.

[87] One can assume they were probably similar to those articulated by Roberts CJ in *South Bay*, set out above.

[88] Joined by Justices Thomas and Kavanaugh. It is instructive that the opinion distinguishes the *South Bay* case (in which Alito J had also joined the dissent). In *South Bay* a church relied on the fact that the California law treated churches less favorably than certain other facilities, such as factories, offices, supermarkets, restaurants, and retail stores. But the law was defended on the ground that in these facilities, unlike in houses of worship, people neither congregate in large groups nor remain in close proximity for extended periods. That cannot be said about the facilities favoured in Nevada. In casinos people do congregate in large groups and remain in close proximity for extended periods. A detailed critique of the distinction between a church and a casino is beyond the scope of this paper.

Justice Alito concluded:

> In sum, the directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause.

In Justice Alito's opinion, the directive fared no better under the Free Speech Clause. Compare the directive's treatment of casino entertainment and church services. Both involve expression, but the directive favors the secular expression in casino shows over the religious expression in houses of worship. Once it is recognized that the directive's treatment of houses of worship must satisfy strict scrutiny, it is apparent that this discriminatory treatment cannot survive. Having allowed thousands to gather in casinos, the State cannot claim to have a compelling interest in limiting religious gatherings to 50 people—regardless of the size of the facility and the measures adopted to prevent the spread of the virus.

Justice Kavanaugh joined in the dissent and added some further comments of his own, remarking that a casino with a 500-person occupancy limit may let in up to 250 people, whereas by contrast, places of worship may only take in a maximum of 50 regardless of their capacity. Nevada offered no persuasive justification for that overt discrimination. A State may not impose strict limits on places of worship and looser limits on restaurants, bars, casinos, and gyms, in the absence of persuasive objective justification.

> Religion cases are among the most sensitive and challenging in American law. Difficulties can arise at the outset because the litigants in religion cases often disagree about how to characterize a law. They may disagree about whether a law favors religion or discriminates against religion. They may disagree about whether a law treats religion equally or treats religion differently. They may disagree about what it means for a law to be neutral toward religion. The definitional battles over what constitutes favoritism, discrimination, equality, or neutrality can influence, if not decide, the outcomes of religion cases. But the parties to religion cases and the judges deciding those cases often do not share a common vocabulary or common background principles. And that disconnect can muddy the analysis, build resentment, and lead to litigants and judges talking past one another.[89]

The legislature, he said, may place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category without causing an Establishment Clause problem. The converse free-exercise or equal-treatment question is whether the legislature is required to place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category. Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category. Under the Court's religion precedents, when a law on its face favors or exempts some secular organizations as opposed to religious organizations, a court entertaining a constitutional challenge by the religious organizations must determine whether the State has sufficiently justified the basis for the distinction. Nevada had had more than four months to respond to the initial COVID-19 crisis and adjust its line-drawing as circumstances change. Yet Nevada was still discriminating against religion. Nevada undoubtedly has a compelling interest in combating the spread of the virus and protecting the health of its citizens. But it does not have a persuasive public health reason for treating churches differently from restaurants, bars, casinos, and gyms.

Almost every State and municipality in America is struggling with maintaining a balance. If preventing transmission of COVID-19 were the sole concern, a State would presumably order almost

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[89] He identified four categories of laws: (1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike; and (4) laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations. Nevada's reopening fell into the fourth category.

all of its businesses to stay closed indefinitely. But the economic devastation and the economic, physical, intellectual, and psychological harm to families and individuals that would ensue (and has already ensued, to some extent) requires States to make tradeoffs that can be unpleasant to openly discuss. With respect to those tradeoffs, however, no precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide. Nevada's rules reflect an implicit judgment that for-profit assemblies are important and religious gatherings are less so; that moneymaking is more important than faith during the pandemic. But that rationale "devalues religious reasons" for congregating "by judging them to be of lesser import than nonreligious reasons," in violation of the Constitution.

More broadly, the State insists that it is in the midst of an emergency and that it should receive deference from the courts and not be bogged down in litigation. If the courts simply enforce the constitutional prohibition against religious discrimination, however, the floodgates will not open. Courts should be very deferential to the States' line-drawing in opening businesses and allowing certain activities during the pandemic. Under the Constitution, state and local governments, not the federal courts, have the primary responsibility for addressing COVID-19, but it is not a blank cheque for a State to discriminate against religious people, religious organizations, and religious services. Justice Kavanaugh concluded:

> There are certain constitutional red lines that a State may not cross even in a crisis. Those red lines include racial discrimination, religious discrimination, and content-based suppression of speech. This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles. The court of history has rejected those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake.

10. Coronavirus and Abortion

A leading Australian scholar has considered the legal and ethical issues arising from the prospect of a COVID-19 vaccine under development which uses a cell line derived from an aborted foetus.[90] Her conclusion is that state-based laws creating incentives to encourage or compel uptake of a future vaccine would not allow for religiously motivated objections under section 116 of the Australian Constitution. I would like to think that a British court would take the religious sensibilities more seriously and at least explore whether alternative vaccines were commercially available which manufacture had not been compromised by the use of cells from an aborted foetus.

A different abortion issue was the subject of litigation in England[91] A judicial review was sought in respect of approval, within the Abortion Act 1967, of the home of a pregnant woman as an authorised place where the treatment for early medical abortion may be carried out.[92] When abortion was legalised, termination of pregnancy usually required a surgical procedure. Developments in medicine now allow medical abortion by taking two medicines either at a 24 to 48-h interval or simultaneously. An earlier approval in 2020 had authorised the second medicine to be taken at the mother's home; the impugned approval extended that to include the first medicine. The rationale was to prevent the

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[90] See (Barker 2020). Concerns were expressed in an open letter sent to the Australian Prime Minister by three Archbishops—Roman Catholic, Anglican and Greek Orthodox—concerns shared by the Australian Federation of Islamic Councils.

[91] *The Queen on the application of Christian Concern v Secretary of State for Health and Social Care* [2020] EWCA Civ 1239.

[92] The approval was time limited until either the date when the temporary provisions of the Coronavirus Act 2020 expire or two years, whichever is the earlier.

mother being exposed to heightened risk of COVID by having to attend a clinic.[93] The thrust of the legal challenge was that this form of self-administered medicine in the home meant that the procedure was not carried out by a registered medical practitioner as required in the statutory framework. Adopting the reasoning of a decision of the Inner House of the Court of Session,[94] the crucial point was that not all acts directed to the termination of pregnancy have to be carried out by a doctor. The doctor does not cease to be in charge of treatment merely because the medication is to be taken by the patient herself at home. The approval was not *ultra vires* the enabling legislation and the judicial review was refused.

11. Global Issues[95]

In Malaysia, Australia, and Japan, places of worship were immediately shut down to prevent the spread of the virus in religious gatherings. Saudi Arabia closed its borders to *Hajj* pilgrims who made their way to the holy land of Islam. A nationwide lockdown in Italy meant that people heard Pope Francis delivering his blessings in empty Saint Peter's Square in the Vatican City as they headed to their homes. In the UK, the Humanists cancelled all ceremonies indefinitely. These are all examples of restrictions that conflict with the right to assemble and to worship in public.

Citizens can reasonably expect their governments to lift current restrictions in due time, although at the time of writing the easing of restrictions has ceased or been put into reverse as a second wave or spike is detected. There is concern that the pandemic will exacerbate authoritarian trends in government. With regards to religious communities and minorities, this may come in the form of continued stigmatisation, discrimination, and harassment.

In Iran, the government released 85,000 prisoners to prevent the spread of the virus, but reportedly placed some of the imprisoned Sufi religious community in overcrowded wards. In India, the pandemic is being used by the Hindu majority state officials to target the Muslim minority population who are being blamed for the rise in cases. In Georgia, authorities allowed religious gatherings for the Orthodox Christians during Easter but reacted with hostility when Muslims wanted to gather for Ramadan.

12. Some 'Covidential' Matters

This paper has focussed on the curtailment of freedom of religion—real or perceived—in consequence of governmental responses to the COVID-19 emergency. It is a helpful counterbalance to identify certain unintended benefits which have accrued in a manner I refer to as 'covidential'. Imaginative new ways have been found to allow religious organisations to flourish and tend to the spiritual needs of congregations and individuals. 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. The State has been compelled to enter into meaningful dialogue with religious organisations, who in turn have improved the ways in which they engage with each other and—collectively—with civic authorities. A lasting effect of the COVID emergency might be its legacy of an improved and enduring dialogue between religious organisations and regional or local government. This should have lasting practical benefits. The government—at all levels—now has an enhanced level of religious literacy. The improved understanding within government of the beliefs

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[93] See the following extract from the government's evidenced: 'The COVID-19 pandemic had multiple impacts on abortion treatment and that this would be the case was evident from, at the latest, mid-March 2020. First, fewer women were willing or able to travel to abortion services because of the danger to themselves in contracting COVID-19 and the difficulties faced in leaving home by those with young children or living in coercive and abusive relationships. Second, the incidence of staff illness within some providers had reduced the availability of provision of services and lengthened waiting times. Third, abortion services themselves were being withdrawn because spare capacity was needed for patients suffering from COVID-19' (emphasis added).

[94] *SPUC Pro-Life Scotland v Scottish Ministers* [2019] CSIH 31.

[95] The following examples are uncorroborated and derived from various websites including: Open Global Rights: https://www.openglobalrights.org/lockdowns-vs-religious-freedom-covid-19-is-a-trust-building-exercise/.

and practices of different faith communities augurs well for constructive cooperation in the future. Proportionality arguments are likely to be better informed in the future.

13. Conclusions

It is difficult to postulate firm conclusions in respect of a situation which is still evolving and with which we engage emotionally making detached objective analysis more difficult than usual. This paper is a work in progress to which I expect to return in the weeks, months and (perhaps) years ahead. Doubtless with hindsight matters will be viewed somewhat differently: but that is not a reason for resisting conjecture while still in the eye of the pandemic's storm. I table for discussion the follow generalisations, mindful that they are capable of improvement, refinement and augmentation.

- Navigating a global health emergency requires a high level of trust between the government and the governed;
- The greater and more immediate the threat, the more likely the population generally will tolerate the restrictions on their human rights in general and curtailment of religious liberty in particular;
- Public health emergencies must be handled with the framework of the rule of law;
- Collaboration between the state and religious organisations (desirable in ordinary circumstances) becomes essential during a health emergency;
- Any curtailment of religious liberty (as with civil rights generally) should be the minimum possible consistent with the emergency faced;
- Restrictions need to the focused and time-limited. Lesser means of achieving the same end should be considered.

Funding: Part of the Global Spotlight Lecture Series 2020, Notre Dame University, London Law Program.

Conflicts of Interest: The author declares no conflict of interest.

References

Addison, Neil. 2020. Is the Coronavirus Ban on Weddings Lawful? *Law & Religion UK*, May 11.

Barker, Renae. 2020. Why Freedom of Religion Won't likely Trump Public Health Interests with a Future Covid-19 Vaccine. *The Conversation*. August 26. Available online: https://theconversation.com/why-freedom-of-religion-wont-likely-trump-public-health-interests-with-a-future-covid-19-vaccine-145030 (accessed on 4 October 2020).

Bielefeldt, Heiner, Nazila Ghanea, and Michael Wiener, eds. 2016. *Freedom of Religion of Belief: An International Commentary*. Oxford: Oxford University Press, pp. 569–70.

Cormacain, Ronan. 2020. *Parliamentary Scrutiny of Coronavirus Lockdown Regulations: A Rule of Law Analysis*. Bingham Centre for the Rule of Law, September 28, Available online: https://binghamcentre.biicl.org/people/ronan-cormacain (accessed on 4 October 2020).

Cranmer, Frank, and David Pocklington. 2020. The Impact of the Covid-19 Pandemic on the Exercise of Religion in the United Kingdom. *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 54: 2020.

Ferrari, Silvio, Mark Hill, Arif Jamal, and Rossella Bottoni, eds. 2020. *The Routledge Handbook on Freedom of Religion of Belief*. London: Routledge.

Hickman, Tom. 2020. The Use and Misuse of Guidance during the UK's Coronavirus Lockdown. September 4. Available online: https://ssrn.com/abstract=3686857 (accessed on 4 October 2020).

Hill, Mark, and Katherine Barnes. 2019. Limitations on Freedom of Religion and Belief in the Jurisprudence of the European Court of Human Rights. In *The European Court of Human Rights and the Freedom of Religion or Belief: The First 25 Years Since Kokkinakis*. Edited by Jeroen Temperman, T. Jeremy Gunn and Malcolm Evans. Leiden: Brill Nijhoff, pp. 82–102.

McCrudden, Christopher. 2020. Democracy, Protests, and Covid-19: The Challenge of (and for) Human Rights. *United Kingdom Constitutional Law Association*, June 19.

Mirvis, Ephraim. 2020. Our Greatest Strength Is now Our Weakness. *The Jewish Chronicle*, May 14.

Petrov, Jan. 2020. The COVID-19 emergency in the age of executive aggrandizement: What role for legislative and judicial checks? *Theory and Practice of Legislation* 8: 71–92. [CrossRef]

Rocker, Simon. 2020. Progressive Movements Suspend Circumcision Ceremonies while Orthodox Minimises Attendance. *The Jewish Chronicle*, March 26.

Sumption, Jonathan. 2020a. Lockdown Challenges Face Tough Audience. *The Times*, May 14.

Sumption, Jonathan. 2020b. Rebel MPs are right—Ministers must not rule by decree. *The Times*, October 1.

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Article

The Right of Religious Freedom in Light of the Coronavirus Pandemic: The Greek Case

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Abstract: The purpose of this article is to take into consideration the impact of unprecedented restrictions due to COVID-19 on the exercise of religious freedom according to the Greek legislation and case-law. The crucial fact to be examined is the proportionality of the exceptional measures of the Greek State. At the beginning of the pandemic, religious ceremonies were allowed only in the presence of clerics, but nowadays they are permitted on the condition that the measures of "social distancing" are being followed strictly. As it is generally accepted, the Greek State managed to deal with the pandemic without deviations from constitutional order and protection of fundamental rights, in accordance with a "pressing social need". In this context, the case-law of the Greek courts is of great importance, which ruled that the above mentioned restrictions did not offend the principle of proportionality, especially because of their temporary and short-term character. Nevertheless, these restrictive measures must be revised from time to time, considering the updated, epidemiological data in order to be selected the most appropriate and less stringent on a case-by-case basis. Consequently, these judgments do not give government a blank cheque regarding the management of the pandemic, but rather provide them with a clear framework which is able to guarantee the measures' accordance with the Greek Constitution. However, the potential risk that people may become used to the restrictions imposed after the crisis has passed must not be overlooked.

Keywords: freedom of religion; Greek case-law; COVID-19

Citation: Androutsopoulos, George. 2021. The Right of Religious Freedom in Light of the Coronavirus Pandemic: The Greek Case. *Laws* 10: 14. https://doi.org/10.3390/laws10010014

Received: 2 January 2021
Accepted: 17 February 2021
Published: 23 February 2021

1. Introduction

It would have been impossible for the Greek legal order to remain unaffected by the COVID-19 pandemic. More precisely, the management of the pandemic crisis has affected conventional relations either directly or indirectly (Karampatzos 2020; Tsolakidis 2020) and inevitably caused the broader decline of both individual rights and fundamental freedoms (Contiades 2020, p. 89ff). Religious freedom, one of the first individual rights claimed in Europe as early as in the 16th century (Konidaris 2020, p. 65) and analyzed into freedom of religious consciousness and freedom of religious worship, is included among them. In particular, the latter refers to the exercise of religious duties[1] in ritualistic forms (Chryssogonos and Vlachopoulos 2017, p. 323) and may occur individually or in community with others, in private or in public, in specially designated houses of worship or outdoors (see for details Papageorgiou 2012, p. 52ff). Likewise, freedom of religion is one of a suite of rights contained in international declarations and conventions, which overlap and interconnect (Ferrari et al. 2020). Whether the strict state/legislative restrictions imposed on the exercise of religious freedom (see also Weiner et al. 2020; Consorti 2020, p. 15) fulfilled the terms and requirements of the condition of proportionality, which ultimately constitutes the threshold of their constitutionality, is a crucial matter. In this case, the role of the courts stands exceptionally strong as "*it seems easy to predict that waves of*

[1] For Orthodox Christians, the religious duties are, for example, the following: (a) going to church and take the sacrament (Eucharist), (b) individual or private prayer in the church, (c) listening to the Bible, etc.

litigation revolving around anti-Covid-19 regulations will flood many courtrooms . . . " (Pin 2020). Moreover, "*the courts have played an active role in monitoring the executive in many countries to ensure that checks and balances remain robustly in place*" (Tew 2020); hence, it is imperative to combine "*normative and political wisdom*" (Benítez 2020) when issuing their decisions and that because "*in a state of emergency, the judiciary fulfils three main functions: it resolves individual disputes over emergency policies, checks the executive, and clarifies the likely imperfect emergency policies*" (Petrov 2020, p. 80).

2. The Legislative Framework

Within the framework of reducing the spread of COVID-19, the Greek Government was forced to legislate emergency measures. Therefore, at first, an Act of Legislative Content (submitted to the Parliament for approval: Law 4682/2020) was issued on the 25th of February 2020 under the title "*Urgent measures to prevent and limit the spread of coronavirus*" through which "*the temporary prohibition of the operation [. . .] of places of worship*" was foreseen, amongst others, as a potential measure as decided by the competent Minister of Education following the consultation of the National Commission of Protection of Public Health. In fact, it is taken for granted that the relevant decision, which is made in view of the constitutional principle of proportionality, ought to clearly state, among other things, the specific public health emergency that imposes the issue of the measure as well as to specify the duration of its implementation.

In accordance with the implementation of the aforementioned legislative provision, a ministerial decision (no. 2867) was issued on the 16th of March 2020 which established the temporary prohibition of exercising all kinds of religious services and ceremonies in all places of worship without exceptions as precautionary measures of public health for the period of time from 16 to 30 March. On the contrary, attendance was allowed only in case of individual prayer[2], services were strictly restricted to television or radio broadcasts and funerals were allowed with the presence of a priest and the utmost close relatives. Subsequently, the relevant framework was partly modified, mostly because of Easter, as it allowed gatherings of worship to be strictly held only by the priests and the necessary auxiliary staff (such as preachers and vergers[3]).

After having taken into consideration the country's reduced number of cases of COVID-19, a ministerial order (no. 29519) was issued on the 12th of May 2020 which initially enabled the limited operation of places of worship until the 5th of June 2020 for the first time after the launch of the lockdown, with the provision of a maximum number of attendees inside the buildings as well as the obligation that all the necessary precautionary measures are satisfied as established by the National Commission of Protection of Public Health to avoid the spread of COVID-19.

In accordance with the aforementioned, with a subsequent ministerial order (no. 48967) as issued on the 31st of July 2020, the mandatory usage of non-medical masks was imposed on all places of religious worship regardless of their legal status, not only during services, worship gatherings, holy ceremonies, sacred mysteries, funerals and their relevant events, but also during attendance for individual or private prayer. Finally, the same aforementioned imperatives related to the protection of public health aiming to address the risk of COVID-19 spread imposed the issue of a new ministerial order (no. 50451) on the 9th of August 2020, with regard to the 15th of August, which suspended the conduction of all religious ceremonies regardless of religion or doctrine that are held via a religious procession outside the religious building. In any case, religious buildings have operated without public attendance since the 6th of November 2020.

[2] The potentiality of individual prayer was abolished with ministerial order no. 20036 issued on 22 March 2020 since *no provision was made for the consideration of an exceptional reason for individual movement.*

[3] A person who takes care of the interior of a church and acts as an attendant during services.

3. The Orthodox Church's Reaction

The effectiveness of these restraining measures depended greatly on the cooperation of the Greek Orthodox Church. Before all holy ceremonies in places of worship were temporarily suspended by government decision, the Orthodox Church had decided, on the one hand, that churches would remain open for personal prayer and, on the other hand, that the holy Mass would take place in a modest way with public attendance from Sunday the 22nd of March 2020 until Lazarus Saturday on 11th of April 2020, from 7:00 to 8:00 a.m. It has been supported that *"the Holy Synod on 16 of March resolved to adopt measures of doubtful utility and poor effectiveness for the current level of spread of the epidemic"* (Martinelli 2020, p. 86). However, it is a fact that at that particular moment the Church with its attitude towards the matter had reached the fullest extent of any room for compromise.

Subsequently, the government measure regarding the closure of churches that undoubtedly restricted the religious worship triggered the Greek Orthodox Church which immediately took the initiative in order for the relevant legislative framework to be amended towards finding a less restrictive measure that would allow the freedom of religious worship and protect the public health alike. Therefore, it was requested among others to the State *"to allow the Divine Liturgy and the Mass to be conducted by only one priest without the attendance of the faithful crowd"*.

At this point, the fact must be underlined that the collective exercise of the freedom of worship, which occurs in the churches, is for the Orthodox Church of great importance. Specifically, the Eucharist, where the Christians receive God's gift of himself to them, is the center of Church's life and, in consequence, the participation of Christians in the eucharistic service is the principal event. In such a meaning, a priest cannot perform per Orthodox "canon" law a eucharistic service only by himself, which can be performed in the presence of at least the preacher and verger. Thus, the operation of church buildings closed for public worship only by the implementation of "ecclesiastical economy"[4] could be justified.

Following its meeting on the 1st of April 2020 in order to reevaluate the effects the spread of COVID-19 had on the Church, the Holy Synod took the decision to accept the government's will regarding the "reopening" of the churches especially during the Holy Week "behind closed doors" and with only a priest, a preacher and a verger being present, as delivered to the media by the competent Minister of Education. In the context of the enforcement of the ministerial decision, the Greek Orthodox Church issued a synodic circular (no. 3018/7.4.2020), which notified the Metropolitans to adhere to "the arrangements" in order to prevent any *"malicious comments and blaming"*.

Therefore, except from a few inevitable but altogether reprehensible dissonances[5], the Greek Church finally came in terms with the experts' suggestions, partaking in its own way in the State's attempt to mitigate the spread of COVID-19.[6]

4. The Principle of Proportionality

It is widely accepted that the allowed space of restricting the exercise of such a fundamental right as religious freedom, and especially regarding the aspect of freedom of worship, is defined by the adequacy and necessity of the taken measure, as well as its appropriateness towards the desired objective. It is of note that the principle of proportionality can be traced back to the ancient Greek ideal of the principle of "mediocrity", according to which "μέτρον ἄριστον", and was further integrated into the Greek Constitution during its

[4] The sui generis institution of "ecclesiastical economy" is found only in the field of Ecclesiastical Law and it consists of the non-precise implementation of a particular holy canon on the part of a body of ecclesiastical power in a particular case and for reasons of equity (Papageorgiou 2012, p. 28).

[5] Despite the fact that the Greek Orthodox Church notified the Metropolitans to adhere to the aforementioned legislative provisions, some of the Metropolitans refused to apply the measures taken on the grounds that they were hostile to the Orthodox Church. It is obvious that this reaction was unacceptable.

[6] The only exception was the Greek Orthodox Church's official refusal to apply the restrictions imposed suddenly and completely barred churches from meeting indoors during *"Theophany"*—a Christian feast day that celebrates the revelation of God incarnate as Jesus Christ (January, 6). It is of note that, as far as I am aware, for first time the Greek Orthodox Church reached the Council of State in globo against the prohibition of conducting holy activities during *"Theophany"*.

revision in 2001 (article 25 paragraph 1 subparagraph δ'), despite the fact that the principle had already been configured by the case-law. In practice, it is probably the most important prerequisite every restriction of a fundamental right should adhere to.

Therefore, its implementation follows three stages of scrutiny; the restriction, thus, must be (a) adequate so as to produce the desired result, (b) necessary, that is a sine qua non condition which means that *"no other option is possible or that the consequences will be dire if the restriction is not imposed"* (Gunn 2012, p. 261) and *"the necessity must be of such a gravity as to trump the exercise of religious liberty"* (Hill 2020). In other words, *"the test of necessity asks whether the decision, rule or policy limits the relevant right in the last intrusive way compatible with achieving the given level of realization of legitimate aim. This implies a comparison with alternative hypothetical acts (decisions, rules, policies etc.), which may achieve the same aim to the same degree but with less cost to rights"* (Rivers 2006, p. 198) and (c) proportionate (stricto sensu or striking a balance between competing rights and interests in a particular case: Anđelković 2017, p. 241), meaning that the burden caused by the restriction of freedom must not exceed the positive outcome for the public interest caused by restriction (Robbers 2005, pp. 859–60; Doe 2011, p. 62). Moreover, proportionality stricto sensu *"leads to a weighing between competing values to assess which value should prevail"* (Pirker 2013, p. 31) and *"requires a balancing of the benefits gained by the public and the harm caused to the constitutional right through the use of the means selected by law to obtain the proper purpose"* (Barak 2012, p. 340). The preferential interpretive of the principle of "practical harmony" (praktische Konkordanz) can be found in this last phase (parametre c) dictating the composition or at least the coexistence and balancing of the opposing constitutional interests (Scaccia 2019, p. 7).

The implementation of these evaluation techniques is necessary in order "*to balance the freedom of religion against competing freedoms that are also constitutionally protected, or against objective goals that have constitutional status. Balancing is not calculable but controlled*" (Engel 2011). Therefore, what should be done in this particular case when two obligations of the State: on the one hand, the assurance of religious worship, and on the other hand, the protection of public health, should simultaneously be serviced despite fighting each other? Based on the constitutional law it is accepted that "*an abstract manner of hierarchy between constitutional rights does not exist and in case that one conflicts another, they must be weighted in the manner of the specific actual circumstances existing each time. This is the right choice. However, when not only the health but even the citizens' life is put in danger, it is obvious that the protection of human life has increased weight in the aforementioned procedure. Because, ultimately, the existence of life consists the prerequisite for the conduction of all human rights*" (Vlachopoulos 2020).

5. The Relevant Case-Law

At primary stages of their implementation, the individual regulations of the emergency legislation, especially regarding the restrictions imposed to the exercise of the right of religious worship, were put under judicial judgement whose duty was to examine whether these restrictions exceeded the terms of proportionality.

In that context, the annulment of the ministerial decision no. 2867 was put into discussion by the Administrative Court of First Instance of Athens under the justification that the constitutionally regulated principle of proportionality is primarily infringed *"based on the fact, that the complete suspension of the conduction of the Mass in all Holy Temples and Monasteries should not be the only way to effectively protect the public health"*. In the context of these objections, the Court issued the decree no. 342/2020, which determined that according to the written case-law, temporary precautionary measures were taken in order to protect the public health and were not imposed as individual sanctions but rather as restrictions to the collective conduction of an individual right. Thus, the protection of the outweighing public health imposed the temporary restriction of conducting religious activities in accordance with the principle of proportionality.

The decision of the Commission of the Council of State, which was called to resolve the ongoing dispute, was towards the same direction. Similarly, in accordance with decision no. 49/2020, it was decided that the temporary nature of the measures and their reasonable duration combined with the lack of other measures that could immediately be taken for the effective protection of public health, due to the existence of overriding reasons of public interest, deemed the suspension of their application prohibitive.

The same rationale is also adopted by the decision no. 60/2020 of the aforementioned Council (Nomokanonika 2020, vol. 2, pp. 108–12, see similarly Council of State decision no. 99/2020), where it is supplemented that the documentation of the necessity of the measures taken to address the pandemic consists of a heavy responsibility of the Administration in accordance with the principle of proportionality, in view of their particularly restrictive nature regarding the exercise of fundamental rights, such as religious freedom and especially the freedom of worship. In fact, the fulfillment of this responsibility is subject to the corresponding judicial review that will necessarily take into account the time passed since the first need of adoption of the emergency measures for the prevention of the COVID-19 spread. Therefore, it is clear that the decision of the Council of State regarding the compatibility of the measures taken according to the principle of proportionality will not necessarily remain unchanged in the future as, amongst others, their short duration constitutes the main objective.

The same view is also expressed by the relevant decree no. 1 BvQ 28/20 on the 10th of April 2020 of the Federal Constitutional Court of Germany[7] (Bundesverfassungsgericht). In particular, with this decree and after having evaluated the request to provide temporary judicial protection against the prohibition of conducting holy activities during Easter, the Court decided that the prohibition of religious gatherings during the pandemic is legal as the protection of life is considered the ultimate goal, despite the fact that the prohibition constitutes an exceptionally severe interference in the religious freedom, especially during Easter, when the religious life of Christians is at its peak.

Nonetheless, the final paragraph of the Court (no. 14) according to which "*every extension of this temporary measure must be imposed to rigorous assessment regarding its proportionality while also taking into consideration the present conditions*" appears to be of paramount importance. In other words, the principle of proportionality should be strictly imposed due to the intensive interference in the public's religious worship. In practice, this means that the prohibition of religious gatherings must constantly be reevaluated based on the latest data about the progress of the spread of the virus as well as the durability of the health-care system, in order to determine whether the prohibition of religious gatherings can be replaced with less excessively restrictive measures (Vlachopoulos 2020, pp. 54–55).

In the same context, a recent decision of the Supreme Court of the United States must be mentioned (*Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, 592 U. S. ___ [2020]), which ruled that:

"Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure".

Similarly, on 5 February 2021, the US Supreme Court issued a pair of orders that overruled as unconstitutional California state restrictions that completely barred churches from meeting indoors but left in place percentage capacity limitations and bans on singing

[7] See the decision available online: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200410_1bvq002820.html.

or chanting (*South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, 592 U. S. ____ [2021])[8]. As Justice Gorsuch observed[9]:

"Since the arrival of COVID–19, California has openly imposed more stringent regulations on religious institutions than on many businesses [. . .] Apparently, California is the only State in the country that has gone so far as to ban *all* indoor religious services [. . .] Regulations like these violate the First Amendment unless the State can show they are the least restrictive means of achieving a compelling government interest [. . .] Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard. Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution".

