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

ALEJANDRO TORRES GUTIÉRREZ*

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

1.1. Constitutional Provisions.

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

Unlike what happens in the case of the declaration of the states of emergency and siege, in which, according to Article 55 of the Constitution it is possible to suspend some fundamental rights, this is not feasible during the state of alarm. In fact, regarding the particular fundamental right of religious freedom, it cannot be *suspended* in any of these three scenarios of constitutional exceptionality. But some fundamental rights may be *limited*. This doctrine has been affirmed by the Spanish Constitutional Court in the Sentence 83/2016, of 28 April 2016,³ the court order 40/2020, of 30 April 2020,⁴ and more recently by the Sentence 148/2021, of 14 July 2021⁵ and the Sentence of 27 October 2021.⁶

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

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

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

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

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

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

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

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

Using the habilitation recognized in Article 116.2 of the Spanish Constitution, the Government proclaimed the state of alarm by means of the Royal Decree 463/2020, of 14 March 2020⁹ (modified by the Royal Decree 465/2020, of 17 March 2020¹⁰), for a period of 15 days, susceptible to additional extensions, covering all the national territory. Following the Article 116.2 of the Spanish Constitution, the Congress was immediately informed, on 20 March 2020.¹¹

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

EXTENSIONS OF THE STATE OF ALARM DECLARED ON 14 MARCH 2020¹²

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

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

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

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

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

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

¹² See: <http://www.congreso.es>.

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

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

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

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

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

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

both Royal Decrees¹⁴ has the consequence that the limit to the freedom of movement does not affect the freedom of religion and all displacements to places of worship should be logically permitted because this last fundamental right, the freedom of religion, was not suspended, and the prohibition of these movements would be unconstitutional.

If we take into consideration the Articles 7 and 11 of the Royal Decree 463/2020, some conclusions are clear: worship is not suspended, places of worship remain open, it is not forbidden to go to these places, and attendance at religious ceremonies is allowed with social distancing of 1 meter.¹⁵ In fact, the provisions on religious freedom of the Royal Decree 463/2020 were among the less limitative in all Europe.¹⁶ In France, for instance, the places of worship were allowed to remain open by the article 8¹⁷ of the Decree 2020–293 of 23 March 2020,¹⁸ but any meeting inside of them was forbidden, with the only exception of funeral celebrations (and, in this case, the maximum attendance of 20 people).

The Order of the Ministry of Public Health SND/272/2020 of 21 March 2020¹⁹ allowed in its Article 3.1 the inscription of deaths in the Civil Register, and the administrative issue of the burial license, without the previous delay of a period of 24 hours. The Article 3.2 of the cited Order permitted the burial, cremation, or donation of the corpse, for scientific or medical purposes, without a waiting period of 24 hours if it was not against the will of the person deceased, or their heirs.

At the end of March and the beginning of April the health crisis was in a serious situation, with almost one thousand deaths per day. In this particularly serious context, the provisions of the Royal Decree 463/2020 would become substantially more restrictive with respect to funeral ceremonies, by a new Order of the Ministry of Public Health, the Order SND/298/2020, of 29 March 2020,²⁰ that established exceptional measures over wakes and funeral ceremonies, to limit the spread and contagion of COVID-19. This new Order prohibited all type of wakes, both in public and private facilities, as well as in private homes.²¹ In the case of deaths caused by COVID-19, it banned all types of *thanatoesthetic* and *thanatopraxia* practices, and all kinds of religious interventions that imply invasive procedures over the cadaver.²² Similar regulations were passed, for instance, in Argentina by the *Recommendations* of the Minister of Health of 23 April 2020.²³ These regulations might raise conflicts with some Jewish and Muslim religious funerary prescriptions, but the Spanish or Argentinian restrictive funerary norms were

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

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

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

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

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

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

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

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

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

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

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

The Order SND/298/2020 postponed²⁴ the celebration of religious, or civil, funeral ceremonies, until the end of the state of alarm,²⁵ but did not affect the rest of religious ceremonies.²⁶ Funeral corteges were limited to a maximum of 3 relatives or closest intimates, in addition to, eventually, the minister of worship, or assimilated person of the respective religious group, for the practice of the funeral rites of farewell to the deceased. In any case, the distance of one to two meters between them should always be respected.²⁷ But we must recognize also that this delicate regulation tried to be respectful of some funerary religious traditions, especially those of Buddhism.²⁸

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

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

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

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

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

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

²⁸ In this regard, it is particularly interesting the document: *Guía para la gestión de la diversidad religiosa en cementerios y servicios funerarios*, (Guide for the management of religious diversity in cemeteries and funeral services), prepared in 2013, by two Spanish anthropologists, Jordi Moreras, (University RoviraiVirgili), and Sol Tarrés, (University of Huelva). In its pages 32 and 33, it is included a reference to the Orthodox Christian religious tradition, in which, burial usually takes place on the third day after death, but, we add, in this case it is not a compulsory rule of *ius cogens*. More important is the peculiarity of the Buddhist funeral rite. Moreras and Tarrés affirm that, in Buddhism, all manipulation of the body is prohibited before the period of 72 hours. It may be taken into consideration: Jordi Moreras and Sol Tarrés, *Guía para la gestión de la diversidad religiosa en cementerios y servicios funerarios*, published by the Observatory of Religious Pluralism in Spain, Madrid, 2013. The content of this Guide was reviewed and validated by the Islamic Commission of Spain, the Federation of Jewish Communities of Spain, the Jehovah's Christian Witnesses, the Orthodox Episcopal Assembly of Spain and Portugal, the Church of Jesus Christ of Latter-day Saints, the Federation of Buddhist Communities of Spain, the Commission of the Observatory of Religious Pluralism in Spain, (Ministry of Justice and the Public Foundation *Pluralismo y Convivencia*), and the Advisory Council of the Public Foundation *Pluralismo y Convivencia*, (the regional Government of the Autonomous Community of Catalonia, *-Generalitat de Catalunya-* and the Government of the Autonomous City of Ceuta). The Guide is accessible online in a Spanish version at: <http://www.observatorioreligion.es/upload/28/95/Guia_Cementerios_y_Servicios_Funerarios.pdf>

Please, note that, on March 6, 2015, a funeral Protocol was signed at the headquarters of the Spanish Ministry of Justice, under its patronage, between the Buddhist Union of Spain and Parcesa Funeral Home, in which it was contemplated that the definitive death, (a concept equivalent to the end of inner breath), must be asserted by a Minister of Buddhist Worship. This can take up to 10 days.

It may be particularly interesting:

<<https://www.ccebudistes.org/es/noticias/protocolo-funerario-para-budistas/>> <<http://www.federacionbudista.es/resumen-del-protocolo-funer.html>> <<https://www.revistafuneraria.com/noticias/protocolo-funerario-especifico-para-los-practicantes-del-budismo-vajrayana-en-espana>> Further information over Buddhist funerary rites: Pablo Martínez de Villa de las Heras, Muerte, Budismo y Protocolo Funerario en España: Aproximación a algunos grupos budistas y a la FBE. This particularly detailed research was directed by Francisco Díez de Velasco accessible at: <<https://eprints.ucm.es/39043/1/%5BTFM%5D%20Muerte%20y%20Budismo%20Pablo%20Mart%C3%ADnez%20de%20Villa.pdf>> Additional documentation: <<http://www.redfuneraria.com/funer-budista>>

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

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

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

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

Silva Sánchez and Solar Martínez³² consider that the Order of the Minister of Public Health SND/298/2020, of 29 March 2020, went further than the Royal Decree 463/2020 of 14 March 2020. According to these authors, the Order did not make an *interpretation*³³ of the Royal Decree, but rather *modified* it. The Order introduced *new* limitations and prohibitions that were *not included* in the Royal Decree. Therefore, there would be suspicions of a possible *excess* or *extra-limitation*.

During the most terrible days of the pandemic's first wave (at the end of March and the beginning of April 2020), an additional problem arose; the insufficiency of suitable places for the practice of burial of the cadavers of citizens belonging to some religious minorities, which was aggravated when Morocco prohibited the repatriation of corpses³⁴ and by the legal prohibition of embalming corpses. This practice is especially frequent among some Muslim communities, like the Moroccan-Muslim minority, who usually practice this technique that makes it possible to transfer the corpses to their country of origin.³⁵ A deep and serious reflection must be done by the Spanish administrative authorities, especially at a local level, to resolve the lack of adequate spaces in cemeteries destined for religious minorities.³⁶

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

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

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

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

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

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

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

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

At that time, the Final Disposition n. 2 of the Royal Decree-Law 17/2020 of 5 May 2020,⁴⁰ increased the percentage of deduction in the Income Tax for donations up to 150 Euros up to 80%,⁴¹ (and up to 35%⁴² for the donations of more of 150 Euros⁴³ with a limit of 10% of the taxable income), in favor of religious groups with an Agreement of Cooperation with the State, (Catholics, Evangelicals,⁴⁴ Muslims, and Jews). This measure was *clever*, but very *limited*. It may be considered *clever* because it tries to make the faithful aware of their *moral* and *economical* commitments to the religious group of belonging, but nevertheless it is not ambitious at all, because it only benefits the religious groups with an Agreement of Cooperation, and discriminates against all the other religious groups without Agreement, such as the Church of Jesus Christ of Latter-day Saints, Jehovah's Witnesses, Buddhists, and most of Christian Orthodox Churches (they enjoy the *mere* administrative declaration of *notorious presence* in Spain but they did not sign an Agreement of Cooperation), and other religious groups such as Hindus, Sikhs, or Scientologists, (merely inscribed in the Register of Religious Groups of the Ministry of Justice).