Additionally, at this point, it has to be indicated that the Administration, in accordance with its regulatory competence following a reasoned opinion from a specialized scientific committee, has the discretionary power to choose the appropriate, necessary, and as mild as possible measures, where relevant, for the protection of public health and definitely not the obligation to impose the prohibition of specific activities. Thus, it was determined by the Council of State, via its decree no. 161/2020, that by not prohibiting specific religious activities, such as the Sacrament, the competent minister does not omit a required legal action, as the evaluation of the purpose of proceeding or not to such kind of action is at the discretion of the substantive judgement of the Administration which is not under the control of the Court.

In the same context, the Administrative Court of First Instance in Larisa decided on objections raised in favor of the annulment of the ministerial order no. 50451 which had totally prohibited the litanies[10] outside the places of worship. The applicants supported that the general prohibition of the litanies during August constituted an interference in the internal affairs of the Church and opposed the principle of proportionality, as it nullified the minimum protection of the right of religious freedom, considering the fact that they were deprived of the conduction of the processions as prescribed by the worshipping practices of the Church, without an existing imperative reason of public interest, as the country was not subject to general curfew.

Additionally, via decree no. 17/2020 (see also decree no 1083/2020 of Administrative Court of First Instance, Athens) and by essentially repeating the reasoning and the legal basis of the decree no. 342/2020 of the Administrative Court of First Instance of Athens which proceeded it, the Court accepted that in view of the temporary nature of the measures there is no question of the State interfering in the internal affairs of the Church (interna corporis). This is so as the processions were not abolished by the contested ministerial decision perpetually but instead their conduction was suspended for a particularly short-term period of time (August of 2020) as determined by the equivalent magnitude of restriction of the freedom of worship in order to ensure the superior value public health of those living in the Greek territory.

Following its no. 49, 60 and 99/2020 decrees[11] which were issued in the context of temporary judicial protection, the Council of State was called at the end of May 2020 to reach a decision regarding the requests of annulment of those ministerial decisions, which temporarily abolished liturgies and holy activities in all places of religious worship without exemption. However, because the validity of the contested ministerial decisions had already expired as the conversations regarding the matter were taking place, the Court

[8] For an overall approach of US courts' caselaw regarding the restrictions on religious liberty due to coronavirus pandemic, see Brian J. Buchanan, *Covid-19 and the First Amendment: A running report* (February 9), available online: https://www.mtsu.edu/first-amendment/post/613/covid-19-and-the-first-amendment-a-running-report-dec-18 (accessed on 10 February 2021).

[9] Joined by Justices Thomas and Alito.

[10] A litany is defined as the religious ceremony with vows and hymns and with the participation of the clergy and the public in a procession as invocation to God in cases of an act of God or to honor a Saint, etc.

[11] See also Council of State decision no 2/2021.

decided (see decree no. 1294-1296/2020) with a marginal majority and possibly via a formalistic approach in favor of no need to adjudicate.

More specifically, the Council of State determined that the applicants had no particular legal interest in the continuation of the proceedings that consisted of the moral damages caused by the contested ministerial decisions affecting the core of their right of religious freedom in the form of religious worship. The decision was based on the rationale that the recovery from the psychological and emotional ordeal, possibly caused by their separation from their religious community, could have been achieved by executing relevant action, without being necessary to issue relevant judgment annulling. Thus, the chance for the pleas to be objectively investigated by the Court was unfortunately lost.

6. Conclusions

There is no doubt that the measures undertaken have inevitably encroached on rights and freedoms which are an integral and necessary part of a democratic society governed by the rule of law. However, it is also accepted by the case-law, that *"Greece [. . .] is now a European paradigm of effectively dealing with the novel pandemic without deviations from constitutional order and protection of fundamental rights"* (Doudonis 2020). This statement is of great importance and despite the fact that frequently the "*Emergencies can be used as cover in for profoundly damaging changes to the constitutional limits and restrictions on the exercise of governmental power*" (Cormacain 2020). In that context, it should be accepted that the State utilized the opportunities provided by the Constitution and the European Convention of Human Rights regarding the management of a "health related state of emergency" to their full extent, by "playing" with their limits without surpassing them in general (Sotirelis 2020).

However, as it has already been highlighted, "*the saga of the (Greek) coronavirus crisis-law is, like everywhere, utterly reduced to the proportionality of the exceptional measures of the (Greek) State, but its moral and political implications seem far broader and ambiguous*" (Karavokyris 2020). Thus, we should not forget that "*Crises require decisive government action, but governments often use times of crises to encroach on individual freedoms or target minority groups long after the crisis has passed*" (Manchin and Carr 2020). Thus, the greatest danger is not the implementation of the measures taken—this is something temporary—but the potential to become used to them; this could be fatal. This is because "*the constitutional rights are really valuable. If at this moment we accept the temporary restriction of them in order to continue their exercise, this does not mean that it is allowed to get used to their loss*" (Vlachopoulos 2020, p. 23). As a conclusion, it is crucial to put a specific emphasis on the Council of Europe's declaration: "*The virus is destroying many lives and much else of what is very dear to us. We should not let it destroy our core values and free societies*"[12].

The emergency legislation was inevitably caused by the sudden appearance of the pandemic. In fact, the necessity of protecting the public health, which was under immediate danger, imposed measures to be taken by the government restricting other constitutionally established, important and legal values such as, in this case, religious freedom, particularly in the context of freedom of worship. These restrictive regulations were decided by the government in accordance with the results and guidance of expert scientists whose decisions cannot be assessed via lessons learned from common experience, and were hence obliged to validate them. It is true that, particularly for the Orthodox Church, the measures taken had a great impact mainly on Christians' collective religious freedom because they did not have, due to the restrictions imposed, the chance to take the Sacrament or to participate in several ceremonies as the churches were closed most of the time.

It is accepted that the regulation of the freedom of religious worship from the legal order also includes the establishment of specific restrictions. In this case, the refusal of the faithful crowd to conform to the laws cannot be justified by their religious beliefs. In fact,

[12] Council of Europe, Information Documents SG/Inf(2020)11 (7 April 2020), *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states*. Available online: https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40 (accessed on 10 February 2021).

these laws must be of general application and ensure the protection of the important legal value which interests the general public and is protected by the Constitution (article 13 par. 4). The public health whose protection is imposed by the Constitution via the adoption of precautionary measures (article 21 par. 3) undoubtedly belongs amongst the last.

Of course, the permissible limits regarding the exercise of such a fundamental right are determined by the adequacy and necessity of the taken measure as well as by its proportionality to the desired result. In fact, the interference of the State in the religious freedom, in this particular case, must correspond to a "pressing social need", in accordance with the case-law of the European Court of Human Rights (*Svyato-Mykhaylivska Parafiya vs Ukraine*, 14.6.2007, recital 116) and therefore the term "necessary" does not have the same flexibility as the phrases "useful" or "desired".

According to the case law of the Greek courts, the principle of proportionality was not infringed by the restrictive measures regarding the freedom of worship, mostly because of the duration of the measures and their temporary nature in particular. Thus, it becomes obvious that as far as their content is concerned the prohibitive or restrictive measures related to the freedom of worship cannot remain unchanged, but they must be redesigned "*from time to time*" based on the renewed data regarding the pandemic, in order for the mildest and most adequate of them to be chosen. Although judicial review is limited to the temporary and revisable nature of the measures taken, it must be underlined that, at least indirectly, it takes into consideration that the burden caused by the restriction of freedom of religion does not exceed the positive outcome for the public interest (public health protection) caused by the above mentioned restriction (proportionality stricto sensu).

In the same context, it is difficult to support that the courts provided a blank cheque to the political authorities for the management of the COVID-19 pandemic. On the contrary, although they rejected the relevant requests of judicial protection, they kept a neutral attitude because they dictated the terms about the constitutional rescue and sustainability of the established measures.

Collaboration between the state and religious organizations (desirable in ordinary circumstances) becomes essential during a health emergency (Hill 2020). It is worth noting that the Orthodox Church and State relation in Greece was, in the main, a good paradigm.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The author declares no conflict of interest.

References

Anđelković, Luka. 2017. The elements of proportionality as a principle of human rights limitations. *Facta Universitatis Series: Law and Politics* 15: 235–44. [CrossRef]

Barak, Aharon. 2012. *Proportionality, Constitutional Rights and Their Limitations*. Cambridge: Cambridge University Press.

Benítez, R. Vicente F. 2020. Hercules Leaves (But Does Not Abandon) the Forum of Principle: Courts, Judicial Review, and COVID-19. *International Journal of Constitutional Law Blog*. Available online: http://www.iconnectblog.com/2020/05/hercules-leaves-but-does-not-abandon-the-forum-of-principle-courts-judicial-review-and-covid-19 (accessed on 18 November 2020).

Chryssogonos, Costas, and Spyros Vlachopoulos. 2017. *Atomika kai Koinonika Dikaiomata*, 4th ed. Athens: Nomiki Vivliothiki. (In Greek)

Consorti, Pierluigi. 2020. Religions and virus. In *Law, Religion and Covid-19 Emergency*. DiReSoM Papers 1. Edited by Pierluigi Consorti. Pisa: DiReSoM, p. 15ff. Available online: https://diresomnet.files.wordpress.com/2020/05/law-religion-and-covid-19-emergency_diresom-papers-1-2.pdf (accessed on 23 November 2020).

Contiades, Xenophon I. 2020. *Pandemic, Biopolitics and Rights. The World after Covid-19*. Athens: Kastaniotis ed. (In Greek)

Cormacain, Ronan. 2020. "Social Distancing" of Emergency Legislation during the Covid-19 Pandemic. *UK Constitutional Law Blog*. Available online: https://ukconstitutionallaw.org/2020/07/10/ronan-cormacain-social-distancing-of-emergency-legislation-during-the-covid-19-pandemic (accessed on 19 November 2020).

Doe, Norman. 2011. *Law and Religion in Europe. A Comparative Introduction*. Oxford: Oxford University Press.

Doudonis, Panagiotis. 2020. Greece Is No Longer Europe's Black Sheep: Coronavirus, Greek Government's Response and the Constitution. *UK Constitutional Law Blog*. Available online: https://ukconstitutionallaw.org/2020/04/08/panagiotis-doudonisgreece-is-no-longer-europes-black-sheep-coronavirus-greek-governments-response-and-the-constitution (accessed on 19 November 2020).
Engel, Christoph. 2011. Law as a Precondition for Religious Freedom. MPI Collective Goods Preprint No. 6. Available online: https://ssrn.com/abstract=1803254 or http://dx.doi.org/10.2139/ssrn.1803254 (accessed on 19 November 2020).
Ferrari, Silvio, Mark Hill, Arif Jamal, and Rossella Bottoni, eds. 2020. *The Routledge Handbook on Freedom of Religion of Belief*. London: Routledge.
Gunn, T. Jeremy. 2012. Permissible limitations on the Freedom of Religion or Belief. In *Religion and Human Rights. An Introduction*. Edited by J. Witte and M. Christian Green. Oxford: Oxford University Press, p. 254ff.
Hill, QC Mark. 2020. Coronavirus and the Curtailment of Religious Liberty. *Laws* 9: 27. [CrossRef]
Karampatzos, Antonios. 2020. Pandemic (Covid-19): Contractual relations and emergency law—In particular force majeure clauses. *Chronicles of Private Law* 5: 378ff. (In Greek)
Karavokyris, George. 2020. The Coronavirus Crisis-Law in Greece: A (Constitutional) Matter of Life and Death. *Verfassungsblog*. Available online: https://verfassungsblog.de/the-coronavirus-crisis-law-in-greece-a-constitutional-matter-of-life-and-death (accessed on 12 November 2020).
Konidaris, Ioannis. 2020. *Lessons of Ecclesiastical Law*. With the cooperation of Androutsopoulos George. Athens-Thessaloniki: Sakkoulas Publications. (In Greek)
Manchin, Gayle, and James Carr. 2020. COVID-19 Symposium: Don't Let Religious Freedom Become a Casualty of Coronavirus. Available online: http://opiniojuris.org/2020/04/06/covid-19-symposium-dont-let-religious-freedom-become-a-casualty-of-coronavirus (accessed on 12 November 2020).
Martinelli, Enrica. 2020. The Greek Orthodox Church at the time of the SARS-CoV-2 epidemic. In *Law, Religion and Covid-19 Emergency*. DiReSoM Papers 1. Edited by Pierluigi Consorti. Pisa: DiReSoM, p. 81ff. Available online: https://diresomnet.files.wordpress.com/2020/05/law-religion-and-covid-19-emergency_diresom-papers-1-2.pdf (accessed on 23 November 2020).
Papageorgiou, Constantinos. 2012. *An Introduction to Hellenic Ecclesiastical Law*. Trikala-Thessaloniki: DeGiorgio Editions.
Petrov, Jan. 2020. The COVID-19 emergency in the age of executive aggrandizement: What role for legislative and judicial checks? *The Theory and Pr actice of Legislation* 8: 1–2, 71–92. [CrossRef]
Pin, Andrea. 2020. Fighting Fire with Fire? The Judicial Review of Anti-Pandemic Measures. *Law and Human Rights Observatory*. Available online: https://tcdlaw.blogspot.com/2020/07/fighting-fire-with-fire-judicial-review.html (accessed on 18 November 2020).
Pirker, Benedikt. 2013. *Proportionality Analysis and Models of Judicial Review*. Zutphen: Europa Law Publishing.
Rivers, Julian. 2006. Proportionality and Variable Intensity of Review. *The Cambridge Law Journal* 65: 174–207. [CrossRef]
Robbers, Gerhard. 2005. The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany. *Emory International Law Review* 19: 841–88.
Scaccia, Gino. 2019. Proportionality and the balancing of rights in the case-law of the European Courts. *Federalismi.it* anno XVII: 1–34. Available online: https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38092 (accessed on 24 November 2020).
Sotirelis, Giorgos. 2020. The Democracy against the Pandemic. Available online: https://www.constitutionalism.gr/2020-04-11-sotirelis-dimokratiapandimia (accessed on 24 November 2020). (In Greek)
Tew, Yvonne. 2020. Constitutionalism in the Time of Corona. *International Journal of Constitutional Law Blog*. Available online: http://www.iconnectblog.com/2020/06/constitutionalism-in-the-time-of-corona (accessed on 18 November 2020).
Tsolakidis, Zafeirios. 2020. Covid-19 Pandemic and Greek Contract Law. *Opinio Juris in Comparatione*. Available online: http://www.opiniojurisincomparatione.org/opinio/article/view/159 (accessed on 24 November 2020).
Vlachopoulos, Spyros. 2020. *Constitutional* «μιθδριδατισμός». *The Individual Liberties in Pandemic Times*. Athens: Eurasia Publications. (In Greek)
Weiner, Scott, Lavery Kirsten, and Nardi Dominic. 2020. The Global Response to the Coronavirus (COVID-19): Impact on Religious Practice and Religious Freedom. Washington: U.S. Commission on International Religious Freedom. Available online: https://www.uscirf.gov/sites/default/files/2020%20Factsheet%20Covid19%20and%20FoRB.pdf (accessed on 31 October 2020).

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The Impact of the Church–State Model for an Effective Guarantee of Religious Freedom: A Study of the Peruvian Experience during the COVID-19 Pandemic

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Abstract: During the COVID-19 pandemic, many governments established important restrictions on religious freedom. Due to a restrictive interpretation of the right to religious freedom, religion was placed in the category of "non-essential activity" and was, therefore, unprotected. Within this framework, this paper tries to offer a reflection on the relevance of the dual nature of religious freedom as an individual and collective right, since the current crisis has made it clear that the individual dimension of religious freedom is vulnerable when the legal model does not offer an adequate institutional guarantee to the collective dimension of religious freedom.

Keywords: religious freedom; church–state models; rule of law; religious entities; state of national emergency

Citation: Mosquera, Susana. 2021. The Impact of the Church–State Model for an Effective Guarantee of Religious Freedom: A Study of the Peruvian Experience during the COVID-19 Pandemic. *Laws* 10: 40. https://doi.org/10.3390/laws10020040

Received: 16 February 2021
Accepted: 29 April 2021
Published: 19 May 2021

1. Introduction

It is possible to affirm that basic rights and freedoms have suffered a very direct impact due to the drastic regulations instituted to control the effects of the global COVID-19 pandemic. It was necessary to balance the rights of individuals with those of the community. Freedom of movement, the restriction of the rights of peaceful assembly and manifestation, the adequate provision of the right to education and the effect on the rights to life and health are only some of the essential freedoms stressed by the impacts of this pandemic. However, in this work, the analysis is focused on the restrictions that have affected religious freedom and consequences therein regarding the Peruvian case. The doctrine is unanimous in stating that the established restrictions have effectively challenged religious freedom. However, it is striking that these regulatory restrictions and limitations have not met a greater level of litigation in practice, particularly in Latin America. There were critical voices, but their impact has been limited and, in practice, restrictive measures have been maintained without excessive problems.[1] However, in the United States, we find a rich and varied case law that has even reached the Supreme Court, not once but several times; this court has been able to study the elements of balance between the restrictive regulations and the effective guarantee of the exercise of religious freedom (Madera 2020). In addition, the German Constitutional Court and the French Conseil d'État have had the opportunity to speak on the matter. Additionally, there are many publications of academic work, seminars and articles that analyze the impact of the pandemic on rights and freedoms and further investigations are underway (Opinio Juris 2020).

In February and March 2020, the media coverage of COVID-19 produced images of enormous visual impact: Mecca empty, Pope Francis celebrating Holy Week alone in Saint Peter's Square, the Church of the Holy Sepulchre closed, workers disinfecting the wall of the lamentations in Jerusalem and many other places of worship usually that usually receive a massive influx of people now empty. However, the restrictions soon began to have a distorting and even potentially discriminatory effect (Sarkar 2020). The accusations against those religious groups that decided to maintain their large-scale religious ceremonies were swift in these initial months of the pandemic; soon, the media (particularly, in

New York Times 2020) and science drew attention to those groups, describing them as "super-spreaders" of COVID-19 (Quadri 2020). In this context, governments around the world soon had to approve their protocols to protect health and balance the rights and freedoms of citizens (Sartea 2020). Unfortunately, many of these regulations made a very clear choice: protect health while trying to save the economy,[2] even if that means sacrificing other fundamental rights (especially the right to education or the exercise of freedom of worship).

A perception of arbitrariness thus arises concerning some of the measures adopted by different governments in those first months of the pandemic; there was unjustifiably different treatment towards places of worship. Several human rights organizations indicated that, in the context of the pandemic, many governments used public health policy as an effective restriction of public guarantees and freedoms.[3]

As time passes, this situation has evolved into new scenarios where it is not only civil rights that are affected. It has become clear that it was not only physical health that needed to be considered, because lockdown has had a direct impact on mental health and on spiritual health (Balluerka Lasa et al. 2020). Religion historically plays an essential role in caring for people, and it is evident that this mediating function is carried out through religious functionaries (De León Azcárate 2020). When social distancing measures and the restriction of access to places of worship prevent such spiritual care, a direct effect is produced on the mental health of the faithful because spirituality is a fundamental strategy against pain and illness.[4]

In hindsight, it seems clear that reasonable measures would have offered alternatives to complying with the restrictions established or at least included accommodation for specific cases. Certainly, many countries began to consider this when the first stage of strict lockdown and curfew ended by advancing in phases,[5] marking areas with greater or lesser incidence of the disease and, therefore, accommodating restrictive measures to specific conditions.

The rule of law plays a key role in these contexts; it requires that the decisions of the executive office follow a procedure and are supported by objectifiable elements validated by science to approve measures with a significant social consensus in such a way that they are received and complied with voluntarily.[6] Unfortunately, what we have seen during many of the phases of this pandemic in many countries is that, during the state of emergency, governments have skipped procedures for the correct supervision of their regulatory competences (OECD 2020a). Indeed, governments understood that the emergency makes it necessary to produce quick decisions, but speed—if not accompanied with efficiency and neutral elements that give validity to the decision and social consensus—can rapidly increase the risk of arbitrariness.[7]

Therefore, it seems necessary to reiterate the content that defines religious freedom as a fundamental human right, since it is essential to understand which of its dimensions were impacted by the restrictive measures, considering that it is expressly prohibited to suspend the rights of freedom of thought, conscience and religion during a state of emergency or that of an exceptional nature.[8]

2. The Layers of Protection of Religious Freedom

2.1. Role of Religion in Society

When liberalism, especially during the French and American revolutionary process, reshaped the political model, it did so by placing the human being as the central axis of the new system, impregnated with a high degree of secularization.[9] In this historical context, it is essential to understand the role that religious struggles played in reshaping the legal system and enforcing the political construction of European states (Gill 2008). Modern states were built in opposition to antiquated structures, and religion was an essential factor in this, among others (such as as culture and language), giving unity to the new national territories (Grzymala-Busse 2020). Thus, it is important to understand the key role that religious freedom had within the category of rights and freedoms during that initial

stage. The role of religious freedom continues to be essential from this political perspective, since it is through freedom of thought that an essential pluralism is guaranteed for the strengthening of democracy and the rule of law.[10]

There is no doubt that religiosity is a multidimensional (Fetzer Institute 1999) construction composed of feelings, thoughts, experiences and behaviors, expressed by the individual but developed through the collective dimension of religious teachings.[11] For such reasons, describing and protecting religious entities is important because they create the basis to specify manifestations of personal faith protected by individual religious freedom. The dual nature of this approach is useful to understanding the complex relationships established on the grounds of the exercise of religious freedom (Yildirim 2017). This relationship can only be explained by the interaction of three different actors: citizen, state and church. The citizen–state relationship can be described under the constitutional parameter of the protection of rights and political freedoms. The faithful–religious entity relationship must be expressed through the free choice of faith made by the act of individual conscience. Finally, closing the circle, there should be the relationship between the religious entity–state established through the institutional[12] status of religious groups.[13]

In this way, religious entities are included in the category of organizations that represent civil society,[14] and following Stepan's approach, they play an important role in strengthening democracy (Stepan 2000). Considering the pandemic as a human and social crisis, the solution must incorporate these two elements: the individual on the one hand and the social element on the other.[15] Undoubtedly, our life in society is built in circles, and religious freedom is related to well-being indicators that allow one to affirm the importance of its effective protection and constitutional recognition (Cross 2015). Although we have indeed advanced towards a secularization that separates political from religious power, we should not be mistaken; while church–state separation occurs at the institutional level, this does not translate precisely into the separation between politics and religion on a personal level. Citizens have an intimate environment of beliefs, whether political, ideological or religious, and these beliefs help build the individual's personal identity (Aldridge 2000).

At this point, it is appropriate to remark upon the particular relationship that is established between the individual and collective dimensions of religious freedom (Scolnicov 2010). Such a dual dimension must be considered because, without beliefs, worship and doctrine, the individual dimension would be empty of content.

2.2. Content of Religious Freedom

To affirm that the right to religious freedom has been violated, we must know what this right entitles or, rather, where the impact is located within its radius of action.[16] For the description of this essential right, the text of Article 18 of the Universal Declaration of Human Rights was used.[17] This document defines the classic trinity of the right as: "freedom of thought, conscience and religion". Curiously, almost everyone (agnostics, liberals and conservatives) feels comfortable with this formula, probably due to the lack of precision that we find in the terms used in Article 18.[18]

The literality of Article 18 was used later in other human rights treaties, particularly in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights, so it is relevant to understand the meaning of this right of religious freedom in the Universal Declaration according to the drafters' intended meaning.[19] From a political analysis that can be made regarding Article 18, some interesting conclusions can be drawn (Lindkvist 2013): the controversial rights of religious minorities that caused many problems during the drafting of the Treaty of Versailles, and in the context of World War II, disappear from the text. As a result of this withdrawal of protection of minorities (understood as organized groups), the Universal Declaration concentrates its efforts on protecting the individual dimension of the right to freedom of thought, conscience and religion, giving significant weight to the free expression of conscience,[20] including the controversial right to change religion.[21]

Therefore, considering this lack of precision, we thus perform intellectual reflection to understand why these three rights appear linked in the same article. First, we must understand that freedom of thought, freedom of conscience and religious freedom appear united in their category of subjective rights, as the right to which the person who constructs his or her identity in religious matters is entitled. Thus, understood as a subjective right, its innermost core will always be composed of freedom of thought. This freedom, exercised in a very personal sphere that is guaranteed immunity from coercion, reaches the external sphere through freedom of expression.[22]

Undoubtedly, freedom of thought is not only composed of a religious dimension but also serves as a basis for providing content for the exercise of many other rights (the right to vote, the right of association, the right to demonstrate, and the right to union participation, to name a few of the classic rights that are consolidated under freedom of thought). Once endowed with content, this freedom of thought escapes the inner core of the person and allows the individual's consciousness to be expressed. From that moment on, we say that someone acts conscientiously because it is consistent with their ideas and they would prefer to make a sacrifice before acting against them. However, at this point, we must ask ourselves what gives content to freedom of conscience. Is it a purely individual act or, on the contrary, does it require a doctrine, teaching or ideology, previously constructed by a religious community? It seems that an individual formulation of conscience that is not supported by religious or ideological doctrine has few options to succeed cases where the conscience is protected through conscientious objection.[23] Therefore, although the origin of consciousness can be placed at the forum internum (freedom of thought), the act of consciousness is materialized in the forum externum.

Finally, the third and last element that makes up the trinity contained in Article 18 is religious freedom. This is not the simple ritualization of faith, but the logical path that communicates the internal sphere of freedom of thought that builds the identity of the person in religious matters, which leads them to act in the forum externum in a manner consistent with their faith, and is accompanied by the effective ritual expression of worship in specific religious modes and contexts. Understanding religious freedom only as a protection of worship acts without also recognizing that the inner protection of the freedom of the faithful's conscience and thought is necessary for the essential dignity of the human being would be an incorrect interpretation of Article 18.

Therefore, Article 18 should be understood as protection in levels or layers. From an internal and generic level, the guarantee of the right is non-interference in freedom of thought; its main protection tool is ideological pluralism as an essential guarantee, which helps to build a free democratic model.[24] The next level of content is specified in the outer layer, which is freedom of conscience building upon freedom of thought, and a final and more specific layer is formed by the different ways of externalizing the religious consciousness worship acts of each believer's community.

Therefore, in the innermost layer, individual nature is much stronger (the guarantee of freedom of thought has to be materialized on the individual level of the person), but as we move towards the outer layers of the exercise of religious freedom, we realize that the content of this freedom is built over a collective dimension. Hence, the importance of structuring the exercise of this right dually, since without individual freedom, there is no effective protection for the free exercise of religion, and without the collective dimension, the external sphere would be left without content.

Finally, religious freedom also has a political dimension (not as a human right but as a constitutional principle) that guides the actions of public powers. This dimension obliges the state to assume responsibility to effectively promote and protect individual rights, creating specific conditions (Viladrich 1980; Mosquera 2018). This explanatory description of the content of the right to religious freedom, which allows us to understand its relationship with the principles that guide the model of church–state relations, serves to clarify the understanding used in this work within the discipline of the study of ecclesiastical law.

Thus, if the role of these first freedoms is important, how does one explain why the protection of these freedoms has not been valued during the pandemic? In the trinity, freedom of thought has a close relationship with freedom of expression—thought lives in the inner core and reaches the forum externum layer through freedom of expression. Thus, with such a reference, how does one explain why/how freedom of religion was forgotten so quickly during this pandemic?

2.3. Suspension of Rights during the COVID-19 Pandemic

Emergency powers should be used within the parameters provided by international human rights law;[25] such powers should be time bound and only exercised on a temporary basis, with the aim to restore a state of normalcy as soon as possible.

In April 2020, the office of the United Nations High Commissioner for Human Rights made clear the limits that these emergency measures should have. "The restriction must be 'provided by law'. This means that the limitation must be contained in a national law of general application, which is in force at the time the limitation is applied. The law must not be arbitrary or unreasonable, and it must be clear and accessible to the public. The restriction must be necessary for the protection of one of the permissible grounds stated in the ICCPR, which include public health, and must respond to a pressing social need. The restriction must be proportionate to the interest at stake, i.e., it must be appropriate to achieve its protective function; and it must be the least intrusive option among those that might achieve the desired result. No restriction shall discriminate contrary to the provisions of international human rights law. All limitations should be interpreted strictly and in favour of the right at issue. No limitation can be applied in an arbitrary manner. The authorities have the burden of justifying restrictions upon rights" (OHCHR 2020).

Nevertheless, we have the impression that the balancing tools used to assess the standards in the context of the pandemic have been insufficient (Lebret 2020; Sun 2020). It is likely that they have not been respectful of the condition of "essential service" that religion and education have for the human being. As Criddle and Fox-Decent point out, during public emergencies, "states must tailor their responsive measures to minimize the potential impact on human rights" (Criddle and Fox-Decent 2012).

Special concern arises from the lack of reasonableness of the measures applied and the effect that they have had on the essential content of the right to religious freedom. As mentioned, the intense application of measures that restrict fundamental rights by governments around the world makes it necessary to carefully consider which regime, mechanisms and control procedures have declared a suspension of rights in the specific case of freedoms related to the dimensions of a faithful. Article 18 of the Universal Declaration of Human Rights reminds us that religious freedom is a right that cannot be derogated (Bielefeldt 2020). In General Comment No. 22, the Human Rights Committee made it very clear that any type of restriction on the exercise of this fundamental right would have to be carried out by law.[26]

The Human Rights Committee, in its General Comment No. 29, establishes the specific safeguards that states must offer when unilaterally derogating Article 4 of the Covenant. Measures must be of an exceptional and temporary nature, and two fundamental conditions must be met: "the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency".[27] As early as April, the Interamerican Commission of Human Rights called on the OAS States to ensure that the emergency measures that they adopt to address the COVID-19 pandemic were compatible with their international obligations.[28]

Thus, a necessary question arises as to whether the COVID-19 rules have restricted the right to religious freedom or have derogated its effective exercise (Du Plessis 2020). Freedom of worship should be protected by the freedom of religion (as the third dimension of the right protected by Article 18, UDHR). Such freedom of worship includes the celebration of sacraments, funeral rites, and spiritual assistance to people deprived of liberty (Ramírez Navalón 2020). Since these are the most frequent manifestations (a non-closed

list), it is important to note that not all religious groups can adapt to a virtual format as required in the context of the pandemic. Therefore, the first situation that arises is related to inequality among denominations because not all worship can be transferred online, thus having a direct consequence on the faithful's rights. Many confessions have had to adapt their acts of worship to virtual celebrations, which are not always in the same conditions. Many small communities do not have enough resources to follow religious ceremonies in this virtual mode. Rural populations, native communities and religious minorities that do not have an official channel of communication with government authorities have seen the exercise of their religious freedom suspended as they have been unable to access a valid way to worship. In all these cases, the restrictive regulations on religious freedom during the pandemic have served to expose the social inequality suffered by these groups. For other communities, the difficulty of adapting to the virtual format is not due to economic, logistical or capacity reasons, but is due to the essential theology and the practice of the sacraments in that religion.[29]

In the specific case of religious freedom, although some layers of content may indeed maintain a minimum guarantee when its exercise is transferred to a remote modality and without the presence of a minister,[30] it is undoubted that the effective realization of liturgical acts that involve a collective sacramentality and that require the presence of the faithful and the minister are impossible to transfer to the virtual world.[31] The previously mentioned "religiosity test" implies the support that the collective religious structure gives to the individual worship. Without a collective dimension, without a religious entity, the individual dimension loses its content. Therefore, an excessive postponement of collective worship acts can ultimately affect the very existence of religious freedom.

Considering pandemic circumstances where regulations have limited religious freedom by categorizing worship a non-essential service, it is worth questioning the importance that the model of church–state relations has for the effective protection of the right to religious freedom. It cannot be forgotten that the health or education sectors, among others, have been the natural field of work for religious entities, especially in the Christian world. Nevertheless, in a context where collaboration would have been decisive (to manage humanitarian aid and health and educational services), the state prefers to postpone collaboration with entities. This forces us to reflect on the proper functioning of the "balancing" tools in the exercise of fundamental rights. Does the lawmaker, the executive or the judiciary play an adequate role? Should the incorporation of other actors be considered? Let us not forget that church and state relationships are tripartite relations: the faithful, the state and religious entities.

Therefore, it is possible to suggest that in the context of this pandemic, the state has resolved the situation of the faithful, not through a direct state–citizen relationship nor through the institutional state–religious entities relationship, but through a state–faithful relationship, which, as a "non-confessional" or neutral state, is expressly disqualified.[32] Considering that the citizen has more difficulties in this bilateral relationship to claim non-compliance by the state in the effective protection of the rights and freedoms linked to religion and worship, it seems that this was a task that religious entities had to assume: to defend the essential content of the religious dimension of the individual.

3. The Church–State Model and Effective Protection of Religious Freedom

After analyzing the generic framework of this work and considering the essential content that we must assign to religious freedom as a fundamental right in its individual and collective dimensions, we must also consider a matrix right that manages to manifest all these layers of content through an exercise combined with other rights and freedoms, such as freedom of assembly, association and demonstration. This peculiar circumstance makes the discipline of ecclesiastical law adopt an interdisciplinary approach since the object of study "religion" displays its effects through different branches of the legal system (Sandberg 2008). This interdisciplinary nature explains why we can find works on the role of religion in society from different approaches that include constitutional law, political

science and the sociology of religions, to name a few. It serves as a clarification that this work is based on the principles and models that are studied from the perspective of civil ecclesiastical law.

3.1. The Church and State Systems

It was believed that the effective and full protection of religious freedom could be achieved through the incorporation of that right into constitutional texts, completing internal protection with a network of human rights treaties. One would think that as long as there was constitutional recognition of the protection of religious freedom, we would have achieved sufficient individual guarantee for the exercise of this right. However, as far as the individual guarantee of the exercise of religious freedom is intrinsically related to the institutional position that a religious group has within the legal model, it is possible to affirm that when there is no protection for the collective dimension of religious freedom, the natural consequence is that the individual exercise of the acts of worship of that faith is severely affected or restricted (Nieuwenhuis 2012).

The literature tends to classify church–state models into three large groups: the state–church model, the secular separation model and the collaboration or hybrid model (Ferrari 2013; Robbers 2019; Madeley 2015). Therefore, we can roughly consider the existence of confessional models (whether real or just sociological confessionalism), models of separation (more or less neutral before the role of religion in society), and models in the cooperation category. It is possible to affirm that the differences between these models are conditioned by historical, cultural and social factors, which, in practice, generate a different combination of alternatives between apparently sibling legal models (which sometimes have a root with a similar legal origin) but which present particular sociocultural religious structures.[33] Taking the three basic models (state–church system, separation and cooperationist), and considering Halmai's approach that the model of state–religion relations could determine the state of religious freedom of a given country,[34] we pose the question as to whether some models of church–state relations are better than others.

The experience left by restrictions on human rights during the COVID-19 pandemic allows for investigations to continue for a long time and offers the basis for new decisions that allow for a better approach to these guarantees of freedom in the future.[35] For the moment, what 2020 has left has been an excess of regulatory intervention by governments sacrificing the exercise of public freedoms under the premise of protecting public health. Certainly, not all governments have applied equally restrictive measures and not all of them have opted for radical lockdowns, and when they have done so, not all legal models have acted the same in response to these restrictions on freedoms.

3.2. The Distinctiveness of the Latin American Context

Two major subjects of content within civil ecclesiastical law—the protection of the right of religious freedom of the person and the church–state relationships—are the obvious consequence derived from the dual nature (individual and collective) of the right to religious freedom. In this dual plane, it is useful to ask which one benefits the most from the legislative development of the right to religious freedom. Cooperation between political and religious powers is necessary and cannot accept violations of the constitutional principles that define the content of ecclesiastical law as an academic discipline: religious freedom, non-discrimination on the grounds of religion or collaboration and independence and autonomy between the state and religious entities.

In the specific context of South America, it is notable that there has been little litigation regarding the protection of religious freedom during this pandemic context. Only a few cases reached the courts of Concepcion in Chile with lawsuits filed by a group of lay Catholics, by a public worker and one filed by a group of pastors from the Bio-Bio Region. All of them were declared unfounded (Bustamante and Astaburuaga 2020). Another lawsuit filed by a Catholic Colombian lawyer against the Government was declared inadmissible and without grounds.[36] The majority opinion of academics in Latin America is that

religious freedom has been subjected to "disproportionate and unjustified" restriction measures,[37] and that religious freedom was, in fact, suspended.[38]

Perhaps to understand this statement we should point out that the church–state relationship in Latin America is based on relatively young constitutional systems that include a bill of fundamental rights and constitutional clauses of interpretation under human rights treaties and a formal separation (or non-establishment clause) of the church–state relationship. However, in Latin America, the secularization of society is still very low, and the political role of religious entities (especially the Catholic Church) is still relevant (Gill 1998), maintaining some of the historic "regalista" of state–church models established during the 18th century (De La Hera 1992).

The right to religious freedom in Latin America since the end of the 20th century has presented a series of characteristics that need highlighting to be able to appreciate the notable peculiarities more clearly. In the 1980s and 1990s, most countries in the region began constituent processes to overcome dictatorships and military governments. Consistently, the new constitutions recognize the right to religious freedom enunciated mainly as "freedom of conscience and religion", likely due to the influence that the drafting of the American Convention on Human Rights had on the constitutional processes of the region.[39] Along with this constitutional and conventional recognition of religious freedom, it is worth noting another peculiarity of the countries of the region in that one can find the survival of models of formal Catholic and sociological confessionalism with greater intensity. Certainly, this is a new confessional formula compatible with the recognition of religious freedom, but this situation is striking when compared to the evolution of secularization in other parts of the world.

Low-intensity concordant regimes[40] coexist in the region with other relationship systems that are evolving towards a formula of cooperation, with legal registration for different cults. Therefore, in their relationship with religious entities, almost all the countries of South America (except for Mexico and Uruguay as models of separatist secularism) are considered collaboration or hybrid church–state models.[41] The Catholic Church is the sociological majority denomination, followed by other Christian denominations making up the main minority groups; Muslims, Jews and other religious groups make up a religious minority in Latin America. Many countries have a registration system for religious entities, designed to grant legal personality to religious entities.[42] A logical consequence of the registration includes the possibility of formalizing church–state collaboration agreements.[43] However, to date, such agreements have been difficult to carry out in addition to the lack of interest in establishing them. The sociological majority presence of a group may cancel out the possibility of promoting a true model of collaboration based on religious pluralism since this pluralism is not yet visible in society (Deiros 1991). Perhaps Buckley's suggestion that "the institutional logic of religion-state relations is quite different in consolidated democracies than less competitive regimes" can be applied to this context (Buckley 2018).

Thus, just as it is possible to find exceptionality in religious matters in Europe (Davie 2002), there is also a specific situation in Latin America. Here, two circumstances combine their effects: democracies that are too young (with a high level of corruption and disorganization) and a low level of secularization in society. The difficulty in promoting pluralism that allows for democratic strengthening may, then, have its origin in the role that religion plays in these countries.[44] Benevolent secularism empowering accommodations could be the option to enforce institutional cooperation with the religious entities (Buckley 2015).

3.3. Peruvian Church and State Relationship

In Peru, the church–state relationship model has evolved from the Catholic confessionalism of the historical constitutions that excluded any other religion, passing through a model of religious tolerance to finally becoming a model of positive cooperation with denominations that fully recognize and protect the right to freedom of conscience and religion of all individuals and groups (Stanger 1927). This cooperationist model took shape

in 1980 with the signing of an agreement between the Holy See and the Peruvian State to regulate common matters in what turned out to be adequate compliance with Article 50 of the Constitution. However, the development and compliance of the second paragraph of that same article were pending, where it was stated that: "The State respects other confessions and may establish forms of collaboration with them".

To implement these "forms of collaboration", in 2001, a series of changes were initiated within the Ministry of Justice. The internal structure within the Ministry was modified; new functions were assigned to the National Direction of Justice; and the Directorate of Interconfessional Affairs was created with the function of coordinating and promoting the relations of the Executive Power with confessions other than the Catholic Church, as established by the State for the strengthening of religious freedom.[45] It appeared that the collaborative model was beginning to lay its foundations, but its evolution has been chaotic (Santos Loyola 2019).

In line with the new role assigned to the Directorate of Interconfessional Affairs, it was imperative to know with which religious entities or groups the new directorate should communicate, hence the need to establish a control or registration system for non-Catholic religious entities.[46]

A Peruvian lawmaker began to build his church–state model by cataloguing and registering the religious entities that operated in the territory, but did so without considering the consequences that such a process would have to comply with, i.e., the constitutional principle of collaboration contained in Article 50 of the Constitution.[47] The regulation was completed with the Law 29635 concerning religious freedom, where we found the practical formulation of how the implementation of this new way of understanding the relations between the state and the confessions was to be carried out. Collaboration agreements with entities that had established roots in Peruvian society were the axis of this legislative development in which great expectations had been placed (Mosquera 2019).

As a conclusion regarding the evolution of the model, it can be said that there has been no significant progress in specifying the constitutional principle of cooperation between the state and religious entities (not in Peru or any other South American country). In such a way, Peru is a state that formally adopts a constitutional model of cooperation between the state and religious entities, but has not yet come to specify the application of that model with the religious minorities and maintains practices of the confessional model (Mosquera 2020).

Peru in particular, and the region in general, lacks an organized structure of churches that can maintain a firm position in the face of excesses of political power. The weakness of religious entities in their institutional presence has a significant impact on the protection of the individual exercise of religious freedom. During the pandemic, it was evident that the ecclesiastical authorities joined the political authorities, accepting the restrictive norms on freedom of worship dictated by the government. Countries as little secularized as Peru keep the "official" church within a role of "quasi" public structure similar to the one it had at the time of the Viceroyalty. In this sense, the Peruvian model of church–state relations claims to be a model of cooperation, but in practice there is evidence of a disguised confessional model in which the religious factor is not sufficiently independent or autonomous from the state. There is no progress in collaboration with the other religions present in the territory, and without cooperation effective separation is not achieved nor is the pluralism that fosters higher levels of democratic quality.

During the current pandemic context, religious entities have played an essential role in democratic regimes, protesting against restrictive regulations and monitoring governments decisions for their potential restriction on the exercise of the fundamental right of freedom of religion.[48] However, in those models with a low democratic level where religious pluralism is not entrenched in society through an effective mechanism to enforce pluralism and the institutional role of religion in society, we observe models with poor protections for the right to religious freedom (Fox and Tabory 2008). Having an organized structure of religious entities, as with the structure of civil society, is an essential instrument to guarantee the rule of law and promote human rights.[49] If we lack strong institutions that

allow for a balance between the functions of the judicial legislative executive, unity with the functions of the market structures and the organizations that represent civil society, the temptation of an unlimited exercise of power by any of these sectors represents a high risk.

Comparing the responses of different congregations and religious groups regarding the governmental regulations, we could say that their reactions have oscillated between an important pragmatism[50] and a second line of action where they have implemented transformative practices in the exercise of worship;[51] finally, there has been a significant group of religious entities that have opted for the format of resistance and defense of the religious freedom of the faithful.[52] The key to facing one or another type of reaction by ecclesiastical authorities appears to be related to the effective separation that exists between the state and religious entities and also with the institutional guarantee of the collective dimension of religious freedom.

For this reason, applying the first parameter, we find that religious entities have been able to provide a better critical response to government restrictions in those legal models with a better understanding of church and state "twin toleration" (such as France or the United States); and in others, with a high recognition of the collective dimension of religious freedom (such as the models of established churches or the models of collaboration, such as in Greece or Germany). On the other hand, in the context of Latin America, where secularization and the organized institutional strength of religious entities are low, critical capacity has been significantly diminished, and subsequently the individual dimension of religious freedom has been affected.

In the Peruvian case, it is worth asking whether the government conducted any consultations with the leaders of different denominations before implementing the restrictive measures on the freedom of worship.[53] Everything seems to indicate that they did not, and when the Peruvian Episcopal Conference proposed a protocol for religious worship in times of pandemic in May 2020,[54] they likely believed that they would be able to decide when to reopen the churches; however, it was not possible to do so until November, when the government expressly authorized it. This means that in the specific case of Peru, the churches were closed for worship from 15 March to 15 November, when in other parts of the world with similar figures regarding the impact of the pandemic, number of deaths and similar sociological data, they had reopened the churches from June 2020.[55] It is striking that the decision of the Peruvian government to reopen the churches came after two very significant legal episodes: a bill presented on 13 October 2020 to force the reopening of the churches[56] and the publication of guides and directives of the Inter-American System for the protection of human rights in October 2020, very much in line with protecting the religious freedom of the faithful in the context of Latin America. In other words, ultimately, it was external pressure that forced the Peruvian government to relax the restrictive measures on freedom of worship.[57]

The Easter 2021 celebration finally set a good example for comparison. Several regions of Peru entered the maximum risk zone on 29 March, and greater restrictions were established. In practice, this has meant reducing the capacity of places of worship to 0, while restaurants and hairdressers kept their capacity at 40%. Specifically, from Holy Thursday to Easter Sunday, a strict home lockdown regime was established. In comparison, during the same period, Italy entered a strict three-day lockdown to prevent a surge in COVID-19 cases over Easter. Non-essential movement was banned, but people were allowed to share an Easter meal at home with two other adults. Churches remained open, but worshippers were told to attend services within their own regions. All non-essential shops were closed, and cafes and restaurants were running a takeaway-only service.[58]

4. Final Remarks

At this point, it seems that it is possible to conclude that the legal tools that allow for balance in the exercise of fundamental rights have not been entirely successful in 2020. The vast majority of governments have decided to attempt to protect citizens' health against the threat of COVID-19, although this has meant sacrificing the exercise of other rights,

including the right to health itself since all other non-COVID-19 diseases have seen their treatments suspended throughout this period as well as other dimensions of health related to mental health and, especially, spiritual health. Together with the right to education (especially concerning the effective protection of inclusive education)[59], the right that has been most infringed upon during the pandemic has likely been freedom of worship.[60]

Political models with a higher level of institutional democracy are those that have offered more guarantees for the protection of public liberties during the pandemic. For this reason, it is possible to remark that models with a weak institutional presence of religious entities have faced a shortage in the protection of individual freedom. Considering the guarantee that religious freedom must be received as a human right, it is especially worrying that religious confessions as structures of civil society suffer such institutional deficits.

Accommodation techniques to resolve these tense situations are possible. Many religious practices have been able to adapt and accommodate to the virtual format (especially in the first stage where scientific information on the modes of contagion of the virus was insufficient). However, as the months progressed, it became necessary to review the legislative measures adopted (since any restrictive measure must be temporary) and, in light of this review, make effective accommodations that would not sacrifice the exercise of rights. Liturgical celebrations in the open air, churches/temples open for individual religious activity with social distancing in place and control measures within places of worship assuming that the faithful can adhere to the established public health measures are just some of the examples of the accommodation measures that could have been taken without having to sacrifice the rights and freedoms of citizens. In this initial balance between individual freedoms and the preservation of the right to health, not all the elements of judgment were taken into consideration for a reasonable assessment of the elements of the debate, and a hierarchical application of rights was made.

In the specific case of the exercise of religious freedom, it is evident that the constitutional guarantee of the individual right to religious freedom requires the institutional complement of protection of the collective dimension of religious freedom. It has become clear that the constitutional framework was insufficient in Peru and that the restriction of fundamental rights did not follow the controls established by international obligations. If the government wishes to maintain some type of restriction on meetings, it must do so through measures that are sufficiently neutral but that at the same time include in the arguments those that refer to the condition of religious freedom as a human right.

The non-discrimination requirements mean that those measures that restrict religious activities in a manifestly different way from other activities with which they retain a relationship and context must have a reinforced justification clause. In other words, religious entities have earned "justifiably different" treatment because their operation is the basis for the effective realization of the right to religious freedom.

The government must be able to convince citizens that there is an interest that justifies the establishment of this limitation on the exercise of rights, and to arrive at this justification, it must apply a careful balancing technique. Not only is it essential that the state demonstrate the existence of a justification for establishing such a limitation but it must also prove that there is no other way to protect that interest. Legal tools help us apply that right. Guiding principles such as the rule of law and the principle of non-discrimination allow the legislator to have objective criteria for making political decisions.

The specific situation in Peru has made evident the precarious development of fundamental rights. It is clear that a deficient guarantee of the right to health, combined with precarious infrastructure, personnel deficits and scarce material resources to deal with a pandemic, has effectively forced the sacrifice of services considered "non-essential" in order to avoid the collapse of the health system; however, some of those non-essential services were as fundamental as a human right. If religious entities do not have a structure that is sufficiently autonomous and independent from the political powers and that can sue against government regulations that restrict the freedom of worship of the faithful, this

layer of individual exercise is hindered because of the scarce guarantee of the collective dimension of religious freedom.

5. Conclusions

Basic rights and freedoms have suffered a very direct impact due to the drastic regulations instituted to control the effects of the global COVID-19 pandemic in Peru. In this context, the decision to limit the exercise of freedom of worship has been a response taken by governments, in Peru in particular and in America in general, but has not been directly challenged by the courts. This situation leads us to affirm that the fundamental right to religious freedom has, in fact, been restricted. The opportunity to use reasonable accommodation on the grounds of religion as a broad legal tool was not taken, thereby evidencing the limitations of law in such complex contexts.

The complexity in the particular case of religious freedom is explained by the layers of content that make up this right. We must consider that freedom of thought, conscience and religion should be understood as a right with protection in levels. The guarantee of freedom of thought plays its main role at the individual level (forum internum), but as we move towards the outer layers of the exercise of religious freedom (conscience and religion), the content of this freedom needs to be sustained over its collective dimension. This is the reason that explains the particular relationship between the individual and collective dimensions of religious freedom. However, during the context of this pandemic, the government has resolved the situation of the faithful neither through a direct state–citizen relationship nor through its institutional state–religious entities relationship, but through a state–faithful relationship, which, as a "non-confessional" state, is expressly disqualified.

Consistent with the relationship between the individual and collective dimensions, the individual guarantee of the exercise of religious freedom is intrinsically related to the effective protection that the religious group has within the legal model, so it is possible to affirm that, when there is no protection for the collective dimension of religious freedom, the natural consequence is that the individual exercise of worship is severely affected or restricted. This is the case in Latin America, where the unique understanding of the church–state relation model with a limited guarantee of the collective dimension of the right to religious freedom may explain the limited reaction to the government measures during this pandemic. This allows for the conclusion that church and state policies have direct impacts on the effective protection of the right to religious freedom in its individual dimension.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The author declares no conflict of interest.

Notes

1 During the first months of 2021, Peru resumed strict restrictions that limit the celebration of liturgical acts to the maximum.

2 "The lack of effective response from a number of governments to protect people's health through proven measures such as social distancing and quarantines to flatten the curve of the pandemic is also very concerning. Arguing that the cure would be worse than the disease, some governments have opposed these measures to avoid an economic slowdown" (Bohoslawsky 2020).

3 (Repucci and Slipowitz 2020) For example, the news came from China about a ban on entering Buddhist temples for acts of worship while they were open for tourism; public health regulations served to restrict or persecute religious minorities; mosques were singled out in India as places of dangerous contagion; stricter quarantines were imposed on some citizens because of their religious affiliation. Many governments have used public health control regulations as political repressive and discriminatory measures against religious groups.

[4] With the intention of allowing spiritual activity to continue, the WHO published an interim guide in April 2020: "Practical considerations and recommendations for religious leaders and faith-based communities in the context of COVID-19". This document acknowledges that religious leaders, faith-based organizations and faith communities can provide pastoral and spiritual support during public health emergencies and other health challenges and can advocate for the needs of vulnerable populations. We can see specific accommodation recommendations in this document—for example, recommendations to hold gathering outdoors or with fewer people, suggesting multiple services with a few attendees—among many other reasonable and effective suggestions to maintain religious activities during the pandemic. Unfortunately, many countries decided not to follow this guideline with the already-known restrictive consequences for religious freedom.

[5] For example, in Spain, in October, the executive established a new protocol to rationalize the exercise of freedom of worship and the protection of health: "The permanence of people in places of worship is limited by fixing, by the authority competent corresponding delegate, of capacity for religious meetings, celebrations and gatherings, considering the risk of transmission that could result from collective meetings. Said limitation may not affect in any case the private and individual exercise of religious freedom", there recognizing the importance of not restricting the exercise of this individual right. In this way, the legal limbo in which the acts of worship had remained in due to the March regulation was corrected.

[6] "Access to the judicial system remained open so that citizens and legal entities could challenge, in court, the provisions and implementing acts. This access to the legal system, I argued, as a basic pillar of Rule of Law, revealed that democracy kept functioning during the pandemic" (Von Münchow 2020).

[7] This is the main reason to include the rule of law as a general principle. Even if the Venice Commission reached the conclusion that Rule of Law was indefinable, a core elements checklist must be used as an operational tool to control state's compliance with the rule of law: legal certainty, prevention of abuse, equality before the law and access to justice. This checklist also addresses specific, topical challenges to the rule of law: corruption and conflicts of interest, collection of data and surveillance (CoE 2016).

[8] As will be discussed, because freedom of thought, conscience and religion undoubtedly play a key role in the formation of ideological pluralism, ignoring the guarantee of protection of this right is probably the most direct way to weaken the democratic quality of a society.

[9] Secularism involves a complex requirement, which can be classified according to Taylor into the categories of the trinity of the French Revolution: no one must be forced in the domain of religion; there must be equality between people of different faiths or basic beliefs; no religious entity can enjoy a privileged status; and finally, all spiritual families must be heard, included in the ongoing process of determining what society is about and how it is going to realize these goals (Taylor 2010).

[10] To better understand the role that government policy regarding religious freedom plays in strengthening democracy (Gill 1999).

[11] For the purpose of this research, the collective nature of religion, organized as a "church", must be considered a fundamental requirement for the approach presented here. For the collective approach to religion, see (Durkheim 1995).

[12] The institutional approach must be understood according to Amartya Sen's theory of institutions (Sen 2009).

[13] We agree with Durham's point of view on this topic (Durham 2004).

[14] This is a particularly valuable category within the United Nations model, since for a successful solution to the sustainable development goals, they must be based on collegiate solutions in which both political power, private structures and organizations representing civil society participate (Tomalin et al. 2018).

[15] "Governments can leverage the trust, reach and practical support of religious leaders to deliver effective public-health responses, because where confidence in and reach of government is fragile, trusted interlocutors are vital to the success of public-health responses. In fact, religious leaders can support behavioural change and public health messaging and provide facilities and community services". https://institute.global/sites/default/files/inline-files/Tony%20Blair%20Institute%2C%20Working%20With%20Religious%20Leaders%20to%20Support%20Public%20Health%20Measures.pdf, accessed on 11 April 2021.

[16] Religious freedom is a complex right, not only because of the varied manifestations of worship but also because of the high degree of subjectivity granted to determine when a personal behavior becomes a religious expression. Such a question necessarily leads to considering the degree of sincerity of those beliefs; however, to answer this question, we must address the collective dimension of religious freedom as a fundamental right. A religiosity test can be the degree to which an individual should be entitled to take responsibility for his convictions—a situation that leads to the extreme affirmation of denying the possibility of an effective protection of this right (Sullivan 2018).

[17] The Universal Declaration and the norms of the Inter-American System for the protection of human rights are taken as a reference because the regional focus of this work is centered on the Peruvian and Latin American systems.

[18] "The Universal Declaration of Human Rights (UDHR) does not define the terms 'thought', 'conscience' and 'religion'" (Scheinin 2000).

[19] "[w]hat has proven to be one of the most influential statements of religious rights of humankind yet devised entered into the international arena with no further light shed upon its meaning." (Evans 1997).

[20] Thus, converting freedom religious into a freedom that is reduced to the scope of the expression or manifestation of acts of worship.

[21] With significant controversy among Islamic countries, as can be seen in the negotiation phase of the treaty (Clarke 1993).

[22] The best way to guarantee the effective protection of freedom of thought is through non-coercion, allowing ideas to be freely expressed without censorship practices and with no limits on freedom of information other than those necessary for the protection of the fundamental rights of third parties.

[23] When the fulfilment of a mandate of our conscience is placed before the fulfilment of a legal duty, the question of conscientious objection arises. Although it is true that the conscience enjoys absolute protection in the forum internum, and no one can force us to act against it, a different question concerns the responsibility produced by that action of our conscience leading it to disregard a legal mandate in the forum externum. It will then be necessary to verify the degree of involvement of one's conscience with this moral mandate; it will be necessary to determine the eventual damage to other legal rights and rights; and it will be necessary to confirm the degree of seriousness or truth that the act contains (Prieto Sanchís 2006).

[24] The ECHR has made it very clear in Leyla Sahim v. Turkey, recalling that: "as protected by Article 9 (of the ECHR), freedom of thought, conscience and religion represents one of the foundations of a democratic society within the meaning of the Convention. This freedom figures in its religious dimension among the most essential elements of the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics or the indifferent. It is about pluralism,—achieved in a very expensive way over the centuries—that could not be dissociated from such a society".

[25] Particularly the International Covenant on Civil and Political Rights (ICCPR), which acknowledges that states may need additional powers to address exceptional situations. Nevertheless, it is well established that "No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees (. . .) and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation" (United Nations 1985).

[26] Article 4, paragraph 2 of the Covenant explicitly prescribes that no derogation from the following articles may be made to Article 18 (freedom of thought, conscience and religion); however, the notifications that Peru submitted in compliance with this obligation have always been generic: "The Secretary-General received from the Government of Peru a notification dated 19 March 2020, made under article 4 (3) of the above Covenant, regarding the declaration of a state of national emergency for a period of fifteen (15) calendar days by Supreme Decrees No. 044-2020-PCM of 15 March 2020, No. 045-2020-PCM of 17 March 2020 and No. 046-2020-PCM of 18 March 2020". Further extensions to the state of national emergency during pandemic were reported every time they were declared, but always in a general and unspecific document. On the other hand, Peru is a signatory state of the Pact that has accumulated the highest number of notifications (244 until January 2021) of a state of emergency, essentially because it does not have a constitutional regulation regarding the state of emergency.

[27] In order that the Committee can perform its task to monitor these emergency laws, states should include in their reports sufficient and precise information about their laws and practice in the field of emergency power. Unfortunately, the information they send is usually too generic and inadequate for the Committee to properly carry out this control work. A fundamental requirement for any measures derogating from the Covenant, as set forth in Article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.

[28] At that moment, IACHR had already observed that different states in the region responded to exponential increases in the number of infections by declaring states of emergency, states of exception and states of disaster on the grounds of so-called public calamity or health emergencies through presidential decrees and various types of regulations to protect public health; many of then officially informed the OAS that they had suspended guarantees as per Article 27 of the American Convention (OAS 2020).

[29] In this respect, the context of the case of the Pentecostal church that reached the Supreme Court of the United States in April 2020 must be understood. The discussion here concerned this religious group: given that they carry out the sacramental elements of their worship in collective headquarters, prohibiting religious assembly implies that the right to religious freedom of this community will be left without content. In this first case, the Supreme Court did not rule in favor of the religious community; it gave the legislator freedom to maintain the restrictions, but it intuited (and later recognized in November 2020) that there was actually an unjustified violation of religious freedom.

[30] Particularly the layers of content that are in the forum internum.

[31] Norms on Canon Law are clear in establishing that the sacraments require a physical presence of the priest to be imparted. "The Internet is relevant to many activities and programs of the Church— evangelization, including both re-evangelization and new evangelization and the traditional missionary work *ad gentes*, catechesis and other kinds of education, news and information, apologetics, governance and administration, and some forms of pastoral counselling and spiritual direction. (. . .) Virtual reality is no substitute for the Real Presence of Christ in the Eucharist, the sacramental reality of the other sacraments, and shared worship in a flesh-and-blood human community. There are no sacraments on the Internet; and even the religious experiences possible there by the grace of God are insufficient apart from real-world interaction with other persons of faith" (Pontifical Council for Social Communications 2002).