³⁷ Lara, 'La libertad' (n8) 138–139.

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

³⁹ <www.donoamiiglesia.es>

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

⁴¹ The previous percentage was 75%.

⁴² The previous percentage was 30%.

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

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

The financial problems were deeper in the case of all the minority religious groups that are excluded in the tax assignment of 0.7% of Income Tax (an exclusive Catholic privilege that provided 301.07 million Euros in 2020⁴⁵). Some minority religious groups, such as Evangelicals⁴⁶ and Orthodox Christians, wanted to include their ministers of worship in the *Records of Temporary Employment Regulation*⁴⁷ because of the dramatic income reduction during the lockdown and the serious difficulties in the payments of rents, salaries, and social security contributions. This possibility was rejected by the Public Administration due to the particular nature of the link between the ministers of worship and their religious group and because, theoretically speaking from a legal point of view, the religious activities had not been suspended during the national lockdown.

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

The Sentence of the Spanish Constitutional Court 148/2021, of 14 July 2021,⁴⁸ in a narrow margin of 6 votes to 5, declared the unconstitutionality of the restrictions to the freedom of movement during the declaration of the *first* state of alarm⁴⁹ from 14 March 2020 until 21 June 2020, (the majority of the Court considered that it was not a case of *limitation* of this right, but rather a case of *suspension*, and it was not possible during the state of alarm), nevertheless, the Constitutional Court considered that the limits imposed on the fundamental right of religious freedom were *constitutional*,⁵⁰ because it was always allowed the freedom of movement to attend places of worship, and the limits were *rational, justified, and proportional*.

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

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

This *graduality* had a double projection⁵¹:

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

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

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

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

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

⁴⁹ Legal Ground number 5.

⁵⁰ Legal Ground number 10.

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

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

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

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

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

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

a) Wakes and funeral ceremonies:

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

Article 5 of the Order SND/386/2020, of 3 May 2020,⁵³ and article 8 of the Order SND/399/2020 of 9 May 2020,⁵⁴ authorized in all territories in Phase 1 the celebration of wakes, in all kind of facilities, with a maximum limit of 15 people in outdoor spaces and 10 people in closed ones. They also authorized entourages for burial or cremation up to a maximum of 15 individuals, plus the minister of worship or assimilated person. The Supreme Court, on 27 May 2020, denied the precautionary suspension of the Order SND/399/2020.⁵⁵

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

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

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

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

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

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

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

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

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

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

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

A very detailed regulation introduced by Order SND/399/2020 established the criteria for the calculation of the maximum capacity of places of worship; trying to guarantee a minimum distance of 1 meter between attendants excluding corridors, lobbies, patios, and, if any, toilets. This Order made compulsory the visible publication of the maximum number of attendants and forbade the religious celebrations outside of the buildings of worship⁵⁸ as to avoid agglomerations of believers. This last limitation was criticized, but we think that it was justified because it was necessary to prevent possible spontaneous and uncontrolled concentrations of people, as already had happened, which in a situation of serious health crisis may have a *collateral* consequence: the spread of the disease. For this reason, we think that it was not an *arbitrary* or *capricious* limit and it was justified by reasons of public health.

González de Lara⁵⁹ considered that the limit of 1/3 of the maximum capacity of the places of worship established by the Orders of the Minister of Public Health SND/386/2020 of 3 May 2020, and SND/399/2020 of 9 May 2020, violated the principle of regulatory hierarchy because they introduced a more restrictive regulation than article 11 of the Royal Decree 463/2020 (passed by the Council of Ministers on 14 March 2020) in which only the limit of 1 meter of interpersonal distance was foreseen. We do not agree with this point of view because, *de facto*, there is not a great difference between both norms; the maximum capacity of a place of worship with 1/3 of attendants is very similar to this second case of a compulsory distance of 1 meter between individuals. The Orders SND/386/2020 and SND/399/2020 were a consequence not only of the general activation of the Minister of Public Health as *delegated authority* (and his consequent interpretative regulatory power), but a result of their own plan of de-escalation adopted by the Council of Ministers on 28 April 2020.

Additional administrative *recommendations* included:⁶⁰

1. – The use of a mask.
2. – Before each meeting or celebration, disinfection tasks must be carried out in all the spaces and, during the activities, the disinfection of the objects that are most frequently touched will be repeated.
3. – The entrances and exits will be organized to avoid groups of people in the entrances and surroundings of the places of worship.

⁵⁸ Article 9.2 of Order SND/399/2020.

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

⁶⁰ Article 9.3 of Order SND/399/2020.

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

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

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

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

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

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

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

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

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

d. – The performance of choirs.

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

WEDDING CEREMONIES – TRANSITION PLAN TO THE *NEW* NORMALITY

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

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

Article 6.2 of the R.D. 555/2020 of 5 June 2020⁶¹ gave the Autonomous Communities, according to medical and epidemiological criteria, the capacity to decide to overcome

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

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

When the *first* state of alarm finished, on 21 June 2020, the restrictions to the citizens’ mobility, and the adoption of measures of pandemic control, will have to be adopted according to the Organic Law 3/1986, of 14 April 1986, of special measures on public health,⁶² and the Royal Decree-Law 21/2020, of 9 June 2020.⁶³ The Autonomous Communities assumed special prominence and some decisions were particularly controversial.

For instance, because of the epidemic outbreak in the district area of Segrià,⁶⁴ in the province of Lleida at the beginning of July 2020, the Counselors of Health and Home Affairs of the regional Government of Catalonia passed article 6 of the Resolution SLT/1671/2020 of 12 July 2020⁶⁵ to limit the maximum number of attendants at private and public meetings, including weddings, religious services and funeral ceremonies and celebrations to 10. This Resolution was not initially ratified by the Judge of first instance because he considered that there was an excess of jurisdiction. The quick answer of the regional Government was to pass the regional Decree-Law 27/2020 of 13 July 2020 that modified the regional Law 18/2009 of 22 October 2009 of public health⁶⁶ and allowed the health authorities to adopt measures limiting the activity and mobility of people in case of pandemic. In this second opportunity, the Judge of first instance ratified the limitative measures, (with the only exception of the small town of Massalcoreig, where only one case had been detected on 1 July 2020 and the Judge considered that the measures adopted were not proportional).⁶⁷ The central Government understood that this regional Decree Law did not invade State’s competences.⁶⁸

Three Resolutions of 15 September 2020, of the Counselor of Public Health of the Autonomous Community of Balearic Islands, ordered extraordinary measures for the pandemic containment in the health areas of Eixample and Es Viver,⁶⁹ and Sant Antoni de Portmany⁷⁰ in Ibiza, and the health area of Arquitecto Bennàzar in the city of Palma.⁷¹ These restrictions prohibited meetings of more than 5 people, including weddings and religious services, limited the attendance at wakes to a maximum of 33% of their capacity and only 15 people, and *suspended the activity in places of worship* with the only exception of funerals (with a maximum of 15 attendants). Some of these limitations were of dubious constitutionality. The Catholic authorities immediately announced an appeal⁷² because of the clear infringement of the fundamental right of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

At the end of spring and the beginning of summer on 19 June 2020, Spain had a national cumulative incidence rate of diagnosed cases of COVID19 over 14 days per 100,000 inhabitants of 8.44.⁷⁷ The health crisis looked to be under control. But during this summer, the rise of mobility, among another factors, like a certain relaxation in the citizens' behavior, provoked a gradual deterioration in the national health indicators.

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

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

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

⁷⁵ Lara, 'La libertad' (n8) 142.

See also: <<https://abogadoscristianos.es/el-juez-da-la-razon-a-abogados-cristianos-y-suspende-la-orden-que-prohibia-cualquier-actividad-religiosa-en-el-municipio-de-villamalea-albacete/>>

<<https://www.cmmedia.es/noticias/castilla-la-mancha/juzgado-suspende-prohibicion-de-actividad-religiosa-en-villamalea-albacete-confinada/>>

<<https://www.latribunadealbacete.es/noticia/ZB3BCFC2C-EA51-7689-0898BA17C8BEAF18/202008/el-juez-reabre-la-actividad-religiosa-en-villamalea>>

<<https://www.periodicoclm.es/articulo/albacete/juzgado-suspende-prohibicion-actividad-religiosa-villamalea-decretada-junta/20200826173740011303.html>>

⁷⁶ See for instance: Resolution of 28 October 2020 of the Provincial Delegate of Health in Albacete, published at the Official Bulletin of Castile – La Mancha of 6 November 2020 <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2020/11/06/pdf/2020_8819.pdf&tipo=rutaDocm>

With the specific limit for wakes of 10/15 attendants in closed/open air spaces, and 25 people for weddings and baptisms.

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

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

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

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

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

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

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

For all these reasons, the national Government, through the Royal Decree 900/2020 of 9 October 2020,⁸¹ declared again a state of alarm for a period of 15 days, but in this second occasion limited to the territorial area of the aforementioned 9 municipalities. The main consequence was their perimeter confinement, consisting of a restriction in the entries and exits from the affected localities that was only allowed for justified reasons⁸².