[32] For more details on the role of neutrality in models of church–state relationships, see (Ruiz Miguel and Miranda 2014).

[33] For further reliable information to compare church and state models, see (The Religion and State Project, https://www.thearda.com/ras/about/, accessed on 11 April 2021) (RAS 2015).

[34] Halmai concludes in his study that "the worldwide resurgence of religion forces liberal constitutionalism to adapt religious rights to different state–church relationships" (Halmai 2017).

[35] In this context, it is possible to consider what future effect these events will have on people's level of religiosity. Will the secularization of society increase or will there be a resurgence in human beings' approach to divinity? Certainly, this is an important question that unfortunately cannot be resolved at this time or in this work; however, it can be intuited that the political model and the decisions it adopts within a religious policy strategy will have an enormous impact on the future evolution of religiosity.

[36] Tutela 1a Inst: 2020-4398 Accionado: Presidencia de la República y otros. Accionante: Edna del Carmen Benítez Casanova.

[37] For opinion from Chile, see (Celis 2020; Patiño 2020; Navarro Floria 2020).

[38] This is the conclusion of Professor Saldaña analyzing the Mexican case (Saldaña Serrano 2020; Navarro Floria 2020).

[39] The ACHR departs from the triad of "thought, conscience and religion" that appears in the main human rights treaties and in many of the constitutional texts of the second half of the 20th century. It appears that it decided to separate religious freedom from freedom of thought with the intention of linking freedom of expression with freedom of ideas from which every democratic state is nourished. The Inter-American Court of Human Rights has given reasons in several of its judgments to understand the special treatment that freedom of thought maintains with freedom of expression within the IAHRS, relating it to the importance of freedom of the press as a guarantee of the democratic quality of states (Mosquera 2017).

[40] Those could be described as "weak establishment" church–state systems.

[41] However, in practice almost all Latin American countries fit the conclusions reached by Fox in his study on separation and secularism. He summarises that: "most state, even those which declare in their constitutions that they are secular or follow a separationist policy, do not follow these policies" (Fox 2011).

[42] Essentially to those other than the Catholic Church since its recognition is obtained through its legal personality as an international subject, and is expressed in the agreements of a concordant nature that remain in force.

[43] Agreements equivalent to those that the Catholic Church has that allow the effective realization of the scope of cooperation between institutions.

[44] For more detail on the effects of regulations on religious freedom, see (North and Gwin 2004).

[45] Article 80A of Supreme Decree No. 019-2001-JUS, which approves the regulation of organization and functions of the Ministry of Justice, published on 20 June 2001, later modified by Article 2 of Supreme Decree No. 026-2002-JUS, of 26 July 2002.

[46] This registry will be published in 2003 with the approval of Supreme Decree No. 003-2003-JUS, and it was regulated that same year (Ministerial Resolution No. 377-2003-JUS (13 October 2003) that implements the Registry of Confessions other than Catholic (RCDC) and approves its Applicable Norms). It began its task of registering the different denominations that religious groups adopt in the Peruvian territory with remarkable success if we verify its statistics since it gave entry to 142 religious entities in the 7 years that it was in operation.

[47] Only after verifying that the procedure was poorly planned did he choose to review it through a series of changes incorporated into the law on religious freedom (Mosquera 2019).

[48] Legal actions in the United States, Germany, Italy and France were filed by religious authorities against the state authorities that had established the restrictive measures. The lawsuits mentioned in Colombia or Argentina were filed by private citizens. No Roman Catholic Diocese of Brooklyn v. Cuomo could be found at the judiciary in South America.

[49] "Whilst 'states of emergency' or similar exceptional regimes may allow for a more rapid, flexible and effective response, they limit the application of normal checks and balances" (CoE 2020).

[50] Especially in the initial phase where the communities made the decision to adapt to the virtual format in order to attend to their faithful and worrying above all about giving support to their community.

[51] Adapting liturgical celebrations and funeral rites, among others. In this second state, there were also religious communities that opted for a position of denial of the facts in a kind of confrontation between science and religion.

[52] Taking legal action and claiming against restrictions and proposals by the government.

[53] As we can see in the Colombian regulation: "once the conditions surrounding the activities of the religious sector have been analysed, and in accordance with the information provided by the National Board of Social Action of the Ministry of the Interior and the participation of leaders of the different confessions and religious communities of the country, this Portfolio prepared the special biosafety protocol to be applied in this sector, which is adopted by means of this resolution". Resolution No. 1120, 3 July 2020.

[54] Protocol for the religious activities of the Catholic Church in times of pandemic. Peruvian Episcopal Conference. "In all this time of national and health emergency, we have complied with and supported the measures established by the Government to prevent the spread of the COVID-19 pandemic. These measures obviously do not deny or impede the freedom to express our religious convictions or the worship that we need to offer to God. Once the state of national emergency (quarantine) has ended, each Bishop of the place will establish the date from which the faithful will be allowed to attend the temples for Eucharistic celebrations". 25 June 2020.

[55] It is true that the circumstances of the Peruvian public health system also affect the decision, but they are not the only factor. This precarious situation of the public health system in the specific Peruvian case is not a novelty; it had been specifically pointed out in timely reports prepared by the same government when presenting a report to the OECD in 2017, and in many others presented to international institutions (CEPAL 2020).

[56] Proyecto de ley, No. 6391/2020-CR, proyecto de ley que dispone la reapertura de templos de toda confesión o denominación religiosa, sean parroquias, iglesias y similares; cumpliendo con los protocolos de bioseguridad, en el marco de la declaratoria de emergencia nacional a causa del COVID-19, 8 octubre 2020.

[57] Decreto Supremo que modifica el artículo 5 del Decreto Supremo N° 170-2020-PCM. Artículo 5.—De la apertura de los templos o centros de culto religioso. "Se autoriza a partir del lunes 02 de noviembre de 2020, a que las entidades religiosas abran sus templos y lugares de culto para recibir a sus miembros, fieles y público en general, para la profesión individual de su fe, con un aforo no mayor a un tercio (1/3) de su capacidad total, y excepcionalmente podrán celebrar sacramentos y ceremonias especiales afines según su culto, debiendo adoptar y cumplir las normas sanitarias emitidas por la Autoridad Sanitaria Nacional y las medidas aplicables del Estado de Emergencia Nacional. A partir del 15 de noviembre de 2020, las entidades religiosas podrán celebrar ritos y prácticas religiosas de naturaleza colectiva, con un aforo no mayor a un tercio (1/3) de la capacidad total de los templos o lugares de culto, según los protocolos debidamente acordados por la Autoridad Sanitaria Nacional y en concordancia con las medidas del Estado de Emergencia Nacional". In the same context, the Health Department aproved "Directiva sanitaria N° 121-MINSA/2020/DGIESP, Directiva sanitaria que establece medidas para el reinicio de actividades religiosas o de culto en el marco de la emergencia sanitaria de la COVID-19", 30 October 2020.

[58] COVID-19: Italy returns to strict lockdown for Easter. https://www.bbc.com/news/world-europe-56621342, accessed on 11 April 2021.

[59] "The COVID-19 pandemic is harming health, social and material well-being of children worldwide, with the poorest children, including homeless children and children in detention, hit hardest. School closures, social distancing and confinement increase the risk of poor nutrition among children, their exposure to domestic violence, increase their anxiety and stress, and reduce access to vital family and care services. Widespread digitalisation mitigates the education loss caused by school-closures, but the poorest children are least likely to live in good home-learning environments with internet connection" (OECD 2020b).

[60] The impact on funeral services has been significant. In this specific manifestation of the posthumous act of worship of the faithful, including accompanying and mourning the death of a loved one, the strict restrictions imposed during this pandemic have been an effective violation of three dimensions of the health of the relatives who have buried a

loved one in these conditions. The WHO has reminded us that health deserves a complete definition; it is not only physical confinement and restrictive measures on rights that have put health at risk in a multilevel sphere.

References

Aldridge, Alan. 2000. *Religion in the Contemporary World. A Sociological Introduction*. Cambridge: Polity.

Balluerka Lasa, Nekane, Juana Gómez Benito, María Dolores Hidalgo Montesinos, Arantxa Gorostiaga Manterola, José Pedro Espada Sánchez, José Luis Padilla García, and Miguel Angel Santed Germán. 2020. *Las consecuencias psicológicas de la COVID-19 y el confinamiento*. Informe de investigación. Bilbao: Servicio de publicaciones de la Universidad del País Vasco.

Bielefeldt, Heiner. 2020. Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom. *Religion & Human Rights* 15: 3–19. [CrossRef]

Bohoslawsky, Juan Pablo. 2020. COVID-19 Economy vs. Human Rights. *Health Hum Rights* 22: 383–85. Available online: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7348433/ (accessed on 11 April 2021).

Buckley, David. 2015. Beyond the Secularism Trap: Religion, Political Institutions, and Democratic Commitments. *Comparative Studies* 47: 439–58. [CrossRef]

Buckley, David. 2018. Religion-state relations and public opinion: Norms, institutions and social consensus. *Religion, State & Society* 47: 104–23.

Bustamante, Macarena, and Roberto Astaburuaga. 2020. La protección de la libertad de culto en tiempos de pandemia: La jurisprudencia de la corte de apelaciones de Concepción. Comentario a las sentencias 7800-2020, 9692-2020 y 11125-2020. *Revista Latinoamericana de Derecho y Religión* 6: 1–36.

Celis, Ana María. 2020. Foro Libertad Religiosa en el marco de la 50 Asamblea General de la OEA. Available online: https://www.youtube.com/watch?v=BAuOfOfELeI (accessed on 11 April 2021).

CEPAL. 2020. La pandemia del COVID-19 profundiza la crisis de los cuidados en América Latina y el Caribe. Repport, abril 2020. Available online: https://repositorio.cepal.org/handle/11362/45335 (accessed on 11 April 2021).

Clarke, Desmond. 1993. Freedom of thought in the UN Declaration and Covenants. *Irish Jurist* 28: 121–47.

CoE. 2020. *Parlamentary Assembly. Committee on Legal Affairs and Human Rights. AS/JUR (2020) 13. The Impact of the COVID-19 Pandemic on Human Rights and the Rule of Law*. Strasburg: CoE, Available online: http://www.assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2020/20200702-CovidImpact-EN.pdf (accessed on 15 February 2021).

CoE. 2016. Venice Commission. Available online: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN (accessed on 11 April 2021).

Criddle, Evan, and Evan Fox-Decent. 2012. Human Rights, Emergencies, and the Rule of Law. *Human Rights Quarterly* 34: 39–87. [CrossRef]

Cross, Frank. 2015. Religious Freedom and Society. In *Constitutions and Religious Freedom. (Comparative Constitutional Law and Policy)*. Cambridge: Cambridge University Press, pp. 185–208.

Davie, Grace. 2002. *Europe: The Exceptional Case. Parameters of Faith in the Modern World*. London: Darton, Longman & Tood.

De La Hera, Alberto. 1992. El Regalismo Indiano. *Ius Canonicum* XXXII: 411–37.

De León Azcárate, Juan Luis. 2020. Grandes religiones y nuevos movimientos religiosos ante la pandemia de COVID-19. *YachaQ* 3: 1. [CrossRef]

Deiros, Pablo. 1991. Religious Freedom in Latin America. *Transformation* 8: 12–15. [CrossRef]

Du Plessis, Georgia. 2020. COVID-19 and Limitations to the International Right to Freedom of Religion and Belief. *Journal of Church and State*, csaa082. [CrossRef]

Durham, Cole. 2004. Facilitating Freedom of Religion or Belief through Religious Association Laws. In *Facilitating Freedom of Religion or Belief: A Deskbook*. Edited by Tore Lindholm, W. Cole Durham and Bahia G. Tahzib-Lie. Leiden: Martinus Nijhoff.

Durkheim, Emile. 1995. *The Elementary Forms of Religious Life*. New York: The Free Press.

Evans, Malcom. 1997. *Religious Liberty and International Law in Europe*. Cambridge: Cambridge University Press, pp. 191–92.

Ferrari, Silvio. 2013. Models of State–Religion Relations in Western Europe. In *The Future of Religious Freedom: Global Challenges*. Edited by Allen D. Hertzke. Oxford: Oxford University Press.

Fetzer Institute. 1999. *Multidimensional Measurement of Religiousness/Spirituality for Use in Health Research: A Report of the Fetzer Institute/National Institute on Aging Working Group*. Kalamazoo: Fetzer Institute.

Fox, Jonathan, and Ephraim Tabory. 2008. Contemporary Evidence regarding the Impact of State Regulation of Religion on Religious Participation and Belief. *Sociology of Religion* 69: 245–71. [CrossRef]

Fox, Jonathan. 2011. Separation of Religion and State and Secularism in Theory and in Practice. *Religion, State and Society* 9: 384–401. [CrossRef]

Gill, Anthony. 1998. *Rendering unto Cesar. The Catholic Church and the State in Latin America*. Chicago: University of Chicago Press.

Gill, Anthony. 1999. Government regulation, social anomie and protestant growth in Latin America. *Rationality and Society* 11: 287–316. [CrossRef]

Gill, Anthony. 2008. *The Political Origins of Religious Liberty*. New York: Cambridge University Press.

Grzymala-Busse, Anna. 2020. Beyond War and Contracts: The Medieval and Religious Roots of the European State. *Annual Review of Political Science* 23: 19–36. Available online: https://www.annualreviews.org/doi/pdf/10.1146/annurev-polisci-050718-032628 (accessed on 11 April 2021). [CrossRef]

Halmai, Gábor. 2017. Varieties of State-Church Relations and Religious Freedom Through Three Case Studies. *Michigan State Law Review* 175: 175–207. [CrossRef]
New York Times. 2020. In a Pandemic, Religion Can Be a Balm and a Risk. *New York Times*. March 22. Available online: https://www.nytimes.com/2020/03/22/world/middleeast/coronavirus-religion.html (accessed on 11 April 2021).
Lebret, Audrey. 2020. COVID-19 pandemic and derogation to human rights. *Journal of Law and Biosciences* 7: lsaa015. [CrossRef] [PubMed]
Lindkvist, Linde. 2013. The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights. *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 4: 429–47. [CrossRef]
Madeley, John T. S. 2015. Constitutional Models and the Protection of Religious Freedom. In *Routledge Handbook of Law and Religion*. Edited by Silvio Ferrari. Abingdon: Taylor & Francis.
Madera, Adelaide. 2020. Some preliminary remarks on the impact of COVID-19 on the exercise of religious freedom in the United States and Italy. Stato, Chiese e pluralism confessionale. *Rivista Telematica*. Available online: https://www.statoechiese.it (accessed on 11 April 2021).
Mosquera, Susana. 2017. Reflexiones a partir del estudio de casos sobre libertad religiosa en el sistema interamericano de protección de los derechos humanos. *Persona y Derecho* 77: 335–51. [CrossRef]
Mosquera, Susana. 2018. Fuentes y principios del Derecho eclesiástico peruano. *Vox Iuris* 36: 59–76. [CrossRef]
Mosquera, Susana. 2019. Los principios de laicidad y cooperación a raíz de los proyectos de reforma a la ley de libertad religiosa. *Gaceta Constitucional* 134: 51–66.
Mosquera, Susana. 2019. Sobre el estado laico. *Ius 360*. February 23. Available online: https://ius360.com/sobre-el-estado-laico/ (accessed on 11 April 2021).
Mosquera, Susana. 2020. Libertad religiosa y principios constitucionales de la relación Iglesia-Estado A propósito del caso Señor de los Milagros. *Gaceta Constitucional* 150: 67–77.
Navarro Floria, Juan. 2020. La pandemia y la libertad religiosa en la Argentina: Algunas reflexiones. *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 54: 12.
Navarro Floria, Juan. 2020. Libertad religiosa y coronavirus. Available online: https://www.youtube.com/watch?v=2cB34dqmMK8 (accessed on 11 April 2021).
Nieuwenhuis, Aernout. 2012. State and religion, a multidimensional relationship: Some comparative law remarks. *International Journal of Constitutional Law* 10: 153–74. [CrossRef]
North, Charles, and Carl Gwin. 2004. Religious freedom and the Unintended Consequences of State Religion. *Southern Economic Journal* 71: 103–17. [CrossRef]
OAS. 2020. Available online: http://www.oas.org/en/iachr/media_center/PReleases/2020/076.asp (accessed on 11 April 2021).
OECD. 2020a. Available online: http://www.oecd.org/coronavirus/policy-responses/regulatory-quality-and-COVID-19-the-use-of-regulatory-management-tools-in-a-time-of-crisis-b876d5dc/ (accessed on 11 April 2021).
OECD. 2020b. Policy Responses to Coronavirus (COVID-19). Combatting COVID-19's Effect on Children. Available online: http://www.oecd.org/coronavirus/policy-responses/combatting-COVID-19-s-effect-on-children-2e1f3b2f/ (accessed on 11 April 2021).
OHCHR. 2020. Emergency Measures and COVID-19: Guidance. April 27. Available online: www.ohchr.org (accessed on 11 April 2021).
Opinio Juris. 2020. Stablishing the Grounds for a Very Rich Future Research. Available online: http://opiniojuris.org/2020/04/06/COVID-19-symposium-dont-let-religious-freedom-become-a-casualty-of-coronavirus/ (accessed on 11 April 2021).
Patiño, Aberto. 2020. 4 Congreso Nacional sobre Libertad Religiosa 2020. Desafíos actuales a la libertad religiosa. Available online: https://www.youtube.com/watch?v=Drs3zw9dH68 (accessed on 11 April 2021).
Pontifical Council for Social Communications. 2002. *The Church and the Internet*. Vatican City: PCSC.
Prieto Sanchís, Luis. 2006. Libertad y objeción de conciencia. *Persona y Derecho* 54: 259–73.
Quadri, Sayed. 2020. COVID-19 and religious congregations: Implications for spread of novel pathogens. *International Journal of Infectious Diseases* 96: 219–21. Available online: https://www.ijidonline.com/article/S1201-9712(20)30313-1/pdf (accessed on 11 April 2021).
Ramírez Navalón, Rosa. 2020. Acceso a los lugares de culto y ceremonias religiosas durante el estado de alarma decretado por la pandemia del COVID-19. *Actualidad Jurídica Iberoamericana* 12: 24–31. Available online: http://www.revista-aji.com/wp-content/uploads/2020/05/2._Rosa_Ram%C3%ADrez_pp._24-31.pdf (accessed on 11 April 2021).
RAS. 2015. The Religion and State Project. Available online: https://www.thearda.com/ras/ (accessed on 11 April 2021).
Repucci, Sarah, and Amy Slipowitz. 2020. The Impact of COVID-19 on the Global Struggle for Freedom. Available online: https://freedomhouse.org/report/special-report/2020/democracy-under-lockdown (accessed on 11 April 2021).
Robbers, Gerard, ed. 2019. *State and Church in the European Union*, 3rd ed. Baden-Baden: Nomos.
Ruiz Miguel, Alfonso, and Luis Villavicencio Miranda. 2014. Estado y religión. Una justificación liberal de la laicidad neutral. *Revista española de Derecho Constitucional* 102: 93–126.
Saldaña Serrano, Javier. 2020. *Libertad religiosa en tiempos de pandemia. Tres comentarios y un epílogo*. México City: UNAM.
Sandberg, Russell. 2008. Church-State Relations in Europe: From Legal Models to an Interdisciplinary Approach. *Journal of Religion in Europe* 1: 329–52. [CrossRef]
Santos Loyola, Carlos. 2019. La Ley de Libertad Religiosa. Principales avances y una problemática reglamentación. *Gaceta Constitucional* 133: 183–92.

Sarkar, Sonia. 2020. Religious Discriminations Is Hindering the COVID-19 Response. *BMJ* 369: m2280. Available online: https://www.bmj.com/content/bmj/369/bmj.m2280.full.pdf (accessed on 11 April 2021). [CrossRef]
Sartea, Claudio. 2020. La tirannia della salute. Riflesioni giusfilosofiche sulla pandemia. *Societá e diritti* 5: 99–126. [CrossRef]
Scheinin, Martin. 2000. Freedom of Thought, Conscience and Religion. *Studia Theologica* 54: 5–18. [CrossRef]
Scolnicov, Anat. 2010. *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights*. London: Routledge.
Sen, Amartya. 2009. *The Idea of Justice*. Cambridge: The Belknap Press of Harvard University Press.
Stanger, Francis. 1927. Church and State in Peru. *The Hispanic American Historical Review* 7: 410–37. Available online: https://www.jstor.org/stable/2505995 (accessed on 11 April 2021). [CrossRef]
Stepan, Alfred. 2000. Religion, Democracy, and the Twin Tolerations. *Journal of Democracy* 11: 37–57. [CrossRef]
Sullivan, Winnifred. 2018. *The Impossibility of Religious Freedom*. Princetown: Princetown University Press.
Sun, Nina. 2020. Applying Siracusa. *Health and Human Rights. Special Edition: Mental Health and Human Rights* 22: 387–90.
Taylor, Charles. 2010. The Meaning of Secularism. *The Hedgehog Review. Critical Reflections on Contemporary Culture* 12: 23–35.
Tomalin, Emma, Jorg Haustein, and Shabaana Kidy. 2018. *Religion and the Sustainable Development Goals*. Cambridge: Cambridge Institute on Religion & International Studies.
United Nations. 1985. *Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex*. New York: United Nations.
Viladrich, Pedro Juan. 1980. Los principios del Derecho eclesiástico Español. In *AAVV. Derecho eclesiástico del Estado Español*. Pamplona: Eunsa, pp. 211–37.
Von Münchow, Sebastian. 2020. The Legal and Legitimate Combat Against COVID-19: German Curfew-related case law. *Connections* 19: 40–60. Available online: https://www.jstor.org/stable/26937609 (accessed on 11 April 2021).
Yildirim, Mine. 2017. *The Collective Dimension of Freedom of Religion or Belief in International Law. The Application of Findings to the Case of Turkey*. London: Routledge.

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Protecting the Rights of Minorities under International Law and Implications of COVID-19: An Overview of the Indian Context

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Abstract: The concept of majority rule and respect for minority rights is demonstrated in several constitutions of the world. Oppression by the majority of the minority is barred by articles of these respective constitutions. Today, democracy is mostly a method of government of the people that is ruled by the people. The issue of minority rights is at the center of the concept of civic rights. Minority protection, thus, operates on the hypothesis that religious, cultural, and linguistic affiliations are essential features of the very notion of a civic, just society. This paper offers an alternative account of why minority rights have international significance and more information on the value of an international, socially just process for the allocation of resources by states. By this approach, international minority rights speak to the wrongs that international law itself produces by organizing international political reality into a legal order. This article focuses on the uncertain effect of religious autonomy in India and the outcome of democracy in the country. While the Indian constitution guarantees autonomy to its religious minorities and promises minorities their freedoms, Indian democracy, which was once considered remarkable in scale and duration, has been weakened by the rise of xenophobic nationalism and threats to religious minorities. Even the safety and religious freedom of minorities have been compromised during COVID-19. In the last few decades, these trends have been clear; however, they have dramatically increased in the last few years, and the administration has turned a blind eye.

Keywords: the rights of minorities; international legal framework; cultural rights; religious rights; constitutional law; democracy

Citation: Ahmad, Nehaluddin. 2021. Protecting the Rights of Minorities under International Law and Implications of COVID-19: An Overview of the Indian Context. *Laws* 10: 17. https://doi.org/10.3390/laws10010017

Academic Editor: Patricia Easteal

Received: 29 December 2020
Accepted: 24 February 2021
Published: 23 March 2021

1. Introduction

In every genuine democracy today, majority rule is both endorsed and limited by the supreme law of the constitution, which protects the rights of individuals. The concept of majority rule and respect for minority rights is demonstrated in many Constitutions of the world for example, the American and Indian constitutions (Jefferson 2006). Oppression by the majority over the minority is barred by articles of the respective constitution. Today, democracy is generally a government of the people that is ruled by the people. Democracies understand the importance of protecting the rights, cultural identities, social practices, and religious practices of all individuals (UN Human Rights Committee 1994). In order for the people's will to govern, a system of majority rule with respect for minority rights has been put into place.

The concept of "minorityism" reflects a phenomenon of uncertainty and inferiority[1] that a particular section of society may face for a variety of reasons (Ibid). The distinctions among communities regarding "minority" and "majority" have existed throughout history. Some political systems do grant special community rights to their minorities, although this is not generally based on any recognition of minority "rights" per se (Jackson Preece 1998).

[1] Some scholars argue that, although the use of the term "inferior" is meant to indicate that a numerical minority position of the group is required, a neutral term with no undesirable connotations would be more suitable. See, generally (Henrard 2000, p. 33; Gilbert 1992).

The French and American revolutions in the late eighteenth century proclaimed the free exercise of religion as a fundamental right, although neither directly addressed the broader issue of minority protection.

In the United States, freedom of religion is a constitutionally protected right provided in the religion clauses of the First Amendment. Freedom of religion is also closely associated with the separation of church and state, a concept advocated by colonial founders, such as Dr. John Clarke, Roger Williams, William Penn, and later Founding Fathers, such as James Madison and Thomas Jefferson (Zimmerman 2010). The 1815 Congress of Vienna, which dismantled the Napoleonic Empire, recognized minority rights to some extent, as did the 1878 Treaty of Berlin, which recognized special rights for the religious community of Mount Athos (Benzo and Ferrari 2014).

India's old philosophy of multicultural and multireligious society has remained threatened by an increasingly exclusionary conception of national identity based on religion[2]. During recent years, religious freedom conditions in India have experienced a drastic turn downward, with religious minorities under increasing assault, after the re-election of the present rightist government in May 2019. The national government used its strengthened parliamentary majority to institute national level policies violating religious freedom across India, especially for the Muslim minority community.

The national government allowed violence against minorities and allowed hate speech and incitement to violence.[3] The Universal Periodic Review (UPR) attributes responsibility for anti-minority violence to the Indian Government, including the present governing political party. The rise of xenophobic discrimination and threats to religious freedom of minorities, was evident in the past also especially in targeting Muslims, Christians, and other minorities. Threats and hate speech against religious minorities have escalated drastically over the last few years. Killing or lynching in the name of "cow protection/vigilantism" is treated a heroic deed.

Following the outbreak of COVID-19, physical, verbal, and psychological warfare is being waged against these minorities, pushing their ostracization further in Indian society.[4] It is regrettable that ideological hatred has been practiced in the garb of patriotism and nationalism. The Indian constitution guarantees autonomy to its religious minorities, and promises the freedom to manage their religious affairs independently[5] Article 15, which encapsulates one of the fundamental rights of India's constitution, explicitly prohibits discrimination on grounds of religion, besides race, caste, sex, or place of birth.[6]

During the latest global pandemic, some governments have blamed minority faith groups for the outbreak of the coronavirus and used the crisis to justify further repression of religious communities that had already been suffering from severe marginalization. COVID-19 has added a new dimension to the hate speech and disinformation circulated by the national media against Indian minority communities (Regan et al. 2020). At the same time, political leadership was busy exacerbating the tensions between religious groups, and official actions were not aimed at fighting the virus but instead busy restricting their religious practices and legal rights.

The article provides a short overview of the targeted discrimination against minorities in India and apathy from the legal and political agencies to protect them. We suggest that neither of these two perspectives adequately captures the nature of the international legal order, which has a normative architecture unto its own.

[2] USCIRF | Annual Report 2018 available at https://www.uscirf.gov/sites/default/files/Tier2_INDIA.pdf, accessed on 16 June 2020.

[3] USCIRF | Annual Report 2020, USCIRF–Recommended For Countries of Particular Concern (CPC) available at https://www.uscirf.gov/sites/default/files/India.pdf, accessed on 16 June 2020.

[4] Rasheed Kidwai, Naghma Sahar (July 2020) Observer research foundation COVID-19 and Indian Muslims https://www.orfonline.org/expert-speak/covid19-indian-muslims-69519/ (accessed on 23 December 2020).

[5] (Indian Constitution, Article 30 see (Das Basu 2008)).

[6] Ibid.

2. Protection of Minorities—Historical Development

The oldest roots of minority protection can be traced in the seventeenth century reforms that, explicitly, can be traced from the Westphalia treaty (1648).[7] Even the treaty of Oliva in 1660 in favor of the Roman Catholics in Livonia, ceded by Sweden and Poland, also tried to protect minorities. The millet system[8] of the Ottoman Empire, for example, allowed a degree of cultural and religious autonomy to non-Muslim religious communities, such as Orthodox Christians, Armenians, Jews, and others (Ghanea 2012). During the 19th century, as result of the Tanzimat reforms (1839–1876), the term was used for legally protected *ethno-linguistic* minority groups. The word *millet* comes from the Arabic word *millah* that literally means "nation" (Masters 2009).

The millet system has been called an example of pre-modern religious pluralism (Sachedina 2001). The millet system in the Muslim world provided the pre-modern paradigm of a religiously pluralistic society by granting each religious community an official status and a substantial measure of self-government.[9] The Ottoman Empire followed the tradition of the millet system, beginning with Sultan Mehmet Fatih (Shaw 1977), and improved its institutional structure by explicitly stating that the rights of non-Muslim communities be addressed to them in the royal decrees. These decrees were called *Ahd-name*, and, because they were accompanied by the Sultan's pledge, they had the force of an international contract (El Fadl 1994).

Greek Orthodox Christians were not established as the first millet after the conquest of Constantinople by Sultan Mehmet (1453), as is commonly assumed in the literature. Rather, they had the same communal rights all along under the Seljuqs and the Ottomans prior to the conquest of Constantinople in 1453 (Inaltck and Quataert 1997). The Orthodox patriarch had been granted the same rights as the leaders of other communities that had previously come under Islamic rule. The patriarch was allowed to apply Orthodox law in secular and religious matters (Senturk 2002). What Sultan Mehmet, who after the fall of Constantinople considered himself the Eastern Roman Emperor, did was to grant a charter to the patriarch of the Orthodox Church, Genady II.