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

1.4.3.1. *Development.*

During the month of October all the national health indicators were showing that the situation was going from bad to worse. For this reason, the national Government declared, again, a *new* state of alarm for the *third* time through the Royal Decree 926/2020 of 25 October 2020.⁸³ The initial declaration was for 15 days until 00:00 a.m. 9 November 2020 *without prejudice to the extensions that may be established*.⁸⁴ But now, on this occasion, the ambit would be all the national territory.⁸⁵ The Royal Decree stated that the *competent authority* will be the national Government, but it also included a *delegation* in the Presidency of the Autonomous Communities or cities with Statute of Autonomy (the cities of Ceuta and Melilla, in Northern Africa). That meant that the regional authorities were allowed, by Government's delegation, to elaborate norms developing the Royal Decree provisions, in their particular regional ambit⁸⁶.

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

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

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

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

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

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

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

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

The Royal Decree 926/2020 included:

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

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

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

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

The Spanish Congress of Deputies, in a Resolution of 29 October 2020, ordered the publication of the permit for the extension of the state of alarm, during a period of 6 months from 00.00 a.m. 9 November, until 00.00 a.m. 9 May 2021.⁹⁶ The political agreement for the extension included the President of the Government's commitment to appear before the Plenary of the Congress every 2 months, and the monthly appearance of the Minister of Public Health before the Commission of Health of the Congress of Deputies. The Conference of Presidents of Autonomous Communities, 4 months after the extension, could submit to the Government a proposal to lift the state of alarm, with the prior favorable agreement of the Interterritorial Council of the National Health

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

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

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

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

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

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

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

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

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

⁹⁶ Official Bulletin of the State of 4 November 2020

<<https://www.boe.es/buscar/doc.php?id=BOE-A-2020-13492>>

System in view of the evolution of the health, epidemiological, social and economic indicators⁹⁷.

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

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

RESTRICTIONS IN THE ATTENDANCE AT RELIGIOUS MEETINGS AND CEREMONIES, IN FORCE ON JANUARY 2021¹⁰⁰

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

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

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

⁹⁹ <<https://www.revistaecclesia.com/limitaciones-de-aforo-a-los-tempos-en-espana-radiografia-de-las-diocesis-en-tiempos-de-pandemia/>>

The same information was reproduced by the Spanish on-line newspaper, *eldiario.es* at: <https://www.eldiario.es/sociedad/misa-espana-radiografia-restricciones-iglesias-catolicas_1_7177964.html>

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

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

¹⁰² From 00:00 a.m. 24 December 2020, to 12:00 p.m., 6 January 2021, the maximum capacity should be 50%, according to article 2.1.c) of the regional Order SAN/1256/2020, of 14 December 2020, declaring the Level of Alert 3. Official Bulletin of Aragon 14 December 2020, <<http://www.boa.aragon.es/cgi-bin/EBOA/BRSCGI?CMD=VEROBJ&MLKOB=1140750063838&type=pdf>>

The Level of Alert 3, with *aggravation* was declared by the regional Decree-Law 1/2021, of 4 January 2021, Official Bulletin of Aragon of 14 December 2020 <<http://www.boa.aragon.es/cgi-bin/EBOA/BRSCGI?CMD=VEROBJ&MLKOB=1143561800404&type=pdf>>

Article 32, h), of the regional Law of Aragón 3/2020, of 3 December, foresees a maximum capacity of 25%, during the Level of Alert 3, with *aggravation*. Official Bulletin of Aragon of 4 December 2020 <<http://www.boa.aragon.es/cgi-bin/EBOA/BRSCGI?CMD=VEROBJ&MLKOB=1139832800303&type=pdf>>

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

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

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

¹⁰⁴ Article 6 of the Decree 18/2020 of 27 November 2020, of the President of the Balearic Islands. Bulletin of the Balearic Islands of 28 November 2020 <<https://www.caib.es/eboifront/es/2020/11302/642143/decreto-18-2020-de-27-de-noviembre-de-la-presidente>>

And Epigraph II, Paragraph 6, of the Annex of the Agreement of the Council of Government of the Balearic Islands, of 27 November 2020. Official Bulletin of the Balearic Islands of 28 November 2020

<<https://www.caib.es/eboifront/es/2020/11302/seccion-iii-otras-disposiciones-y-actos-administra/472>>

<<https://www.caib.es/eboifront/es/2020/11302/642142/acuerdo-del-consejo-de-gobierno-de-27-de-noviembre>>

¹⁰⁵ Agreement of the Council of Government of the Balearic Islands, of 29 January 2021. Official Bulletin of the Balearic Islands of 30 January 2021 <<https://www.caib.es/eboifront/es/2021/11331/seccion-iii-otras-disposiciones-y-actos-administra/472>>

<<https://www.caib.es/eboifront/es/2021/11331/644376/acuerdo-del-consejo-de-gobierno-de-29-de-enero-de->>

These restrictions were gradually adapted, for instance, the article 4 of the Decree 27/2021, of 12 March 2021, of the President of the Balearic Islands established the limit of 30% in Ibiza, and 50% in Mallorca, Menorca and Formentera, and the social distance of 1.5 meters between non co-habitants. Official Bulletin of the Balearic Islands of 13 March 2021 <<http://www.caib.es/eboifront/ES/2021/11353/646322/decret-27-2021-de-12-de-marc-de-la-presidenta-de-l>>

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

¹⁰⁷ Agreement of the Government of Canary Islands of 23 December 2020, Annex I, paragraph 3.16.

Additional restrictions:

1) In the practice of worship, physical contact between attendees, and singing, will be avoided.

2) The temple or place of worship must remain with the doors and windows open, before and after the celebration, the time necessary to guarantee its ventilation. Doors will be open during the celebration, if this does not prevent the practice of it.

3) The use of the exterior areas of the places of worship, will need the previous permit by municipal authorities, for the celebration of acts of worship. It must be guaranteed the maintenance of interpersonal safety distance. These celebrations may not be performed during the level of alert 3.

¹⁰⁸ Article 1 of the Decree 7/2020 of 7 November 2020, of the President of the Autonomous Community of Cantabria. Official Bulletin of Cantabria of 7 November 2020, extraordinary issue number 100 <<https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=355318>>

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

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

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

¹¹⁰ Article 4 of the Decree 66/2020, of 29 October 2020, of the President of Castile – La Mancha. Official Journal of Castile – La Mancha of 29 October 2020
<<https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=1603885240656750526.doc&tipo=rutaCodigoLegislativo>>

These restrictions were in force on March, 2021. See: Article 1, paragraph 5 of the Resolution of 11 March of 2021 of the Counselor of Health of Castile – La Mancha. Bulletin of Castile – La Mancha of 12 March 2021
<https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/03/12/pdf/2021_2909.pdf&tipo=rutaDocm>.

¹¹¹ Article 3 of the Agreement 3/2021, of 15 January 2021, of the President of the Regional Government of Castile and Leon. Official Journal of Castile and Leon of 16 January 2021
<<http://bocyl.jcyl.es/boletin.do?fechaBoletin=16/01/2021>>.

This limit of 25 people was very controversial. The Agreement 7/2021, of 18 February 2021, of the President of Castile and Leon, established the limit of attendance in 1/3 of the maximum capacity of the places of worship in this Autonomous Community. (Official Journal of Castile and Leon of 16 January 2021
<<https://bocyl.jcyl.es/boletines/2021/02/19/pdf/BOCYL-D-19022021-1.pdf>>).

¹¹² Paragraph 6 of the Resolution SLT 3397/2020, of 22 December 2020, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 23 December 2020,
<<https://portaldogc.gencat.cat/utillsEADOP/PDF/8302/1828461.pdf>>

The initial validity of these measures was for a period of 15 days, but it was modified by Resolution SLT 1/2021, of 4 January of 2021, of the Counselor of Health of the regional Government of Catalonia, that entry into force on 7 January 2021.

This normative was updated regularly. For instance, the Resolution of 12 March 2021, established the limit of 33% in the islands of Tenerife, Gran Canaria, and Fuerteventura. Official Bulletin of Canary Islands of 13 March 2021, accessible at.

<<http://www.gobiernodecanarias.org/boc/2021/051/002.html>>

¹¹³ Paragraph 10 Resolution SLT 1/2021, of 4 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 5 January 2021, in force until 18 January 2021, and latterly extended

<https://www.diba.cat/documents/713456/344101719/RESOLUCIO+SLT_1_2021+de+4+de+gener+per+la+qual+es+prorroguen+i+es+modifiquen+les+mesures+en+mat%C3%A8ria+de+salut+p%C3%ABblica+...pdf/11c2d562-4964-9ee5-2a3e-159ad5a7f0aa?t=1609835423958>

Extended until 25 January 2021 by Resolution SLT 67/2021 of 16 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 17 January 2021

<https://www.diba.cat/documents/713456/344101719/RESOLUCIO%C3%93+SLT_67_2021%2C+de+16+de+gener%2C+per+la+qual+es+prorroguen+les+mesures+en+mat%C3%A8ria+de+salut+p%C3%ABblica+...pdf/16dcc27b-08e3-2952-b79a-a8e71c92301d?t=1610959559812>

Extended until 8 February 2021, by Resolution SLT 133/2021 of 22 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 23 January 2021

<https://www.diba.cat/documents/713456/344101719/RESOLUCIO_SLT_133_2021_de+22+de+gener.pdf/4a72360b-59c6-9c19-84aa-85d9b1d3b0c1?t=1611562672762>.

Extended until 22 February 2021, by Resolution SLT 275/2021 of 5 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 6 February 2021

<<https://portaldogc.gencat.cat/utillsEADOP/PDF/8335/1834594.pdf>>.