As the policy of religious pluralism and multiculturalism was consolidated by the millet system, it allowed the Jews to form their own community and to establish independent religious, educational, and legal institutions in Istanbul (Shaw 1991). Historians commonly note that the freedom that was granted to the minorities within the Ottoman territories attracted large numbers of displaced Jewish communities that were among the victims of persecution in Spain, Poland, Austria, and Bohemia (Braude and Lewis 2013). While in Russia, Rumania, and most of the Balkan states, Jewish communities suffered from constant persecution (pogroms, anti-Jewish laws, and other vexations), Jews established on Turkish territory enjoyed an altogether remarkable atmosphere of tolerance and justice (Dumont 2013).

The French and American revolutions in the late eighteenth century proclaimed the free exercise of religion as a fundamental right, although neither directly addressed the broader issue of minority protection. On the contrary, "the contemporary minority issues with which we have familiarity are largely rooted in the nineteenth century" (Sigler 1983). The three great congresses of the nineteenth century, Vienna (1814–1815), Paris (1856), and Berlin (1878), included minority protection provisions in treaties establishing rights and security of populations that were to be transferred to foreign sovereignty (Thornberry 1991, p. 37). However, a more rational approach can be seen for the first time in the history of international law in the steps were taken for minority protection and their rights that were methodically defined in the Treaty of Versailles after World War I (Fink 1995).

[7] Compare for example Treaty of Westphalia, which in 1648 granted religious right to the Protestant German population.

[8] (Masters 2001) In the Ottoman Empire, a millet (Turkish: [millet]) was an independent court of law pertaining to "personal law" under which the Muslim community (a group abiding by the laws of Muslim Sharia), Christian Canon law, or Jewish Halakha were allowed to rule itself under its own laws.

[9] Ibid.

The international protection of minorities originates from the Paris Peace Conference, which was held in 1919, giving the birth to the League of Nations (MacMillan 2003). Although the pact of the League of Nations contained no provisions regarding human rights, it incorporated two relating systems of mandates and of minorities (Buergenthal 2009). The League's failure to establish an effective minorities system reflected the economic, social, and political problems of the inter-war period and contributed to the fall of Woodrow Wilson's vision 1919 (Knock 1995) of security system and disarmament, which resulted from the Second World War. The idea of human rights protection emerged stronger after the Second World War's disaster (Gibson 1996) regarding peoples that would be considered minorities from today's perspective (Henkin 1990).

Most international legal–political concerns during the nineteenth century, however, were directed toward justifying the unification of linguistic "nations" based on the principle of self-determination, rather than the protection of minority groups as such (Fisch 2015). As the lure of nationalism grew, people who did not share the ethnic, linguistic, or religious identity of the majority within their country were increasingly under threat (Baycroft 1998). By the time of the outbreak of the First World War in 1914, national or minority concerns were at the forefront of international politics, at least in Europe.[10]

Today "minorityism" is a global phenomenon, and, although its time significance and concomitant elements differ from country to country, the issue has been under the constant consideration of the United Nations. At the United Nations level the term "minority" was defined by Francesco Capotorti in 1977, as a "group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.".[11]

Defining the Term "Minorities"

The concept of minorities has existed from long time, and, until the 1960s and 1970s, the term generally referred to national, ethnic or religious minorities in heterogeneous nation-states (Rawls 2003). In the 1960s and 1970s, the range of characteristics used to identify minority groups widened (e.g., gender, disability, and sexual orientation), and the practice of defining minority groups primarily on the basis of power and status disadvantages became common, as the world took the passage to Nationalism and state creation. Several definitions other than the one mentioned above for the term minority have also been shared over time.[12]

The United Nations Minorities Declaration in its Article 1[13] and Article 2[14] refers to minorities based on national or ethnic, cultural, religious, and linguistic identity, and provides that States should protect their existence, adopted by consensus in 1992.[15] There is no internationally agreed definition of minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language, or religion) and subjective factors (including that individuals must identify themselves as members of a minority).

Despite many references to "minorities" in international legal instruments, there is no universally agreed, legally binding definition of the term "minority." (Capotorti 1991)." This is primarily because of a feeling that the concept of "minority" is inherently vague

10 Ibid.

11 (Pentassuglia 2002). Also see /E/CN.4/Sub.2/384/Rev.1, para. 568, Minority Rights: International Standards and Guidance for Implementation (HR/PUB/10/3).

12 Ibid.

13 Article 1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

14 Article 2, States shall adopt appropriate legislative and other measures to achieve those ends.

15 United Nations Human Rights, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly resolution 47/135 of 18 December 1992 https://www.ohchr.org/EN/ProfessionalInterest/Pages/Minorities.aspx (accessed on 12 February 2020).

and imprecise and that no proposed definition would ever be able to provide for the innumerable minority groups that could possibly exist (Rehman 2000). Consequently, international law has found it difficult to provide any firm guidelines in relation to defining the concept (Rehman 2000, p. 41).

The most widely acknowledged definition is the one formulated by Francesco Capotorti (Pejic 1997), a special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1977. For the purpose of his study on the rights of persons belonging to Ethnic, Religious and Linguistic Minorities, he defined, with the application of Article 27 of International Covenant on Civil and Political Rights (ICCPR) in mind, a minority group as a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members, being nationals of the state, possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, and maintain a sense of solidarity, directed toward preserving their culture, traditions, religion, or language.[16]

In 1985, the Sub-Commission submitted to the Commission on Human Rights a text on the definition of "minority" prepared by Jules Deschenes. The definition was, however, not accepted by the Commission. According to this definition, a minority is a group of citizens of a state, consisting of a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious, or linguistic characteristics that differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if not implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.[17] Although there is some measure of agreement regarding the essential elements of the definitions proposed by Capitorti and Deschenes, scholars have criticized some of the elements for being vague, misguiding, and inadequate for the diversified minority situations (Wheatley 2005).

A majority, on the other end of the spectrum, refers to the group that exercises political dominance in the state even if not in the numerical majority, while lobby actors are the internal and external pressures and factors that affect the state. Democracy is a method of government of the people that is ruled by the people. Democracies understand the importance of protecting the rights, cultural identities, social practices, and religious practices of all individuals. In order for the people's will to govern, a system of majority rule with respect to minority rights has been put into constitution of various countries. Are those constitutional provisions always respected by the majority rulers? The answer is not necessarily affirmative (Thornberry 1991).

Thus, the question often arises as to whether, for example, persons with disabilities, persons belonging to certain political groups, or persons with a particular sexual orientation or identity (lesbian, gay, bisexual, transgender, or intersexual persons) constitute minorities. While the United Nations Minorities Declaration is devoted to national, ethnic, religious, and linguistic minorities, it is also important to combat multiple discrimination and to address situations where a person belonging to a national or ethnic, religious, and linguistic minority is also discriminated against on other grounds, such as gender, disability, or sexual orientation. Similarly, it is important to keep in mind that, in many countries, minorities are often found to be among the most marginalized groups in society and severely affected by, for example, pandemic diseases such as COVID-19 and HIV/AIDS, and in general have limited access to health services.[18]

3. Minorities Rights under International Law

The issues related to the rights of persons belonging to minorities may be found in nearly every human rights instrument. The United Nations recognizes that minority rights are essential to protect those who wish to preserve and to develop values and practices that

[16] Supran 44 Francesco Capotorti, Study on the Rights of Persons.
[17] Jules Deschenes, "Proposal concerning a definition of the term minority", UN Doc. E/CN.4/Sub.2/1985/31/Corr.1 para.181 (1985).
[18] Minority Rights: International Standards and Guidance for Implementation (HR/PUB/10/3).

they share with other members of their community and has been a champion for the cause of minorities rights since its inception in1945. The United Nations provides protection of the rights of minorities under Article 27 of the International Covenant on Civil and Political Rights (ICCPR),[19] and under Article 30 of the Convention of the Child.

In addition, the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities is the document that sets the principal standards and provides guidance to countries to take legislative and other necessary measures to ensure the rights of persons belonging to minorities (Henrard 2000, p. 48). Instruments adopted by the Conference on Security and Co-operation in Europe and the Council of Europe, on the other hand, refer only to "national" minorities. The Minorities Declaration has the broadest scope, encompassing persons belonging to "national or ethnic, religious and linguistic minorities;" it also refers to the protection of "cultural" identity (Gellner 1983).

The UN Declaration on Minorities, as the first exclusively devoted to the subject, is perhaps the single most important UN instrument on minority rights; however, it is neither the beginning nor the end of UN efforts to promote and protect minority rights, for instance, the Convention against Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; United Nations Educational, Scientific and Cultural Organization's(UNESCO's) Convention Against Discrimination in Education; the UNESCO Declaration on Race and Racial Prejudice; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious Belief; the Universal Declaration of Human Rights (Article 26); the International Convention on Economic, Social and Cultural Rights (Article 13); and the Declarations and Programmes of Action adopted in 1978 and 1983 by the two World Conferences to Combat Racism and Racial Discrimination (Fink 1995).

Article 13 the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the right of everyone to education, stating in some of its paragraphs that states should made possible for parents or legal guardians to choose schools for their children, other than those established by the public authorities, that conform to certain minimum educational standards. States are also expected to ensure the religious and moral education of their children in conformity with their own convictions. The Limburg principles on the implementation of ICESCR[20] endeavor to eliminate all kinds of discrimination and adopt special measures that allow disadvantaged groups access to the enjoyment of economic, social, and cultural rights (Eide et al. 1995).

The first Optional Protocol to the ICCPR[21] allows individuals to submit complaints to the Human Rights Committee. The Human Rights Committee, an expert body, was established to monitor the implementation of the ICCPR and the Protocols to the Covenant in the territory of State parties. One part of its activities is the assessment of the reports,[22] which the State parties must submit every five years on the legislative and implementation measures they have adopted regarding the rights recognized in the Covenant and on the progress made in the enjoyment of those rights.

The other scope of Human Rights Committee competences is individual procedure mechanisms, designed for individuals who claim that their rights and freedoms have been violated by a State who is party to the Optional protocol.[23] The International Convention on the Elimination of All Forms of Racial Discrimination has protective closes extending to

[19] UN Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), CCPR/C/21/Rev.1/Add.5, (1994).

[20] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, http://shr.aaas.org/thesaurus/instrument.php?insid=94 (accessed on 12 February 2020).

[21] Adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976. See the text at http://193.194.138.190/html/menu3/b/a_opt.htm (accessed on 21 January 2020).

[22] Article 40 of the Covenant on Civil and Political Rights.

[23] A great part of the minority rights related cases decided by the Human Rights Committee are related to rights of indigenous peoples. See *Lubicon Lake Band (Bernard Ominayak) v Canada* (No 167/1984) (CCPR/C/38/D/167/1984), *Lovelace v Canada* (No.24/1977), *Mikmaq v Canada* (No.78/1980), 2 Selected Decisions 23, *Kitok v Sweden* (No. 197/1985), 1988 Report of the Human Rights Committee, GAOR 43rd Session, *Cadoret v France* (Nos 221/1987 and 323/1988 ibid at 219.

minorities.[24] Under the scope of the Article 14 the Committee on the Elimination of Racial Discrimination (CERD),[25] which is the first body by the United Nations created to monitor and review States' actions taken in fulfillment of their obligations under a specific human rights agreement.[26]

The Convention established three procedures to make it possible for CERD to review the legal, judicial, administrative, and other steps taken by individual States to fulfill their obligations to combat racial discrimination. First, all States that ratify or accede to the Convention must submit periodic reports to CERD. Secondly, the Convention provides for State-to-State complaints. Last but not least, the Convention makes it possible for an individual or a group of persons who claim to be victims of racial discrimination to lodge a complaint with CERD against their State.

The Convention on the Prevention and Punishment of the Crime of Genocide[27] also extends its protection to minority groups, defining genocide in Article 2 as an act committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, such as, killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and/or forcibly transferring children of the group to another group.

The 1992 United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious, and Linguistic Minorities is generally seen as the consequence of the events that occurred after the fall of communism. It is the fundamental instrument that guides the activities of the United Nations in this field today. The Declaration contains a list of rights in favor of persons belonging to ethnic, national, religious, or linguistic minorities, and obliges State parties "to protect the existence and the national or ethnic, cultural, religious, and linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that identity."[28] The weak point of the Declaration is the lack of precise state obligations. However, as it is not a legally binding document, but simply a political declaration, it represents one of the first international documents that attempts to promote the protection of minority rights (Benoit-Rohmer 1996).

Some Observations of the Universal Periodic Review (UPR), United Nations, Human Rights Council Regarding the Indian Situation

The Universal Periodic Review (UPR) is a unique process that involves a periodic review of the human rights records of all 193 UN Member States. The UPR is a significant innovation of the Human Rights Council, which is based on equal treatment for all countries. The UPR was established when the Human Rights Council was created on 15 March 2006 by the UN General Assembly in resolution 60/251.[29]

As observed, a number of reoccurring communal incidents were associated with the attack on religious minorities in India. These give power and immediacy to the civil society accounts and underline the troubling nature of contemporary religious intolerance:

- *Terror* (e.g., "in Tamil Nadu one writer was terrorized to withdraw his [religious] books. Often they (writers and artists) are not provided with adequate security and protection and on the other hand, their abusers are not restricted. Mostly such abusers

[24] Ibid at 219.

[25] Adopted and opened for signature and ratification on 21 December 1965, entry into force 4 January 1969, http://193.194.138.190/html/menu3/b/d_icerd.htm (accessed on 21 February 2020).

[26] Human Rights Committee (which has responsibilities under the International Covenant on Civil and Political Rights), the Committee on the Elimination of Discrimination against Women, the Committee against Torture, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child.

[27] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force on 12 January 1951. http://www1.umn.edu/humanrts/instree/x1cppcg.htm (accessed on 21 February 2020).

[28] Article 1 of the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.

[29] Basic Fact about UPR www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx (accessed on 24 May 2020).

get backing, encouragement, even felicitation by the *Hindutva* organizations and ruling elites").[30];

- *Harassment*—(e.g., "Christians have suffered harassment from both the government and civil society. Their requests for help and protection have also frequently been ignored by authorities").[31];
- *Victimization* (e.g., "the authorities have failed to prevent religious violence across the country. Draft legislation aimed at preventing and punishing communal and targeted violence, and ensuring access to justice and reparations for victims, has yet to be passed").[32];
- *Threats* (e.g., "religious minorities, especially Muslims and Christians, are feeling increasingly at risk. Some ruling party leaders have made inflammatory remarks against minorities while militant Hindu groups, threatened and harassed Muslims and Christians, in some cases physically attacking them").[33];
- *Torture* (e.g., "Police use of torture on individuals accused under Maharashtra Control of Organized Crime Act, 1999 (MCOCA)[34] in Maharashtra has been widespread . . . [there are many accounts] detailing the torture to which they had been subjected to extract the confessions").[35]
- *Killing* (e.g., "in March 2015, a trial court in Delhi acquitted 16 policemen accused of killing 42 Muslim men 28 years in the past[36], arbitrarily picked up from Meerut city of Uttar Pradesh . The Hashimpura massacre is an incident of mass murder, which took place on or around 22 May 1987 near Meerut in Uttar Pradesh state, India, during the 1987 Meerut communal riots during March to June 1987 with a death toll of 350. It is alleged that 19 personnel of the Provincial Armed Constabulary[37] rounded up 42 Muslim youths from the Hashimpura (locality) of the city, took them to the outskirts of the city, shot them in cold blood and dumped their bodies in a nearby irrigation canal . . . charges were dismissed due to a 'scanty, unreliable and faulty investigation'").[38];
- *Force* (e.g., "now again, just before the 2015 Panchayat elections, a Hindu attacked the Muslims,[39] torched their homes and forced them to seek refuge at the Ballabhgarh police station").[40];
- *Intimidation* (e.g., "Converts are often subjected to violence and intimidation, especially those who leave the Hindu faith for Islam, Buddhism or Christianity")[41]

30 National Solidarity Forum, Submission to the Third Cycle UPR (NY: UN, 2016), p. 10. About The Universal Periodic Review (UPR) is a unique process that involves a periodic review of the human rights records of all 193 UN Member States. The UPR is a significant innovation of the Human Rights Council that is based on equal treatment for all countries. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The UPR also includes a sharing of best human rights practices around the globe. Currently, no other mechanism of this kind exists.

31 Civil Society Coalition for Freedom of Religion and Strengthening Pluralism in India, *Submission to the Third Cycle UPR* (NY: UN, 2016), p. 10; *Cycle UPR* (NY: UN, 2016), p. 10; *Submission to the Third Cycle* Universal Periodic Review(*UPR)* (NY: UN, 2016), p. 8.

32 Amnesty International India, *Submission to the Third Cycle* Universal Periodic Review(*UPR)* (NY: UN, 2016), p. 8

33 Human Rights Watch, *Submission to the Third Cycle UPR* (NY: UN, 2016), p. 4.

34 Maharashtra Control of Organised Crime Act, 1999 http://www.lawzonline.com/bareacts/maharashtra-control-of-organised-crime-act/maharashtra-control-of-organised-crime-act.html (accessed on 24 May 2020).

35 Advocates for Human Rights et al, ibid, 2016, p. 5. Also Paul Chaney (2019): India at the crossroads? Civil society, human rightsand religious freedom: critical analysis of CSOs' third cycle Universal Periodic Review discourse 2012–2017, The International Journal of Human Rights, doi:10.1080/13642987.2019.1656610.

36 (Amnesty International 2016).

37 Hashimpura survivors file 615 RTI applications in 20 years long pursuit of justice. Asian Tribune. 25 May 2007.

38 Advocates for Human Rights et al., ibid, 2016, p. 3. And Commonwealth Human Rights Initiative (2007). Feudal Forces: Democratic Nations–Police Accountability in Commonwealth South Asia. CHRI.

39 Prabhu Razdan Hindustan Time, Ballabgarh: Muslim families seek refuge in police station, refuse to return home, 30 May 2015.

40 National Council of Churches India, *Submission to the Third Cycle UPR* (NY: UN, 2016), p. 11.

41 Zo Indigenous Forum, *Submission to the Third Cycle UPR* (NY: UN, 2016), 15. See also Paul Chaney (2019): India at the crossroads? Civil society, human rightsand religious freedom: critical analysis of CSOs' third cycle Universal Periodic Review discourse 2012–2017, The International Journal of Human Rights, doi:10.1080/13642987.2019.1656610.

4. Minorities in India

Majority rule is a way of organizing a government where the citizens freely make political decisions through voting for representatives. The representatives with the most votes then represent the will of the people through majority rule. Minority rights are rights that are guaranteed to everyone, even if they are not a part of the majority (Charlton 2004). The constitution guarantee the minorities rights and assures the minority that they must trust that the majority will, and, in return the majority will take care of the wishes of the minority when making decisions that affect everyone.[42] However, in practice, this system may be flawed as in the case of Indian democracy as well as in many other countries.

It is important to keep in mind that Indian minorities have not migrated to India from outside; rather, they have lived there from generation to generation. In India, minorities generally consist of Christians (2.5%), Sikhs (2%), Jains (1%)[43], and Muslims (14%).Indian Muslims are world's third largest population in the world. In India, the majority consist of Hindus, and their population includes 80% of India's population.[44] India is ostensibly a secular state; however, in a practical sense, in a country where more than 80% of population consists of one single religion, it is quite difficult to provide equal status to minority groups. Thus, in order to provide equal status to these minorities, special privileges are accorded to them in the Indian constitution. Taking an example, Muslims in India have a poverty rate of 43%, whereas the national average is 39% (National Sample Survey Organisation, 1999–2000). In rural areas, Muslim landlessness is 51% as compared to 40% for Hindus (Majumdar 2018).

Literacy rates are substantially lower among Muslims, leading to the deprivation of jobs in higher positions in government offices and skilled professions in the service sector. In urban areas, 60% of the Muslims have never gone to school, against the national average of 20%. Only 5% of Muslim women have completed high school education, and the income of the average Muslim is 11% less than the national average. To this may be added the Kashmiri Muslim community, with its distinct political history and its guaranteed status of self-rule in past, which is a testimony to the betrayal of rights and the denial of justice to the Muslim population.[45] Therefore, there is still need for further implementations of new laws in order to meet the drowning standards.

A report commissioned by the Congress government, the Justice (Retd) Rajinder Sachar Committee Report, presented the issues of income, education, and employment related to Indian Muslims. The Committee was set up by the Prime Minister as a High Level Committee under the Chairmanship of Justice (retd) Rajinder Sachar to examine in comprehensive detail the social, economic, and education status of the Indian Muslim community as of 2006. The findings of the Sachar Committee in 2006 clearly indicated certain levels and forms of systemic discrimination and official prejudice operating in Indian society at almost all levels against Muslims, and some of the results have shocked the whole country. The Committee used data tabulated indices for the levels of education (matriculation, graduates, and above), employment (workers and the formal sector), and economic status (poverty and land holdings) between Hindus and Muslims (Parvez and Hasan 2015).

On the education front, only about 3.6 per cent of Muslims above the age of twenty were college graduates according to the recent data collected in 2006 from the National Sample Survey Organisation (NSSO). Proportions of 54.6 per cent of Muslims in villages and 60 per cent in urban areas have never attended schools. There are 3.1 per cent of the Muslim community in urban areas who are graduates and 1.2 per cent who are post-graduates. Only 0.8 per cent of Muslims in rural areas are graduates. The Committee also found an inadequate number of government schools in the Muslim-dominated areas

[42] Ibid.

[43] Jains become sixth minority community—Latest News & Updates at Daily News & Analysis. 21 January 2014.

[44] "India has 79.8% Hindus, 14.2% Muslims, says 2011 census data on religion". Firstpost. 26 August 2016 https://www.firstpost.com/india/india-has-79-8-percent-hindus-14-2-percent-muslims-2011-census-data-on-religion-2407708.html, accessed on 8 June 2020.

[45] Ibid.

contributing to the low number of Muslim boys and girls attending schools (Ibid; Parvez and Hasan 2015).

Brief Historical Background of Muslims as a Minority in India

Islam was first introduced in India through the Arab invasion of Sind in CE 712 and through subsequent invasions of the eleventh and twelfth centuries. The religion firmly established itself as a force through the Mughal empires in the sixteenth century. The Mughals generally refrained from forcible conversions to Islam, and the great Mughal Emperor Akbar granted a remarkable measure of tolerance and autonomy to non-Muslims. Although a considerable number of soldiers and officials came with the Mughals, the bulk of the Muslim population is descended from peoples of India, mainly from members of lower castes who converted to Islam as a means of escape from persecution and repression at the hands of the caste Hindus (Chand 1972).

While the concentration of Muslims was in the north-west of India (present-day Pakistan) and the east (present-day Bangladesh), there were also substantial numbers throughout the north and east. The decline of the Muslim domination of India and the ultimate dispossession of the Mughal empire had a number of consequences. While bitterly resenting the loss of the empire, Muslims had to bear the brunt of the retaliatory policies at the hands of the new colonial masters after the failed uprising of 1857.[46]

The Muslim League came in time to represent the aspirations of the Muslim masses in India during 1906 (Mujahid 2007), and ultimately spearheaded the Pakistan movement in 1940, led by Mohammed Ali Jinnah and Liaquat Ali Khan. Conflict between the Muslim League and the Indian National Congress, at the helm of the movement for independence from Britain, eventually resulted in the decision to partition India and to create Pakistan, 14 August 1947.[47]

The division of India along communal lines could not completely eradicate the religious minorities; instead, it contributed to exacerbating the already existing tensions and divisions. The tragedy, which ensued at the time of partition, with Muslims, Sikhs, and Hindus all as victims of brutal and widespread conflict, remains one of the great catastrophes of human history.

As far as India's Muslims were concerned, the creation of Pakistan as a homeland for Muslims resulted in a new minority problem for the now independent state of India. Muslim-majority regions (with the exception of Kashmir) separated to form the state of Pakistan. Muslim inhabitants of India now felt more insecure (Jalal 1994). The numerical strength of Muslims in India also decreased, from over 26 per cent of the population during 1941 (Jalal 1994) to about 14.4 per cent according to the 2011 census.

Indian Muslims are not granted the same constitutional safeguards as the scheduled castes and scheduled tribes, and they are not entitled to reservations in employment and education. Muslims are strikingly underrepresented in the civil service, the military, and institutions of higher education.

Constitutional Rights Accorded to Minorities and Their Protection

Right of a minority to establish educational institutions—(a) Article—30—Article—30(1) gives the linguistic or religious minorities the following two rights: (a) The right to establish; (b) The right to administer educational institutions of their choice. Article—30(2) mandates that, while granting aid to educational institutions, the state shall not discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language (Jain 2006).

The minorities have been given protection under article 30 in order to preserve and strengthen the integrity and unity of the country. The sphere of general secular education

[46] Ibid.
[47] Ibid.

will develop the commonness of boys and girls of India. This is in the true spirit of liberty, equality, and fraternity through the medium of education.[48]

The Supreme Court indicated in Ahmedabad St. Xaviers College v. State of Gujarat that the spirit behind article 30(1) is the conscience of the nation in that minorities, religious as well as linguistic, are not prohibited from establishing and administering educational institutions of their choice, for the purpose of giving their children the best general education to make them complete men and women of the country.[49]

In the Year Book on Human Rights U.N. Publication 1950 ed., minorities were described as non-dominant groups with different religious or linguistic traditions compared with the majority population. Article 30(1) of the Indian constitution uses the terms 'linguistic' and 'religious' minorities. The word 'or' means that a minority may either be linguistic or religious and that it does not have to be both a religious minority as well as a linguistic minority.

The Indian constitution uses the term 'minority' without defining it. In Re: The Kerala Education Bill[50], the Supreme Court opined that, while it is easy to say that a minority means a community that is numerically less than 50 per cent, the important question is, 50% of what? Should it be of the entire population of India, or of a state, or a part thereof? It is possible that a community may be a majority in a state but a minority in the whole of India. A community may be concentrated in a part of a state and may thus be in the majority there, though it may be in the minority in the state as a whole. If a part of a state is to be taken, then the question is where to draw the line and what is to be taken into consideration a district, town, a municipality, or its wards.[51]

The ruling in the Kerala Education Bill was reiterated by the Supreme Court in the Guru Nanak University case[52]. In that case, the Supreme Court rejected the contention of the state of Punjab that a religious or linguistic minority should be a minority in relation to the entire population of India. The Court has ruled that a minority has to be determined, in relation to the particular legislation that is sought to be impugned. If it is a state law, the minorities have to be determined in relation to the state population. The Hindus in Punjab constitute a religious minority. Therefore, Arya Samajistis in Punjab also constitute a religious minority with their own distinct language and script[53].

It is within the realm of possibility that the population of a state may be so fragmented that no linguistic or religious group may by itself constitute 50 percent of the total state population. In such a situation, every group will fall within the umbrella of Article. 30(1) without there being a majority group in the state against which minorities need to claim protection.[54]While upholding these rights, the Supreme Court of India has, in the T.M.A. PAI case[55], also endorsed the concept that there should be no reverse discrimination and opines that the essence of Article 30(1) of Indian Constitution, is to ensure equal treatment between the majority and the minority institutions.

The Court has pointed out that if various sections and classes of the Hindus were to be regarded as 'minorities' under art. 30(1), then the Hindus would be divided into numerous sections and classes and cease to be a majority any longer. The sections of one religion cannot constitute religious minorities. The term 'minority based on religion' should be restricted only to those religious minorities, e.g., Muslims, Christians, Jains, Buddhists, Sikhs, etc., that have kept their identity separate from the majority, namely, the Hindus.[56]

48 Ibid.
49 Ahemdabad St. Xavier's College v. State of Guajrat, AIR 1974 SC 1389.
50 In Re the Kerala Education Bill, AIR 1958 SC 956.
51 (Bakshi 1996).
52 D.A.V. College, Jullundur v. State of Punjab, AIR 1971 SC 1737.
53 Ibid. D.A.V College also see T.M.A. Pai Foundation & others v. State of Karnataka, (1995) 5 SCC 220.
54 ILI, Educational Planning (1967).
55 T.M.A PAI Foundation v. State of Karnataka, AIR 1994 SC 13.
56 A.S.E Trust v. Director, Education, Delhi Adm., AIR 1976 Del 207.

In a vast country, such as India, in order to provide equality and unity among its citizens, as there is a wide difference between the minority and the majority, special rights should be endowed to minorities so that they can develop their personality. In accordance with this view, various articles in our constitutions and acts are enshrined so that these minorities can compete with the majority.

Among these articles, article 30(1) and the National Commission for Minority Educational Institutions Act, 2004, provides minorities the right to establish, administer educational institutes and affiliate themselves to central universities. The case before the Indian Supreme court involved the validity of the National Council for Minority Educational Institution's (NCMEI) decision to accord minority status to a college [57]. The High Court had invalidated the NCMEI's grant of minority status to the college, and this decision was appealed in the Supreme Court of India. The Indian Supreme court's judgment was historic, as it reiterated that no fundamental right—including the rights of minorities—can be waived.

However, various lacunas have been observed since the birth of these rights and acts. These articles and acts raise several questions: (1) Is there any right to create educational institutes for minorities, and if so, under which provision? (2) In order to determine the existence of a religious or linguistic minority in relation to article 30 of the Indian Constitution, what is to be the unit, the State or the country as a whole? (3) To what extent can the rights of aided private minority institutions to administer be regulated? Answers to these questions are illusionary and ambiguous in nature.

5. Discriminatory Laws and Violence against Muslim Minorities

New, designed, more multifarious targeted forms of violence have started against minorities in India. A few such laws and incidents of violence against Muslim Minorities are discussed here.