Extended until 1 March 2021, by Resolution SLT 436/2021 of 19 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 20 February 2021

<<https://portaldogc.gencat.cat/utillsEADOP/PDF/8346/1837041.pdf>>.

Extended until 8 March 2021, by Resolution SLT 516/2021 of 26 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 27 February 2021

<<https://portaldogc.gencat.cat/utillsEADOP/PDF/8352/1838141.pdf>>.

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

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

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

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

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

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

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

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

The final consequence in Spain was a very *diverse* and *dispersed* regulation, with too many *differences* between Autonomous Communities, trying to find a supposedly *coherent* and *efficient* solution for the problems caused by a virus that knows nothing about territorial borders, and legislative jurisdictions of regional parliaments. A legislation written in form of *macchie di leopardo*, that is, *leopard spots*, adopting the particularly accurate metaphoric figure used by Pierluigi Consorti¹²⁵ for the Italian case. The regulations passed by the Autonomous Communities were *dissimilar*. The Autonomous Community of Madrid, one of the regions with the worst pandemic indicators, established the most

Extended until 11 March 2021, by the Order 5/2021, of 23 February 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 February 2021, n. 44, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/44/1>>.

Extended until 25 March 2021, by the Order 6/2021, of 9 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 February 2021, n. 44, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/57/1>>.

Extended until 8 April 2021, by the Orders 7/2021, and 8/2021, of 23 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 March 2021, n. 68, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/68/2>> and: <<https://bon.navarra.es/es/anuncio/-/texto/2021/68/3>>.

Extended until 22 April 2021, by the Order 11/2021 of 6 April 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 8 April 2021, n. 78, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/78/3>>.

From 1 April to 9 April 2021, (during the Easter celebrations), it was recommended to finish all religious celebrations before 9:00 p.m. Article 6 of the Order 10/2021 of 29 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 31 March 2021, n. 73, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/73/0>>.

¹²⁰ Paragraph 5 of the Annex of the Decree 44/2020, of 10 December 2020, of the Lehendakari (President) of the Basque Country. Official Bulletin of the Basque Country of 11 December 2020, <<https://www.euskadi.eus/y22-bopv/es/bopv2/datos/2020/12/2005319a.pdf>>.

See also: Paragraph 5 of the Annex, of the Decree 13/2021, of 6 March 2021, of the Lehendakari (President) of the Basque Country. Official Bulletin of the Basque Country of 8 March 2021 <<https://www.euskadi.eus/bopv2/datos/2021/03/2101349a.pdf>>.

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

¹²² Paragraph e) of the Annex of the Decree of the President of the City of Ceuta of 28 October 2020. Official Bulletin of the City of Ceuta of 28 October 2020 <<https://www.ceuta.es/ceuta/component/jdownloads/finish/1835-octubre/20439-bocce-extra83-28-10-2020?Itemid=0>>.

Paragraph 5, of the Annex of the Decree of the President of the City of Ceuta of 5 November 2020. Official Bulletin of the City of Ceuta of 5 November 2020 <<https://www.ceuta.es/ceuta/component/jdownloads/finish/1837-noviembre/20448-bocce-extra86-05-11-2020?Itemid=534>>.

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

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

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

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

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

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

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

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

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

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

Autonomous Community/City	Limits in the attendance.
Canary Islands	<p>It will be allowed a maximum attendance of 20 people in open air facilities, and 10 people in closed spaces, and a maximum capacity of¹³⁰:</p> <ol style="list-style-type: none"> 1) Facilities in Areas with Level of Alert 1: 75% 2) Facilities in Areas with Level of Alert 2: 50%. 3) Facilities in Areas with Level of Alert 3: 33%. <p>Participation in the entourage for the burial or farewell of the person deceased, is restricted to a maximum of 50 people, including relatives and close friends, until the alert level 1, and 25 people in alert levels 2 and 3, in addition to the minister of worship or person assimilated of the respective confession for the practice of the funeral rites of farewell to the deceased, not exceeding the capacity limits of 75%, 50% and 33% of the capacity authorized, respectively.</p> <p>At the moment of incineration or cremation, a maximum of 5 people may be present.</p>
Cantabria ¹³¹	<p>Wakes: A maximum of 20/10 people in open air/closed spaces, with a maximum of 33% of the maximum capacity of the facility.</p> <p>Corteges of burial or cremation: 20/10 people in open air/closed spaces and the celebrant.</p>
Castile – La Mancha	<p>Funeral celebrations in closed places of worship: 40% of maximum capacity of closed spaces. Wakes and funeral corteges: 6 people.¹³²</p>

¹³⁰ Agreement of the Government of Canary Islands of 23 December 2020, Annex I, paragraph 3.17, <<http://www.gobiernodecanarias.org/boc/2020/266/009.html>>.

This normative was updated regularly. For instance, the Resolution of 12 March 2021, established the limit of 33% in the islands of Tenerife, Gran Canaria, and Fuerteventura. Official Bulletin of Canary Islands of 13 March 2021, accessible at.

<<http://www.gobiernodecanarias.org/boc/2021/051/002.html>>.

¹³¹ Article 3 of the Resolution of the Counselor of Health, of the Government of Cantabria of 6 November 2020. Official Bulletin of Cantabria of 6 November 2020, extraordinary issue number 9

<<https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=355329>>.

New limits were established by Resolution of 2 March 2021, of the Counselor of Health of Cantabria, in force from 00.00 a.m. 3 March 2021:

1) Wakes: A maximum of 50/30 people in open air/closed spaces, with a maximum of 50% of the maximum capacity of closed facilities.

2) Corteges of burial or cremation: 50/30 people in open air/closed spaces and the celebrant.

Official Bulletin of Cantabria of 2 March 2021 extraordinary issue number 14,

<<https://boc.cantabria.es/boces/verAnuncioAction.do?idAnuBlob=359137>>.

¹³² Paragraph 1.6, of the Resolution of 18 January 2021 of the Counselor of Health of the Autonomous Community of Castile – La Mancha. Official Bulletin of Castile – La Mancha of 19 January 2021,

<https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/01/19/pdf/2021_527.pdf&tipo=rutaDocm>.

Initially, this Resolution of 18 January 2021 of the Counselor of Health, established that the said 6 participants in wakes and funeral corteges must remain always the same, during all the wake or cortege. This last condition, (*to remain always the same individuals*), was disallowed by the Superior Court of Justice of Castile – La Mancha, in a Judicial Order of 20 January 2021, considering that it supposed a null restriction of the fundamental right of assembly by an incompetent organ. Roj: ATSJ CLM 1/2021 – ECLI: ES:TSJCLM:2021:1AId Cendoj:02003330022021200001, <<https://www.poderjudicial.es/search/documento/AN/9384805/Real%20Decreto%20alarma%20sanitaria%20Covid-19/20210125>>.

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

A new Resolution of 22 January 2021 of the Counselor of Health of Castile – La Mancha, abolished that additional requirement. Official Bulletin of Castile – La Mancha of 25 January 2021, <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/01/25/pdf/2021_700.pdf&tipo=rutaDocm>;

See also the Resolutions of 28 January 2021 and 6 February 2021,

<https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/01/29/pdf/2021_903.pdf&tipo=rutaDocm>;

<https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/02/07-ext-2/pdf/2021_1254.pdf&tipo=rutaDocm>;

And article 1, paragraph 6, of the Resolution of 11 February 2021, of the Counselor of Health, of Castile – La Mancha. Official Journal of Castile – La Mancha, of 12 February 2021, extraordinary issue <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/02/12-ext-3/pdf/2021_1457.pdf&tipo=rutaDocm>;

And article 1, paragraph 5, of the Resolution of 20 February 2021, of the Counselor of Health, of Castile – La Mancha. Official Journal of Castile – La Mancha, of 21 February 2021, extraordinary issue, <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/02/21-ext-5/pdf/2021_1852.pdf&tipo=rutaDocm>;

A new limit of 10 people was established for all the municipalities with the Level II of alert, (for municipalities with a level of Alert III, the limit was 6 people), by article 1, paragraph 5, of the Resolution of 2 March 2021, of the Counselor of Health of Castile – La Mancha. Official Bulletin of Castile – La Mancha of 3 March 2021 <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/03/03/pdf/2021_2397.pdf&tipo=rutaDocm>;

This limit of 10 attendants to wakes and funeral cortejes, for municipalities in Level II of alert, was extended 10 days more by Article 1, paragraph 5 of the Resolution of 11 March of 2021 of the Counselor of Health of Castile – La Mancha. Bulletin of Castile – La Mancha of 12 March 2021, <https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2021/03/12/pdf/2021_2909.pdf&tipo=rutaDocm>.

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

¹³⁴ Paragraph 6 of the Resolution SLT 3397/2020, of 22 December 2020, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 23 December 2020 <<https://portaldogc.gencat.cat/utillsEADOP/PDF/8302/1828461.pdf>>;

The initial validity of these measures was for a period of 15 days, but it was modified by Resolution SLT 1/2021, of 4 January of 2021, of the Counselor of Health of the regional Government of Catalonia, that entry into force on 7 January 2021.

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

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

Extended until 25 January 2021, by Resolution SLT 67/2021, of 16 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 17 January 2021, <https://www.diba.cat/documents/713456/344101719/RESOLUCI%C3%93+SLT_67_2021%2C+de+16+de+gener%2C+per+la+qual+es+prorroguen+les+mesures+en+mat%C3%A8ria+de+salut+p%C3%BAblica+....pdf/16dcc27b-08e3-2952-b79a-a8e71e92301d?t=1610959559812>;

Extended until 8 February 2021, by Resolution SLT 133/2021, of 22 January of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 23 January 2021, <https://www.diba.cat/documents/713456/344101719/RESOLUCIO_SLT_133_2021_de+22+de+gener.pdf/4a72360b-59c6-9c19-84aa-85d9b1d3b0c1?t=1611562672762>;

Extended until 22 February 2021, by Resolution SLT 275/2021, of 5 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 6 February 2021, <<https://portaldogc.gencat.cat/utillsEADOP/PDF/8335/1834594.pdf>>;

Extended until 1 March 2021, by Resolution SLT 436/2021, of 19 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 20 February 2021, <<https://portaldogc.gencat.cat/utillsEADOP/PDF/8346/1837041.pdf>>;

Extended until 8 March 2021, by Resolution SLT 516/2021, of 26 February of 2021, of the Counselor of Health of the regional Government of Catalonia. Official Journal of the Generality of Catalonia of 27 February 2021, <<https://portaldogc.gencat.cat/utillsEADOP/PDF/8352/1838141.pdf>>.

¹³⁶ Article 13 of the Order 668/2020, of 19 June, of the Counselor of Health of Madrid, Official Journal of Madrid of 20 June 2020, <http://www.madrid.org/wleg_pub/secure/normativas/contenidoNormativa.jsf?opcion=VerHtml&nmnorma=11297#no-back-button>;

Article 2 of the Order 1405/2020, of 22 October 2020, of the Counselor of Health of Madrid, Official Journal of Madrid of 24 October 2020,

<http://www.bocm.es/boletin/CM_Orden_BOCM/2020/10/24/BOCM-20201024-2.PDF>;

The list restricted areas have been periodically updated.

The last update of this list, made on January 2021, was made by the Order 79/2021 of 29 January 2021, of the Counselor of Health of Madrid, Official Journal of Madrid of 30 January 2021,

<http://www.bocm.es/boletin/CM_Orden_BOCM/2021/01/30/BOCM-20210130-1.PDF>.

Autonomous Community/City	Limits in the attendance.
Valencia	<p>1) Initial general provisions:¹³⁷ Wakes: 30% and 25/15 people in open door/closed spaces. Corteges of burial or cremation: 25/15 people in open door/closed spaces</p> <p>2) In certain municipalities¹³⁸ with higher rates of incidence, from 7 January to 20 January 2021,¹³⁹ and in all the region for a period of 14 days, from 21 January 2021¹⁴⁰ that was latterly extended.¹⁴¹ Wakes: 30% and 25/10 people in open door/closed spaces. Corteges of burial or cremation: 15/10 people in open door/closed spaces</p>
Extremadura ¹⁴²	<p>Wakes: 10 people in open door and closed spaces. Corteges of burial or cremation: 15 people and the celebrant.</p>
Galicia ¹⁴³	<p>Wakes: 25/10 people in open door/closed spaces. Corteges of burial or cremation: 25 people and the celebrant.</p>

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

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

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

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

¹⁴¹ These provisions were extended:

1) Until 23:59 hours of 15 February 2021, by article 3.1 of the Resolution of the Counselor of Health of Valencia of 29 January 2021. Official Bulletin of the Autonomous Community of Valencia of 30 January 2021, <http://www.dogv.gva.es/datos/2021/01/30/pdf/2021_888.pdf>.

2) Until 23:59 hours of 1 March 2021, by the Resolution of the Counselor of Health of Valencia of 12 February 2021. Official Bulletin of the Autonomous Community of Valencia of 12 February 2021, <http://www.dogv.gva.es/datos/2021/02/12/pdf/2021_1346.pdf>.

3) Until 23:59 hours of 14 March 2021, by article 2 of the Resolution of the Counselor of Health of Valencia of 25 February 2021. Official Bulletin of the Autonomous Community of Valencia of 26 February 2021, <http://www.dogv.gva.es/datos/2021/02/26/pdf/2021_1854.pdf>.

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

Paragraph 1 of the Annex of the Agreement of 8 January 2021 of the Council of Government of Extremadura, Bulletin of Extremadura of 8 January 2021 <<http://doe.gobex.es/pdfs/doe/2021/41o/41o.pdf>>.

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

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

¹⁴⁴ Paragraph h) of the Annex I, of the Resolution 4/2021, of 27 January 2021, of the Technical General Secretary of the Board of Health of La Rioja. Official Bulletin of La Rioja of 28 January 2021, <https://iasl.larioja.org/boletin/Bor_Boletin_visor_Servlet?referencia=15259807-1-PDF-536181-X>.

See also the Resolution 6/2021 of 17 February, of the General Technical Secretary of the Counselor of Health of La Rioja. Official Bulletin of La Rioja of 18 February 2021

<https://iasl.larioja.org/boletin/Bor_Boletin_visor_Servlet?referencia=15569798-1-PDF-536757-X>.

¹⁴⁵ Article 1, paragraph 6, of the Order 63/2020 of 14 December 2020, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 16 December 2020, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2020/290/1>>; Extended until 14 January 2021, by the Order 64/2020 of 28 December 2020, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 30 December 2020, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2020/303/0>>;

Extended until 28 January 2021, by the Order 1/2021 of 13 January 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 14 January 2021, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/9/1>>;

Extended until 11 February 2021, by the Order 3/2021 of 26 January 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 28 January 2021, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/21/0>>;

Extended until 25 February 2021, by the Order 4/2021, of 9 February 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 11 February 2021, n. 33, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/33/1>>;

The Order 5/2021, of 23 February 2021, of the Counselor of Health of Navarre, allowed the attendance in wakes of 50/10 people in open door/closed spaces. In case of corteges of burial or cremation the new limit was established in 50 people. In force from 26 February 2021 until 11 March 2021. Official Bulletin of Navarre of 25 February 2021, n. 44, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/44/1>>;

The Order 5/2021, was extended:

1) Until 25 March 2021, by Order 6/2021, of 9 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 February 2021, n. 44, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/57/1>>;

2) Until 8 April 2021, by the Orders 7/2021, and 8/2021, of 23 March 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 25 March 2021, n. 68, extraordinary issue, <https://bon.navarra.es/es/anuncio/-/texto/2021/68/2> and: <<https://bon.navarra.es/es/anuncio/-/texto/2021/68/3>>;

3) Until 22 April 2021, by the Order 11/2021, of 6 April 2021, of the Counselor of Health of Navarre. Official Bulletin of Navarre of 8 April 2021, n. 78, extraordinary issue <<https://bon.navarra.es/es/anuncio/-/texto/2021/78/3>>.

¹⁴⁶ Paragraph 4 of the Annex of the Decree 44/2020, of 10 December 2020, of the Lehendakari (President) of the Basque Country. Official Bulletin of the Basque Country of 11 December 2020, <<https://www.euskadi.eus/y22-bopv/es/bopv2/datos/2020/12/2005319a.pdf>>;

See also: Paragraph 4 of the Annex, of the Decree 13/2021, of 6 March 2021, of the Lehendakari (President) of the Basque Country. Official Bulletin of the Basque Country of 8 March 2021 <<https://www.euskadi.eus/bopv2/datos/2021/03/2101349a.pdf>>.

Autonomous Community/City	Limits in the attendance.
Murcia ¹⁴⁷	<p>Wakes, and corteges of burial or cremation:</p> <ol style="list-style-type: none"> 1) Areas with a Level of Alert low: <ol style="list-style-type: none"> a) Closed spaces: 75% or 50 people b) Open spaces: 100 people. 2) Areas with a Level of Alert medium/high: <ol style="list-style-type: none"> a) Closed spaces: 50% or 15 people b) Open spaces: 25 people. 3) Areas with a Level of Alert very high: <ol style="list-style-type: none"> a) Closed spaces: 50% or 15 people b) Open spaces: 25 people. 4) Areas with a Level of Alert extreme: It is recommended the postponement of civil and religious celebrations, if it is not possible: <ol style="list-style-type: none"> a) Closed spaces: 50% or 15 people b) Open spaces: 25 people.
Autonomous City of Ceuta ¹⁴⁸	<p>Wakes: The presence of a maximum of 8 people at the entry of the mortuary facilities, and in the rooms 1 and 4, and a maximum of 4 people in the rooms 2 and 3 is allowed.</p> <p>Corteges of burial or cremation: 10 people in open air spaces.</p>
Autonomous City of Melilla ¹⁴⁹	<p>Wakes, and funerary corteges:</p> <ol style="list-style-type: none"> 1) In open air spaces: 25 people. 2) In closed facilities: 1/3 of the maximum capacity, or a maximum of 10 people, respecting a safe distance of 2 meters.

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

2. THE RESPONSE AND ATTITUDE OF RELIGIOUS GROUPS.

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

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

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

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

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

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

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

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

2.1. The Catholic Church.

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

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

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

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

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

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

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

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

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

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

2.2. *Evangelical entities.*

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

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

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

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

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

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

suspended. Diligently, the Secretary of the Executive Council of the Spanish Federation of Assemblies of God ordered, on 8 March 2020, the suspension of said Congress and its postponement until November 2020 for reasons of force majeure in a clear example of responsibility and solidarity.¹⁶¹ Unfortunately, the same public authorities permitted the massive national demonstrations commemoratives of the Women's Day on 8 March 2020 and the ultra-conservative party VOX celebrated a multitudinous meeting in Vistalegre with the attendance of 10,000 people¹⁶² with disastrous consequences for the pandemic's control in both cases.