5.1. National Register of Citizens: Discrimination and Denial of Nationality

Relevant ICCPR provisions: Art 2 (non-discrimination), 7 (freedom from inhuman treatment), And 14 (right to fair trial and independent judiciary) are violated as below.

The complete draft National Register of Citizens (NRC) in Assam was published on 30th July 2018, raising fears that, contrary to international law, it risked arbitrarily depriving the nationality of over 4 million persons and rendering them stateless. The populations at risk are overwhelmingly from minority ethnic, religious, and linguistic groups consisting of Muslims and Hindus of Bengali descent and Nepali-speaking populations with high percentages of women, children, and daily wage workers, all among the most marginalized and excluded communities.[58]

Three days of violence erupted in Delhi with mobs attacking Muslim neighborhoods during February 2020, in the aftermath of the NRC agitation,[59] after Lok Sabha (one of the houses of Parliament) cleared the Citizenship Amendment Bill December 2019.[60] There were reports of Delhi police, operating under the Home Ministry's authority, failing to halt attacks and even directly participating in the violence. At least 50 people were killed.[61]

[57] CWP No.4211 of 2018, The Director School Education Vs National Commission for Minority decision on 20 March 2020.

[58] Alison Saldanha and Karthik Madhavapeddi, 'Our New Hate-Crime Database: 76% of Victims Over 10 Years Minorities; 90% Attacks Reported Since 2014' (*Fact Checker*, 30 October 2018). https://archive.factchecker.in/our-new-hate-crime-database-76-of-victims-over-10-years-minorities-90-attacks-reported-since-2014/ (accessed on 17 July 2020).

[59] The Citizenship (Amendment) Act, No. 47 of 2019. http://egazette.nic.in/WriteReadData/2019/214646.pdf (accessed on 14 January 2020).

[60] Deeptiman Tiwary and Avishek G Dastidar, "Lok Sabha clears Citizenship Amendment Bill: Amit Shah invokes 'Partition on basis of religion' to defend Bill," *Indian Express*, 10 December 2019, https://indianexpress.com/article/india/lok-sabha-clears-citizenship-amendment-bill-amit-shah-invokes-partition-on-basis-of-religion-to-defend-bill6158951/ (accessed on 14 January 2020).

[61] Jaffery Gentleman, The New York Times How Delhi's Police Turned Against Muslims 12 March 2020 from USCIRF | ANNUAL REPORT 2020.

5.1.1. Hate Speech and Incitement (Art 20 of CCPR)

The laws to deal with hate speech and the prohibition of incitement to hatred, is generally contained in sections 153, 153a, 295a, and 505 of the Indian Penal Code. There is also section 123 (3A) of the Representation of People Act, 1951, which is applicable to political candidates during elections.

These laws are weak, and the State's record of enforcement of the laws is poorer still. According to an New Delhi Television Ltd. (NDTV) report of 2018, the use of hateful and divisive language by high-ranking politicians increased almost 500% in the previous 4 years. Of the 45 leaders responsible for hate speech since April 2014, only in six cases was there evidence of the accused being reprimanded or cautioned, or issuing a public apology. At least 21 political leaders (or 48%) had recorded more than one instance of hate speech.[62]

5.1.2. Extrajudicial Killings (Called 'Encounter Killings' or 'Fake Encounters' in India)

State (province) police have also targeted Muslim youth, with Muslims killed disproportionately in extrajudicial killings, in what are called 'fake encounter killings' in India, in Uttar Pradesh and Haryana.[63] The Northern Uttar Pradesh state, in particular, has seen a spate of encounter killings by the local police since March 2017.[64]

According to the state government of Uttar Pradesh (UP), there were 3026 'encounters' in UP from March 2017 to July 2018. In these encounters, 78 criminals were killed, 7182 were arrested, and 838 sustained injuries. In the six months between January 2018 and July 2018, 61 criminals were killed in the encounters with an average of more than eight persons per month.[65] Fact finding reports by civil society and media reports have stated that several victim families are being continuously harassed, threatened, and arrested in fabricated cases. The five UN human rights experts expressed alarm about allegations of at least 59 extrajudicial killings by the police in UP since March 2017 and the pattern of events in the cases of individuals allegedly being abducted or arrested before their killing as well as their bodies bearing injuries indicative of torture.[66]

According to 2015 statistics from the National Crimes Records Bureau, more than 67% of those in India's jails are defendants under trial, 25% of whom were in prison for over one year. Muslims, Dalits, and Adivasis make up 55% of prison population, but only a combined 39% of the country's total population. Overrepresentation of minorities in India's prisons reflects deeper institutional bias against minorities in relation to law enforcement, with severe manifestations including cases of 'encounter killings' and physical abuse by authorities.[67]

The extrajudicial killings show that the National Human Rights Commission and the Supreme Court guidelines require reworking. The only way to stem the rising tide of extrajudicial killings is to end the culture of impunity and punish police officers who resort to such extra-legal means.

5.1.3. Anti-Cow Slaughter Laws

Mob lynching has become a way of life today in the northern part of India. In 22 June 2019, a viral video was shared on social media in India in which a young Muslim man tied up, bleeding profusely all over his body, hands folded, was being lynched by a mob that forced him to chant Glory to Lord.[68] The man, later identified as 24-year-old Tabrez Ansari,

[62] Nimisha Jaiswal with Sreenivasan Jain NDTV19 April 1018 https://www.ndtv.com/india-news/under-narendra-modi-government-vip-hate-speech-skyrockets-by-500-1838925 (accessed on 23 July2020).

[63] (Citizens Against Hate 2018).

[64] India's compliance with ICCPR, May 2019 Citizens Against Hate, New Delhi & Quill Foundation, New Delhi.

[65] 4 May 2018. UP encounter death No 50: Same chase same story. http://indianexpress.com/article/india/up-encounters-yogi-adityanath-up-police-same-chase-same-story-5162715/ (accessed on 21 June 2020).

[66] The Hindu, 31 March 2018. 'Uttar Pradesh's Encounters: 1000 and counting' www.thehindu.com/news/national/ups-encounters-1000-counting/article23404224.ece (accessed on 21 June 2020).

[67] (Viray 2016).

[68] (Ayub 2019).

was beaten for hours until he died at the hands of a mob in the eastern state of Jharkhand. This was a hate crime.[69] This phenomenon has continued, and a total of 30 Indians were killed in 63 incidents from 2014 to 2017[70], according to an India Spend content analysis of English media. In the wake of a number of well-publicized incidents of lynching and mob violence, most of them related to issues surrounding the cattle trade or beef consumption.[71]

In May 2018, a Muslim tailor, Siraj Khan, was beaten to death by a cow vigilante mob in Madhya Pradesh following accusations of slaughtering a bull.[72] Anti-cow slaughter laws exist in 21 states in India, except Kerala, Goa, West Bengal, and states of Northeast states of India[73]. Gujarat increased its punishment for cow slaughter to life imprisonment, becoming the country's most severe. Discriminatory impacts are felt directly by religious minority groups, particularly Muslims and Christians but also by lower-caste Hindus, including Dalits, many of whom consume beef. Nearly 30 Muslims have been lynched in India over suspicions of cow slaughter and the possession and consumption of beef since 2015.[74]

The U.S. Commission on International Religious Freedom (USCIRF) chairman Mr. Tony Perkins called for the Indian government to take action to prevent further violence. "We condemn in the strongest terms this brutal murder, in which the perpetrators reportedly forced Tabrez Ansari to say Hindu chants as they beat him for hours."[75]

In 2018, the Supreme Court urged[76] the National and state governments to combat lynchings with stricter laws. However, the National government and 10 states failed to take appropriate action by July 2020, and the Supreme Court again directed them to do so[77]. Instead of complying, the Home Minister stated that the existing laws are sufficient and denied that lynchings had increased[78], while the Home Ministry instructed the National Crime Records Bureau to omit lynchings from the 2019 crime data report.[79]

5.1.4. Anti-Conversion' Laws (Officially Called Freedom of Religion Act)

Anti-conversion laws are in force in six states (provinces), with recent efforts to introduce laws to additional states, and renewed calls for a national anti-conversion law. While these laws specifically prohibit conversions where fraud, force, or inducement are involved, in practice, the legislation has been used by right-wing extremists to discourage or prevent conversion from Hinduism to other religions, particularly Islam and Christianity—a situation that particularly disadvantages to lower castes (Dalits), for whom conversion can mean greater advantageous. Interfaith couples have faced harassment, with lynching carried out against so-called 'love Jihad'—a purported Muslim conspiracy to lure Hindu women into marriage.

5.1.5. International Response on Discriminatory Citizenship (Amendment) Act (CAA)

The CAA drew international condemnation and prompted protests around the world. The Office of the UN High Commissioner for Human Rights called the law "fundamentally

69 (Saberin 2018).

70 (Abraham and Rao 2017).

71 Rupa Subramanya, Has India become "Lynchistan"? ORF, 1 July 2017. Available online: https://www.orfonline.org/expert-speak/has-india-become-lynchistan/ (accessed on 15 June 2020).

72 (Ghatwai 2018).

73 Lauren Frayer Spate of Lynchings Target Minorities, Especially Muslims, NPR Morning Edition In India 19 August 2019.

74 (Giri 2018).

75 (Supra 2019).

76 Annie Gowen, "India's Supreme Court warns of 'mobocracy,' urges government to pass anti-lynching law after deadly attacks"The Post's National desk, 17 July 2018. She was the India bureau chief, 2013–2018 in USCIRF | ANNUAL REPORT 2020.

77 Staff reporter, The wire, Mob Lynchings: SC Issues Notice Over Implementation of Its Previous Directions 26/Jul/2019 in USCIRF | ANNUAL REPORT 2020 available at https://www.uscirf.gov/sites/default/files/India.pdf (accessed on 16 June 2020).

78 News18.com, Amit Shah Says Lynchings Have Not Increased Under Modi Govt, No Special Law Needed to Tackle It 17 October 2019. https://www.news18.com/news/politics/amit-shah-says-lynchings-have-not-increased-under-modi-govt-no-special-law-needed-to-tackle-it-2348987.html (accessed on 16 June 2020).

79 Vijaita Singh, 30% jump in 'crimes against state': National Crime Records Bureau (NCRB) The Hindu N.Delhi, 23 October 2019 in USCIRF | ANNUAL REPORT 2020.

discriminatory."[80] In February 2020, the UN secretary-general said he was concerned over the future of religious minorities in India after the enactment of the CAA, saying "there is a risk of statelessness."[81] In January 2020, the United States Congress held a hearing on global religious persecution and raised concerns over the citizenship law and citizenship verification processes.[82]

The same month, the European Parliament debated a joint motion on the law that described it as "discriminatory in nature and dangerously divisive."[83] The US Commission on International Religious Freedom said the US government "should consider sanctions against the home minister and other principal leadership" and held a hearing in March during which one commissioner raised concerns that the law "in conjunction with a planned National Population Register and a potential nationwide National Register of Citizens, or NRC, could result in the widescale disenfranchisement of Indian Muslims.".[84]

5.2. Sponsored Religious Discrimination: Rise with the COVID-19 Pandemic

At the height of the Black Death in the 14th century, rumors circulated throughout Europe that Jews were deliberately transmitting the plague by poisoning wells. Rather than quell these rumors, some governments effectively endorsed them and incorporated them into official policy. In 1349, the city fathers of Brandenburg passed a law that preemptively condemned the Jewish community for spreading the disease.[85]

Similarly, in the recent pandemic, a barrage of disinformation blaming Muslims for deliberately spreading coronavirus flared up across the country, posing a further threat to India's Muslim minority.[86] The health crisis has provided both motivation and cover for the increased persecution of minority faith groups.

Muslims in India are facing attacks and boycotts amid the coronavirus crisis. Muslims are being blamed for what some locals are calling "corona jihad."[87] The Indian administration has also used the pandemic as an opportunity to crack down on political dissidents. Lockdown measures in the country have also led to the sudden displacement of migrant workers from large urban centers.[88]

5.2.1. Smear Campaign against Muslims and Tablighi Jamat (An Islamic Reformist Movement)

Xenophobic tropes are evident from the manner in which the spread of COVID-19 in the country has been framed along religious lines. India's 201 million Muslim citizens now

[80] "New citizenship law in India 'fundamentally discriminatory': UN human rights office." *UN News*, December 13, 2019. https://news.un.org/en/story/2019/12/1053511 (accessed on 25 June 2020).

[81] "Citizenship Amendment Act may leave Muslims stateless, says U.N. Secretary-General António Guterres." *The Hindu*, February 19, 2020. https://www.thehindu.com/news/national/citizenship-amendment-act-may-leave-muslims-stateless-says-un-secretary-general-antnio-guterres/article30863390.ece (accessed on 13 September 2020).

[82] Sriram Lakshman, "CAA, NRC raised during Congressional hearing on global human rights." *The Hindu*, January 29, 2020. https://www.thehindu.com/news/international/caa-nrc-raised-during-congressional-hearing-on-global-human-rights/article30681185.ece (accessed on 15 August 2020).

[83] "European Parliament debates anti-CAA motion, vote delayed till March," *Press Trust of India*, January 30, 2020. https://www.indiatoday.in/india/story/european-parliament-debates-anti-caa-motion-vote-delayed-till-march-1641429-2020-01-30 (accessed on 13 August 2020).

[84] "USCIRF Raises Serious Concerns and Eyes Sanctions Recommendations for Citizenship (Amendment) Bill in India, Which Passed Lower House Today." 9 December 2019. https://www.uscirf.gov/news-room/press-releases-statements/uscirf-raises-serious-concerns-and-eyes-sanctions (accessed on 15 August 2020); "USCIRF members express concern over CAA; say it could result in 'disenfranchisement' of Muslims," *Press Trust of India*, March 5, 2020. https://economictimes.indiatimes.com/news/politics-and-nation/uscirf-members-express-concern-over-caa-say-it-could-result-in-disenfranchisement-of-muslims/articleshow/74491626.cms (accessed on 15 August 2020).

[85] (Zahler 2009).

[86] Helen Regan, Priyali Sur and Vedika Sud, CNN, 24 April 2020 India's Muslims feel targeted by rumors they're spreading Covid-19, https://edition.cnn.com/2020/04/23/asia/india-coronavirus-muslim-targeted-intl-hnk/index.html (accessed on 23 December 2020).

[87] Nimisha Jaiswal DW'News Meerut. https://www.dw.com/en/india-covid-19-crisis-used-to-fuel-religious-hatred/av-53158999 (accessed on 23 December 2020).

[88] (Menon 2020) "Covid-19 Pandemic: Should You Believe What the Models say about India?", https://science.thewire.in/the-sciences/covid-19-pandemic-infectious-diseasetransmission-sir-seir-icmr-indiasim-agent-based-modelling/ (accessed on 26 December 2020).

find themselves blamed for the country's COVID-19 outbreak. Many Muslims have also been reportedly turned away from testing centers and health clinics due to such fears.[89]

A congregation took place in the headquarters of Tablighi Jamat (an Islamic reformist movement) at New Delhi in 3 March 2020, drawing hundreds (1306) of foreign nationals from 41 countries, such as Thailand, Nepal, Myanmar, Indonesia, Bangladesh, Malaysia, Sri Lanka, and Kyrgyzstan.[90] As the COVID-19 lockdown came into force on 25 March 2020, around 1000 people were left stranded in these headquarters at New Delhi.[91]

The Indian government has been criticized for its poor preparation for the nationwide lockdown imposed in March 25, 2020, as they instead turned all their attention toward the three-day Tablighi Jamaat[92] gathering held in Delhi in early March, which was vilified on local media and social media outlets. The right-wing nationalists deemed the meeting a sinister plot by Indian Muslims to deliberately infect the rest of the population instead of the virus spreading organically across the country[93]. The Tablighi Jamaat congregation became the ultimate punching bag of the right-wing agenda.

Members of the ruling party, such as Chief Minister of Uttar Pradesh[94] and the Health Minister of Assam, made biased comments against Tablighi Jamat and Muslims in general. They are "smelling Corona Jihad behind all this" in reference to the gathering[95]. The event has been linked to 1023 cases across 17 states—believed to have been spread by infected foreign attendees. The search for scapegoats during the coronavirus pandemic has focused squarely on the country's sizable Muslim minority, a community of 200 million that felt under threat even before the advent of COVID-19.[96]

Speaking at a press conference, Joint Secretary in the Health Ministry said 4291 or about 30% of the coronavirus cases in the country had been traced to the Tablighi Jamaat congregation in Delhi out of 14,378 cases in the country. In Delhi, 63% of the reported 1707 cases were linked to the same gathering.[97]

On 2 April, the Home Ministry identified 960 foreigners who took part in the event and blacklisted their visas for violation of The Foreigners Act, 1946 (by violating visa norms by entering India with a tourist visa and indulging illegally in missionary work), and the Disaster Management Act, 2005, and asked the Director General Police of respective states and union territories to initiate legal action against them[98]. Over 3000 members of the Tablighi Jamaat subsequently spent more than 40 days in quarantine with government

[89] Misha Ketchell 21 May 2020, The conversation India's treatment of Muslims and migrants puts lives at risk during COVID-19, https://theconversation.com/indias-treatment-of-muslims-and-migrants-puts-lives-at-risk-during-covid-19-136940 (accessed on 23 December 2020).

[90] IANS, The New Indian Express, 3rd April 2020, Foreigners from 41 countries joined Tablighi Jamaat in Delhi amid coronavirus crisis https://www.newindianexpress.com/nation/2020/apr/03/foreigners-from-41-countries-joined-tablighi-jamaat-in-delhi-amid-coronavirus-crisis-2125256.html (accessed on 23 December 2020).

[91] Ibid.

[92] The Tablighi Jamaat is an Islamic reformist movement formed in 1927 whose members travel around the world on proselytizing missions. It held a big gathering at its mosque headquarters in Delhi from March 13 to 15 in which member from over 40 countries participated.

[93] Shweta Desai, Amarnath Amarasingam, "#Coronajihad: Covid-19, misinformation, and anti-Muslim violence in India." *Strong Cities* (26 May 2020): https://strongcitiesnetwork.org/en/wp-content/uploads/sites/5/2020/06/CoronaJihad.pdf. (accessed on 23 December 2020).

[94] The Economic Times May 03, 2020 CM blames Tablighi Jamaat members for spread of COVID-19 https://economictimes.indiatimes.com/news/politics-and-nation/cm-adityanath-blames-tablighi-jamaat-members-for-spread-of-covid-19/articleshow/75514677.cms (accessed on 26 December 2020).

[95] *The Hindu*, April 4, 2020 "Tablighi event: Shobha smells 'Corona jihad,'", https://www.thehindu.com/news/national/karnataka/tablighi-event-shobha-smells-corona-jihad/article31259288.ece (accessed on 26 December 2020).

[96] Joanna Slater and Niha Masih April 24, 2020, The Washington Post, As the world looks for coronavirus scapegoats, Muslims are blamed in India https://www.washingtonpost.com/world/asia_pacific/as-world-looks-for-coronavirus-scapegoats-india-pins-blame-on-muslims/2020/04/22/3cb43430-7f3f-11ea-84c2-0792d8591911_story.html (accessed on 24 December 2020).

[97] Despite criticism, health ministry continues to refer to Tablighi Jamaat in covid-19 briefings. Wire. 18 April 2020. https://thewire.in/government/health-ministry-covid-19-tablighi-jamaat (accessed on 26 December 2020).

[98] *India Today*, 960 foreigners linked to Tablighi Jamaat blacklisted, visas cancelled by MHA. accessed on 24 December 2020.

authorities refusing to discharge them.[99] The Indian government levelled charges of culpable homicide at the Tablighi Jamaat chief.[100]

The Tablighi Jamaat phase saw hate speech directed against one entire community—Muslims—with a visible impact on the ground, such as calls for economic and social boycott and physical violence against Muslims. Hate speech in this period was, in some instances, a clear incitement to genocide and sought to reduce Muslims to second class citizenship.[101]

5.2.2. Attacks on Muslims and Segregation

The government administration blocked Muslim vegetable vendors from selling their produce. Many Muslims were blocked from entering hospitals before taking a coronavirus test. Muslims all across India were attacked in the name of the COVID-19 surge[102]. Tamil Nadu became the first Indian state to set up detention centers for 129 foreign nationals who had stayed in Tablighi Center at North Delhi. All the cases were based on anti-Muslim sentiments rather than facts or evidence[103].

In the Una district in Himachal Pradesh, a man hanged himself due to taunts from fellow villagers for having come in contact with Tablighi Jamaat missionaries.[104] Several truckers belonging to the Muslim community were allegedly beaten up in Arunachal Pradesh, following which they fled to neighboring Assam leaving their vehicles behind, on 5 April 2020[105]. A Muslim man in Delhi was beaten up by a mob that accused him of spreading coronavirus.[106] Both private and government-run hospitals have been accused of providing Muslim COVID-19 patients with lower-quality care. In the state of Gujarat, a government hospital placed Muslim and Hindu coronavirus patients in separate wards, prompting accusations of apartheid.[107] A bakery owner in the southern city of Chennai advertised that it did not employ any Muslims.

5.2.3. Rumors and Misinformation on Media

Mainstream India media propagated conspiracies of Muslims deliberately spreading coronavirus called "Corona Jihad". This went viral on social media. Human rights watch groups condemned this Islamophobic campaign.[108]

The Star of Mysore newspaper went to the extent of inciting genocide/ethnic cleansing of Muslims in India. The hate speech was soon followed by calls from across the country for a social and economic boycott of Muslimss.[109] This hate speech is then supplemented with fake news and tangible action in terms of direct attacks on Muslim relief volunteers and socio-economic boycott of Muslims in public spaces. Divisive debates on television and xenophobic social media trends and hashtags have added fuel to the fire.

[99] PTI., Delhi govt to release Tablighi Jamaat members with no covid-19 symptoms from quarantine: High court told. New Indian Express. 15 May 2020. https://indianexpress.com/article/cities/delhi/delhi-govt-to-release-tablighi-jamaat-members-with-no-covid-19-symptoms-from-quarantine-hc-told-6411387 (accessed on 23 Decemebr 2020).

[100] Bhardwaj A. Tablighi Jamaat chief Saad charged with culpable homicide for spread of covid-19. Print. 15 April 2020. https://theprint.in/india/tablighi-jamaat-chief-saad-charged-with-culpable-homicide-for-spread-of-covid-19/402240 (accessed on 20 December 2020).

[101] Shruti Menon 30 June BBC "Coronavirus: The human cost of fake news in India" https://www.bbc.com/news/world-asia-india-53165436 (accessed on 26 December 2020).

[102] Menon, Aditya (7 April 2020). Attacks on Muslims in the Name of COVID-19 Surge Across India. The Quint. Retrieved 16 December 2020.

[103] *The Wire*. "COVID, Communal Reporting and Centre's Attempt to Use Independent Media as Alibi for Inaction". Retrieved 16 December 2020.

[104] Mohan, Lalit (5 April 2020). "Taunted over coronavirus spread after Tablighi meet, Himachal man commits suicide". *The Tribune (Chandigarh)*.

[105] *CNN-News18. 5 April 2020*. "Muslim Truckers 'Beaten Up' in Arunachal, Concern Over Supplies of Essential Items". (accessed on 23 December 2020).

[106] *Ellis-Petersen, Hannah; Azizur Rahman, Shaikh (13 April 2020). The Guardian* "Coronavirus conspiracy theories targeting Muslims spread in India".

[107] Special correspondence, The Hindu, 15 April 2020, Ahamdabad Coronavirus | COVID-19 patients segregated on basis of religion at Ahmedabad Civil Hospital, according to reports https://www.thehindu.com/news/national/other-states/covid-19-patients-segregated-on-basis-of-religion-at-ahmedabad-civil-hospital-according-to-reports/article31344862.ece (accessed on 23 December 2020).

[108] Jayshree Bajoria. *CoronaJihad is Only the Latest Manifestation: Islamophobia in India has Been Years in the Making*. Human Rights Watch. 1 May 2020. Retrieved 21 December Also see (Gettleman et al. 2020).

[109] Mohammed Afeef Wire 28 May 2020 Does Law Allow Calls to Boycott Muslims During the COVID-19 Lockdown? https://thewire.in/communalism/covid-19-lockdown-muslims-boycott-law (accessed on 21 December 2020).

5.3. Supreme Court Intervention

The Jamait Ulema-Hind filed a petition in the Supreme court drawing attention to the fake news blaming the community for the spike in COVID infection. The court was dealing with a petition complaining of the manner in which TV channels had demonized the Tablighi Jamaat amid the coronavirus lockdown.[110]

A Supreme court bench headed by the Chief Justice of India, which was hearing pleas of Jamiat Ulama-Hind and others alleging that a section of media was spreading communal hatred over the Tablighi Jamaat congregation during the onset of the COVID-19 pandemic, pulled up the Centre for its "evasive" and "brazen" affidavit on the issue.[111] News channels have misused the right to free speech, the Chief Justice of India said, and they asked the Centre to explain if it had taken any steps to curb the trend. "Freedom of speech is one of the most abused rights in recent times," the CJI said.[112]

Judicial Proceedings

The court had, on August 24, framed the charges against the foreigners under sections 188 (disobedience to order duly promulgated by public servant) and 269 (negligent act likely to spread infection of disease dangerous to life) of the Indian Penal Code and Section 3 (disobeying regulation) of the Epidemic Act, 1897.[113] Dozens of cases were filed against the non-Indian Tablighi Jamaat members by various Indian states, and hundreds of them were blacklisted from travelling to India for 10 years.[114] Several countries have expressed concern over the continued custody of their nationals, and this became a diplomatic headache for the governments.[115]

On 15 December 2020, the court of Chief Metropolitan Magistrate, Delhi, dismissed all cases against detained foreigners, observing an utter lack of evidence. The court noted that the accused were not present at the site and were picked up from different places and maliciously prosecuted under the directions of controversial orders from the Ministry of Home Affairs.[116]

6. Conclusions

Religious freedom conditions in India have experienced a drastic turn downward, with religious minorities under increasing assault after the re-election of a right-wing government. In May 2019, the national government used its strengthened parliamentary majority to institute national level policies, violating religious freedom, particularly for Muslims[117]. The national government allowed violence against minorities and allowed hate speech.[118] Even during the COVID-19 pandemic, the search for scapegoats has focused squarely on the country's sizable minority, a community of 200 million that felt under threat even before the advent of COVID-19.[119]

Some of the neighboring governments, such as Myanmar, Sri Lanka, and Pakistan are using the coronavirus pandemic to divert attention from their crimes they have committed,

110 Smanwaya Rautray The Economic Times 17 November 2020 Demonising Tablighi Jamaat: SC seeks to know mechanism to deal with complaints on TV content. https://economictimes.indiatimes.com/news/politics-and-nation/sc-not-satisfied-with-centres-affidavit-on-pleas-over-tablighi-congregation-media-reporting/articleshow/79259347.cms (accessed on 21 December 2020).

111 Smanwaya Rautray The Economic Times Oct 08, 2020, Tablighi case: Freedom of speech & expression most abused right in recent times, says SC. https://economictimes.indiatimes.com/news/politics-and-nation/tablighi-case-freedom-of-speech-expression-most-abused-right-in-recent-times-says-sc/articleshow/78550618.cms (accessed on 24 December 2020).

112 Ibid The Economic Times, 8 October 2020.

113 The Indian Express. 16 December 2020. *Tablighi case: All foreigners freed, court slams police, says no proof.* Retrieved 28 December 2020.

114 Bilal Kuchay Aljazeera 16 Dec 2020 India court acquits foreigners over Tabligh event during pandemic, Court says prosecution failed to prove presence of 36 foreigners inside the Muslim missionary movement's headquarters.

115 Suhasni Haider, The Hindu 23 August 2020.

116 Ibid.

117 USCIRF | ANNUAL REPORT 2020, USCIRF–RECOMMENDED FOR COUNTRIES OF PARTICULAR CONCERN (CPC) Available online: https://www.uscirf.gov/sites/default/files/India.pdf (accessed on 4 July 2020).

118 Ibid.

119 Supra n.146 Joanna Slater and Niha Masih 24 April 2020, The Washington Post.

and continue to commit, against minorities in their countries.[120] The outbreak of COVID-19 in India has presented yet another opportunity to launch a fresh physical, verbal, and psychological attack on the Muslim minority.

There is also evidence that much remains to be done. Many minorities are subject to serious and persistent violations of their basic rights. Unresolved situations and conflicts involving minorities indicate that further measures to address minority issues must be adopted, and new avenues of conflict resolution need to be sought. The effective implementation of the non-discrimination provisions and special rights, as well as of the resolutions and recommendations of the various organs and bodies of the United Nations, can contribute to meeting the aspirations of minorities, and to the peaceful accommodation of different groups within a State. Tolerance, mutual understanding, and pluralism should be nurtured and fostered through human rights education, confidence-building measures, and dialogue.

Although India describes itself as a secular, democratic nation, several constitutional provisions and laws, including anti-conversion and cow-protection legislation, fuel anti-minority sentiments. Communalism is becoming heightened, and lynch mobs are set in motion to divide and intimidate the working class and poorer sections of society for political reasons.

'India should provide more effective protection for human rights defenders, by removing the legal obstacles and societal repression undermining their legitimate activities to promote and protect human rights'.[121] In addition to the physical protection of those threatened by communal violence, much of the discourse under this frame is concerned with legal protections. The Government should enact a special 'witness protection' law to protect the lives of witnesses associated with cases of communal incidents. Across the country, a large number of witnesses turn hostile in courts and the conviction rates for communal crimes are low; therefore, there is a need to create legal provisions for witnesses to feel secure so that justice is not compromised.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The author declares no conflict of interest.

References

Abraham, Delna, and Ojaswi Rao. 2017. Cow Slaughter Row: Since 2010, 97% of Beef-Related Violence Took Place after BJP Govt Came to Power, IndiaSpend Jun 29. Available online: https://www.firstpost.com/india/cow-slaughter-row-since-2010-97-of-beef-related-violence-took-place-after-modi-govt-came-to-power-3752479.html (accessed on 15 June 2020).

Amnesty International. 2016. Annual Report: India 2015–2016. February 23. Available online: https://www.amnesty.org/en/countries/asia-and-the-pacific/india/report-india/ (accessed on 24 May 2020).

Ayub, Rana. 2019. What a Rising Tide of Violence against Muslims in India. *Times*, June 28.

Bakshi, P. M. 1996. *Constitution Of India*. New Delhi: Universal Law Publishing Co.P Ltd., p. 41.

Baycroft, Timothy. 1998. *Nationalism in Europe 1789–1945*. Cambridge: Cambridge University Press, p. 104.

Benoit-Rohmer, Florence. 1996. *The Minority Question in Europe*. Strasbourg: Council of Europe Publishing.

Benzo, Andrea, and Silvio Ferrari. 2014. *Between Cultural Diversity and Common Heritage: Legal and Religious*. Farnham: Ashgate Publishing.

Braude, Benjamin, and Bernard Lewis. 2013. *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society*. Teaneck: Holmes & Meier Pub.

Buergenthal, Thomas. 2009. *International Human Rights in a Nutshell*, 4th ed. Saint Paul: West Academic Publishing.

[120] Omar Suleiman, Aljazeera 20 May 2020 Like India, Sri Lanka is using coronavirus to stigmatise Muslims https://www.aljazeera.com/opinions/2020/5/20/like-india-sri-lanka-is-using-coronavirus-to-stigmatise-muslims (accessed on 24 December 2020).

[121] Christian Solidarity Worldwide, Submission to the Third Cycle UPR(NY: UN, 2016), p. 8.

Capotorti, Francesco. 1991. *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. New York: United Nations, p. 5.
Chand, Tara. 1972. *History of the Freedom Movement in India*. New Delhi: Publications Division, Ministry of Information and Broadcasting, vol. 3, pp. 252–53.
Chaney, Paul. 2019. India at the crossroads? Civil society, human rightsand religious freedom: Critical analysis of CSOs' third cycle Universal Periodic Review discourse 2012–2017. *The International Journal of Human Rights*. [CrossRef]
Charlton, Sue Ellen M. 2004. *Comparing Asian Politics: India, China, and Japan*. Boulder: Westview Press.
Citizens Against Hate. 2018. *Countering the Silence: Citizens Report on Extrajudicial Executions in Uttar. Pradesh and Haryana, India*. New Delhi: Citizens against Hate.
Das Basu, Durga. 2008. *Introduction to the Constitution of India*. Buterworth: Nagpur.
Dumont, P. 2013. Jewish Communities in Turkey during the Last Decades of the Nineteenth Century in the Light of the Archives of the Alliance Israelite Universelle. In *Christians and Jews in the Ottoman Empire*. Edited by Benjamin Braude and Bernard Lewis. New York: Cambridge University Press, p. 209.
Eide, Asbjorn, Katarina Krause, and Allan Rosas, eds. 1995. *Economic, Social and Cultural Rights. A Textbook*. London: Martinus Nijhoff Publishers.
El Fadl, K. 1994. Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries. *Islamic Law and Society* 1: 141–48. [CrossRef]
Fink, Carole. 1995. The League of Nations and the minority question. *World Affairs* 157: 197.
Fisch, Jörg. 2015. *A History of the Self-Determination of Peoples: The Domestication of an Illusion*. Cambridge: Cambridge University Press, p. 118.
Gellner, Ernest. 1983. *Nations and Nationalism*. Oxford: Blackwell.
Gettleman, Jeffrey, Kai Schultz, and Suhasini Raj. 2020. In India, Coronavirus Fans Religious Hatred. *The New York Times*, April 12.
Ghanea, Nazila. 2012. Are Religious Minorities Really Minorities? *Oxford Journal of Law and Religion* 1: 57. Available online: https://doi.org/10.1093/ojlr/rwr029 (accessed on 20 January 2020). [CrossRef]
Ghatwai, Milind. 2018. MP: Man lynched for slaughtering bull. *Indian Express*, May 20.
Gibson, John S. 1996. *Dictionary of International Human Rights Law*. Lanham: Scarecrow.
Gilbert, G. 1992. The Legal Protection Accorded to Minority Groups in Europe. In *Netherlands Year Book of International Law*. Cambridge: Cambridge University Press, vol. 23, p. 73.
Giri, Avinash. 2018. Police in India Punish Muslim Victims in 'Mob Lynching' Case. *The Diplomate*, February 8.
Henkin, Louis. 1990. *The Age of Rights*. New York: Columbia Un Press.
Henrard, Kristin. 2000. *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*. The Hague: Kluwer.
Inaltck, Halil, and Donald Quataert, eds. 1997. *An Economic and Social History of the Ottoman Empire: 1600–1914*. Cambridge: Cambridge University Press.
Jackson Preece, Jennifer. 1998. *National Minorities and the European Nation-States System*. London: Oxford University Press.
Jain, M. P. 2006. *Indian Constitutional Law*, 5th ed. Nagpur: Wadhwa Publisher, reprint 2006.
Jalal, Ayesha. 1994. *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan*. Cambridge: Cambridge University Press, p. 261.
Jefferson, Thomas. 2006. The Papers of Jefferson, 17 February to 30 April 1801. *JSTOR* 33: 148.
Knock, Thomas J. 1995. *To End All Wars: Woodrow Wilson and the Quest for a New World Order*. New Jersey: Princeton University Press.
MacMillan, Margaret. 2003. *Paris 1919: Six Months That Changed the World*. New York: Random House.
Majumdar, Samirah. 2018. *5 Facts about Religion in India*. Washington: Pew Research Center, June 29.
Masters, Bruce. 2001. *Christians and Jews in the Ottoman Arab World: The Roots of Sectarianism*. Cambridge: Cambridge University Press, pp. 61–62.
Masters, Bruce. 2009. Millet. In *Encyclopedia of the Ottoman Empire*. Edited by Gábor Ágoston and Bruce Masters. New York: Facts on File, pp. 383–84.
Menon, Gautam L. 2020. Covid-19 Pandemic: Should You Believe What the Models say about India? *The Wire*, April 4.
Mujahid, Shairf. 2007. Reconstructing the Saga of the All India Muslim League (1906–1947). *Journal of the Pakistan Historical Society* 55: 15–26.
Parvez, M., and M. Hasan. 2015. Muslims' Participation in Education and Employment as Compared to Other Socio-Religious Categories: An Analytical Study. *International Journal of Social Sciences and Management* 2: 114–18. [CrossRef]
Pejic, Jelena. 1997. Minority Rights in International Law. *Human Rights Quarterly* 19: 671. [CrossRef]
Pentassuglia, Gaetano. 2002. *Minorities in International Law*. Strasbourg: ECMI Handbook Series.
Rawls, John. 2003. The Domain of the Political and Overlapping Consensus. In *Debates in Contem-Porary Political Philosophy*. Edited by D. Matraversand and J. Pike. London: Routledge, pp. 67–93.
Regan, Helen, Priyali Sur, and Vedika Sud. 2020. CNN, April 24, India's Muslims Feel Targeted by Rumors They're Spreading COVID-19. Available online: https://edition.cnn.com/2020/04/23/asia/india-coronavirus-muslim-targeted-intl-hnk/index.html (accessed on 23 December 2020).
Rehman, Javaid. 2000. *The Weaknesses in the International Protection of Minority Rights*. Hague: Kluwer Law International, p. 14.

Saberin, Zeenat. 2018. India: Village mourns death of man killed in cow-related lynching. *Al Jazeera*, July 22.
Sachedina, Abdulaziz Abdulhussein. 2001. *The Islamic Roots of Democratic Pluralism*. Oxford: Oxford University Press, pp. 96–97.
Senturk, Recep. 2002. *Towards an Open Science: Learning from the Ottoman Humanities*. Edited by Judi Upton-Ward. New Millennium Perspectives on the Humanities. New York: Global Humanities Press, p. 55.
Shaw, S. J. 1991. *Jews of the Ottoman Empire and the Turkish Republic*. New York: New York University Press.
Shaw, S. J. 1977. *History of the Ottoman Empire and Modern Turkey*. Cambridge: Cambridge University Press.
Sigler, Jay A. 1983. *Minority Rights. A Comparative Analysis*. Westport and London: Greenwood Press, p. 68.
Supra, Rana Ayub. 2019. What a Rising Tide of Violence Against Muslims in India. *Times*, June 28.
Thornberry, Patrick. 1991. *International Law and the Rights of Minorities*. Oxford: Clarendon Press.
UN Human Rights Committee. 1994. *General Comment No. 23: The Rights of Minorities. (Art. 27)*. International Covenant on Civil and Political Rights (ICCPR). New York: United Nations Headquarters.
Viray, Patricia Lourds. 2016. Extrajudicial Killing a Crime under int'l Law. Available online: https://www.philstar.com/headlines/2016/08/24/1616778/amnesty-extrajudicial-killing-crime-under-intl-law (accessed on 23 June 2020).
Wheatley, Steven. 2005. *Democracy, Minorities and International Law*. London: Cambridge University Press, p. 20.
Zahler, Diane. 2009. *The Black Death*. Minneapolis: Twenty-First Century Books, p. 64.
Zimmerman, Mark. 2010. *Symbol of Enduring Freedom*. Columbia: Columbia Magazine, p. 19.

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Zimitsani Moto: Understanding the Malawi COVID-19 Response

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Abstract: The coronavirus disease 2019 (COVID-19) pandemic has unsettled societies and economies of people and countries all over the world. Malawi is no exception. As such, the COVID-19 pandemic is more than just a health crisis. Countries have responded by instituting lockdowns and other restrictive measures among the populace. These have, in turn, elicited negative responses and legal challenges; most of which are rights-based. The main challenge has been that of the restriction of individual and religious freedoms. It is, thus, no surprise that reactions against government decrees restricting religious gatherings in the wake of the pandemic have been challenged in the courts. We will explore the Malawian traditional religious concept of healing and wholeness, give a chronological outline of government decrees and the responses to the pandemic, and conclude with an analysis using some reflections on Ferdinand Tönnies concepts of *Gemeinschaft* and *Gesellschaft* and recollection of traditional religion and critique of the new evangelicalism leading to an understanding of the Malawian response to the pandemic.

Keywords: umunthu; rights and freedoms; public health; legislation; African Traditional Religions; evangelicalism

Citation: Tengatenga, James, Susan M. Tengatenga Duley, and Cecil J. Tengatenga. 2021. *Zimitsani Moto*: Understanding the Malawi COVID-19 Response. *Laws* 10: 20. https://doi.org/10.3390/laws10020020

Received: 13 January 2021
Accepted: 23 March 2021
Published: 26 March 2021

1. Introduction

The coronavirus disease 2019 (COVID-19) pandemic has unsettled societies and economies of people and countries all over the world. As such, the COVID-19 pandemic is more than just a health crisis. Countries have responded by instituting lockdowns and other restrictive measures among the populace. These have, in turn, elicited a pluriverse of negative responses, most of which are rights-based. The main challenge has been that of the restriction on liberty, especially religious freedom. In Malawi, this has become pronounced given the current public discourse on the role of religion in an uncertain legal context that is increasingly vulnerable to neo-liberal economics and religious fundamentalism. The historical tension between political and civil rights and economic and social ones is a salient reality. In the Malawian context, the COVID response also conjures a question about economic freedom and how religion interfaces with that right, such as religious clerics' right to earn a livelihood unencumbered by restrictive legislation. Therefore, it is an epistemological misnomer to pit the two, religious freedom and economic freedom, against each other in attempting to explain the country's unique response to the current pandemic. The point we intend to emphasize here is the interconnectedness of the two, which in itself has been an emblematic argument rehearsed elsewhere by human rights scholars and activists from the Southern hemisphere (Mamdani 2009; Nkhata and Mwenifumbo 2020). Pragmatically, what we are arguing for is the very distinguishing feature of the African Charter on Human and Peoples' Rights (1981) (Banjul Charter) as an instrument of rights-based action across Africa. As the Banjul Charter unequivocally summarizes:

"Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights." (*Preamble*, Banjul Charter 1981).

As implied above, rights do not exist in a vacuum. Indeed, the society for which the Banjul Charter speaks on behalf of here invokes the active "performance of duties," which are a complex set of practices that ensure social cohesion. That cohesion functions as a "conception" of "universality" and as a "satisfaction" of all freedoms, achieved concurrently for human "development." The sentiment is inclusively positivist. It is the presence of enjoyment conditions, not just the mere absence of them, leading to a just society. It is no wonder then that the updated version of the definition of health and wellbeing by the World Health Organization (WHO) now appropriates this expansion of rights, defining them as " . . . a state of complete physical, mental, social wellbeing and not merely the absence of disease or infirmity" (*Constitution*, WHO).

In the public health arena, religion is constitutive of a structural social determinant of health espoused by WHO's definition above. This is consequential for Malawi, especially as faith-based hospital networks subsidize most of its healthcare delivery system. Historically, this partnership has been predictable and mediated by technocratic organizational structures, as in the ethical councils governing Catholic and Islamic clinical practice, ecumenical health associations (e.g., Christian Health Association of Malawi (CHAM)), and government contractual agreements with these formal institutions. Furthermore, religion's role in healthcare bears continuities in the post-independent state inherited from the medical missionary enterprise's pre-existing support. In the wake of another pandemic, HIV/AIDS, and the expansion of civil society lobbying for women's and sexual rights, religion's role in public health has become ever contentious. The morality of issues such as extramarital sex acts, abortion, and same-sex relationships became cultural assaults and produced unlikely partnerships. Significantly, religion's unifying role became a nation's activism to protect its constitutional right as "a God-fearing country." The current pandemic is another constitutional dilemma for a country grappling with an elusive separation between the state and the church.

In a telephone survey assessing factors influencing compliance to COVID restrictions in Malawi, researchers found that Malawians are likely to observe public health officials' health measures over religious clerics (Kao et al. 2021). These results, however, were limited and offered a very narrow definition of what counts as health in the traditional Malawian sense:

1. The researchers were attempting to adopt a belief system assessment that assumes religion and health can be separated, which is counter to public health's cultural ethos in Malawian tradition.
2. The researchers' focus on compliance failed to account for the fact there is a fine line between reverence, respect, and compliance; particularly when factoring in individuals' worldviews.
3. The survey had methodological limitations (small respondent sample size, was not longitudinal) so it did not fully capture the diversity of beliefs among Malawians relative to the accessibility of the authority figures cited in the study.

Notwithstanding these limitations, the study's findings are illustrative of that elusive separation between state and church.

Were there differences in compliance between public health officials at state over faith-based hospitals? It is well established that one's social network characteristics (i.e., density and activities) and activity spaces (i.e., church, social clubs, markets, and bars) also influence decision-making about health (Alexandre et al. 2020; Mason and Mennis 2018; Browning and Soller 2014; Yousefi-Nooraie et al. 2012). The legal cases we will discuss below concern these social networks and highlight Cedric the plaintiffs' social

activities intended to protect their rights against government intrusion. Therefore, it is significant to note that it took the authority of the institutions of religion and not medical professional associations to give voice to a national concern about COVID in daily life and an international one. Kao et al. (2021) miss the fact that traditional leaders are religious and political entities which might have been enough smoke to call attention to the fire that must have been brewing from the many institutions that feared the losses that would come from any response to the pandemic.

A mere nine days after the WHO declared COVID-19 a pandemic and before any recorded hospitalization in Malawi, the government rushed to declare a state of national disaster and other measures, culminating in a decree of a lockdown (Ghebreyesus 2020; Mutharika 2020; Mhango 2020). The government measures in response to COVID-19 were immediately challenged in the courts. Due to the volatile political context at the time, one was not sure whether both the government's response and the consequent activist-led response were playing politics or a serious and considered response to the pandemic. Religious leaders also added their voice to the discontent. The narrative below will trace the response to the pandemic in Malawi with all its twists and turns. We will also explore traditional/cultural Malawian ways of responding to health crises to analyze the current responses. What lies at the base of the conflicting responses to this pandemic? Does politics trump economics, and how does the interface of both with religion inform the response to this pandemic? Are Malawian responses a result of globalization and thus amnesiac of Malawian cultural-religious responses to public health crises? What if Malawians recalled and, as a result, used their cultural heritage to inform their response to COVID-19?

2. Traditional Religion, Health, and Wholeness

As Schuurman observes, "the importance of religion includes the fact that religion is the root from which different branches of life sprout, grow and are nurtured. Religion concerns the deepest root of human existence and integrates human life into a coherent role" (Schuurman 2011, pp. 373–74). In most African societies, the social, cultural, and religious are intertwined such that it is difficult to draw the line between these three spheres.

The expressions of religion impact how societies deal with various issues that have a socio-cultural influence on their members. Therefore, religion and its structures have a role in dealing with the public health crisis, the social and cultural effects of the COVID-19 pandemic. During the pandemic, this has been apparent in the influence religion has had on the measures taken to prevent and control against it. This is not surprising for a country where most of the population identifies with one religion or another. According to the 2019 census, 77.3% of the population identifies as Christian, 13.8% as Muslim, 5.6% as other religious groupings, which include Hindus, Baha'is, Jews, Sikhs, and Rastafarians, and there is about 2.1% of the population that identifies as having no religious affiliation (U.S. Department of State 2019). The measures adopted by the country in managing the pandemic have impacted the expression of the right to religion. They have also informed the approach to dealing with it. Legislative measures have been adopted, taking into account the role of religion and its structures.

The government decrees in dealing with this pandemic take cognizance of religious leadership's role in the Malawian socio-cultural context. In Malawian society, it is not uncommon for religious leaders to be the first port of call when there is a health crisis, be it illness or even death. The Malawi government's response to COVID-19 acknowledges this. For instance, under Rule 6 of the Public Health (Public Health 2020a) (Coronavirus and COVID-19) (Prevention, Containment, and Management) Rules 2020 (COVID-19 Rules I), community leaders, including religious leaders, were obliged to report any suspected case or death related to COVID-19 in their community. In addition to this, the Presidential Task Force on COVID-19 has had consultations with religious leaders to discuss the limits on numbers attending public gatherings as decreed by the government (Xinhua 2020).

At the height of the HIV/AIDS pandemic (c1995), truckloads of people (if not whole villages) flocked to Liwonde (a town in southern Malawi) to drink a concoction (reminiscent

of *mchape*) to cure HIV/AIDS (Probst 1999). Health and wholeness are an integral part of African worldviews. Malawi, being part of African societies, exhibits all of these characteristics. Since African societies inhabit the natural, supernatural, and spiritual worlds at the same time, there is what can be termed an obsession with wholeness and thus health as both physical and spiritual. Although sickness is an individual's experience, it is also a societal (a community) matter. No illness befalls a person that cannot be explained by causation, by other humans and/or from the spiritual realm. Ill will and witchcraft are the usual suspects. When it is not these, illness suggests misbehavior and transgression of certain norms and taboos (De Gabriele 1998). In traditional Malawian society, it was, therefore, a common practice for the whole village to be summoned and corporate cleansing, and thus healing. The action is decreed by the chief and observed by all without exception. Ajima and Ubana (2018) observe, "Sickness in any individual in the African society is viewed as a sickness to the entire community because of the communal system that is operated in Africa, thereby necessitating the healing of that community." When pandemics hit a community, traditional healers are sought to not only explain the phenomena but also to mediate and effect healing. In the recent past (the 1930s and 1940s), Malawi and other parts of East, Central, and Southern Africa, *mchape* (literally translated "cleanse him" or "cleansing concoction") became famous for the cleansing of the community not only of illness but also of witches (Bonhomme 2013; Ranger 1968, 1972). Whole villages were asked to drink the *mchape* concoction (Schoffeleers 1999; De Gabriele 1998; Chakanza 1995; Doran 2007).

A more traditional practice, that is in line with a long practice from time immemorial, in the face of an "epidemic" was to call for *kuzimitsa moto* (translated "to extinguish the fire"). Extinguishing the fire is a euphemism for the cessation of sexual activity and strict observance of other taboos in all households and also the physical (and thus symbolic) dousing of local fires in the household hearths leaving only the central fireplace at the chief's meeting place from which each family would kindle their daily fire every morning. Fire is a potent symbol of life, healing, and death. For healing to occur, the whole community has to be "cold." This would be akin to biblical cleanliness/holiness. Sexual activity is a "hot" activity. It is heat from unauthorized sources that pollutes the community. As such, the symbolism of the fire's dousing is enacted by abstinence from sexual activity and other proscribed activities. This was a restriction of personal and communal freedoms for the sake of public health, a common good. No doubt these would result in some considerable inconvenience and no less economic hardship. This cold state was maintained by all, regardless of whether one was directly affected by the illness or not, until the chief called it off through a ritual integrative cleansing act performed with the right formulaic invocations, thus reconciling the community with the ancestors and the divine, completing the wholeness circle of life.

Given this vignette into one aspect of the Malawian concept of corporate responsibility for public health, one would imagine that it would come naturally for Malawians to heed the lockdown call in the wake of COVID-19. Are Malawians amnesiacs toward culture, is it that they have changed their world view, or are they now confused by the multi-worldview that Malawi now inhabits in the global village? Aside from the medical question, is there another issue influencing this confusion in this medical and freedoms pluriverse? It seems to us that economic wellbeing is the controlling argument, trumping even the religious freedom one. On the other hand, is it confusion or one element trumping another, given the interconnectedness of all of them in the African concept of wholeness and life? These questions stem from an anthropological take on the analysis of the situation. As Fairhead (2016) observes concerning the Ebola crisis among the Kissi: "Suppose there is something of an impasse here. In that case, it is one of anthropology's own making: a situation in which discussion of things "cultural" tends to slip into more totalizing ideas of "culture"—of there being a Kissi "culture," or indeed, its symmetrical opposite, a "humanitarian culture" or a "Western culture." Anthropologists have great difficulty in handling interpreting (multicultural, hybrid, transnational, creolized, globalized) worlds."

3. Government Response to COVID-19 and Reactions

To best understand the situation as it unfolded in Malawi, we will give, in chronological order, government actions and decrees, and outline some of the court cases. In each case, we will give the precipitating action followed by the concerns raised by it, the response, and the resolution. The first three cases were confirmed on 2 April 2020 in Lilongwe, the capital. As noted above, Malawi's COVID-19 response began before there were any confirmed cases in the country. On 7 March 2020, the then President established a Special Cabinet Committee on Coronavirus mandated to receive updates about COVID-19 and relay these to the public. This committee had the responsibility of issuing recommendations on proactive measures to prevent the occurrence and spread of the disease and facilitate the implementation of activities aimed at mitigating the impact of COVID-19 on the country's socio-economic development. This committee was reshuffled and renamed the Presidential Task Force on Coronavirus. In the meantime, Malawi experienced a transition of power when the nation's general elections were contested and rerun. The new government created a COVID-19 office in the Office of the President and Cabinet on 14 July 2020.

On 20 March 2020, the then President made a declaration of a state of national disaster (Mutharika 2020). This declaration appeared on 3 April 2020. This declaration was valid for three months and expired on 20 June 2020. The declaration was made under the Disaster Preparedness and Relief Act, Chapter 33:05 of the Laws of Malawi (DPRA). This Act gives the president the power to make such a declaration where there is a disaster to protect Malawi. Such a declaration is valid only for three months from the date it comes into effect (Section 32). A further declaration of COVID-19 as a formidable disease was made by the then Minister of Health under the Public Health Act, Chapter 34:01 of the laws of Malawi (PHA) on 1 April 2020. This declaration was made under Section 30 of the PHA, which empowers the minister to declare a formidable epidemic and endemic diseases. In exercise of these powers, the minister issued COVID-19 Rules I, which came into effect on 9 April 2020. On 14 April 2020, relying on the powers under this Act, the minister announced a planned nationwide lockdown to run from 18 April 2020 to 9 May 2020 (Mhango 2020). This lockdown entailed confinement to one's place of residence unless in exceptional circumstances where one was to perform, provide, or access essential services. These essential services could only be obtained within one's locality of residence.

Councils had powers to identify and license persons to provide these essential services. All non-essential services or businesses were suspended. This order also mandated the closure of all central markets. Local markets were restricted to operate between 5:00 a.m. and 6:00 p.m. The list of essential services did not include any religious activities. This decree elicited a reaction from much of the population because it affected a big section of the population involved in the small business informal sector. Given that most of the population are subsistence farmers, this decree impacted most of the population (85% of the population are subsistence farmers, and only 10% are gainfully employed). For example, economists project that by the end of March 2021, the pandemic will lead to job losses of up to 7% of the workforce, the majority of which will be in the agricultural sector. The total cost will round up to approximately US $172.28 million (Thula et al. 2020). Aside from the numbers issue, most Malawians (especially the urban dwellers) live in cramped spaces such that it is virtually impossible to spend much time inside, and the immediate vicinity has no yard to speak of for people to sit outside. With this kind of situation, one can see how the restrictions would not make sense.

In the Malawi context, subsistence farming is an essential business, and so is the small business informal sector. The decree, therefore, also highlighted the rich and poor divide in the population. Therefore, the decree would make sense to the low-density area resident who is also in paid employment and not the villager and the slum dweller whose very existence is adversely affected. Thus, the very concept of essential services needed definition, and none spoke to all without prejudicing the other.

Moreover, religion is not included in the catalog (such as there was) of essential services. As has been indicated above, Malawi is a religious society. As Mbiti (1969) once

said about Africans, "notoriously" so. Malawian's default response to crises would thus be recourse to religion (traditional and new), and in this day and age when American-style-tele-evangelicalism rules, church and other religious gatherings are the default place of refuge. As such, to say that religious gatherings are not essential services is to misconstrue the culture and mores of Malawian society and the place and role of religion in times of crisis.

On 17 April 2020, the case of Prophet David F. Mbewe (2020) (On his behalf and behalf of the Registered Trustees of the Living Word Evangelistic Church) v Malawi Council of Churches and Attorney General, HC/PR Civil Cause No. 112 of 2020 was commenced to challenge the lockdown measures imposed by the minister. The case meant to stop the mandated suspension and closure of religious gatherings of any church in Malawi. The argument deals with the matter of the impact of the restrictions in infringing on constitutional rights to religious liberty, economic activity, and development. It was stated that some churches in Malawi had already ordered their members to suspend and close their churches and that the Malawi Council of Churches intended to order the remaining churches to close (see also Kao et al. 2021).

The suspension of religious gatherings and closure of churches was disproportionate, taking into account the number of positive COVID-19 cases diagnosed in Malawi at the time. The applicants, therefore, argued that they had implemented measures to prevent the spread of COVID-19 by limiting the number of members attending the gatherings to 50 (including clergy and officials) and ensuring that they maintain a distance of 2 m between individuals in all directions, allowing 2 h cooling off period between services and provision of sanitary products. This argument referenced Rule 12 of the COVID-19 Rules I, governing public gatherings. Under this rule, the minister could set a maximum number of persons to attend a public gathering, including religious worship, weddings, funerals, and cultural events. In addition to this, those planning such gatherings could also make further ventilation, sanitary, and hygienic facilities available for these gatherings.

What this case illustrates is more than just a question of the right to the exercise of religion. It raises the matter of livelihood for the religious officials and the maintenance and continuance of religious spaces. On the matter of restricting attendance, one can argue that it can be mitigated by restricting numbers and not by abolition. However, attendance for most churches is not a small matter. One demonstrates their faith by faithfully attending worship. Thus, the idea of restricting that attendance is tantamount to infringement on the right to gather, participate and exercise one's religious freedom. What would happen if the pandemic goes on for a long time? Will the congregation get so used to not attending a church that it becomes a habit? Less attendance and non-attendance also affects supplications and intercession, which are central to the invocation of the divine favor in the face of the pandemic. The maintenance of the churches, mosques, etc., is dependent on offerings and other forms of giving. Non-attendance also means less, if not no, offerings for the maintenance of those spaces. Therefore, it is not surprising that the applicants in the case under discussion highlighted the economic impact of religious gatherings' suspension. On the matter of livelihood, in a cash society, actual attendance translates into a bigger offering. The offering not only maintains the gathering space but also sustains the ministers. Less attendance is equal to less offering! Less offering becomes less pay for the ministers resulting in a negative effect on their livelihood. Thus, the right to earning a living and consequently infringing on their right to life leading to a catch twenty-two.

This case was later consolidated with The State on the application of Kathumba and Others v The President and Other (Judicial Review Cause No. 22 of 2020) [2020] Malawi High Court 8 (28 April 2020). This application challenged the lockdown order as well. This application stopped the lockdown decree from coming into effect. The first argument raised in this case was that the decree of the lockdown without a declaration of a state of emergency violated fundamental rights under the Constitution of the Republic of Malawi. Another argument raised was that the lockdown order was a punishment to innocent Malawians as the government had not put in place adequate social security measures

for people to rely on during the lockdown. The majority of the population made their income in the informal economy, and their survival was on a hand-to-mouth basis. The order violated socio-economic rights and the right to livelihoods for most Malawians who depended on their freedom to engage in economic activity to support themselves. Nkhata and Mwenifumbo (2020) discuss the impact of the pandemic and the measures to contain and manage it on the right to economic activity in Malawi. The court granted an initial seven-day injunction against the lockdown order, which was later extended to a permanent injunction (Nyale 2020). These cases illustrate what Kao et al. (2021) in their study of compliance found; that "the costs associated with preventative actions affect compliance."