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

A couple of days before the official declaration of the state of alarm, on 12 March 2020, FEREDE released a statement taking a step further, and requesting the suspension of all meetings and services for at least the next 15 days, avoiding displacements, trips, and advising to remain at home as much as possible, as requested by the public authorities, especially for those of advanced age or with severe previous pathologies. It was recommended to take advantage of the resources of new technologies to hold virtual or streaming meetings¹⁶⁴. The Seventh-day Adventist Church echoed this call in a statement published the following day¹⁶⁵.

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

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

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

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

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

¹⁶⁴ <<https://www.actualidadevangelica.es/2020/COMUNICADO-SUSPENSION-TEMPORAL-DE-CULTOS-DOMINICALES.pdf>>:

<https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12169:ferede-impulsa-el-teletrabajo-y-restringe-las-visitass-a-sus-oficinas&catid=42:freed>;

<https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12171:2020-03-12-17-11-39&catid=42:freed>.

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

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

¹⁶⁷ <<https://www.actualidadevangelica.es/2020/Comunidado-de-Prensa-Reiteracion-del-llamado-a-la-suspension-de-cultos.pdf>>;

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

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

2.3. Muslim Communities.

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

2.4. Jewish Communities.

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

- 1) Do not kiss people, Tefillah books (Siddur¹⁷¹), tallits¹⁷², mezuzahs¹⁷³ and Sefer Torah¹⁷⁴.
- 2) Do not shake hands.
- 3) Stay home in case of cough, fever, or shortness of breath.
- 4) Wash your hands frequently with soap and water, or hydroalcoholic gel.
- 5) Refrain from visiting people in quarantine.
- 6) Do not go to the synagogue in case of previous contact with someone infected.
- 7) The elderly or sick people should refrain from going to the synagogue, if a large attendance of people is expected.
- 8) Do not share the same cup during the Kiddush.¹⁷⁵ Individual cups must be used.

Shortly after the declaration of the state of alarm, the President of the Federation of Jewish Communities of Spain, Isaac Querub, addressed a message of encouragement¹⁷⁶. And on 22 March 2020, the media echoed the message of solidarity because of the coronavirus crisis in Spain, addressed to King Felipe VI, by the President of Israel, Reuven Rivlin¹⁷⁷.

2.5. Orthodox Churches.

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

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

¹⁶⁹ <<http://www.centro-islamico.com/reflexiones/aviso/>>;

<<http://www.centro-islamico.com/reflexiones/es-una-buena-oportunidad/>>.

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

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

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

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

¹⁷⁴ The scrolls of the Law (Collins Dictionary).

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

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

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

¹⁷⁸ <<http://www.obispadoortodoxo.es/index.php/arhiva/evento-2019/194-mai-2020/2020-comunicar-de-presa>>.

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

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

3. CONSTITUTIONAL CONTROVERSIES.

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

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

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

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

Nevertheless some authors, such as Aragón Reyes,¹⁷⁹ pointed out that the declaration of the state of alarm does not allow a generalized suspension of the freedom of movement¹⁸⁰ because this is only possible during the state of *emergency*. For this reason some authors considered that the only constitutional alternative was to declare the state of emergency.¹⁸¹ From a very different perspective, López Garrido¹⁸² remarked that the only alternative constitutionally possible was to declare the state of alarm, because

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

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

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

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

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

As mentioned, the Sentence of the Spanish Constitutional Court 148/2021 of 14 July 2021,¹⁸⁴ established the unconstitutionality of the restrictions to the freedom of movement during the declaration of the state of alarm¹⁸⁵ from 14 March 2020 until 21 June 2020. The Constitutional Court understood that what has happened was not a *mere* case of *limitation* of this right, but rather a *suspension*, and this *suspension* is not possible during the state of alarm. On the Court's opinion, the state of *emergency* had to be declared. The point of view of the Constitutional Court has been criticized, because what really happened was a (*mere*) *epidemic*, it was not a *crisis of public order*, or a case of *abnormal functioning of public services*.

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

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

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

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

¹⁸³ Ruiz Rico, 'Las dimensiones' (n13)

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

¹⁸⁵ Legal Ground number 5.

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

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

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

Immediately, some prestigious authors like Banacloche¹⁸⁷ and Ruiz Robledo,¹⁸⁸ pointed out the necessity of a teleological and systematic interpretation of the legal system, detecting a *general rule of Law* establishing that *any extension may be longer than the initial term*, that directly inspired the drafting of Article 91.2 of the Spanish Congress Standing Orders, and the same logic deduced from Article 116.3 of the Spanish Constitution, which states that the declaration of a state of emergency may not exceed thirty days, subject to an extension for a further thirty-day period. As stated by this doctrinal position, it is logical that if the first declaration may be only made for a maximum period of 15 days, then any additional extensions should not be longer than this period of time and must be renewed every 15 days by the Congress.

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

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

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

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

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

¹⁸⁹ See: <<https://www.larazon.es/espana/20200430/fzujvcw45fjlfw6neoyqgfb4.html>>.

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

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

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

The problem reappeared again during the *third* declaration of the state of alarm by the Royal Decree 926/2020 of 25 October 2020,¹⁹² during the emergence of the *second wave*, initially for a period of 15 days, *without prejudice to the extensions that may be established*.¹⁹³ Article 14 of this Royal Decree, initially foresaw, in case of extension, the mere appearance of the Ministry of Health in the Commission of Health of the Congress of Deputies every 15 days. This was considered insufficient by the political parties represented in this camera. Finally, the Spanish Congress permitted the extension of the state of alarm, during a period of 6 months, from 00.00 a.m. 9 November, until 00.00 a.m. 9 May 2021.¹⁹⁴ The political parliamentary agreement included three commitments:

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

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

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

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

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

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

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

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

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

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

2) The unconstitutionality of the state of alarm extension for a period of 6 months. The reason was not the *long* period of time but the indeterminacy of the measures susceptible of adoption (their content, and temporary and geographical ambits) and the lack of parliamentary control.¹⁹⁸

3) That the delegation in the Autonomous Communities of the capacity of decision over the particular measures to be adopted in their territories was unconstitutional, because the Spanish Congress of Deputies could not check and control politically these measures.¹⁹⁹

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

García García²⁰⁰ criticized that the Spanish Advisory Commission on Religious Freedom was not consulted by the Spanish Government during the state of alarm. This author affirms that this advisory Commission *must* be consulted and *must* pronounce its opinion on any legal project or provision relating to the fundamental right of religious freedom.

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

The second mistake consists in the unawareness of the mechanisms of relation between Church and State in a country in which *there shall be no State religion*,²⁰¹ and consequently the State may legislate on religious freedom without the *patronage* or *supervision* of religious groups, the Catholic Church included. This is the teleological orientation of the Royal Decree 932/2013 of 29 November 2013, which regulates the Spanish Advisory Commission on Religious Freedom. This is evidently clear if we read carefully the Article 3 of the own Royal Decree 932/2013²⁰² in which it is *mandatory* to ask for a previous report of this Commission, (that is not binding in any case), only in the specific hypothesis regulated in its letter a): the drafts or projects of agreements of cooperation between the State and religious groups. In all the other cases, to require the previous opinion of this Advisory Commission is only *optional*, and *never binding*.

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

¹⁹⁸ Sentence of the Spanish Constitutional Court of 27 October 2021, Legal Ground number 8.

¹⁹⁹ Sentence of the Spanish Constitutional Court of 27 October 2021, Legal Ground number 10.

²⁰⁰ <<http://www.blog.fder.uam.es/2020/06/18/libertad-religiosa-en-tiempo-de-coronavirus/>>.

²⁰¹ Article 16.3 of the Spanish Constitution <<https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>>.

²⁰² Official Bulletin of the State of 16 December 2013 <<https://www.boe.es/boe/dias/2013/12/16/pdfs/BOE-A-2013-13069.pdf>>.

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

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

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

3.4. *Limitations and Extra-Limitations.*

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

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

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

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

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

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

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

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

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

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

<https://www.actualidadevangelica.es/index.php?option=com_content&view=article&id=12155:2020-03-06-19-58-47&catid=42:freed>.

²⁰⁷ <<https://www.20minutos.es/noticia/4223298/0/policia-desaloja-catedral-granada-arzobispo-fieles-oficios-viernes-santo-estado-alarma-coronavirus/>>;

<<https://www.elmundo.es/andalucia/2020/04/11/5e91ecff6c833b538b457e.html>>;

A different perspective of the same events: <https://www.eldiario.es/sociedad/portavoz-desmedida-intervencion-policial-granada_1_2259738.html>

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

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

On 28 April 2020, the ultra-conservative party VOX filed an appeal of unconstitutionality against the Royal Decrees 463/2020, 465/2020, 476/2020, 487/2020, 492/2020, and the Order SND/298/2020, considering that these dispositions violated the freedom of religion consecrated in Article 16 of the Spanish Constitution.²¹⁰ It was certainly a *surprise* because none of the 349 deputies who participated in the parliamentary vote allowing the first extension of the state of alarm²¹¹ on 25 March 2020 had voted against this extension, formalized by the Royal Decree 476/2020 of 27 March 2020; a Royal Decree that was now appealed before the Constitutional Court. It is convenient to remember that, from Roman Law times, *venire contra factum proprium non licet*.