It is worth noting that these were not the only legal challenges lodged against Malawi's COVID-19 response measures. The declaration of the state of national disaster, on 20 March 2020 also ordered the closure of all educational institutions from 23 March 2020. A group of students challenged this as unconstitutional and an infringement of their right to education (The State and The President of the Republic of Malawi and others Ex Parte Steven Mponda and others Judicial Review No. 13 of 2020, HC, ZA). The court ruled that the declaration was lawful and constitutional. This was because the court was of the view that the declaration had been issued under the DPRA, which vested such authority to the presidency and therefore did not breach any provision of the Malawian Constitution. The other point of contention raised by the applicants in this case was that the declaration of the state of national disaster derogated from the provisions of Section 44 of the Malawian Constitution. This section provides that there may be no restrictions or limits on the exercise of rights and freedoms under the Constitution unless these are lawful, reasonable, and recognized by international human rights standards and necessary in an open and democratic society. The court decided that the declaration satisfied these requirements and was therefore lawful. The court found the declaration to be reasonable because the pandemic was spreading everywhere globally and the college attended by the applications was in a location with high population density, such that the risk of spread of the disease would have catastrophic consequences. It also held that the declaration adhered to international human rights standards and that an open and democratic society needed to balance the right to life against education. In the challenges to the lockdown decree, there seems to have been confusion on whether the lockdown order was based on a declaration of a state of emergency governed by the Constitution or the declaration of a state of disaster under the DPRA. The minister made the lockdown order based on the latter and not the former. The DPRA and the PHA need to be updated, and there is a need for further clarification on whether a pandemic can merit a declaration of a state of emergency as envisaged by the Constitution. See (Nkhata and Mwenifumbo 2020).

Another legal challenge on Malawi's COVID-19 response hinged on the right of entry into the country, as there were also restrictions placed on the country's borders and airports to prevent the importation of the disease. For an in-depth discussion, see The State (on the application of Lin Xiaoxiao et al.) v The Director-General—Immigration and Citizenship Services and The Attorney General (Judicial Review Case Number 19 of 2020) [2020] MWHC 5 (3 April 2020) is another matter that the court heard concerning restriction on entry into Malawi due to the nation's COVID-19 Response.

It was reported by Capital FM Malawi, a radio station, that most cases of COVID-19 were "imported." For example, the radio station reported that 98 cases of the 132 new cases that were reported in early January 2021 were imported (Capital FM Malawi, 5 January 2021). Most of this importation was through the land borders, either legal repatriation and/or illegal entry. Most of those who entered the country at that time were advised to self-isolate; however, this was requirement was hardly enforced. Relying on people's honor does not always work, especially when the risk is still not appreciated or understood. Airports are relatively secure as valid negative test certificates are required. It seems to us that this aspect of "importation" influences the public's non-compliance to the protective and preventative health measures. One would assume that Malawians would call upon their (and universal African) *Umunthu* (*Ubuntu*) (see Bandawe 2010;

Chigona 2013; Musopole n.d.; Mvula 2017) philosophy and moral and ethical stance that requires everyone to be their neighbors' keeper. This is akin to *Gemeinschaft* instead of *Gesellschaft* in the old Ferdinand Tönnies model (Tönnies 2012; Kamenka 1965). *Ubuntu* says that our lives are inextricably linked: I am because we are—we are because I am. As such, the community is paramount and communal responsibility is a Malawian default moral stance. "Covering up" for your neighbor's sake should come as normal and more so if the chief has called for it: *Zimitsani moto!* The implications for not heeding the call are death to the community. Does the state need to call *mchape*-like smoking out of the selfish and the irresponsible?

The WHO acknowledges that, even though the pandemic is a health crisis, it has far-reaching social and economic, and human effects (Ghebreyesus 2020). This is clear when one considers the freedom to express and practice one's religion in the light of COVID-19. In Malawi, the pandemic and the measures to prevent, manage, and contain it have had significant socio-economic effects (UNDP 2020; Nkhata and Mwenifumbo 2020); for example, the right to religious expression and also cultural cohesion. The measures have led to limiting the frequency of regular meetings and members' ability to interact with each other, as highlighted above. Social and cultural activities like weddings and funerals have been impacted, which may have long-term effects on social cohesion (UNDP 2020).

In response to all these challenges, the government went back to the drawing board. On 7 August 2020, Public Health (Public Health 2020b) (Coronavirus and COVID-19) (Prevention, Containment, and Management) Rules 2020 (COVID-19 Rules II) came into force, repealing the COVID-19 Rules I. These new rules provided for additional activities that would be deemed essential services, but did not include any religious services, apart from funeral services. In addition to this, these rules provide more detailed guidelines on the management of patients, deaths and funerals, educational institutions, and workplaces.

In partnership with civil society, the government worked on the COVID Preparedness and Response plan, which was budgeted at $28 million. In addition to this, other preventative measures that the government imposed as part of this plan included restrictions on the travel and transport sector, measures for screening and minimization of transmission of the infection in prisons, screening and quarantine measures for those returning from affected countries, and development of a national communication and coordination strategy. The right to freedom of religious expression was also restricted vicariously through the limitation imposed on public gatherings. Such gatherings were restricted to less than 100 people and affected weddings, funerals, churches, and congregations (United Nations Malawi 2020).

Spanner in the Wheel: Presidential Elections

While these challenges were on, the country was also in a politically volatile situation. Earlier in the year (in February), courts had annulled the presidential elections of 2019. They required the rerun to happen within 150 days of the ruling in the case of Mutharika and Another v Chilima and Another (2020) (Msca Constitutional Appeal No. 1 of 2020) MWSC 1 (8 May 2020). This led to suspicions of nefarious intentions on the part of the government. Some of the reactions against these restrictions were, thus, political. With the country on edge politically, the population agitated for civil disobedience. The political issues took precedence over the health concerns brought about by COVID-19. The restrictions were seen to deny the politicians and Malawians their political rights to organize and campaign. As the political history of Malawi has demonstrated over the ages, politics and religion are inextricably linked. As it was then, the situation was also complicated by the religious tinge in the political activity of the emergent political coalition. This religious tinge is interesting because, for the outside onlooker, the tenor was more in the image of the American Religious Right. The American Religious Right is a coalition of politically and socially conservative evangelical and fundamentalist individuals, congregations, and organizations which has, since the 1980s Moral Majority, become very politically active and highly organized with an effective lobby. It includes Roman Catholics and, when

convenient, Muslims. It is pro-life and stands against most progressive rights as they are anti-gospel and considers them anti-"traditional values" and seeks to influence social issues, politics, and law.One may consider this an insignificant side issue, but when one considers the American rightist-driven conspiracy theories about COVID-19 and the search for a vaccine, it becomes a significant matter. This is not to mention the American Bible Belt responses to COVID-19 restrictions in the USA. The southern United States region has the most conservative evangelical Protestants in the country, is socially and politically conservative, and boasts the most church attendance. During this pandemic, many people in this region have tended to call on their freedoms and rights to determine whether to obey the federal call for masking or not, and chose not to mask as a way to assert those rights. It is also among these that conspiracy theories about COVID-19 and the vaccine are rife. It is the main base for the Religious Rights movement. Some of the theories are about the origins of the pandemic, while others are apocalyptic theories about the biblical "mark of the beast" in the vaccine. For religious rightists, these are not insignificant matters. How much these played into the "civil disobedience" may need more space than this article can afford as there may need to be a significant discussion in their own right. Suffice it to say that in this case, we have another point of interface of the political and the religious, face-to-face with the legal and the constitutional. This movement has taken on hegemonic proportions through its free-to-air television broadcasts around the world, influencing not only a significant proportion of the United States of America but also the world.

However, one cannot only lay this on this new religious phenomenon. According to Malawi, not gathering would be counterintuitive. Even though traditional religion did not have regular gatherings, as in weekly gatherings, outside of the main seasonal gatherings, the people would congregate for "worship" during crises. COVID-19 is a crisis. Similarly, regular Christian sensibilities would encourage people to gather en masse to intercede and invoke God's intervention. In this case, both the political situation and the pandemic called for such gatherings. To stop gathering was, thus, seen as infringing on religious freedom.

4. Zimitsani Moto?

The preceding sections are a vignette into the Malawian conundrum. In a democratic society, constitutionalism and the rule of law are the underpinnings of society. The challenge in governance comes when a country is faced with an unprecedented public health catastrophe, as has happened in the wake of COVID-19. It highlights the globalization of Malawian society; the conflict between public health expediency on the one hand, and human rights and freedoms on the other. It indeed exposes the cracks in the philosophical, sociological, and moral underpinnings of society. Since Malawi maintains its traditional and religious mores, it is part of and participates in the global village of modern politics and rights-based interactions as a signatory to all the Human Rights protocols. As stated at the beginning of this article, the situation raises the question of whether Malawians are amnesiacs insofar as their culture is concerned. Is it that they have changed their world view? Rather, are they now confused by the multi-worldview that Malawi now inhabits in the global village in their response to this pandemic? The medical question and the human rights and freedoms question seem to have come into conflict with the question of the people's economic wellbeing. These are all interconnected concerns. There are many possible ways through which we could analyze the situation. For convenience, we will use Eugene Kamenka's *Gemeinschaft* and *Gesellschaft* and James Christenson's reflections on Ferdinand Tönnies' influential *Gemeinschaft* and *Gesellschaft* in Christenson (1984).

Ferdinand Tönnies came up with his ideal types (*Gemeinschaft* and *Gesellschaft*) of how community/society holds together and functions. The types are based on the basic value that holds the community together and what determines its members' behaviors and choices with regard to the common good. His point was not to demonstrate how mutually exclusive these types are but to identify how they inform the values of society. They can be operative at the same time among the same people. Even though some sociologists have tried to talk about them as defining rural against urban society, that was not his intention.

Kemanka observes that societies are generally a unit, but they hold together differently. He says that "in Gemeinschaft, they remain essentially united in spite of all separating factors" (Kamenka 1965, p. 3). Christenson, talking about his understanding of Tönnies' *Gemeinschaft*, observes that "religion is part of morality made real and more necessary by tradition, socialization, sentiment, and duty. Religion tends to support the edifice of the commonwealth. It brings together Gemeinschaft relationships (ends and means) in pursuit of salvation and has strong prescribed tenets to help one's fellow man" (Christenson 1984, pp. 161–62).

As said earlier, unity and the common good are at the heart of this way of being. Primordial societies like Malawi tend to hold together in this way. This makes it possible for the chief to call for the dousing of the fires and the people's compliance. Thus, one would expect Malawian society to value and to desire health and wholeness for themselves and for their brothers and sisters. *Ubuntu*, a Malawian value, seems to have given in to a *Gesellschaftliche* response to this. It is important to acknowledge that Malawi is no longer the primordial, traditional society that it once was. Since religion is still important and as societies have evolved, it now plays a different role than in the past. Christianity, which is the dominant religion, has now taken on a more American individualistic evangelicalism direction. Furthermore, this tradition tends towards apocalypticism and millennialism,[1] which is fraught with conspiracy theories of the American Religious Right. Many have been concerned more about the hereafter by and by and when it comes to the here and now, only abiding the present while awaiting the return of Jesus Christ. Attendant conspiracy theories have led some to believe that COVID-19 is not real but a product of a leftist/liberal agenda to destabilize the world. They have many believing that the vaccine is part of that conspiracy and further that it contains the Biblical "mark of the beast" (Revelation 13:16–18), a precursor to the return of Christ—the anti-Christ. This is the Biblical 666 without which no business will be transacted as required by the Anti-Christ and that all who will have it will not enter heaven. This is an obsession with the end times that removes focus from present concerns.

Yet another element of this American evangelicalism is miracles and wonders. These are elements of the Pentecostal and Charismatic[2] movements within American evangelicalism which hype healings. This phenomenon is not limited to the overtly evangelical and Pentecostal churches and believers; it has become pervasive in Malawi's denominations. It has become the "popular religion." It gives believers a sense of invincibility as they are protected by the blood of Christ, especially during worship and religious gatherings. Furthermore, should they fall sick, Jesus is the healer. To us, this latter point is the interface between the primordial African and the modern African. Pentecostal fervor and emphasis on signs and wonders, thus healing, are like African traditional religions. As such, it exhibits some *Gemeinschaftliche* elements. There is a herd mentality similar to the communal spirit that leads to obedience of the chief's call; only in this case, it is the pastor's call. A further difference is that the common good is limited to those who believe and excludes those who do not believe, even though they may be family or the same tribe. At face value, this may sound like the Calvinist (akin to, but different from the dominant Reformed Tradition in Malawi) double predestination doctrine,[3] but this is Separatist, Branham-its type. This is a Christian movement akin to Calvinism but different in that it says that the elect is true believers who hold the same understanding and belief in God, the saved ones, who have to live a separate life from everyone else who does not believe like them. They have to separate themselves from the rest as they await the imminent return of

[1] Apocalypticism is the Christian teaching of the end times, especially with the judgment: salvation for the saints and fire and brimstone for sinners. Millennialism is a teaching that talks about 1000 years (Millennium) before the final consummation. There are two types of this: Pre-millennialism teaches that Christ will return before the 1000 years, and Post-millennialism teaches that Christ will return after 1000 years.

[2] Pentecostal refers to the first Christian's experience of the Holy Spirit experience on the Day of Pentecost (Acts 2) and the Christian Movement that began in 1906 in California and spread throughout the world in churches like the Assemblies of God, for instance. The Charismatic movement is an expression of the same across denominational lines, including the traditional liturgical churches like Roman Catholics and Anglicans.

[3] This is the Calvinist doctrine that says that God has already chosen the elect who will enter heaven. However, no one knows yet who they are but God alone.

Jesus Christ, hence their name Separatists. The prominent leader of one such movement was Branham, who believed that the end was imminent and the saints have to separate themselves from non-believers (in fact, one expression of his teachings in Malawi is the Bible Believers' Church). Even though it is communitarian, it is only so for the elect and, thus, not a "common" good. We would conclude, then, that this Malawian response, even though it looks like it comes from a *Gemeinschaft* value base, it is a *Gesellschaft* type. To that, we turn.

As Tönnies defined it, *Gesellschaft* is that community that tends to be more contractual, fragmented, and self-serving: a society, a conglomeration of individuals that is not quite communal. Says Kamenka, " . . . whereas in the Gesellschaft they [people in community] are essentially separated despite all the uniting factors (Kamenka 1965, p. 3)." Christenson says more:

"Gesellschaftliche relationships are rationalistic in structure, instrumental in form, individualistic in motivation, and exploitative in consequences. Social interaction is a construct stimulated by modern industrial production and a money economy. "In Gesellschaft, every person strives for that which is to his own interest" (Tönnies 1957). Three phenomena stimulating *Gesellschaft* are (1) rationality, (2) negotiated order (e.g., contracts, regulations), and (3) individuality. For *Gesellschaft*, social order is grounded in the Hobbesian idea of mutual self-interest. Through negotiated social interaction and guided by rational will, individuals can be freed from natural bonds of family, kin, traditions, habit, and duty (Tönnies 1957). The ideological basis of Gesellschaft can be seen in values such as freedom, material success, conspicuous consumption, rationality, and individualism (Christenson 1984, p. 162).

The Malawians' response to COVID-19 is very much like the situation Christensen describes as *Gesellschaftliche*. The call for a lockdown was challenged by many and in courts, as we have seen above. The ostensible reason was that the government had not made enough provisions for those whose livelihoods were being affected. What this meant, in our view, is that material success and consumption for those aggrieved was at stake. As such, that this was the cost of heeding a public health call was less important to them. Granted, the government needed to have done a better job, but given the economy of Malawi, which is heavily dependent on donor funding to balance the budget, that would be a tall order. *Kuzimitsa moto* was never without an economic effect on the community.

This response and the litigations that ensued are also based on the social contract between the government and the governed. As we have shown, the aggrieved felt that the government was reneging on the citizens' social contract. This, thus, pitted the public good of health and the legal; a contractual relationship of the people on the one hand, and government and health officials on the other. Since the relationship was contractual, and thus legal and not *umunthu* values-based, it tended toward the self-interest of those who felt aggrieved. Their rights, their freedoms, and their pursuit of happiness were at stake, and those trump the common good. It thus created a legal conundrum for the legal profession. As Kamenka says, "The concept of public law, one might say, in Hegelian language, is the dissolution of law; it is the lawyer come to vacillate between political moralism and political science" (Kamenka 1965, p. 9). This was the dicey space that the community was landed at by the pandemic. As such, this conundrum is what arises in a *Gesellschaftliche* context.

When it came to the call for face masks, immigration restrictions, and quarantine, it was the individual's freedoms that were being challenged; the freedom to do what one likes whenever they like and to travel as they please. Quarantine took away the right to travel, mix, and gather with others. These were seen to be restrictive and infringements on people's rights. Yes, community matters, so the rights were claimed even as they went counter to *umunthu*. *Zimitsani moto*, for whatever reason, is thus counter to *Gesellschaft* values. Social responsibility, mutual interdependence, and public health became an encumbrance and not a common good. Malawi society thus exhibited *Gesellschaft*—"dog eats dog," "one man for himself and God for us all"; all looking out for number one!

Secondly, it follows Christenson's idea that Tönnies' ideal types are present simultaneously in the same people, thus creating a hybridity of values. Postcolonial (chronologically) Malawi is part of the globalized world, and its people are hybridized global citizens with multiple worldviews, lived both consciously and unconsciously at the same time. It makes for seemingly confused people who are either holy hybrid, who know no other way (even as they feel radar-less) or amnesiacs, either by choice or circumstance.

There remains the question of how to live in a money economy within a predominantly rural community whose life runs on urban, individualistic values. Poverty removes certain choices from individuals and communities and leads people to look after number one even though it disturbs their consciences. However, for us, the moral arc bends towards *kuzimitsa moto*. It is not just the moral arc but that the very philosophical, moral, ethical, religious, and social values are based on *umunthu*. In a pandemic, "dog eats dog" leads to death, and *kuzimitsa moto* leads to life and wholeness, in as much as De Gabriele can claim that *tsabola wakale sawawa* (old peppers don't bite), *mawu aakulu sagonera* (literally translated, "ancient wisdom does not sleep" but idiomatically, "ancient wisdom is ever relevant"). Witch-hunting has no place either, hence *mchape*-like solutions are unhelpful in this scientific age, and as is religion that is individualistic, self-centered with eyes raised to an exclusive heavenly kingdom. Such religion forgets the Johannine message, which says, "whoever claims to love God and hates his brother or sister is a liar. For whoever does not love their brother and sister whom they have seen, cannot love God, whom they have never seen." (1 John 4:20). It goes against the Pauline and Johannine beloved community concept: a community that looks after one another and has the common good as a central value.

Hence every response we make to COVID-19 is certainly not about us. However significant (and primary) that may be, it is really about the common good. Rights and freedoms cannot be suspended lightly, but there comes a time when they may be legally and rightfully (as constitutions permit) suspended for the common good. As has been noted above, the "Banjul Charter" and the WHO adoption of it is a testament to this. Rights and freedoms and health and wellbeing go together. The unbridled pursuit of satisfying and gratifying individual rights and freedoms is as good as anarchy and tyranny of the selfish. Litigations and challenges to sloppy law-making and wanton decrees are not, in and of themselves, bad, and neither are they an end in themselves. They should serve *umunthu* and public health in the face of this pandemic. Religious and traditional leaders have to recognize their interface as enforcers of compliance and the rallying sites for it. John Mbiti observed that African Christians inhabit two worlds: the traditional and the modern and Christian one. This hybridity has to be considered if compliance is to be achieved during this pandemic Blessings Chinsinga (2006, pp. 257–58) in his article "The Interface between Space at the Local level in Malawi," quoting Obario (2002) and Senyonjo (2002) observes.

"Stunningly the re-emergence of traditional leaders is increasingly being held as 'the panacea for the achievement of decentralized, pluralistic democratic cultures and the strengthening of civil society' (Obario 2002, p. 4)" . . . "[chiefs are] at the heart of custom and culture . . . guardians of traditional norms, values, practices . . . "

Traditional leaders are not just archaic institutions devoid of relevance in modern societies, and they are key to the continuity of society. Power in his "Chieftaincy in Malawi: Reinvention, Re-emergence or Resilience? A Kasungu Case Study" (Power 2020), also discusses the role of chiefs among the grassroots in Malawi and accounts for their tenacity as an institution of authority through the ages, as due to its "reinvention, re-emergence, and resilience." As such, it may be time for the chiefs to make the call: Malawi, *zimitsani moto*!

Author Contributions: Conceptualization, J.T., S.M.T.D. and C.J.T.; methodology, J.T., S.M.T.D. and C.J.T.; software, Microsoft Word.; validation, J.T., S.M.T.D. and C.J.T.; formal analysis, J.T., S.M.T.D. and C.J.T.; investigation, J.T., S.M.T.D. and C.J.T.; resources, James Tengatenga, S.M.T.D. and C.J.T.; data curation, J.T., S.M.T.D. and C.J.T.; writing—original draft preparation, J.T., S.M.T.D. and C.J.T.; writing—review and editing, J.T., S.M.T.D. and C.J.T.; visualization, J.T., S.M.T.D. and C.J.T.;

supervision, J.T., S.M.T.D. and C.J.T.; project administration, J.T., S.M.T.D. and C.J.T. All authors have read and agreed to the published version of the manuscript.

Funding: The authors did not receive rely on and receive any funding for this work.

Conflicts of Interest: The authors declare no conflict of interest.

References

African Charter on Human and Peoples' Rights. 1981. Banjul Charter.

Ajima, Onah Gregory, and Eyong Usang Ubana. 2018. The Concept of health and Wholeness in Traditional African Religions and Social Medine. *Arts and Social Sciences Journal* 9. [CrossRef]

Alexandre, Naud, Sueur Cédric, Basile Chaix, and Kestens Yan. 2020. Combining social network and activity space data for health research: Tools and methods. *Health Place* 66: 102454. [CrossRef] [PubMed]

Bandawe, Chiwoza. 2010. *Practical Umunthu Psychology: An Indigenous Approach to Harmonious Living*. Blantyre: Montfort Media, ISBN 9990888286X/9789990882865.

Blessings Chinsinga. 2006. The Interface between Tradition and Modernity: The Struggle for Political Space at the Local Level in Malawi. *Civilisations* 54: 255–74. Available online: www.jstor.org/stable/41229744 (accessed on 15 March 2021).

Bonhomme, Julien. 2013. Anti-Witchcraft Movements in Africa. In *Encyclopedia of Social and Political Movements*. Edited by David A. Snow, Donatella della Porta, Bert Klandermans and Doug McAdam. Hoboken: Wiley-Blackwell, pp. 1–3.

Browning, Christopher R., and Brian Soller. 2014. Moving Beyond Neighborhood: Activity Spaces and Ecological Networks as Contexts for Youth Development. *Cityscape* 16: 165–96. [PubMed]

Chakanza, Joseph Chaphadzika. 1995. Kunadza Mchape '95'. *The Lamp* 1: 18–20.

Chigona, Gerard. 2013. *Umunthu Theology: A Christological Response in Africa*. Saarbrücken: Lambert Academic Publishing.

Christenson, James. 1984. Gemeinschaft and Gesellschaft: Testing the Spatial and Communal Hypotheses. *Social Forces* 63: 160–68. [CrossRef]

De Gabriele, Joseph. 1998. *"Old Peppers Don't Bite", Paper Presented at the Postgraduate Colloquium in the Department of Theology and Religious Studies*. Zomba: University of Malawi.

Doran, Marissa. 2007. Reconstructing Mchape '95: AIDS, Billy Chisupe, and the Politics of Persuasion. *Journal of Eastern African Studies* 1: 397–416. [CrossRef]

Fairhead, James. 2016. Understanding Social Resistance to the Ebola response in the Forest Region of the Republic of Guinea: An Anthropological Perspective. *African Studies Review* 59: 7–31. [CrossRef]

Ghebreyesus, Tedros Adhanom. 2020. WHO Director-General's Opening Remarks at the Media Briefing on COVID-19. March 11. Available online: https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (accessed on 8 January 2021).

Kamenka, Eugene. 1965. Gemeinschaft and Gesellschaft. *Political Science* 17: 3–12. [CrossRef]

Kao, Kristen, Ellen Lust, Boniface Dulani, Karen E. Ferree, Adam S. Harris, and Erica Metheney. 2021. The ABCs of Covid-19 Prevention in Malawi: Authority, Benefits, and Costs of Compliance. *World Development* 137: 105167. Available online: https://www.sciencedirect.com/science/article/pii/S0305750X20302941 (accessed on 15 February 2021). [CrossRef] [PubMed]

Mamdani, Mahmood. 2009. *Saviors and Survivor: Darfur, Politics and the War on Terror*. New York: Pantheon Books.

Mason, Michael J., and Jeremy Mennis. 2018. Young Urban Adolescents' Activity Spaces, Close Peers, and the Risk of Cannabis Use: A Social-Spatial Longitudinal Analysis. *Substance Use and Misuse* 53: 2032–42. [CrossRef] [PubMed]

Mbiti, John. 1969. *African Religions and Philosophy*. London: Heinemann.

Mhango, Jappie. 2020. Speech by Minister of Health on Additional Measures on COVID-19. Available online: https://malawi.un.org/en/46796-speech-minister-healths-additional-measures-covid-19 (accessed on 3 January 2012).

Mutharika, P. 2020. Declaration of State of Disaster by Malawi President Peter Mutharika. Available online: https://malawi.un.org/en/46778-declaration-state-disaster-malawi-president-peter-mutharika (accessed on 3 January 2021).

Mutharika and Another v Chilima and Another. 2020. Msca Constitutional Appeal No. 1 of 2020. MWSC 1. Available online: https://malawilii.org/mw/judgment/supreme-court-appeal/2020/1 (accessed on 8 May 2020).

Musopole, Augustine. n.d. Umunthu Theology and a Paradigm Shift in Theological Education. Unpublished Paper.

Mvula, Hermann. 2017. Reflecting on the Divine Image: The Crux of Umunthu in Contemporary Africa—Foundation of True Humanity. *Journal of Humanities* 25.

Nkhata, Mwiza Jo, and Anganile Willie Mwenifumbo. 2020. Livelihoods and Legal Struggles amidst a Pandemic: The Human Rights Implications of the Measures Adopted to Prevent, Contain and Manage COVID-19 in Malawi. *African Human Rights Law* 20: 512–39.

Nyale. 2020. Lockdown injunction stands, Kaphale faulted. *The Nation*, April 29.

Obario, Juan. 2002. *Legal Pluralism and the Peace Process: The Ambiguous Reemergence of Customary Law in Mozambique*. Switzerland: Peace and Global Security.

Power, Joey. 2020. Chieftaincy in Malawi: Reinvention, Re-emergence or Resilience? A Kasungu Case Study. *Journal of Southern African Studies* 46: 263–81. [CrossRef]

Probst, Peter. 1999. "Mchape" 95, or, "The Sudden Fame of Billy Goodson Chisupe: Healing, Social Memory and the Engima of the Public Sphere in Post-Banda Malawi". *Africa Journal of the International African Institute* 69: 108–37. [CrossRef]
Prophet David F. Mbewe. 2020. On his behalf and behalf of the Registered Trustees of the Living Word Evangelistic Church. v. Malawi Council of Churches and Attorney General, HC/PR Civil Cause No. 112 of 2020.
Public Health. 2020a. Coronavirus and Covid-19. Prevention, Containment, and Management Rules.
Public Health. 2020b. Corona Virus Prevention, Containment, and Management Rules.
Ranger, Terence. 1968. Religious Movements and Politics in Sub-Saharan Africa. *African Studies Review* 29: 1–69. [CrossRef]
Ranger, Terence. 1972. Mcape. In *The History of Central African Religious Systems*. Lusaka: The University of Zambia; Los Angeles: The University of California.
Schoffeleers, Jan Matthew. 1999. The AIDS Pandemic: The Prophet Billy Chisupe and the Democratization Process. *Journal of Religion in Africa* 29: 406–41. [CrossRef]
Schuurman, Egbert. 2011. Technology and Religion: Islam, Christianity and Materialism. *Koers: Bulletin for Christian Scholarship* 76: 373–86. [CrossRef]
Senyonjo. 2002. Traditional Institutions and Land. Available online: www.federo.com/pages/TraditionalInstitutionsandland.htm (accessed on 23 March 2021).
Thula, Maleka, Joseph Upile Matola, Themba Nyasulu, and Kettie Nyasulu. 2020. Assessment of the Impact of COVID-19 on Employment in Malawi. Available online: https://malawi.un.org/sites/default/files/2020-09/Assessment%20of%20the%20Impat%20of%20Covid-19%20on%20the%20Labour%20Market%20in%20Malawi_ECAM%20Final%20Report.pdf (accessed on 3 January 2021).
Tönnies, Ferdinand. 1957. *Community & Society (Gemeinschaft und Gesellschaft) 1855–1936*. East Lansing: Michigan State University Press.
Tönnies, Ferdinand. 2012. Gemeinschaft und Gesellschaft. In *Studien zu Gemeinschaft und Gesellschaft vs. Verlag für Sozialwissenschaften*. Springer: Wiesbaden, pp. 27–58. [CrossRef]
U.S. Department of State. 2019. Report on International Religious Freedom: Malawi. Available online: https://www.state.gov/reports/2019-report-on-international-religious-freedom/malawi/#:~{}:text=The%20U.S.%20government%20estimates%20the,Christian%20and%2013.8%20percent%20Muslim (accessed on 27 December 2020).
UNDP. 2020. *Covid-19 Pandemic in Malawi: Final Report*. Lilongwe: UNDP.
United Nations Malawi. 2020. Malawi COVID-19 Situation Update No. 3 as of 3 April 2020. Available online: https://malawi.un.org/sites/default/files/2020-05/Malawi%20COVID-19%20Situation%20Update%20No.3%20-%2003.04.20.pdf (accessed on 27 December 2020).
Xinhua. 2020. Malawi Government Eases Covid-19 Rule on Gathering. Available online: http://www.xinhuanet.com/english/2020-08/14/c_139291127.htm (accessed on 4 January 2021).
Yousefi-Nooraie, Dobbins Reza, Melissa Brouwers, and Patricia Wakefield. 2012. Information-seeking for making evidence-informed decisions: A social network analysis on the staff of a public health department in Canada. *BMC Health Services Research* 12: 118. [CrossRef] [PubMed]

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ISBN 978-3-0365-2280-7