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

The appeal of unconstitutionality also questioned the prohibition of wakes, and the postponement of religious and civil funerals, by Articles 3 and 5 of the Order SND/298/2020, of 29 March 2020.²¹² These limits were particularly painful for families but we consider that they were justified by the Preamble of the Order, in which it was expressly recognized that *due to the special characteristics surrounding funeral ceremonies*, it was difficult to ensure the application of the distancing measures with the interpersonal separation of more than one meter. And because family members and friends of the deceased could have been close contacts, it was especially important to observe the quarantine and distance rules. One of the most important outbreaks of the pandemic was a burial ceremony celebrated in the city of Vitoria at the end of February 2020.

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

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

²¹¹ Until 00:00 a.m. 12 April 2020.

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

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

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

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

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

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

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

Article 1.1 of the Agreement 2/2021 of 15 January 2021 of the President of Castile and Leon²¹⁸, anticipated the curfew in this region at 8.00 p.m. (instead of 10.00 p.m. the earlier hour, in the interval between 10:00 p.m. and 12:00 p.m. established by article 5 of the Royal Decree 926/2020, of 25 October 2020).²¹⁹ The Supreme Court in a court order of 16 February 2021,²²⁰ suspended the enforcement of this regional provision, considering that it overreached the competences of the regional President as *delegated authority* of the national government.²²¹ Automatically, that same day the Agreement 6/2021 of 16 February 2021²²² postponed the curfew to 10:00 p.m. in this Autonomous Community.

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

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

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

²¹⁶ Legal Ground number 10.

²¹⁷ *Citizens*, sic.

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

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

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

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

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

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

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

14 days per 100,000 inhabitants of 2,283.54 cases. This day, the average of this rate in the Autonomous Community of Castile and Leon was of 1,295.91 cases. And the serious rate of occupation by patients of COVID-19 in the Intensive Care Units of the hospitals of this city was 67.50%, and the regional average: 57.87%. One third of all the hospital beds of the region were occupied by patients of COVID-19.²²⁵

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

Martínez López-Muñiz²²⁸ pointed out that many places of worship of this region have an area and volume which allow the attendance of more than 25 people with a secure interpersonal distance. This author also remarked that the regional legislation allowed the agglomeration of people in public transportation, terraces, schools, and other educational centers.

This author also indicated that the general and absolute limit of 30 attendants in places of worship, established in France by Article 47 of the Decree 2020–1310 of 29 October 2020,²²⁹ was voided by the Council of State in France through its *Ordonnance* of 29 November 2020.²³⁰ The Council of State considered this limit abusive because the religious meetings and celebrations were the only activities affected by this general limit, and gave a term of 3 days to the First Minister for the drafting of a new legislation with a more proportional criterion. Article 2 of the Decree 2020–1505 of 2 December 2020²³¹ annulled the general limit of 30 attendants, and established a new one based on a ratio of proportionality, and susceptible to variation, according to the real dimensions of the place of worship. The new legislation ordered a minimum distance of two places between those occupied by each person or group of persons sharing the same domicile, and every second row must remain unoccupied.²³²

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

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

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

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

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

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

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

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

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

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

Government of Castile and Leon, requested in the Appeal number 13/2021 by the association *Abogados Cristianos*,²³⁴ and dismissed the suspension of the Agreement 3/2021 of 15 January 2021 of the President of the Regional Government of Castile and Leon²³⁵ that established the limit of 25 attendants in the regional places of worship. The Supreme Court considered that the appellant did not prove the *special urgency* of the precautionary measures of suspension of this limitation in the number of attendants.

Nevertheless, in a later court order of 18 February 2021²³⁶ (appeal number 19/2021) the Spanish Supreme Court invalidated the maximum limit of 25 attendants, established by the regional legislation of Castile and Leon, leaving only the general limitation of a maximum percentage of 33% of the maximum capacity, of the places of worship.²³⁷

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

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

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

- a) The Agreement 13/2020 of 12 November 2020 only affected a very limited territory, only the city of Burgos, in the specific context of a very critical health situation.
 - b) This Agreement had a very limited validity, of initially 1 week, that latterly was extended until 3 December 2020.²⁴⁰
- 2) The particular emotional circumstances concurring in a funeral or burial ceremony, and the festive environment of a wedding, first communion ceremony, or baptism.
 - 3) The existence of many elements of physical contact such as doorknobs, benches, kneelers, confessionals, or holy water fonts.
 - 4) The agglomeration of people at the entry and exit of these activities makes difficult the maintenance of the interpersonal distance of security.
 - 5) The important attendance of old people at these ceremonies. It is well known that the age and the presence of people with certain diseases are risk factors or elements that predispose to greater severity, higher frequency of hospitalization, and higher risk of complications and mortality.

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

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

²³⁴ *Christian lawyers*, sic.

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

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

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

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

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

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

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

for a small chapel or meeting-house if proper social distancing is to be observed, but the same thirty people would be lost inside the vastness of a cathedral.²⁴²

3) It did not distinguish between religious ceremonies in closed spaces, and open-air celebrations. All of them were affected by the same absolute limitation of only 25 attendants, while the health risks and health conditions are very different in each case.

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

The Agreement 7/2021 of 18 February 2021 of the President of Castile and Leon²⁴³ (based on an epidemiological report of the regional Counselor of Public Health of that day), and *coincidentally* dated the *same day* as the court order of the Spanish Supreme Court (which is not cited in the Agreement 7/2021), established the *only* limit of attendance in 1/3 of the maximum capacity of the places of worship in this Autonomous Community.

A similar strict legislation was passed in Cantabria. In this region a general limit of 33% of the maximum capacity of places of worship was approved,²⁴⁴ but at the end of January a limitation of only 10 people in certain municipalities with a high rate on incidence was established for towns with 34,500 inhabitants,²⁴⁵ such as Laredo, Polanco, Colindres and Santa María de Cayón.²⁴⁶ At that time the local hospital of Laredo had begun to transfer patients to the hospital of Valdecilla, in Santander, and the pressure over the local hospitals was really high²⁴⁷. In fact, in Laredo and Colindres, at the end of January, the cumulative incidence rate of diagnosed cases in 14 days per 100,000 inhabitants exceeded 1,000 cases.²⁴⁸ The Catholic bishop of Cantabria, Mgr. Manuel Sánchez Monge, was conscious of the difficult health situation, but manifested his opposition to this restrictive measure because he thought that the measure was not adequately proportional as the capacity of the places of worship located in these municipalities was very diverse and, according to his opinion, it was adequately safe to celebrate the religious services with a greater number of attendants in certain temples with a greater capacity. In his opinion, the solution should be based on an *ad hoc* case by case perspective.²⁴⁹

It is important to remark that the limit of 10 attendants, in the regional legislation of Cantabria, only affected 4 specific cities, and there was an additional difference with the case of Castile and Leon: the *temporal* limit of validity, because it was foreseen for the reduced period of 2 weeks, between 28 January and 11 February 2021.²⁵⁰

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

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

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

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

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

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

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

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

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

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

Another very restrictive legislation was passed by the local authorities of Melilla, the Spanish Autonomous city in Northern Africa, a city with a very serious health situation in January and February 2021. Article 5 of the Decree n. 110 of 26 January 2021 of the President of Melilla,²⁵³ reduced the maximum capacity of places of worship to 1/4 in this city, the lowest ratio in all the national territory. And article 6 of the Order n. 341 of 26 January 2021²⁵⁴ of the Counselor of Economy and Social Policies of Melilla, ordered the closure of the places of worship from 8:00 a.m. to 12:00 p.m., during the days of greatest attendance, on Fridays, in case of Muslim mosques, Saturdays, for Jewish synagogues, and Sundays, for Catholic churches. The initial validity period for these limitations was 20 days, from 27 January to 15 February 2021. The protests came especially from the Catholic²⁵⁵ and Muslim²⁵⁶ local authorities. The Counselor of Economy and Social Policies, Mohamed Mohand, justified the *Solomonic* decision, in the high incidence of around 1,000 cases per 100,000 inhabitants, and the difficulties for the control of the limits of attendance, especially among the Muslim community, (recognized by its own President of the Muslim Community of Melilla).²⁵⁷ The reaction of the Catholic Community was to celebrate the Holy Mass on Sundays at 7:00 a.m., respecting the maximum capacity limit of 25%.²⁵⁸ The local press echoed the aroused controversy.²⁵⁹

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

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

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

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

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

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

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

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

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

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

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

February 2021, extended the restrictions in the opening of places of worship, and their maximum capacity, without a specific temporal limit, and depending on the evolution of epidemiological indicators.²⁶¹ Melilla had the worst national ratios of COVID-19 of incidence per 100,000 inhabitants at the end of February 2021.²⁶² These Orders of the Melilla's authorities limited only religious activities, and their proportionality was *very dubious*.

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

4. ELEMENTS FOR A BALANCE OF PROPORTIONALITY.

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

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

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

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

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

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

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

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

The restrictions in the freedom of religion must be:²⁷¹

1) *Established in a Law*. The Spanish Constitution recognizes, in its Article 16, the *fundamental* right of religious freedom, but it is not *absolute*, because it has the limit of the *public order*, which is expressly provided by the own constitutional precept. The Spanish Constitutional Court in the Sentence 46/2001 of 15 February 2001²⁷² understands that *only when the existence of a certain danger to "public safety, health and morality" has been proven in court . . . it is pertinent to invoke public order as a limit to the exercise of the right to freedom of religion and worship*.

2) *Necessary in a democratic society*. The necessity must be of such gravity as to trump the exercise of religious liberty.²⁷³

3) Proportional to the purpose pursued.

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

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

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

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

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

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

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

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

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

²⁷³ Hill (n153) 3.

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

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

- a) At the beginning of the confinement's end,²⁷⁴ in France, the *Ordonnance* of 18 May 2020,²⁷⁵ gave a term of 8 days, in which the First Minister should change the prohibition of meetings inside the places of worship, established by the article 8 of the Decree 2020–548, of 11 May 2020,²⁷⁶ and adopt *les mesures strictement proportionnées aux risques sanitaires encourus²⁷⁷ et appropriées aux circonstances de temps et de lieu applicables en ce début de "déconfinement", pour encadrer les rassemblements et réunions dans les établissements de culte*. The article 1 of the Decree 2020–618, of 22 May 2020,²⁷⁸ abolished that *anomalous* prohibition of collective religious celebrations.
- b) The *Ordonnance* of 29 November 2020,²⁷⁹ revoked the abusive limit of 30 attendants in places of worship, established in France by article 47 of the Decree 2020–1310, of 29 October 2020,²⁸⁰ and gave a term of 3 days to the First Minister for the drafting of a new legislation with a more proportional criterion.

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

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

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

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

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

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

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

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

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

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

in account the particular *situation of risk*, and the *constitutional purpose* pursued, and trying to produce the lowest possible restriction in the fundamental rights, and interests affected²⁸²:

1) Some of the most intensive restrictions in the collective exercise of the fundamental right of religious freedom had a very limited *temporal* and *spatial* impact:

a) The Agreement 13/2020 of 12 November 2020 of the President of Castile and Leon,²⁸³ that established a general limit of attendance at the places of worship of 1/3 of their maximum capacity or 15 people, had an evident *surgical* nature:

1.- It only affected a very limited territory, the municipality of Burgos, in the specific context of a very critical health situation in this city, in November 2020.

2.- It had a very limited validity, of initially 1 week, that latterly was extended until 3 December 2020.²⁸⁴

b) The similar strict legislation passed in Cantabria, at the end of January limiting the maximum attendance to 10 people in the 4 specific municipalities of Laredo, Polanco, Colindres and Santa María de Cayón²⁸⁵, was justified by its critical health conditions, and it was not extended to the rest of the regional territory of Cantabria, with better medical indicators. It had also a temporal vocation of validity, as we said, because it was foreseen for the reduced period of 2 weeks, between 28 January and 11 February 2021. This was a circumstance that was particularly pointed out by the court order of the Spanish Supreme Court of 18 February 2021.²⁸⁶

2) This was not the case of the Agreement 3/2021 of 15 January 2021, of the President of the Regional Government of Castile and Leon,²⁸⁷ that limited the maximum assistance to places of worship to 1/3 of their maximum capacity, and no more than 25 people. This restriction covered all the regional territory and was temporally unlimited.

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

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

a) Its extension was uncertain from a territorial and temporal perspective. It affected all the regional territory, forgetting the possible different health indicators of each province in this region, and with indefinite temporal projection, because it covered all the period of the state of alarm, several months, until 9 May 2021. The restrictive measures must be *gradual*, *flexible*, and *adaptable* to different *temporal* and *spatial* scenarios.²⁸⁹

b) It did not consider the different sizes, dimensions, and characteristics, of the places of worship of this region.

c) It did not distinguish between religious ceremonies in closed spaces, and open air celebrations. All of them were affected by a common and absolute limitation of only 25 attendants, but the risks and health conditions are very different in each case.

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

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

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

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

²⁸⁶ Legal Ground number 5.

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

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

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

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

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

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

5. CONCLUSIONS AND PROPOSALS.

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

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

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

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

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

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

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

²⁹⁴ Siera Mucientes, 'Estado de alarma' (n8) 302.

²⁹⁵ Such as the declaration of the state of alarm.

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

In this context, the new and unexpected crisis had underlined the importance of political dialogue, between political parties and administrative authorities, from a national and regional perspective. Many aspects must be improved. During the last year, it was used recurrently the *legislation of urgency*, the so-called *Royal Decrees-Laws*. The use of this *legislative tool* was justified from a theoretical point of view by reasons of *extraordinary and urgent necessity*, but, at the same time, it is a juridical phenomenon that sometimes seems to put in serious risk the principle of separation of powers, and the central position that Parliament must have during these circumstances of serious social and health crises.²⁹⁷ Additionally, some provisions included in these *Royal Decrees-Laws* were of very dubious²⁹⁸ *extraordinary and urgent necessity*, for instance the inclusion of the Vice-President of the Government in the Delegated Commission of the Government on Intelligence Affairs, by the Final Disposition number 2, of the Royal Decree Law 8/2020, of 17 March 2020.²⁹⁹ This unconstitutionality was finally declared by the Sentence of the Constitutional Court 110/2021 of 13 May 2021.³⁰⁰

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

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

Dialogue between public authorities and representatives of religious groups may be an important and useful tool of work. Some Autonomous Communities, such as Madrid³⁰³ gave a clear evidence of it. Nevertheless, the State, (or the Autonomous Communities, like delegated authority), may legislate without the previous consent of religious groups. The request of the previous opinion of the Advisory Commission of Religious Freedom is only optional, and never binding, especially in this particular context of health crisis.

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

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

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

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

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

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

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

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

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

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

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

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

³⁰⁴ Frank Cranmer and David Pocklington (n242). 31.

³⁰⁵ Hill (n153) 18.

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

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

SOPHIE GALLOP*

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

ex-Soviet States¹⁰ have claimed to be moving towards democratic governance.¹¹ True democratisation is contingent on adequate standards of judicial independence being attained in a State.¹² However, the complexities of judicial independence continue to allow States to subvert those standards, and conceal the reality from the international community. This can result in a two-fold problem. Perceived standards of democratisation in a state may not be as extensive as those claimed. Additionally, without assurances as to the achieved standards of judicial independence, in reality human rights protection in those ‘democratising’ States may be under greater threat than apparent to the international community.

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

JUDICIAL INDEPENDENCE: IMPORTANCE AND COMPLEXITIES

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

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

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

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

¹² Russell, ‘Towards a General Theory of Judicial Independence’ (n2) 2.

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

¹⁴ See generally Levi (n1).

¹⁵ International Commission of Jurists (n2), 4.

¹⁶ Fiss (n13) 59.

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

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

has been translated into numerous regional¹⁹ and international human rights treaties,²⁰ and has been further incorporated into the majority of State constitutions.²¹ The extensive acceptance of judicial independence is reflected in the fact that judicial independence, alongside other rights included in the Universal Declaration on Human Rights,²² has become part of the general principles of international law.²³

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

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

Other international organisations, including the World Bank,²⁵ the World Trade Organisation,²⁶ and the Inter-American Development Bank²⁷ COE and OSCE, have all echoed this sentiment and placed great emphasis on the importance of securing judicial independence, pledging resources to States to encourage them to adopt effective standards.²⁸

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

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

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

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

²² UDHR (n18).

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

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

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

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

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

²⁸ Ginsburg and Moustafa (n2) 9.

²⁹ International Commission of Jurists (n2) 18.

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

The guarantee that all citizens will only be held accountable under the rule of law means that judicial independence holds 'the central role of the administration in the promotion and protection of human rights'.³³ By acting as a bulwark against tyranny³⁴ the judiciary ensures that the executive and legislative branches of government do not act *ultra vires* of their jurisdiction by violating the rights of disfavoured individuals or groups. In this respect the United Nations has repeatedly noted the link between the gravity and frequency of serious violations of human rights and the absence of a truly independent and impartial judiciary.³⁵ That conclusion was reiterated in the Vienna Declaration and Programme of Action:

(t)he administration of justice . . . especially an independent judiciary . . . are essential to the full and non-discriminatory realisation of human rights and indispensable to the processes of democracy.³⁶

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

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

³⁰ Russell (n2) 2.

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

³² See generally Forsyth (n3).

³³ UNGA Res 50/181 (n5).

³⁴ Vickers (n17) 213.

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

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

³⁷ Russell (n2) 1.

³⁸ Larkins (n6) 607.

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

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

⁴¹ *Ibid.*

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

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

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

⁴² Ferejohn (n39) 357.

⁴³ *Ibid* 356.

⁴⁴ *Ibid* 357.

⁴⁵ *Ibid* 355.

⁴⁶ *Ibid* 360.

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

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

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

⁵⁰ Ferejohn (n39) 355.

⁵¹ Fiss (n13) 58.

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

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

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

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

Measuring those standards is further complicated by the secrecy that accompanies instances of compromised judicial independence, in particular where individual independence has been imperilled. Instances where judges experienced external influence are likely to remain inconspicuous, given that judges are unlikely to concede that they reached a particular judgment because of that pressure.⁶⁰ Instead judges are inclined to conceal ‘their lack of autonomy’.⁶¹ This may be in part be owing to the type of pressure exerted over members of the judiciary, which can vary from threats to a judges’ employment⁶² to death threats.⁶³ Those judges wishing to preserve their livelihood and lives are likely therefore to remain silent. Further, instances where judgments are reached due to external influence, rather than based on the rule of law, are likely to illicit feelings of shame and humiliation,⁶⁴ which judges presumably wish to keep from becoming public. These factors are likely to mean that instances where judges are faced with threats or other external pressures are likely to remain clandestine, preventing them from being brought to international attention. Moreover, instances where individuals

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

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

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

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

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

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

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

⁶¹ *Ibid.*

⁶² Larkins (n6) 622.

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

⁶⁴ Tamar Frankel, ‘Fiduciary Duties as Default Rules’ (1995) 74 *Oregon Law Review* 1209, 1269.